

11 MAY 2015



28 April 2015

NDIS Quality and Safeguards
PO Box 7576
Canberra Business Centre ACT 2610

Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework

An effective National Disability Insurance Scheme Quality and Safeguarding framework ('Framework') is critical to a successful National Disability Insurance Scheme ('NDIS'). The comments below are designed to inform the development of that Framework. They are not intended to be a prescription for the Framework. A number of comments made in this submission also were made in an article I authored Eric Windholz, 'NDIS Beware: Pink Batts Below!' (2014) 39(2) *Alternative Law Journal* 89, available at <http://ssrn.com/author=1997836>. I am happy for this submission to be published online.

- The NDIS will revolutionise the provision of services to persons with disabilities. Most discussion has focused on the demand side of the reform – the provision of choice and control for people with a disability. The supply side of the reform – quality assurance and provider oversight - has received comparatively little attention. Yet it is on the supply side that much of the NDIS's risk exists.
- The size and complexity of the supply side reforms should not be underestimated. Estimates of the number of new jobs that will be required to meet the Scheme's needs when fully rolled out exceed 250,000. Governments already are acting consistently with the Productivity Commission's recommendation that governments remove themselves as the main provider of disability services, thereby facilitating the growth of a more competitive, responsive and innovative market for disability services.¹ As a result, the necessary growth in disability support services is likely to be met, not by government, but by a combination of both the not-for-profit and profit sectors, and by existing providers and new providers.
- The injection of significant new funding into the sector is likely to have a 'honey pot' effect, attracting both the competent and not so competent - those committed to improving the life of people with disabilities and those committed to improving their own lives possibly at the expense of those with a disability.
- This 'honey pot' effect, coupled with the fact that in many instances funding will now be controlled by some of the more vulnerable members of our community, makes quality assurance and provider oversight critically important. However, it is here where the NDIS is potentially most at risk.

¹ Productivity Commission, *Disability Care and Support, Inquiry Report*, Report No. 54 (Productivity Commission, 2011).

+

- The Productivity Commission recommended a two-pronged strategy to ensure quality under the NDIS. First, the Commission placed great faith in the power of market forces. The Commission argued strongly that persons with disabilities, as newly empowered consumers capable of changing providers if dissatisfied, would act as powerful drivers of quality.² The Commission did concede, however, that these market forces would need to be supported, at least initially, by measures designed to promote robust competition and help consumers make well informed decisions and understand their rights. Thus, the Commission recommended a public education campaign to support the introduction of the Scheme, and the development of a national internet database containing information on the quality and performance of services providers.³
- Second, the Commission recommended the development and implementation of a national quality framework comprising a range of targeted consumer protection mechanisms. These included rigorous provider approval processes, certification against nationally consistent standards, and effective monitoring of compliance against those standards through a range of instruments such as audits, community visitors, independent consumer surveys and compliant mechanisms.⁴
- A number of options canvassed in the consultation paper appear to be heavily influenced by the Productivity Commission's faith in market forces. Caution should be exercised, however. It is submitted that too much reliance should not be placed on market forces (at least in the short-term) and that the initial regulatory regime should properly regulate the market to protect persons with disabilities. Over time, regulation could be relaxed as the Scheme and the market for disability support services matures.
- Development of the Framework should balance a number of risks. Haines, for example, argues that to be effective, regulation needs to address three risks: (1) actuarial risk - the risk (based on past experience and assumptions about the future) of provider misconduct measured in terms of the likelihood and consequences of a particular hazard occurring; (2) socio-cultural risk – the need for regulation to promote social cohesion and to provide the community will a sense of security and comfort; and (3) political risk - risk to the legitimacy and credibility of the system itself.⁵
- The consultation document is framed primarily in terms of actuarial risk. However, the importance of socio-cultural and political risks should not be underestimated. The NDIS has received strong community support. It has become a symbol of what we expect from a mature, compassionate society. The community has directly invested in the NDIS by accepting (through near popular acclaim) a dedicated surcharge on their income to fund it. That support comes with expectations that the NDIS will be delivered to a high standard. Crises in its delivery (such as instances of carer abuse of persons with disabilities) risks undermining the community's sense of security and comfort in the Scheme, its legitimacy and credibility, and community support for it.
- Following on from this, the test of scheme design should go beyond normative and utilitarian assessments of effectiveness and efficiency, and cost-benefit analyses. A test also

² Productivity Commission, above n 1, 357-358.

³ Ibid 478-491.

⁴ Ibid 493-513.

⁵ Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar, 2011).

should be how would the Scheme stand up to intense scrutiny should there be adverse incidents compromising the health, safety and welfare of persons with a disability (as inevitably will be the case). I call this the '4 Corners' test.

- The Home Insulation Program ('HIP') is evidence of what can happen when a scheme does not adequately regulate the provider market. The supply sides of the HIP and NDIS have many things in common: both are hybrid schemes relying on a combination of Commonwealth and State and Territory regulation; and both involve the injection of significant amounts of money into a provider market with insufficient capacity.
- The many reports into the HIP's failure make clear that the sheer volume of installation activity quickly overwhelmed the regulatory regimes and regulators overseeing it.⁶ They also make clear that the 'honey pot' effect was either not understood or ignored, and that no one foresaw the possible extent of malfeasance that eventually materialised.
- There are lessons to be learned from the HIP that should inform the development and implementation of the Framework.⁷
- First, neither a light regulatory touch nor reliance on the power of market forces is likely to suffice. The NDIS is expected to attract new providers with varying experience, skills and motivations. In this situation, strong and timely provider controls are important. A scheme of the size and importance of the NDIS requires tailor made controls. If the HIP taught us anything, it is that 'governments need to regulate markets to ensure their proper functioning'.⁸
 - The guiding principle of 'reducing/minimising regulation' places the wrong emphasis on the regulatory design challenge. The emphasis should be on designing regulation that is 'proportionate, targeted and balanced' – that adopts regulatory measures proportional to the problem they seek to address; which target compliance and enforcement activities to prevent the most serious risks or harms; and which strike the appropriate balance between protecting against those risks and the compliance burden they impose.
 - Provider controls should be designed to act as a disincentive to those you do not want in the Scheme without constituting an insurmountable barrier to those you want in it. Up-front compliance costs are not, by definition, something to be avoided. One person's red-tape is another person's safety net.
 - While the presumption of capacity as a guiding principle is laudable, there will remain persons with disabilities who are vulnerable and for whom there will be a power and information imbalance vis-à-vis providers. How the Scheme safeguards the most vulnerable members of our community will be a criterion against which it will be assessed (applying the '4 Corners' test).

⁶ They include: Senate Environment, Communications and the Arts References Committee, Parliament of Australia, *Energy Efficient Homes Package (ceiling insulation)* (2010); Allan Hawke, *Review of the Administration of the Home Insulation Program*, Report prepared for the Departments of the Environment, Water, Heritage and the Arts, Finance and Prime Minister and Cabinet (2010); Australian National Audit Office, *Home Insulation Program* (Audit Report No.12, 2010–11); Local Court of New South Wales, Coronial Jurisdiction, *Inquest into the death of Marcus Wilson* (2012); Queensland Courts, Office of the State Coroner, *Inquest into the deaths of Matthew James Fuller, Reuben Kelly Barnes and Mitchell Scott Sweeney* (2013); Commonwealth of Australia, Royal Commission into the Home Insulation Program, *Report of the Royal Commission into the Home Insulation Program* (2014).

⁷ These lessons are further explored in Eric Windholz, 'NDIS Beware: Pink Batts Below!' (2014) 39(2) *Alternative Law Journal* 89, available at <http://ssrn.com/author=1997836>.

⁸ Hawke, above n 6, viii.

- In this context, and addressing question canvassed in the consultation document:
 - Reporting of serious incidents should be mandatory under the NDIS, and they should be reported to an independent body. Lessons from the Royal Commission into Institutional Child Sexual Abuse also should be learned.
 - Provider registration should be tailored to the risks associated with each category of service and good provider. One size is unlikely to fit all. Having said that, and for the reasons discussed elsewhere in this submission, I would not expect Option 1 (the 'light touch' option) to suffice for any category of providers.
 - The NDIS should have a complaints handling structure. A complaints office within the National Disability Insurance Agency (NDIA) should suffice. A strong case would need to be made to demonstrate sufficient value in establishing yet another government body.
 - The establishment of a screening agency to assess individual person's suitability to be a provider could become very bureaucratic and time-consuming. It also would be subjective and prone to challenge. A combination of referee and police checks and a barred persons list should suffice.
 - Protections should be the same for persons managing their own plans and those whose plans are being managed on their behalf by the NDIA. How could you justify a system that provided a lesser level of protection (regulation) to persons managing their own plans when compared to persons whose plans are being managed by the better informed and equipped NDIA? This lends itself to a system in which participants are required to use a provider approved and screened by the NDIA.
 - However, there is no need for an additional independent oversight body for the NDIS – existing governance arrangements if properly resourced and vigilantly and diligently implemented should suffice.
- Second, proper coordination and communication is essential. Hybrid schemes of this nature involve numerous interactions and interdependencies. Many are obvious and known; others are subtle and may be hidden. Only through transparent and inclusive processes can they be properly identified and addressed. It is therefore important that the Commonwealth government establish consultative arrangements to leverage the experience and knowledge of all actors involved with the disability sector and, having set up those processes, listens to and heeds their advice. The consultation process informing the development of the Framework is evidence this lesson has been learned.
- Third, avoid short-cuts. Many of the problems encountered by the HIP can be traced to its prioritisation of speed over proper process, with the result that many risks associated with the program were either not identified, or their magnitude and remedial action not properly understood or scoped. The careful analysis and planning going into the development of the Framework is evidence this lesson has been learned.
- Fourth, all regulators (Commonwealth, State and Territory) need to gear up to meet the demands which will be placed on them by the expansion of the disability support market. Adequate funding and resourcing of these regulators is essential. The extent to which the NDIS is learning this lesson is unclear. As far as I am aware, the Commonwealth has not provided any funding to States and Territories to cover the increased demands this will inevitably place upon them.

+

- As with most regulatory schemes, the 'how' (the manner in which the scheme is implemented) is as important (if not more important) than the 'what' (the regulatory design and instruments). Commonwealth, State and Territory costs administering the Scheme should be properly estimated and funded. In particular, the startup effort should not be under-estimated.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Eric Windholz", with a long horizontal flourish extending to the right.

Dr Eric Windholz

Email: Eric.Windholz@monash.edu

Phone: 61-3-99053381