



Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to The NDIS Thin Markets Project

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Recommendations

Recommendation 1

The National Disability Insurance Agency should publish, consult on and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:

- multiple designated providers of last resort are clearly identified;
- providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice;
- the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants;
- clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just 'critical' supports);
- participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding;
- as soon as possible, participants are transitioned back to support outside provider of last resort arrangements;
- provider of last resort mechanisms continue to exist beyond full rollout of the NDIS (and are not just a temporary or artificial market artefact during transition).

Recommendation 2

The National Disability Insurance Agency should develop a national training program for planners and support coordinators.

Recommendation 3

The National Disability Insurance Agency as market steward, in collaboration with federal, state and territory governments, should consider the effectiveness of the specialist disability accommodation (SDA) pricing framework under the National Disability Insurance Scheme. The review should consider:

- the availability, diversity, and stability of SDA;
- mapping current SDA and identifying gaps in the market;
- whether clients most in need of SDA are prioritized;
- ways to stimulate the SDA market;
- robust builds for situations of crises;
- provider of last resort arrangements.

Recommendation 4

The National Disability Insurance Agency, in conjunction with federal, state and territory governments, should adjust market levers and policies (including the pricing framework) to stimulate and ensure the existence of sufficient numbers and diversity of crisis accommodation providers, and should also ensure that sufficient funds are provided so that Specialist Disability Accommodation provision is able to meet existing and future demand.

Recommendation 5

The National Disability Insurance Agency's Maintaining Critical Supports and Immediate Support Response policy and framework should specifically address and provide guidance in relation to Specialist Disability Accommodation and crisis accommodation providers of last resort. The framework should include a vacancy management strategy for providers to prioritise clients with the most urgent need.

Recommendation 6

The National Disability Insurance Agency should enable contingency funding to be immediately accessible when crises arise. This approach would require designated liaison and emergency contact points and procedures within the NDIA (or authorised agencies) which are responsive during and outside of business hours.

Recommendation 7

The National Disability Insurance Agency should directly commission the provision of Short Term Accommodation and Assistance (STAA) for participants who need accommodation at short notice.

Recommendation 8

Federal, state and territory governments should enact legislative and other safeguards to provide security of tenure and other rights protections for all forms of accommodation used by NDIS participants, including people in Specialist Disability Accommodation.

Recommendation 9

The Victorian Government should include a map of NDIS and non-NDIS mental health programs and populations in its annual mental health report and evaluate the impact of the NDIS on the mental health service landscape.

Recommendation 10

The Council of Australian Governments (COAG) should conduct an audit of all Australian, state and territory services, programs and associated funding for mental health.¹

Recommendation 11

The Victorian Government should advocate for the retention and effective resourcing of the Community Visitors Program as an essential legislated safeguard in the National Disability Insurance Scheme.

¹ Joint Standing Committee on the NDIS. *General issues around the implementation and performance of the NDIS – Progress Report*. March 2019. Page ix.

1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests of people with disability.²

The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian Parliament. OPA's primary functions include advocacy, investigation, and guardianship services for people with cognitive impairment and mental illness. The Office provides advice, information, and education about laws affecting people with disability, and coordinates four volunteer programs.

Last financial year, OPA was involved in 1806 guardianship matters (963 of which were new), 389 investigations, and 320 cases requiring advocacy.

In 2017-18, OPA was guardian for 182 NDIS participants, advocate for 13 participants, and the Office undertook 28 investigations in relation to individuals where NDIS matters were relevant. OPA has previously acted as an advocate for 57 participants who currently reside or have previously resided in Colanda Residential Services and Disability Accommodation Services in Colac and Geelong during the NDIS trial phase.

OPA continues to undertake a range of systemic advocacy activities in the transition to the NDIS and the implementation of a nationally consistent quality and safeguarding framework.

OPA provides training and support to more than 600 volunteers across four volunteer programs: the Community Visitors Program, the Community Guardian Program, the Independent Third Person Program, and the Corrections Independent Support Officer Program. As a key component of the quality and safeguarding arrangements operating during the transition to the NDIS, OPA Community Visitors continue to visit disability residential accommodations, supported residential services, and mental health facilities where residents and patients have various interactions with the NDIS.

2. The need for an urgent response

OPA welcomes the opportunity to make a written submission to the NDIS Thin Markets Project but notes that thin markets have been thoroughly investigated by independent inquiry bodies such as the Joint Standing Committee on the NDIS, the Productivity Commission, and McKinsey & Company. Despite numerous calls to action, the implementation of recommended market interventions has been slow. Meanwhile, the impacts felt by participants continue to accumulate. OPA stresses the need for an urgent and comprehensive market response to prevent further unnecessary harm, and reminds the National Disability Insurance Agency (NDIA) of its commitment to intervene proactively to market-related issues, as stated below:

*“The NDIA will seek to *pre-empt* market issues in thin markets through *early identification and action*, and work to understand the market for each community. This includes how the current market is responding to NDIA prices for support, the number of service providers and the range of available supports.”³*

² *Guardianship & Administration Act (1986)*

³ National Disability Insurance Agency. *National Disability Insurance Scheme Market Enablement Framework*. October 2018. Page 11. [emphasis added].

Past OPA publications have thoroughly described thin markets and recommended solutions to the issues presented in this submission. The following publications are particularly relevant and should be referred to when considering this submission:

- Submission to the Joint Standing Committee on the NDIS' inquiry into market readiness (March 2018):
<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/ndis-market-readiness/505-opa-submission-to-inquiry-on-ndis-market-readiness-pdf>
- *The Illusion of Choice and Control* (September 2018):
<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/the-illusion-of-choice-and-control/519-the-illusion-of-choice-and-control>

3. Market stewardship governance

One of the greatest challenges in market intervention thus far has been the absence of a well-established governance structure for market stewardship. This has resulted in the piece-meal assignment of roles and responsibilities across a number of policy areas as illustrated in the following documents.

- The *NDIS Market Enablement Framework* (October 2018) reasserts the role of the NDIA as market steward but is silent on the roles of other parties.
- The *NDIS Market Approach: Statement of Opportunity and Intent* (November 2016) and Communiqués from the Disability Reform Council (DRC) identify a role for State, Territory, and Commonwealth Governments, but the specifics remain undefined: "The Council also agreed a way forward to provide clarity in the roles and responsibilities of jurisdictions in the management of the NDIS Market."⁴
- The *NDIS Quality and Safeguards Framework* (December 2016) assigns a market oversight role to the NDIS Quality and Safeguards Commission for "collecting, analysing, and advising on a range of unique market information to identify trends and changes in the NDIS market."⁵ To OPA's knowledge, the information sharing arrangements that would enable effective market oversight have yet to be determined.

The discussion paper omits governance for market roles and responsibilities altogether and fails to acknowledge previous work on this topic, for example, the McKinsey & Co pricing review, and the commitments for a Maintaining Critical Supports Project.

Without clear direction, market responsibilities will continue to be diffused, creating delays or inaction in market interventions and negative outcomes for participants. Effective strategies cannot be implemented if roles and responsibilities must be established at every occasion.

⁴ Disability Reform Council. *Communiqué*. 10 December 2018. Page 2.

⁵ <https://www.ndiscommission.gov.au/providers/commission-role-ndis-market-oversight>

4. Thin markets

4.1. Participants with complex needs

The issue

The Joint Standing Committee on the NDIS, the Productivity Commission, and the McKinsey & Company review observed that thin markets are exacerbated for people with complex needs and/or with very challenging behaviour. OPA agrees with this finding.

Participants with complex support needs (or vulnerable participants as they are identified in the discussion paper) tend to receive extensive NDIS plans with sizeable amounts of funding, but this in itself does not stimulate market supply. Thin markets for this cohort are a result of the combination of an undersupply of providers, and an unwillingness of some providers to accept participants with complex needs because of the challenges and risks they pose. This results in delays in plan implementation due to limited or poor-quality services. Specifically, Community Visitors and OPA identify the following scarcities in supply:

- Occupational therapists: While not a new problem, the shortage of occupational therapists is exacerbated due to requests for assessments in the NDIS access and planning process. Community Visitors have documented instances where delays in obtaining an occupational therapy assessment has prevented funding for aids and equipment that are necessary to a participant's mobility, hygiene, and/or comfort.
- Specialist behaviour support: An increased demand for behaviour support assessments has some participants waiting more than 12 months for a review of their behaviour support plan. They receive inappropriate behaviour support in the meantime, which compromises their safety and that of those around them.
- Specialist Disability Accommodation (SDA) and Short Term Accommodation and Assistance (STAA): Shortages in SDA and STAA are addressed in sections 4.2 and 4.3 of this submission.

In addition to scarcities in supply, the NDIS market also suffers from significant skill shortages, which exacerbate the difficulties for participants. For example, the dearth of support coordinators is compounded by a variability in experience and skill. Choice can be so limited that some participants are employing support coordinators who do not have the level of skill and experience required to meet their needs.

Before the NDIS, the Victorian Department of Health and Human Services (DHHS) exercised its duty of care by providing services without discrimination to individuals with complex needs and challenging behaviours. In the NDIS private market, choice and control are granted not only to participants, but also to providers who have no obligation to provide or maintain services to participants if/when problems arise. While there may be a financial incentive to take on participants with substantial NDIS funding, OPA has seen that for many providers the perceived risks outweigh the monetary benefits.

Participants with complex needs continue to be disadvantaged by the scheme; their safety and wellbeing are compromised by thin markets. *The Illusion of Choice and Control* and the 2017-18 Community Visitors Annual Report provide examples that illustrate the impact of NDIS thin markets on this cohort.

Proposed response

Some efforts have been deployed to address thin markets for participants with complex needs, but the approach has not been comprehensive in addressing both the failure of supply and shortage of skills.

In OPA's view, thin markets for participants with complex needs will be chronic. Consequently, market intervention strategies should not rely on temporary measures.

OPA hoped the Maintaining Critical Supports Project would identify market intervention strategies for thin markets affecting participants with complex needs but is disappointed that no update has been published on this project in over 12 months.

OPA maintains its position that, in this setting, direct commissioning of a provider of last resort is required and repeats a recommendation from *The Illusion of Choice and Control*:

Recommendation 1:

The National Disability Insurance Agency should publish, consult on and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:

- multiple designated providers of last resort are clearly identified;
- providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice;
- the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants;
- clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just 'critical' supports);
- participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding;
- as soon as possible, participants are transitioned back to support outside provider of last resort arrangements;
- provider of last resort mechanisms continue to exist beyond full rollout of the NDIS (and are not just a temporary or artificial market artefact during transition).

In relation to support coordination, the Complex Support Needs Pathway and the recently announced Exceptionally Complex Support Needs Pathway are welcome initiatives that endeavour to prescribe adequately priced (and skilled) planners and support coordinators. However, the introduction of the pathways will not necessarily raise the level of skills in the workforce. OPA recommends market development activities to train planners and support coordinators are necessary to ensure that services operate consistently across Australia.

Recommendation 2:

The National Disability Insurance Agency should develop a national training program for planners and support coordinators.

4.2. Specialist Disability Accommodation

The issue

OPA and Community Visitors have expressed concerns about the scarcity of SDA for NDIS participants with high support needs and complex behaviours.

In the absence of long-term accommodation, NDIS participants cycle through a succession of unsustainable short-term arrangements. Some OPA guardians face such limited choice within the NDIS market that the safest option is to move a client into a Supported Residential Service (SRS). SRSs are not NDIS providers and therefore, participants risk losing SDA funding to underspend, at the expense of their safety. At its worst, the SDA shortage has left participants in unnecessary detention within the criminal justice or mental health systems or has thrust participants into homelessness. In this way, the SDA thin market has far-reaching systemic impacts as it imposes unnecessary strains on adjacent sectors. *The Illusion of Choice and Control* presents multiple examples of this.

In OPA's experience, the fundamental shift in the delivery of disability residential services has not been executed with the necessary precautions that would have ensured the market supply meets demand. One of the greatest losses from the NDIS reform is the fading of a mandated duty of care, which was previously placed on State Governments delivering disability residential services.

Proposed response

OPA acknowledges the importance of the SDA Price Guide and the SDA Pricing and Payments Framework but notes that neither identify interventions that could stimulate the supply of SDA in the short term.

OPA updates a recommendation from its submission to the Joint Standing Committee's inquiry into market readiness:

Recommendation 3:

The National Disability Insurance Agency as market steward, in collaboration with federal, state and territory governments, should consider the effectiveness of the specialist disability accommodation (SDA) pricing framework under the National Disability Insurance Scheme. The review should consider:

- **the availability, diversity, and stability of SDA;**
- **mapping current SDA and identifying gaps in the market;**
- **whether clients most in need of SDA are prioritized;**
- **ways to stimulate the SDA market;**
- **robust builds for situations of crises;**
- **provider of last resort arrangements.**

OPA also repeats recommendations made in *The Illusion of Choice and Control*, which apply to both SDA and STAA (addressed at 4.3).

Recommendation 4:

The National Disability Insurance Agency, in conjunction with federal, state and territory governments, should adjust market levers and policies (including the pricing framework) to stimulate and ensure the existence of sufficient numbers and diversity of crisis accommodation providers, and should also ensure that sufficient funds are provided so that Specialist Disability Accommodation provision is able to meet existing and future demand.

It seems likely that a market approach will continue to fail to meet the needs of some people with disability. OPA predicts that this will be a chronic limitation of the market. In OPA's view, the only market players that will ever have the resources necessary to build, develop, and maintain fit for purpose properties will be governments. In the transition to the NDIS, the Victorian State Government has remained involved by retrofitting existing properties, but this is often unsatisfactory, especially in terms of meeting safety requirements. OPA sees an expanded role for governments as a commissioned provider who can be commissioned to build bespoke SDA.

Recommendation 5:

The National Disability Insurance Agency's Maintaining Critical Supports and Immediate Support Response policy and framework should specifically address and provide guidance in relation to Specialist Disability Accommodation and crisis accommodation providers of last resort. The framework should include a vacancy management strategy for providers to prioritise clients with the most urgent need.

4.3. Short Term Accommodation and Assistance

The issue

Alongside shortages in long-term accommodation options, OPA and Community Visitors have observed participants having trouble accessing Short Term Accommodation and Assistance (STAA), such as crisis accommodation and respite care, with NDIS funding.

The 2017-18 Community Visitor Annual Report speaks to pricing issues related to respite care:

“Two factors appear to be contributing to [underutilisation of NDIS funded respite services]: the additional fees being charged to cover staff needed for people with complex needs and low levels of funding for respite in NDIS plans. As a consequence, it appears that families are reluctant to use respite until absolutely necessary which has led to underutilisation of these services in some areas.”⁶

In addition to this, OPA and Community Visitors note that there is a limited supply of crisis accommodation and that NDIA processes are unable to quickly respond to a participant's sudden need for short term accommodation. The *Illusion of Choice and Control* provides multiple examples of situations where contingency funding may be required to respond to a participant's fluctuating needs. These include, but are not limited to, a participant entering custody or a participant whose tenancy is being threatened.

Prior to the existence of the NDIS, DHHS could be relied upon to respond to threatened or broken tenancy arrangements for people living in disability residential services. At present, DHHS continues to respond to accommodation crises experienced by people with complex needs and behaviours of concern. However, in August 2018, the Victorian Government, in keeping with governments in other jurisdictions, announced the transfer of government operated disability accommodation and respite services to non-for-profit providers. OPA fears a private market may not be as responsive.

Proposed response

OPA updates recommendations made in *The Illusion of Choice and Control*:

Recommendation 6:

The National Disability Insurance Agency should enable contingency funding to be immediately accessible when crises arise. This approach would require designated liaison and emergency contact points and procedures within the NDIA (or authorised agencies) which are responsive during and outside of business hours.

Recommendation 7:

The National Disability Insurance Agency should directly commission the provision of Short Term Accommodation and Assistance (STAA) for participants who need accommodation at short notice.

⁶ *Community Visitors Annual Report 2017-18*. Page 8.

Recommendation 8:

Federal, state and territory governments should enact legislative and other safeguards to provide security of tenure and other rights protections for all forms of accommodation used by NDIS participants, including people in Specialist Disability Accommodation.

Refer also to recommendations 4 and 5, at 4.2.

4.4. Psychosocial disability supports

The issue

Community Visitors have documented the closure of mental health services following the reduction funding for community mental health services by the Victorian Government in the transition to the NDIS.

Some mental health providers have reported to Community Visitors that the NDIS funding model is not viable, as it psychosocial supports are not adequately priced to be delivered at the required level of expertise. OPA and Community Visitors have heard accounts of larger mental health providers operating NDIS programs at a loss (pro-bono) in order to meet the needs of their clients. The issue is not new; it was first documented by Community Visitors in the Victorian NDIS trial site where some mental health providers went into voluntary administration.

The loss of mental health services has consequences that extend beyond the NDIS, given that most people with mental illness are not eligible for the scheme but are nonetheless being disadvantaged by the shrinking market.

Proposed response

OPA acknowledges recent funding commitments made by the Victorian Government to bolster the mental health sector. Some gaps nonetheless remain.

OPA repeats a recommendation made in its submission to the Joint Standing Committee on the NDIS' inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition:

Recommendation 9:

The Victorian Government should include a map of NDIS and non-NDIS mental health programs and populations in its annual mental health report and evaluate the impact of the NDIS on the mental health service landscape.

OPA also sees a role for the Australian Government, and endorses the following recommendation from the Joint Standing Committee on the NDIS' recent progress report:

Recommendation 10:

The Council of Australian Governments (COAG) should conduct an audit of all Australian, state and territory services, programs and associated funding for mental health.⁷

⁷ Joint Standing Committee on the NDIS. *General issues around the implementation and performance of the NDIS – Progress Report*. March 2019. Page ix.

5. Safeguards: Advocacy, supported decision-making, and Community Visitors

In closing, OPA repeats long standing concerns about the reduction in safeguards in the transition to the NDIS. Safeguards such as advocacy, supported decision making, and Community Visitors are imperative in enabling participants to fully participate in, interact with, and navigate the NDIS market. This is especially true for participants with limited informal supports or severe cognitive impairment.

Advocacy facilitates the realisation of choice and control, as intended in the development of the scheme. Indeed, the general principles of the *National Disability Insurance Scheme (NDIS) Act 2013* highlight the crucial roles of advocacy and decision-making supports:

- “People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.” (s4(4))
- “The role of advocacy in representing the interests of people with disability is to be acknowledged and respected.” (s4(13))
- “People with disability should be supported to receive supports outside the National Disability Insurance Scheme, and be assisted to coordinate these supports with the supports provided under the National Disability Insurance Scheme.” (s4(13))

In Victoria, the Community Visitors Program is an important safeguard for people with disability. Community Visitors are dedicated advocates who pursue the resolution of concerns both for and with the residents they support. Community Visitors are able, by undertaking their role and through their Annual Report to parliament, to identify NDIS implementation issues, such as thin markets, as they arise. The program has been in place for over 30 years and is an integral part of Victoria’s safeguarding system. There would be a significant gap in the NDIS safeguarding regime if the current program did not continue. OPA repeats a recommendation made in the 2017-18 Community Visitors Annual Report for the retention, legislation, and effective resourcing of the Community Visitors Program.

Recommendation 11:

The Victorian Government should advocate for the retention and effective resourcing of the Community Visitors Program as an essential legislated safeguard in the National Disability Insurance Scheme.

Funding for advocacy and other safeguards for people with disability now sits outside the NDIS. While this provides a necessary layer of independence, governments have not (yet) fully compensated for funding cuts to these services, and OPA is aware of advocacy organisations operating with waiting lists in an environment of limited and uncertain funding.

The consequence, as documented by Community Visitors, is that participants are not able to access the advocacy they need to meaningfully participate in the scheme. The shortage of advocacy supports leads to operational and implementation issues like delays in access requests and plan implementation. OPA’s submission to the Joint Standing Committee on the NDIS’ inquiry into market readiness focusses on the need for independent safeguards.

Independent safeguards represent an invaluable component of the NDIS market, especially for participants seeking providers within thin markets. OPA welcomes initiatives like the Decision Support Pilot Project and hopes that similar collaborations will be encouraged and facilitated by the market steward, to stimulate engagement with and participation in the market. OPA reiterates the importance of independent safeguards in the realisation of the intention and the benefits of the NDIS.