

# NDIS Thin Markets Project

Legal Aid NSW submission to  
Ernst & Young Australia

*June 2019*

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**Legal Aid**   
NEW SOUTH WALES

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, pro bono legal services and 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW is well placed to identify challenges that vulnerable people are facing in accessing the National Disability Insurance Scheme. We receive federal funding to represent clients in appeals to the Administrative Appeals Tribunal against decisions of the National

Disability Insurance Agency (**NDIA**) that raise issues that are "complex or novel".

A significant proportion of our clients across all our practice areas have a disability.<sup>1</sup> We also offer a number of specialist services that assist clients who have engagement with the NDIS. These services include the Mental Health Advocacy Service (**MHAS**), the Client Assessment and Referral Unit (**CARS**), the Family Law Early Intervention Unit, the Children's Civil Law Service, and the Prisoners Legal Service.

Through our regional offices and outreach services, we also have experience assisting clients who have engagement with the NDIS in rural and remote areas. Our specialist Civil Law Service for Aboriginal Communities (**CLSAC**) conducts outreach to over 20 locations in order to provide legal services for disadvantaged and remote Aboriginal communities.

Legal Aid NSW welcomes the opportunity to make a submission to the NDIS Thin Markets Project. Should you require any further information, please contact:

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<sup>1</sup> For example, from August 2017 to July 2018, 20.3% of all grants of legal aid for casework were to clients who identified as having a disability.

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## 1 Executive summary

Legal Aid NSW fully supports the principles and objectives of the National Disability Insurance Scheme (**NDIS**). We acknowledge that the NDIS provides opportunities to improve disability services and increase choice and control for people with disability.

However, there is room for improvement to ensure that market failures and other factors limiting access to the scheme do not prevent the scheme's goals of choice and control from being fully realised, especially for some of the most vulnerable members of the community. Of primary concern are thin markets for specialist disability accommodation (**SDA**) for people with complex needs, particularly those in contact with the criminal justice system

## 2 Where our clients experience 'thin market' issues

In our experience thin markets are evident in a number of areas. These include:

- inadequate markets for SDA for people with complex needs
- a lack of Aboriginal specific disability service providers, and of suitable providers to assist cultural and linguistically diverse participants
- limited sector development as a result of the use of preferred provider lists by public agencies
- limited service choice as a result of providers performing dual roles of coordinating support and providing services
- a lack of disability support services in rural and remote areas.

### 2.1 SDA market failure for people with complex needs

People who require SDA are some of the most vulnerable people in our society. Many of them have complex needs arising from the interplay of their disability with mental and physical health problems, the impact of childhood trauma, poverty, difficulty in accessing mainstream services, periods of homelessness and social isolation. They are also likely to engage in challenging behaviour and require specialist behavioural support, including support to reduce the risk of committing offences.

In our experience, the SDA market is struggling to provide sufficient, reliable and appropriate accommodation for people with complex needs, particularly those who have contact with the criminal justice system.

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Compounding this problem is the fact that the transition to the NDIS removed a safety net of SDA services that were funded and coordinated by the NSW Government. There is no longer an SDA provider of last resort to step in when the market fails. We note that the Legislative Council's Inquiry into the *Implementation of the NDIS and the provision of disability services in NSW* (2018) recommended that the NSW Government reinstate its role as a public sector safety net to capture people with disability, particularly those with complex and challenging needs. It also recommended that the NSW Government be established as a service provider of last resort to ensure crisis situations are managed appropriately.<sup>2</sup>

These problems mean that our clients are more likely to become homeless, come into contact with the criminal justice system, and spend longer in prison than necessary. It can also lead to our clients spending prolonged periods in temporary accommodation or hospital because appropriate SDA cannot be found.

Thin markets also mean that our clients often spend long periods in custody, and in the forensic mental health system, because bail, parole, leave and release all often depend on the availability of appropriate supports in the community. When these supports cannot be located, clients remain in detention even if they are otherwise suitable for release. In essence, this amounts to clients being detained as a direct result of their disability, since clients who do not require specialist supports can be released into the community without these delays.

The provision of adequate SDA to meet demand was acknowledged as a major challenge by the NDIA in its submission to the Inquiry by the Joint Standing Committee on the NDIS into market readiness for provision of services under the NDIS.<sup>3</sup> Legal Aid NSW also made a submission to that Inquiry in which we highlighted challenges for our clients in gaining access to SDA.<sup>4</sup>

In our view, the significant impact of SDA shortages on our clients necessitates an urgent response. Clients such as Troy (discussed below), who would otherwise not be in prison, should not be spending significant periods of time in custody due to a failure in the SDA market. As a starting point, and to clearly scope this problem, we suggest that the number of NDIS participants who remain in custody because of a failure to secure disability services should be assessed by the NDIA and NSW Government as a matter of urgency. The NDIA and NSW Government should also make provision, on an

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<sup>2</sup> Recommendations 12 and 13.

<sup>3</sup> National Disability Insurance Agency, Submission No 52 to the Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Inquiry into market readiness for provision of services under the NDIS*, February 2018, 19.

<sup>4</sup> Legal Aid NSW, Submission No 93 to the Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Inquiry into market readiness for provision of services under the NDIS*, March 2018.

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ongoing basis, for a provider of last resort where the market cannot provide appropriate accommodation for an NDIS participant. Last resort accommodation should not be limited to people who are in crisis, but should also be available before the person reaches crisis point; that is, in cases where a service cannot meet the needs of a resident and there is an emerging risk that the service will be withdrawn.

### ***Case Study: Troy***

Troy is a young man with a significant cognitive impairment, mental illness and substance abuse problems. Troy has high needs and is currently in an Additional Support Unit in prison.

Troy went into custody after being charged with offences, but the prosecution agreed to support a bail application if suitable accommodation could be found, and Troy agreed to certain conditions.

Legal Aid NSW helped Troy access NDIS funding. Both a support coordinator and a specialist support coordinator worked with Troy to find appropriate accommodation for him, but neither was able to identify suitable accommodation.

Throughout this process, allocated funding was being exhausted by support coordination that was not meeting Troy's needs.

Until appropriate accommodation could be found, Troy remained in custody, without having been found guilty of an offence.

## **2.2 Lack of culturally appropriate support providers**

In our experience there is a general lack of Aboriginal community run disability service providers. This makes it very difficult to find appropriate services for participants who are forensic patients returning to the community.

There is also a lack of disability services that are able to support culturally and linguistically diverse forensic patients. The use of interpreters can be problematic when cultural nuances and references are misunderstood or mistranslated.

Culturally appropriate services are best able to meet the needs of people with disability and a lack of culturally appropriate services can discourage people from engaging with their providers.

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## 2.3 Preferred provider lists

We have observed that, in some contexts, government agencies operate using a list of preferred providers. For example, agencies may refer people who are transitioning to the community from detention (in prison or a mental health facility) to one of a limited number of approved providers for support. While from the agency's perspective, there may be good policy reasons for this approach, it has an impact on markets. Preferred providers often have long waiting lists, but other providers are unable to enter a niche market as they will not receive referrals. There is no ability for the market to build capacity to work with the challenging and complex needs of these client groups. This limits the number of skilled providers in the sector and reduces choice for people with a disability. In our experience, long waiting times for services from preferred providers can also result in vulnerable people remaining in forensic hospital or custody for longer than is necessary.

In our view, NDIS participants should be able to choose their service provider whenever possible.

## 2.4 Dual role of coordination of support and service provision

We are aware that in some instances the same provider acts as a NDIS participant's coordinator of supports and as their service provider. In our experience, this can sometimes lead to coordinators not arranging services that aren't offered by that provider. As well as creating a conflict of interest for providers, this practice significantly curtails participant choice, particularly for forensic patients who already have a very limited choice of providers. Limiting participant choice does not encourage the building of capacity within the sector, and contributes overall to limited service availability.

## 2.5 Problems accessing services in rural and remote areas

In some rural and remote areas, there are no services permanently based in the community. Where service providers do visit the community, they often don't stay long enough to develop long term relationships with clients, and be flexible and responsive to clients' needs. As noted above, there is also a general lack of Aboriginal community operated providers in many communities.

There are several ways these problems could be addressed, including:

- expanding services to have a permanent presence in more rural areas
- better co-ordinating within and across services, so they are able to spend longer in communities

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- providing training and other support to assist community members to become disability support workers.

In our experience, several other factors are limiting access to the scheme in rural and remote areas. We have observed a lack of knowledge of the NDIS in some rural and remote communities. As part of their intake process, Legal Aid NSW's specialist CLSAC team asks clients if they are NDIS participants. However, many people in remote communities, including people with disabilities, have no knowledge of the NDIS or what being a participant entails. Another significant barrier to entry is a lack of formal diagnosis of a disability, especially in areas where there are limited health providers.