

**Submission
No 317**

**INQUIRY INTO IMPLEMENTATION OF THE NATIONAL
DISABILITY INSURANCE SCHEME AND THE PROVISION
OF DISABILITY SERVICES IN NEW SOUTH WALES**

Organisation: Mental Health Review Tribunal

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Mental Health Review Tribunal submission

Inquiry into the implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales

The NSW Mental Health Review Tribunal (the Tribunal) welcomes the opportunity to make a submission to this Inquiry.

The NDIS has had some notable successes for people living with psychosocial disability. The NDIS has supported people to live in the community instead of institutional care, reconnect with their family and engage in activities that improve their independence.

However, there are still gaps in the provision of services. While the debate continues about which government agency is responsible for funding these gaps, those in need of the services are missing out. There is therefore an urgent need to clarify which government agency is responsible for funding these services and to develop a Complex Needs Framework.

Background

The New South Wales Mental Health Review Tribunal is an independent statutory Tribunal.

It has a wide range of powers to make orders for the compulsory care and treatment of people with a mental illness, either in a mental health facility as an involuntary patient, or in the community under a Community Treatment Order.

The Tribunal also has responsibility for making decisions in relation to forensic patients. Forensic patients are people who have been diverted from the criminal justice system. In broad terms, forensic patients in NSW are those who are unfit to stand trial, have had a special hearing and a limiting term was imposed or who have been found not guilty of a serious offence by reason of mental illness.

The Tribunal is responsible for deciding if a forensic patient should be detained, and if so where that person should be detained (a mental health facility or other place). Due to the lack of suitable alternative accommodation some forensic patients are in NSW prisons. The Tribunal decides when a person may have leave from any place of detention and when the person may be released to live in the community under conditions. The Tribunal also decides when a person may be unconditionally released, so that the person is no longer a forensic patient.

The Tribunal gathers a great deal of written and oral evidence as part of its hearings in both the civil and forensic jurisdictions. It hears about the living arrangements and supports available for people living with mental illness or cognitive impairment or both. The Tribunal's knowledge of the implementation of the NDIS is gathered through its hearings and its meetings with people across the sector. De-identified case studies are used in this submission where possible.

Comments on specific terms of reference

1. *The implementation of the National Disability Insurance Scheme and its success or otherwise in providing choice and control for people with disability*

The NDIS has the potential to offer significant opportunities to support people living with mental illness and/or cognitive impairments to live contributing lives.

The Tribunal has certainly seen NDIS plans which work in this way. Some examples are:

- (a) Allowing people to reconnect with family (by paying for support workers to drive the person to visit family);
- (b) Allowing a person with chronic medical conditions as well as mental illness and cognitive impairment to live at home, by supporting their transport to medical appointments and other activities;
- (c) Support independent living plans that allow patients to live in supported community accommodation, and to move out of institutional care.

There have been difficulties with the implementation. The Tribunal is concerned that:

- (a) The content of NDIS support plans appears to be strongly dependant on the region where an NDIS applicant lives. For example, in the Hunter New England region, the NDIS will not pay for any supports to assist people living in mental health facilities to engage in community activities, unless the person is guaranteed to be discharged from that mental health facility within 3 to 6 months. In the Western Sydney region, those same community engagement supports are provided under NDIS plans, although there no discharge date has been decided.
- (b) The Justice Applied Principles and Tables of Support (APTOS) provides that the NDIS will fund supports to assist people with disability to live independently in the community and to transition from custodial or secure mental health settings. There are limited programs available in custody to improve the independent living skills of those with disability. Providing services to people while they are in a secure setting (through in-reach services) is key to successful transitions. Independence would be improved through the provision of NDIS funded literacy and numeracy programs, cognitive behavioural therapy or supervised leave out of custody to participate in vocational programs. Yet, from the Tribunal's experience, these NDIS funded opportunities are rarely available.
- (c) The Tribunal's Forensic Division is responsible for reviewing the care and treatment of people with a disability, who have come into contact with the criminal justice system. Forensic patients have not been found criminally responsible for their actions, either because their disability prevented them from understanding the nature and quality of their actions at the time of the index event, and/or because their disability prevented them from truly participating in the trial process.

For many forensic patients, their disability continues to impact their behaviour, which can lead to difficulties in a community setting. However, not all NDIS planners have recognised that these behaviours are related to a forensic patient's disability and have instead characterised those needs as related to "justice" rather than disability. "Justice" needs are not funded by the NDIS, so that the support packages for some patients have been inadequate.

Case study 1

Mr A is a man with an intellectual disability and a mental illness. He has been conditionally released by the Tribunal to reside in accommodation provided by a non-government organisation. This organisation was previously contracted to provide this service by the Community Justice Program of Family and Community Services. Mr A will now need to pay for the accommodation using NDIS funding.

Mr A's impulsivity combined with his ongoing experiences of mental illness have lead him to engage in difficult behaviour in the community. For example, he has picked up cigarette lighters and brought them back to his room, he has repeatedly contacted a female receptionist in the belief that she is his girlfriend, and has also managed to obtain marijuana. Mr A is subject to strict conditions imposed by the Tribunal that include a requirement that he remain within sight of NGO service staff whenever he is not at the accommodation. These conditions are imposed by the Tribunal to ensure the safety of Mr A and the community. Without NDIS funding, this supervision in the community cannot be maintained. The supports could be considered related to the obligations imposed by the Tribunal, and so related to a justice obligation. However, in fact the need for the support is driven by Mr A's psychosocial disability.

Case study 2

Mr B is a man with an intellectual disability and a history of sexually offending against a child who was a family member. The actions of Mr B were reported by the victim some years after they occurred.

Mr B had been living by himself in the community with NGO and family support. He no longer has the support of his family. The NGO support is limited to support with activities of daily living. Mr B is isolated and lonely. His disability and upbringing have meant that his understanding of how to appropriately engage in social contact with other people, including children, is misguided. Improving his knowledge of appropriate sexual interactions and social interactions would address his disability needs. It would have the added benefit of reducing his risk of reoffending.

2. *The experience of people with complex care and support needs in developing, enacting and reviewing NDIS plans*

The importance of recognising difficult behaviours as requiring disability support rather than a criminal justice response is critical for people with complex care needs. This has already been discussed above.

There are currently 8 forensic patients who have current CJP packages and have been assessed for NDIS funding, 4 have plans which are not sufficient to meet their current psychosocial disability needs. Two have plans that are sufficient. Another two cases have funding that is adequate in dollar terms but the allocation of funds may not meet the Tribunal's requirements.

An additional difficulty has arisen in developing NDIS plans for people in custody. A person's functional needs cannot be assessed successfully in custody, because of the restrictions inherent in that environment. The Tribunal understands that the NDIS assessment has operated on the assumption that there will be a residence in the community where people who are in custody can be detained for 3 months to allow that person's independent living skills to be assessed. NSW does not have accommodation of this kind, so that the functional assessments (which are the precursor to approving a plan) cannot take place, and no plan can be approved.

One further limitation on enacting NDIS plans for people with complex needs has been the lack of suitable accommodation options. Accommodation needs to be physically suitable, which may mean that it needs to be purpose built. If the accommodation has a number of clients sharing the accommodation, those clients need to be able to live with one another. For example, there are a number of people detained within forensic mental health units who require high level support in specialist accommodation. The Tribunal has been advised anecdotally that NDIS funding does not offer a sufficient financial incentive for NGO service providers to build and staff the kind of accommodation needed to accommodate this client group. Without appropriate accommodation, people are unable to be safely discharged to less restrictive environments.

3. *The effectiveness and impact of privatising government-run disability services*

Government run disability services have previously offered

- (a) purpose built accommodation;
- (b) compatibility assessments for clients of group accommodation;
- (c) vacancy management and support for clients transitioning from institutional placements;
and
- (d) tertiary advice and support for NGO service providers who are working with complex clients.

Together, these government services offered accommodation for clients with complex needs, or the support needed to allow NGO service providers to be confident to take on clients with complex needs. Without these services, the Tribunal is aware of clients who have been approved for significant NDIS packages, who are still unable to access supports or be discharged. Government services also ensured that there was a decision maker who could advocate for the placement of clients who otherwise risked missing out on services all together. It is important these funding gaps are met by either the NDIS or the NSW government.

Case study 3

Mr C has an intellectual disability and a history of substance use. He has also had experiences of psychosis. He has a history of not accepting any services or support, even when he has told the Tribunal (in hearings) that he will

accept those services. The Tribunal has been told that his difficulty in engaging with services and attending appointments is at least partly attributable to his intellectual disability.

He has been accepted as eligible for the NDIS, and has a substantial NDIS package. However, two significant NGO service providers have refused to accept him as a client in their supported accommodation, because of his lack of insight into his difficulties and refusal to accept services. Mr C remains detained in a mental health facility, because of the lack of alternative accommodation that will enable his safe and effective care.

The process of transitioning to community accommodation, particularly for forensic patients, often occurs over 6 months or more. A person often begins by spending a few days per week at particular accommodation, before gradually moving from one or two nights per week to full time placement. This allows the service staff and the person to know one another and ensure that the service can respond appropriately to a person's needs. Government run disability services would ensure that a person's place in accommodation remained available over this long transition period.

Case Study 4

Ms D has had a lengthy limiting term imposed. She has an intellectual disability. Her first community placement failed and the Tribunal ordered her detention in a mental health facility, rather than in custody. After nearly a year, an alternative placement was identified for her. Because of the difficulties that occurred with her first community placement, her transition to this second accommodation took place over 18 months, with Ms D spending slowly increasing time at the accommodation.

The Community Justice Program (FACS) paid the NGO service provider to keep Ms D's place in the community accommodation available throughout this period. Additional supports (eg an awake staff member) were also funded by the CJP for part of the transition process.

Ms D's placement is now funded through the NDIS and the CJP. The Supported Independent Living Package (SIL) has not yet been approved by the NDIS and CJP have funded the accommodation for over a year after transition. If CJP had not funded her long transition and the additional supports needed during the transition, it is unlikely that the arrangements for her transition to community living would have been approved by the Tribunal. At this time, while the SIL application is outstanding, she would have to return to a mental health facility if CJP were no longer able to fund the accommodation.

4. *The provision of support services, including accommodation services, for people with disability regardless of whether they are eligible or ineligible to participate in the National Disability Insurance Scheme*

The availability of suitable and affordable accommodation remains a significant limitation that stops many people living with psychosocial disability from moving out of institutional care to community accommodation.

There is a wide range of unmet needs for people with psychosocial disabilities. At one end of the spectrum, there is a need for accommodation which is close to public transport and services to allow those with good functional independence to access their own supports (which may or may not be NDIS funded).

At the other end of the spectrum there is a need for highly supported specialist accommodation for those with very complex behavioural needs. For example, there are a number of people who are detained at the Forensic Hospital in Malabar and whose complex needs stem from a combination of intellectual disability, mental health concerns, cognitive impairment, epilepsy, personality traits and physical health issues. Some of these patients also identify as Aboriginal and Torres Strait Islander people and meeting their cultural needs is an important aspect of an effective transition to the community. Intensive support and specially adapted housing is needed for a safe transition to the community for this client group. Accommodation of this kind is not currently available. Despite advocacy over many years, no government agency has taken responsibility for constructing and staffing a service of this kind. NDIS will not fill the gap.

Particular difficulties are faced by those forensic patients who do not have a right of residency in Australia. They are not entitled to any Commonwealth support services, and the NSW government has not met the funding gap. These people are detained in institutional care in mental health services unnecessarily.

5. *Incidents where inadequate disability supports result in greater strain on other community services, such as justice and health services*

The difficulties in obtaining suitable accommodation (outlined above) and disability supports inevitably slows the discharge or release of forensic patients, and others detained in mental health facilities or correctional centres.

For example, at the end of the 2017/18 financial year, there were 27 forensic patients in custody waiting for a bed in the Forensic Hospital. However, at the same time there were 9 people waiting to move from the Forensic Hospital to less secure mental health facilities. Although statistics are hard to obtain, the Tribunal is aware that discharge from mental health facilities to the community is often delayed by the lack of suitably supported community accommodation.

These delays impact on justice and health services. More importantly, it means that the people themselves are, by reason of their disability, unnecessarily detained in restrictive environments.

6. *Policies, regulation or oversight mechanisms that could improve the provision and accessibility of disability services across New South Wales*

For the reasons discussed above, the Tribunal considers that there is an urgent need for a nationally agreed Complex Needs Framework to ensure that there is appropriate recognition and funding for people with complex disability needs.