



ASU Submission
to
The NDIS Review
Working together to deliver the NDIS

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Introduction to the ASU and our submission

The Australian Services Union (ASU) is one of Australia's largest unions. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association, and the Municipal Employees Union, as well as smaller organisations representing social welfare workers, information technology workers and transport employees. The ASU has members in every state and territory of Australia and in almost every regional area, working in a wide variety of industries and occupations, including:

- Social, community and disability services
- Local government
- State government
- Transport, including passenger air and rail transport, road, rail, and air freight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission, and distribution
- Water industry
- Higher education (Queensland and South Australia)

The ASU in the disability services sectors

The ASU is the largest national union of workers in the disability services sector. The Union has 135,000 members nationally, with 26,500 members in the community and disability services sectors.

We have members working in every state and territory, every metropolitan area and almost every regional and remote community across the country. Our members predominantly work in non-government, not-for-profit and faith-based organisations that support people who are participants in the National Disability Insurance Scheme (NDIS) and those with disability who are not participants in the NDIS, including many people who are living with mental health and psychosocial issues.

Our members work throughout the disability sector across a wide range of providers, as sole traders and so-called 'platform' workers, as disability support workers, local area coordinators, service coordinators, team leaders, in residential and independent supporting living services, and a range of other roles. Many of the people with whom our members work are experiencing, or at the risk of experiencing crisis, disadvantage, social dislocation or marginalisation.

These ASU members are highly skilled practitioners. They hold qualifications in law, psychology, management, social sciences, welfare work, disability work, social work, youth work, child protection, aged care and community work, mental health, drugs and alcohol counselling, financial counselling, and a long list of specialist qualifications. Our members also include clergy of many faiths. We believe that we are therefore uniquely placed to contribute to your deliberations and the work of The NDIS Review.

It is our submission that:

- The National Disability Insurance Scheme (NDIS) is one of the most important social reforms in the history of Australia.
- The disability sector is unique in that its foundational purpose and legislative base specifically relies upon a just-in-time workforce as the means to deliver ‘client choice-and-control’.
- A central feature of the disability sector is precarity of employment.
- It is harder to effectively enforce traditional labour standards in a sector in which there is heavy reliance upon workers employed in non-traditional employment relationships.
- However, it is not necessary for the laudable commitment of the NDIS to choice-and-control by participants to be founded upon insecure employment of workers who deliver those services.
- The NDIS Act establishes a framework of choice-and-control for participants underpinned by a human rights approach to disability. This legislative design of the scheme however has led to fragmentation of the workforce and prevalence of insecure jobs. It is therefore the responsibility of legislators to do what is necessary to develop and design systems of secure work within this NDIS framework.
- Our submission makes specific recommendations to address the negative consequences of these non-traditional and precarious employment relationships in the disability sector in relation to:
 - Part 1: Ending wage theft and underpayment of workers to promote sustainability of the workforce
 - Part 2: The importance of providing portable leave entitlements to the disability sector to promote workforce recruitment, retention, and sustainability of quality disability services
 - Part 3: Workforce development and training initiatives including a portable training entitlement for disability sector workers to promote and ensure quality disability services
 - Part 4: Ensuring safe systems of work in the disability sector to protect the safety of both people with disability and the workers who support them
 - Part 5: Procurement of disability services outside the NDIS such as the Partners in Community Program and Advocacy Organisation support that assist people with disability to navigate the NDIS and raise concerns about quality and safety

We believe that the recommendations in this submission below are not only in the best interests of the workforce but also support the sustainability of the sector and allow the NDIS to deliver on its promise to people with disability and their families.

NDIS Review Terms of Reference

Context

The NDIS aims to improve the wellbeing of Australians by investing and empowering people with disability and supporting them to achieve their goals and participate in the community and economy.

The NDIS takes a lifetime approach to achieving these outcomes, investing in people with a disability early to improve outcomes later in life and improve system sustainability.

An effective NDIS will improve outcomes for:

people with disability and their families and carers, helping them achieve their life goals and participate in social and economic life; and

society, by strengthening communities and reducing avoidable system costs, including social security, employment, health, housing and justice.

There will be two parts to the Review:

Part 1 will examine the design, operations and sustainability of the NDIS covering issues outlined in the full-Scheme bilateral agreements between the Commonwealth and jurisdictions.

Part 2 will examine ways to build a more responsive, supportive and sustainable market and workforce.

An overarching objective for both parts of the Review will be to put people with disability back at the centre of the NDIS, restoring trust, confidence and pride in the NDIS amongst them and their families and carers as well as the broader Australian community, while ensuring the sustainability of the scheme so that future generations receive the benefit of the NDIS.

Part 1: Design, operations and sustainability of the NDIS

Objectives

The Independent Review Panel will make findings and recommendations to Disability Reform Ministers on:

the participant experience and costs of engaging with the Scheme and opportunities to rebuild trust and improve key scheme design and administration, including by examining:

the user journey, including awareness and access to the scheme, assessment, planning, review processes, and navigation of supports and key transition points

ways to improve the evidence based understanding and usage of services covered in a plan now and over time;

ways to improve and make more timely decision making in relation to home modification, assistive technology and accommodation; and

ways to ensure participants are well informed and supported as relevant remaining in-kind services are transitioned into the NDIS.

With a view to putting people with disability back at the centre of the NDIS.

the effectiveness and sustainability of the NDIS, including the achievement of participant meaningful employment and lifetime outcomes and broader social and economic benefits, through the provision of reasonable and necessary supports and consider:

the effectiveness of: Information, Linkages and Capacity Building; Local Area Coordination and Community Connectors; and early childhood early intervention; and

the suitability of the NDIS outcomes framework and data to measure effectiveness, and options to improve the ongoing monitoring and evaluation of the Scheme's effectiveness, including economic and social participation for participants and their families;

the fiscal sustainability of the scheme, including the longer term fiscal trajectory.

ways to better ensure the delivery of value and outcomes for participants and government, including capacity building and assistive technology supports;

scheme governance arrangements and the extent they support effective operation of the scheme, including the roles and interaction between the NDIA and NDIS Quality and Safeguards Commission and DSS, and the NDIA's and the NDIS Quality and Safeguards Commission operational models and costs;

efficiencies within the Scheme and improving the interaction between the NDIS and other significant related policies and systems, including mainstream services delivered by the Australian Government, the states and territories, local government, and the community sector;

whether there has been any service and financial impact, positive or negative, on other service systems and programs and the adequacy of supports for people with disability outside the NDIS; and

financial risks and the drivers of cost pressures, and the most appropriate levers to manage these risks and cost pressures.

Part 2: Building a more responsive and supportive market and workforce

Objectives

The Independent Review Panel will make findings and recommendations to Disability Reform Ministers on reforms to:

foster and steward an innovative, effective and sustainable market where providers (commercial or otherwise) invest, grow and improve outcomes for participants and the Scheme;

improve the pricing and payment system to incentivise providers to improve outcomes for participants, improve productivity, support workforce development and ensure market and system sustainability;

improve access to supports in thin markets – including cultural and regional, remote and very remote communities and service categories – and ensure participants with complex needs have continuity of support where a provider withdraws from the market;

attract, build and retain a capable workforce, including employment and training models that enhance participant experience and worker attraction, retention and career pathways;

ensure adequate supply of appropriate and cost-effective accommodation and supports, including specialist disability accommodation, medium-term accommodation and supported independent living and individualised living options;

improve consumer information and dissemination on supports / services (type of service, price, quality and availability) and the role of intermediaries to make it easier for participants and carers to find value for money supports that meet their needs and deliver outcomes;

ensure the adequacy and effectiveness of the operation of the Quality and Safeguards Framework in ensuring quality, addressing conflicts of interest, and providing appropriate protection for participants;

improve the efficiency and effectiveness of current price setting and regulatory functions (market oversight, monitoring and enforcement), including interaction with other relevant Commonwealth, state and territory regulatory systems; and

improve performance monitoring, compliance, reporting and responses to breaches, unscrupulous behaviour, including the detection of fraud and sharp practices.

The Independent Review Panel will consider interactions across the broader care and support sector, including aged care, veterans' care and primary health care, as well as broader community based activities, and identify how programs could achieve better outcomes through an integrated approach.

Approach

The Review will:

analyse challenges to the effectiveness of the NDIS and the NDIS market and workforce, and opportunities to improve their effectiveness to support people with disability and their families and carers, helping them achieve their life goals and participate in social and economic life. This includes analysis of barriers to accessing and navigating the NDIS;

consult widely to ensure participant, provider and community feedback and, where necessary, draw on specialist expertise while managing demands on those consulted;

examine barriers that have affected the operation of the NDIS and the NDIS market and the development of a capable workforce, including an assessment of the impact of major policy changes, regulation and interaction with other systems;

co-design directly with participants, carers and their families, and providers and workers, and prioritise potential reforms to improve the responsiveness and capability of the NDIS and the NDIS

market to ensure they deliver for Australians with a disability and their families and carers, and society more broadly; and

review the reasons for ongoing significant upward revisions of cost pressures on the scheme and **identify** options to ensure scheme sustainability and manage future financial risks, including growth in scheme costs.

The Independent Review Panel will be guided by Australia's commitments under the United Nations Convention on the Rights of Persons with Disabilities, Australia's Disability Strategy 2021-31 and the National Agreement on Closing the Gap.

It will apply best practice for designing policy that supports people with disability. This will include consideration of the needs of First Nations participants and participants with a range of lived experiences including in relation to gender, culture, socio-economic status, age, and sexuality to ensure the NDIS is catering to the diversity of participant needs and intersections between them.

The Independent Review Panel will also have careful regard to the findings and proceedings of previous and ongoing reviews and inquiries, including the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the National Autism Strategy, so that input already provided by the disability community is fully taken into account.

The Panel will also identify and provide advice on ways to monitor and manage implementation risks.

The ASU supports The Review's **Objectives** and hope that you will make findings that support our very practical recommendations, specifically in relation to reforms that will:

improve the pricing and payment system to incentivise providers to improve outcomes for participants, improve productivity, support workforce development and ensure market and system sustainability;

attract, build and retain a capable workforce, including employment and training models that enhance participant experience and worker attraction, retention and career pathways;

ensure the adequacy and effectiveness of the operation of the Quality and Safeguards Framework in ensuring quality, addressing conflicts of interest, and providing appropriate protection for participants;

improve the efficiency and effectiveness of current price setting and regulatory functions (market oversight, monitoring and enforcement), including interaction with other relevant Commonwealth, state and territory regulatory systems; and

improve performance monitoring, compliance, reporting and responses to breaches, unscrupulous behaviour, including the detection of fraud and sharp practices.

While all aspects of the NDIS Review's (hereinafter The Review) Terms of Reference are of critical importance, with the greatest respect we do not specifically address all the terms of reference in this submission. Given the specific purpose of the Australian Services Union as a registered industrial organisation with responsibility to represent the industrial and other workplace issues of our members, this submission will in large part address **Part 2: Building a more responsive and supportive market and workforce**. In particular we discuss and provide recommendations on how to:

improve the pricing and payment system to incentivise providers to improve outcomes for participants, improve productivity, support workforce development and ensure market and system sustainability;

improve access to supports in thin markets – including cultural and regional, remote and very remote communities and service categories – and ensure participants with complex needs have continuity of support where a provider withdraws from the market;

attract, build and retain a capable workforce, including employment and training models that enhance participant experience and worker attraction, retention and career pathways;

improve consumer information and dissemination on supports / services (type of service, price, quality and availability) and the role of intermediaries to make it easier for participants and carers to find value for money supports that meet their needs and deliver outcomes;

ensure the adequacy and effectiveness of the operation of the Quality and Safeguards Framework in ensuring quality, addressing conflicts of interest, and providing appropriate protection for participants;

improve the efficiency and effectiveness of current price setting and regulatory functions (market oversight, monitoring and enforcement), including interaction with other relevant Commonwealth, state and territory regulatory systems; and

improve performance monitoring, compliance, reporting and responses to breaches, unscrupulous behaviour, including the detection of fraud and sharp practices.

We also consider and provide recommendations in relation to some aspects of **Part 1: Design, operations and sustainability of the NDIS**:

the effectiveness of: Information, Linkages and Capacity Building; Local Area Coordination and Community Connectors; and early childhood early intervention; and

scheme governance arrangements and the extent they support effective operation of the scheme, including the roles and interaction between the NDIA and NDIS Quality and Safeguards Commission and DSS, and the NDIA's and the NDIS Quality and Safeguards Commission operational models and costs.

efficiencies within the Scheme and improving the interaction between the NDIS and other significant related policies and systems, including mainstream services delivered by the Australian Government, the states and territories, local government, and the community sector.

Our submission reflects The Review's **Approach**, which in part states an intent to:

Analyse challenges to the effectiveness of the NDIS and the NDIS market and workforce, and opportunities to improve their effectiveness to support people with disability and their families and carers, helping them to achieve their life goals and participate in social; and economic life.

In accordance with The Review's approach, we have **consulted widely** with our members, who are employed to deliver the NDIS and peak bodies in the disability sector, to ensure feedback and where necessary, draw on their specialist expertise.

In our submission we **examine** barriers that affect the operation of the NDIS and the development of a capable workforce, including an assessment and recommendations relating to the impact of major policy changes, regulations, and interaction with other systems.

Finally, our recommendations reflect a **co-design process**, underpinned by a deep and detailed consultation with our members, who are frontline workers, advocates, providers and peak bodies. Those recommendations suggest practical **reforms to improve the responsiveness and capability of the NDIS to ensure delivery for Australians with disability and their families and carers, and society more broadly.**

For the NDIS to be the best that it can be and deliver on its promise of genuine choice-and-control to participants, there needs to be a stable and well-trained workforce to deliver those essential services upon which the NDIS depends. As recent evidence has demonstrated, providers are finding it increasingly difficult to recruit and retain a stable workforce. Inevitably this puts at risk the provision of regular, stable, and secure services to participants. Indeed, many participants themselves now report that they cannot secure the services they need, when they are needed.

National Disability Services (NDS) is Australia's peak body for non-government disability service organisations, representing over 1,000 non-government service providers. Collectively, NDS members operate services for Australians with all types of disability. In a recent submission to Government, as Australia's peak body representing providers of disability services, NDS stated: *'The disability sector is one of the largest and fastest growing in Australia. This has been driven significantly by growth in the National Disability Insurance Scheme (NDIS). It is estimated that an additional 83,000 workers (or a 31 per cent increase in current workforce size) will be required across the NDIS sector by 2025 (NDIS National Workforce Plan 2021-2025). This is against consistently high turnover rates which see many workers leave the sector each year. In fact, it is anticipated that the NDIS will lose approximately 213,000 workers by 2025 (NDIS National Workforce Plan 2021-2025). When considered together, the challenge facing the sector to attract, recruit and, importantly retain workers is considerable. Disability service providers consistently report workforce as being their most pressing issue and this has only been exacerbated by COVID-19. In 2021, providers who responded to the NDS Annual Market Survey (see State of the Disability Sector Report 2021 (nds.org.au) reported a dramatic rise in difficulty in recruiting disability support workers with this increasing to 70 per cent compared to 59 per cent in 2020. Given that significant amounts of core daily living supports are provided by disability support workers, in real terms this means that some people with disabilities were not able to access the daily support that they need.'*¹

The critical skills shortages and acute problems of recruitment and retention to which the NDS refers are well reported elsewhere, including research by the current and former federal governments. In particular, the NDIS National Workforce Plan (2021)² refers to a range of factors that operate to discourage people to join the disability sector workforce and to commit to a career in the sector.

¹ NDS November 2022: <https://www.nds.org.au/news/nds-raises-concerns-regarding-lack-of-consultation-with-federal-fair-work-bill>

² NDIS National Workforce Plan 2021 – 2025 Building a responsive and capable workforce that supports NDIS participants to meet their needs and achieve their goals Australian Government

Similar research by HESTA, which is the industry superannuation fund covering the sector, reflects those same concerns.³

While workers in the disability sector consistently report that they love their work, the research is equally consistent in reporting that workers feel undervalued, that there are insufficient opportunities to develop skills or upskill. Workers point to their low wages and lack of full-time hours, meaning that they must work for multiple employers to even provide a modest standard of living for themselves and their families. They refer to this insecure, low paid work as being an overwhelming obstacle to enrolment in accredited training so that they can increase their skills and commit to a career in the sector. In this highly precarious sector, where workers are often working multiple jobs, without opportunities for training, little or no professional supervision or support, and without leave entitlements that would allow them to rest and recuperate, inevitably there will be challenges to quality care and appropriate response to indications of abuse and neglect.

Despite the significant investment by government in the NDIS, the nature of the scheme is such that it provides a positive disincentive to the establishment of a stable, well-trained workforce, essential to ensure the prevention of and response to abuse, neglect and exploitation as essential elements in the long-term sustainability of the NDIS.

³ <https://www.hesta.com.au/cdsreport21>

Background to workforce issues in the NDIS and disability services sector – an insecurely employed workforce that impacts service quality

The National Disability Insurance Scheme (NDIS) is one of the most important social reforms in Australian history, delivering choice-and-control for people with disability and creating new business and employment opportunities. The NDIS has become one of the largest job creation opportunities in Australian history.⁴ Through this growth, the NDIS also provides a unique opportunity to build a diverse workforce, which reflects the needs of all NDIS participants. The rapid growth of the NDIS workforce has resulted in rising demand for workers with relevant skills and experience. Responsible for delivering the promise of the NDIS, Australia's disability sector workforce is a very significant part of the Australian workforce and one that is growing exponentially, – certainly justification for immediate and serious reform to address the systemic failures to which we refer in our submission.

The disability sector is complex

The NDIS commenced in 2013 following a public inquiry into providing a long-term disability care and support scheme. The inquiry, conducted by the Productivity Commission, found that individuals and families could not adequately prepare for the risk and financial impact of significant disability. It found that the existing system was underfunded, unfair, fragmented, and inefficient and gave people with disability little choice and no certainty of access to support. The NDIS provides people with a disability the opportunity to directly engage and manage their own disability support services. Workers from a range of professions are drawn upon to provide disability care. These include disability support workers and allied health practitioners.

The system is overseen by the NDIS Quality and Safeguards Commission (NDIS QSC) and the National Disability Insurance Agency (NDIA). Support services are provided by registered NDIS service providers, as well as non-government organisations and other NDIS service providers operating as unregistered providers, mainstream businesses, and individuals. Under this system, the government provides financial support via Funded Support Packages (FSPs), provided to individual NDIS participants based on their needs. People may directly choose, control, and purchase their support services (self-management), may have an intermediary to manage their budget and find support providers on their behalf (plan management), or have the NDIA pay the service provider directly, in accordance with the participant's NDIS plan (NDIA managed). Specialist services must be delivered by 'registered' providers able to demonstrate that their workers have the requisite skills and capacities to meet NDIS standards for the services they deliver. Other services, such as meal preparation, dressing and washing, cleaning and home maintenance, may be provided by any person operating as an unregistered provider. For plans managed by the NDIA, only registered service providers can be used. Participants who are self-managing or who are using a registered plan management provider, can choose whether to use a registered provider or an unregistered provider.

⁴ The scale of job creation is expected to exceed previous major national projects, including: National Broadband Network required 25,000 FTE 2017–2025; BER School Building Program 22,971 FTE 2009–10; Snowy Hydro Scheme 22,500 FTE 1950-70; China Free Trade Agreement 5,400 FTE 2014-2035.

The disability services sector landscape is complex. Essential care and support services span the aged, disability, veteran, and mental health sectors. While these services are focused on meeting specific care and support needs, there are intersections and interactions across programs, cohorts, providers, and workers. NDIS participants and their families are often able to access services across a range of programs. The provider landscape is also complex with over 13,000 providers, although most (around 11,000) operate exclusively within the NDIS⁵.

The disability sector workforce

Over recent years, growth in the care and support workforce has been 3 times faster than total employment across the Australian economy. This reflects the ongoing increase in demand for care and support, and particularly the introduction and subsequent expansion of the NDIS.⁶ Data obtained through National Disability Services (NDS) – the peak body for disability services - confirm that the disability support workforce is extraordinarily concentrated in casual, part-time, and very insecure positions. NDS data (NDS 2018) indicates that:

- Less than 10 percent of the disability support workforce are employed on a full-time and permanent basis.
- Many workers work irregular hours in multiple locations⁷.
- Many do not receive minimum legal compensation (including for time spent traveling between locations, and other essential job functions⁸).
- 81 percent of the workforce are in part-time positions.
- 42 percent of workers fill casual jobs.
- Staff turnover is extremely high: around 25 percent per year for the workforce, and over 35 percent per year among casual employees.
- The average number of hours that employees work in a week is low and falling to just over 20 hours per week.
- The workforce reflects a high concentration of women workers, and older workers: around 80 percent are women, and 44 percent are 45 years or older.

This data has been confirmed by other research, including the National Skills Commission Labour Market report on the so-called ‘care economy’ released in October 2022. On the basis of this research, the disability sector workforce can be described in the following terms:⁹

- It has the highest growth rate in the Australian workforce.
- The workforce has more than doubled since 2015.

⁵ National Skills Commission Australian Government Care Workforce Labour Market Study. (Released October 2022)

⁶ *ibid*

⁷ NDS (2018) reports that only 35% of permanent employees (19% of the total workforce) are employed on a full-time basis, implying that just 7% of the workforce fills permanent full-time positions.

⁸ Macdonald F., Bentham E., and Malone J. (2018) Wage Theft, Underpayment and Unpaid Work in Marketised Social Care in Economic and Labour Relations Review 29 (1) pp 80-96

⁹ See National Skills Commission, Labour Market Study 2021 (released October 2022) and see also evidence to the Equal pay case 2012 (Australian Services Union)

- More than 60% of the disability support workforce is in part time or precarious employment, without entitlements including long service leave, annual leave, sick leave, carer's leave, pandemic leave.
- Around 14% of the workforce hold multiple jobs.¹⁰
- A very high majority of the disability workforce is Award dependent.
- Terms and conditions for workers in the disability sector, are in almost all cases only at the minimum standards set by the SCHADS award, and rates of pay and conditions are not enhanced by enterprise bargaining agreements or over-award contractual entitlements.
- A very high majority of the workforce is employed in the not-for-profit sector and is entirely or almost entirely dependent upon government for its funding.

Despite the successful ASU campaign for Equal Pay, won after a decade long campaign in 2012¹¹, and a high proportion of employees having tertiary qualifications, the largely feminised disability services sector remains marked by Award-dependent, low incomes, with careers interrupted by caring responsibilities. This has meant that upon retirement, people who have worked an entire lifetime in the disability sector are more likely to have no savings, no access to long service leave, very little superannuation, while also being less likely to own their own homes or have secure and affordable rental accommodation. It is noteworthy and not a coincidence that the fastest growing group of homeless people in Australia, notwithstanding COVID, is women over 55 years of age.¹² Yet the disability sector, in which its workers are so under-valued, is indispensable¹³ for its economic contribution. It also has a growing public value in implementing government programs and delivering government services, and for its enormous role, extending far beyond the public funding that it receives, in creating a fairer and more civil society.

The ASU Equal Pay campaign and ultimately its case before the Fair Work Commission was conducted at a time when workers in the community and disability sectors had been historically underpaid for many decades, their skills, and qualifications at best undervalued, at worst, unrecognised and unrewarded. Despite the essential work that they were delivering on behalf of government at all levels, the highly feminised community and disability sectors provided such low rates of pay and such poor conditions that employers found it increasingly difficult to recruit and retain employees¹⁴. While workers in the not-for-profit community and disability sectors were often equally qualified and providing the same services to the same clients and communities as public sector disability support

¹⁰ Working in new disability markets: A survey of Australia's disability workforce, Dr Natasha Cortis & Dr Georgia van Toom, UNSW Social Policy Research Centre, May 2020)

¹¹ <https://www.fwc.gov.au/documents/decisionsigned/html/2012fwafb1000.htm>

¹² Not So Super, for women. Superannuation and women's retirement outcomes. David Hetherington and Warwick Smith. Per Capita (2017) and (unpublished data) from HESTA Superannuation

¹³ False Economy: the economic benefits of the National Disability Insurance Scheme and the consequences of government cost cutting Per Capita November 2021

¹⁴ In its submission to the FWC in relation to the Equal Remuneration Order, the NDS stated: NDS further asserts there are major issues faced by the disability services sector, including significant future workforce shortages, increasing demand for services and the need for a workforce that possesses increased skills to deal with more complex models of service provision. Equitable levels of remuneration for the sector's workforce will help alleviate these challenges and ensure quality service provision for people with disability, who remain among the most marginalised members of our society. NDS Supplementary Submission - Equal Remuneration Case No.C2010/3131 P 3 (2011)

workers, their terms of employment were significantly inferior. The inevitable skills crisis in the sector saw skilled and experienced workers leave the not-for-profit sector and drawn to the public or corporate sectors.

The ASU case was not only an historic victory for workers in the community and disability sectors but was also notable for the manner in which it was presented. Witness statements were presented from all parts of the sector, including from disability support workers. Highly detailed information about the skilled work performed by those workers was presented to a Full Bench of the Fair Work Commission and the Commissioners were invited to visit workplaces across the country to see for themselves the highly skilled work being performed routinely across the sector. The successful outcome of the case, based upon that evidence is known as the Equal Remuneration Order¹⁵. It resulted in wage increases of between 23% and 45% for workers in the community and disability sectors, including those disability support workers to whom we have been referring throughout this submission.

Work in the disability sector – designed to be insecure.

A central feature of the disability sector is precarity of employment. Unique among other sectors of the economy is that this feature of the disability sector is built into the scheme design, and below in subsequent parts of our submission we will outline scheme level responses to promote more secure work arrangements. The ASU strongly supports the tenet of participant ‘*choice-and-control*’ which underpins the NDIS. However, this design feature of the NDIS also means a *just in time* workforce which is intrinsically insecure.

Fundamental to understanding this insecurity of employment in the disability sector is recognising the changing nature of the relationships between employers, workers, governments, and regulators¹⁶ and the evolving balance of power between these groups. We argue that it is systemic issues that determine the impact of these changes in the workplace and that it is the responsibility of government and its regulators to ensure that whatever the employment relationship, there is protection for wages, workplace rights, safety, training, and accrued entitlements, among other aspects of that relationship.

Work in all sectors of the economy has been transformed in recent years by the growth of insecure or ‘precarious’ employment. Precarious work comes in many forms, including temporary or casual jobs, greater reliance on nominally independent contractors and other forms of self-employment, and the use of digital or on-line ‘platforms’ to recruit and deploy labour. The very rapid rate of growth across the disability sector, has been accompanied by a concomitant growth in all forms of precarious employment. This growth of precarious work poses fundamental challenges to the traditional model of employment – and to traditional methods for regulating work and ensuring minimum standards for the rapidly growing disability workforce. Traditional labour regulations which have been developed over time and are most familiar to workers in other sectors of the economy often exclude temporary or independent workers.

¹⁵ [Fair Work Commission Order – PR525485](#) – Social, Community, Home Care and Disability Services Award Equal Remuneration Order following the Equal Remuneration Case.

¹⁶ Regulators with a role in the disability sector include the NDIA, Fair Work Commission, the Fair Work Ombudsman, the NDIS Quality and Safeguards Commissions, state regulators such as the NSW Ageing and Disability Commission, and Safe Work agencies in relevant jurisdictions.

The emergence of ‘care services platforms’ in the disability sector

Findings from the recent Victorian Government Inquiry on the Gig Economy (hereinafter the Victorian Inquiry) found that ‘platform work’ is more prevalent than previously thought and is growing, particularly in the disability sector. Independent contracting arrangements are very common and there has been a steady increase in ABN registrations. The Report describes the major characteristics of modern precarious work:¹⁷

- Work is performed on an on-demand or as-needed basis. Workers only work when their services are immediately required, and there is no guarantee of ongoing engagement.
- Work is compensated on a ‘piece-work’ basis.
- Workers are often required to supply their own equipment, including phone, car etc.
- The entity organising work is often distinct from the end-user or final consumer of the output, implying a triangular relationship between the producer, the end-user, and the intermediary (such as a labour hire agency or a digital platform).
- Some form of digital intermediation is often utilised to commission the work, supervise it, deliver it to the final customer, and facilitate payment.¹⁸

Several factors have facilitated the expansion of precarious forms of employment, including independent contracting, self-employment, casual or temporary jobs, and digital platform work in the disability sector in recent years. Technology such as smart phones and computers have played a role by allowing employers to tap pools of labour, assign them to tasks, and supervise and compensate them more easily. Broader economic conditions have also been important. In particular, the ongoing existence of a large pool of underutilised labour. As the Australian economy is changing away from agriculture, manufacturing and other ‘traditional’ forms of employment, people losing their jobs are seeking alternative employment in the services industry, particularly in the disability sector. The rapidly changing nature of the workforce and a large, insecure pool of people seeking employment have played a significant role in facilitating insecure staffing strategies on the part of employers. If they were not so confident that labour resources could be quickly and effectively recruited when needed, employers would feel more pressure to offer more secure and permanent jobs.¹⁹

Importantly for our submission, another key factor facilitating precarious work has been the generally passive, inconsistent application of labour regulations and minimum standards. Regulators have been slow to recognise the risks posed to the quality of work by the expansion of precarious work and the evasion of traditional labour regulations; they have failed to adapt regulatory models to encompass workers in these growing categories of insecure, nominally ‘independent’ work. Our submission refers to regulators including the Fair Work Commission, the Fair Work Ombudsman, the NDIA, the NDIS Quality and Safeguards Commission and SafeWork authorities. We address these issues in detail in a later section of this submission, including providing specific proposals for addressing some of our concerns. We also give specific case studies and examples where regulators have not been able to

¹⁷ <https://engage.vic.gov.au/inquiry-on-demand-workforce>

¹⁸ Jim Stanford The Economic and Labour Relations Review Aug 2017

¹⁹ See The Dimensions of Insecure Work: A Factbook by Dr. Tanya Carney, Economist & Dr. Jim Stanford, Economist and Director May 29, 2018, and Historical and Theoretical Perspectives on the Resurgence of Gig Work by Jim Stanford Economic and Labour Relations Review: <http://journals.sagepub.com/toc/elra/28/3>

assist to promote and protect decent working conditions for workers in the disability sector, and outline proposals for an alternative model of intervention by regulators. Specialised platforms have emerged to enable NDIS participants to directly engage providers for a range of services, from domestic support to more specialised services. The Victorian Inquiry heard that support services can also be accessed via platforms such as Airtasker. NDIS participants can use on-demand platforms to negotiate the type, quantity, and scheduling of support services, while the online platforms undertake administrative and payroll services. These are responsibilities that would normally fall upon the participant when engaging support workers directly. To understand the difference between models of employment relationship, enabling a comparison between platforms deploying similar services via employment-based and non-employee models, we will consider two prominent specialised platforms that operate in the disability sector, *Hireup* and *Mable*. Both companies engaged with the 2020 Victorian Inquiry.²⁰

Hireup is a registered provider and may offer all services to all NDIS participants. *Mable* is not a registered provider, so it offers services to self and plan managed NDIS participants and those with home care packages. *Hireup* began delivering disability support services in 2015. *Hireup* employs its workforce on a casual basis under the Social Community, Home Care and Disability Services (SCHADS) Award 2010.

Mable began matching workers to NDIS package recipients in 2014. Workers register with *Mable* as independent contractors and are engaged via the platform by the client. *Hireup*'s onboarding process involves providing two referees; checking qualifications; police, working with children and vulnerable persons checks; and a review of an online application form detailing a worker's experience. *Hireup* suggested to the Victorian Inquiry that there is an assumption of risk in its use of employment arrangements, that is valued by workers. The additional checks undertaken by *Hireup* as part of their onboarding provides potential participants with a sense of security when they use the service. The fact that these checks are undertaken by *Hireup* (but not by *Mable*) also relieves workers from having to undertake these processes themselves. *Mable* does not undertake an onboarding process however it safeguards clients by undertaking police checks and reviewing qualifications prior to approving publication of worker profiles on its website.²¹

Mable and *Hireup* operate similarly to the extent that workers use their websites to post their profile containing experience, qualifications, and other relevant personal information. NDIS participants consider the information to help them select workers to provide services. Platforms offer clients an opportunity to view the work history and personal attributes of prospective support workers. The availability of user profiles enables clients to choose workers based on a range of skills and attributes as well as qualifications. On the *Mable* platform, clients rate worker performance. These ratings are attached to the worker's profile. *Mable* says that ratings provide the best quality assurance. *Hireup* does not use ratings. *Hireup* and *Mable* both emphasised to the Victorian Inquiry the importance of relationships between clients and workers on their platforms. The average relationship on the *Hireup* platform lasts nine months or 52 bookings.²²

²⁰ <https://engage.vic.gov.au/inquiry-on-demand-workforce>

²¹ *ibid*

²² *ibid*

This precarity of work in the disability sector is contributing to churn of the workforce as workers are not able to find stable income and working conditions in the NDIS. This in turn exacerbates the labour shortages in the NDIS and directly undermines the promise of the scheme to participants to enable greater choice of stable quality supports to meet their needs.

In the subsequent parts of this submission, we will outline practical solutions that promote minimum standards, entitlements, and access to training across the NDIS workforce which will assist with the recruitment and retention of workers to ensure the growth of a diverse ecosystem of quality disability services that participants can choose from and rely on.

Part 1: Ending wage theft and underpayment of workers to promote sustainability of the workforce

In 2021, the Department of Social Services launched its NDIS Workforce Plan, in which it was acknowledged that perception of low wages was a barrier to attraction and retention of workers to the disability sector. Those workers are essential to allow the NDIS to meet the need for a growing and skilled workforce, capable of delivering high quality services for NDIS participants.²³ Without a stable and reliable workforce, committed to a career in the sector, it is impossible to ensure the prevention of abuse, neglect, and exploitation of people with disability, or to appropriately deal with these when they occur. Without continuity of services by professional practitioners, people with disability are denied access to a consistent confidant and advocate. *Choice and control* needs to be more than a comforting slogan attached to the NDIS. It must have practical implementation. This can only happen when people with disability have access to professional practitioners whom they choose and in whom they can trust.

The NDIA in its price methodology sets prices for NDIS supports based on an assessment of the minimum pay rates for disability support workers under the relevant Modern Award (the Social Community Home Care and Disability Services Industry Award).²⁴ The NDIA's pricing of minimum wage levels in the sector is pegged at Level 2 of the SACS Stream of the Award which is the agreed and widely accepted minimum pay rate for disability support workers.

*Level 2 SACS Stream minimum rates of pay at December 2022:*²⁵

SCHADS Award Classification Level	Hourly rate of pay permanent workers	Hourly rate of pay casual workers
SACS Stream Level 2.1	\$30.46	\$38.08
SACS Stream Level 2.2	\$31.41	\$39.29
SACS Stream Level 2.3	\$32.37	\$40.46
SACS Stream Level 2.4	\$33.23	\$41.54

Note: These rates would be higher if shift penalties, weekend or public holiday loadings apply per the SCHADS Award

Level 2 SACS was acknowledged in evidence accepted to the Fair Work Commission Equal Remuneration Order Decision of 2012²⁶ to be the appropriate minimum classification of disability support work on the Award. The classification descriptors in Level 2 also reflect the minimum expectation of work as outlined in the NDIS Code of Conduct²⁷ which is mandatory and the NDIS

²³ <https://www.dss.gov.au/disability-and-carers-publications-articles/ndis-national-workforce-plan-2021-2025>

²⁴ <https://www.fairwork.gov.au/employment-conditions/awards/awards-summary/ma000100-summary>

²⁵ The full range of pay rates for disability support workers and other workers in the disability sector can be accessed here: Pay Guide Social, Community, Home Care and Disability Services Industry Award [MA000100] Published 18 November 2022

²⁶ <https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/equal-remuneration-case-2010-12/decisions>

²⁷ <https://www.ndiscommission.gov.au/about/ndis-code-of-conduct>

Commission's Workforce Capability Framework²⁸ which sets out the Commission's expectation of work in the sector. RMIT has produced a detailed report launched in February 2022 outlining these elements and supporting the NDIA's assumption that Level 2 SACS provides for the minimum base rate of pay in the sector industrially²⁹.

As we have said previously, the labour market has evolved in the disability sector in response to changes in funding arrangements and the opportunity and expectation of NDIS participants, strongly supported by the ASU, to exercise greater choice and control over their own lives. In so doing, however, concerns have arisen about workers' pay and conditions, their health and safety, training, and professional development.

Hireup told the Victorian Inquiry that it pays award wages, matching the support requested to an Award level. However, *Hireup* casual workers have told the ASU that they believe they are not paid properly and are classified as home care workers in the Award rather than disability support workers. This is a difference of several dollars per hour, and effectively excludes them from the benefits of the Equal Remuneration Order that the Fair Work Commission applied to the disability sector, and which is funded by the NDIA in its pricing assumptions. The ASU takes this matter very seriously and is currently investigating these concerns raised by members. We address this issue in further detail below.

Mable advised the Victorian Inquiry that it has coded a safety net hourly rate into its platform. Workers using the *Mable* platform negotiate both scheduling and remuneration.³⁰ However a review of *Mable's* own website makes it clear that its sample rates "typically range" from \$35 to \$48 per hour with the worker receiving 90% of this (i.e. \$31.50 to \$43.20)³¹. These "typical rates" are a range that is below the minimum hourly rate for casual disability support workers (SACS Level 2.1 Casual minimum rate is \$38.08). They are further below the correct Award minimum wage when you take into account superannuation and other provisions a worker using Mable would have to set aside for (e.g. holiday or sick pay arrangements) as an independent contractor.

While disability workers employed as 'platform' or 'gig' workers have been shown to be at particular risk of not being paid at the correct rate under the SCHADS Award, it has been increasingly our experience that disability workers who are employed in more 'regular' arrangements as part time or casual employees are also not being paid correctly. Increasingly we are being contacted by members who are employed to work as 'disability support workers' but are being paid as 'homecare workers' under the SCHADS Award. In many instances investigation has found that the NDIS participant is being charged the disability support worker rate according to the NDIS Pricing Guide, even though the worker is being paid at the lower homecare worker rate. The SCHADS Award pay rates at the time of writing sets out that a disability support worker in their first year of service (level 2.1 SACS Stream SCAHDS Award) must be paid \$30.46 per hour (base rate of permanent employee). A Home care

²⁸ <https://workforcecapability.ndiscommission.gov.au/>

²⁹ Fiona MacDonald and Karen Douglas: Disability support workers & the classification of their work in the Social, Community, Home Care & Disability Services Industry Award, February 2022 RMIT Centre for People, Organisation and Work

³⁰ [https://www.vgls.vic.gov.au/client/en_AU/VGLS-public/search/detailnonmodal/ent:\\$002f\\$002fSD_ILS\\$002f0\\$002fSD_ILS:551736/one?qu=Casual+labor+--+Victoria.&ic=true&ps=300&h=0](https://www.vgls.vic.gov.au/client/en_AU/VGLS-public/search/detailnonmodal/ent:$002f$002fSD_ILS$002f0$002fSD_ILS:551736/one?qu=Casual+labor+--+Victoria.&ic=true&ps=300&h=0)

³¹ <https://mable.com.au/pricing/> (accessed December 14, 2022)

worker (level 2.1 Home Care Stream of SCHADS Award) is paid \$24.26 per hour (base rate of permanent employee).³² The issue of misclassification and under classification of disability support workers has been recently discussed in a very important piece of research by Dr Fiona MacDonald and Dr Karen Douglas. Their paper considers the history of the NDIS Pricing Guide and how it has been operating within the NDIS in relation to the payment of disability support workers. The MacDonald & Douglas paper also discusses the important differences between the role of a disability support worker and a homecare worker.³³

It is worth noting that the Fair Work Commission has clarified in the SCHADS Award that the location of the work in a participant's private residence does not determine the difference between a disability support worker engaged on SACS stream (Schedule B) and a homecare worker engaged on that stream (Schedule E) of the Award.³⁴ This is made clear in 'Definitions and Interpretation' provided by Section 3.1 of the SCHADS Award, where it is stated: 'To avoid doubt, an employee will not be precluded from being engaged under Schedule B, instead of another schedule, merely because they provide services in a private residence or in outreach' (SCHADS Award 2021, s 3.1). This clause was inserted as a variation to the SCHADS Award in 2012 specifically to clarify that SACS Schedule B (rather than the Home Care Schedule E) applied to all forms of disability support and other social welfare and community development roles that may be undertaken in these locations.³⁵

The NDIA issues regular price guides setting out price limits for different support items. As noted, prices are set with reference to an industry benchmarking survey. The NDIA price limits are based on the reported costs of 'efficient providers' participating in the benchmarking survey, with these deemed to be the 25 per cent of providers with the lowest operating costs.³⁶ The NDIA sets prices for support items in NDIS individual support plans. These prices determine the level of funding allocated to NDIS participants for them to purchase their supports. There are three broad categories of NDIS support, two of which include items involving disability support workers: *Core Supports* enable NDIS participants to complete activities of daily living and *Capacity Building Supports* enable NDIS participants to build their independence and skills. NDIS pricing arrangements are funded for supports in both these categories based on the assumption that disability support workers are correctly engaged as SACS Stream (Schedule B) Level 2 workers or higher.

The purpose of NDIS *Core Supports* is to help NDIS participants achieve their individual goals in the NDIS 'outcome domains' of daily living and social and community participation. *Core Support* categories include personal support provided in individuals' private homes, as described here: 'Assistance with Daily Life', describes supports 'assisting with or supervising personal tasks of daily life to enable the participant to live as autonomously as possible. These supports are provided individually

³² <https://www.fairwork.gov.au/pay-and-wages/minimum-wages/social-and-community-services-industry-pay-rates>

³³ Fiona MacDonald and Karen Douglas: Disability support workers & the classification of their work in the Social, Community, Home Care & Disability Services Industry Award, February 2022 RMIT Centre for People, Organisation and Work

³⁴ FWA 2012, Consent Determination Modern Awards Review 2012—application to vary the Social, Community, Home Care and Disability Services Industry Award 2010. (MA000100 PR531544) <https://www.fwc.gov.au/documents/awardsandorders/html/pr531544.htm>.

³⁵ Disability support workers & the classification of their work in the Social, Community, Home Care & Disability Services Industry Award Fiona Macdonald and Karen Douglas February 2022

³⁶ <https://www.ndis.gov.au/providers/pricing-arrangements/making-pricing-decisions/financial-benchmarking>

to participants and can be provided in a range of environments, including the participant's own home' 'Assistance with Social and Community Participation' is described as relating to 'assisting with or supervising a participant to engage in community, social, recreational, or economic activities. These supports can be provided in a range of environments, such as in the community or a centre'. NDIS *Capacity Building Supports* assist participants achieve goals in the NDIS 'outcome domains' of 'Choice and Control, Home, Social and Community Participation, Work, Relationships, Health and Wellbeing, Lifelong Learning, and Daily Living.'³⁷

In 2021, the NDIS Commission released *The NDIS Workforce Capability Framework* (the Workforce Capability Framework) 'to support consistency in practice and delivery of quality disability services across Australia.'³⁸The Workforce Capability Framework is described as 'translating the NDIS Commission's principles, Practice Standards and Code of Conduct into clear and observable behaviours that service providers and workers should demonstrate when delivering services to people with disability').³⁹ The Workforce Capability Framework applies to any worker funded under the NDIS, from a receptionist, gardener or driver through to support workers, health and allied health professionals, managers and business leaders, and gives clear, practical examples of how workers deliver supports and what they need to know.⁴⁰

While not mandatory, the Workforce Capability Framework 'articulates the Australian Government's expectations around workforce quality'. The *NDIS National Workforce Plan* states 'it will be crucial for governments and industry to provide support to embed the attitudes, behaviours, skills and knowledge described in the Framework in the workforce'.⁴¹According to the NDIS Commission, the three levels of core capabilities reflect 'the complexity, intensity or specialised nature of the work' but 'do not align directly with (worker) classifications, pay grades or training requirements.' However, in describing worker roles and requirements they do provide some clear guidance for identifying employee classifications.⁴²

The difference between the role of the disability support worker and the homecare worker are also set out clearly in the NDIS Workforce Capability Framework *core capability descriptors*. Among other requisite behaviours and knowledge, these descriptors describe requirements that demonstrate scope for initiative and problem-solving, the centrality to the work of the provision of guidance/training and advocacy and the need for knowledge gained from qualifications and/or experience that are clearly not aligned with home care work as described in the SCHADS Award, are beyond the requirements of SACS level 1 employees and are commensurate with SACS level 2 or 3. For example, there is no expectation or requirement at SACS classification level 1 that a worker will have the scope for judgment and initiative or the knowledge necessary to support a person with disability to understand, explore and think creatively about their options. Nor does the work involve working with an individual and their support team to understand the person's current strengths and what else they need to support their goals. There is certainly no such work requirement in home care

³⁷ *ibid*

³⁸ <https://www.ndiscommission.gov.au/workers/worker-training-modules-and-resources/ndis-workforce-capability-framework>

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ <https://workforcecapability.ndiscommission.gov.au/faq>

⁴² *ibid*

work in the SCHADS Award. These requirements are potentially within the scope of SCHADS SACS level 2 work, although in many circumstances may require work at SACS levels 3.

Prices of all NDIS support items involving a disability support worker are based on employing a support worker at SCHADS SACS level 2, 3 or 4. There are no support items involving disability support work that are based on employing a worker at SCHADS SACS level 1. There are no NDIS support items involving support work that have prices based on workers employed under the Home Care Schedule E of the SCHADS Award.

In the NDIS Code of Conduct and Workforce Capability Framework there is a very clear articulation of the importance of the disability support worker role to the achievement of NDIS objectives for people with disability. The exercise of choice and control by NDIS participants to meet their goals and the system's support for their independence and social and economic participation rely heavily on support workers' skills, experience, knowledge, and actions. This is recognised in the NDIS pricing arrangements.

All workers in this sector – no matter how they are employed, deployed, or engaged – should be entitled to the same basic safety net of SCHADS Award conditions as all other disability support workers. This includes wages at a rate no lower than Level 2 disability support worker rates in the SCHADS Award (SACS stream) and associated allowances, penalty rates and other work-related expenses. This would set a minimum industrial safety net and standard for all workers in the sector and give NDIS participants the assurance that they were paying their support workers properly and not engaging in wage theft, inadvertently or otherwise. It would level the playing field so that all providers can compete on quality – not exploitation of people – when providing services to participants.

The ASU Equal pay campaign that resulted in the Fair Work Commission awarding the Equal Remuneration Order (ERO) included specific reference to disability support workers being included in the new ERO arrangements. This was a measure to address those issues inherent in a system where there is such a clear power imbalance between employers and a low paid, feminised workforce without the history, skills, or organised power to address pay issues. The ERO was also a deliberate and conscious measure by the Fair Work Commission to ensure that employers should not 'pocket' funding that is specifically allocated for wages.

Given that there are now in excess of 11,000 providers in the NDIS, we recognise that there will be instances of inexperience and naivete among those providers in relation to payment of their employees. Mistakes can be made. In these instances, there are some employers who are happy to work with the ASU to correct mistakes and ensure that their skilled and committed employees who are working as disability support workers are paid appropriately. However, it has been alarming to us that there has been an increasing number of members contacting the ASU whose pay rates have been consistently below the SCHADS rates set out above. In these instances, the worker is being paid at the rate of a homecare worker or other lower rate. Upon investigation it has become clear that the NDIS participant is being charged for a disability support worker, even though the worker is not being paid at that correct rate. In these instances, it has been a very difficult and protracted process to work with those employers and ensure that the worker is being paid at the appropriate rate, commensurate with the price being charged to the NDIS participant. This experience is also documented in the Deloitte Financial Benchmarking Survey Final Report provided to the NDIA in May. The report surveyed over

1,000 NDIS providers who provided disability support worker funded supports in the financial year 2020 – 2021. It shows in Table 3.1 the weighted average pay for a disability support worker and shows that the 10th percentile of providers surveyed paid a base rate of \$26.23 per hour. This is \$2 an hour less than the minimum wage for support workers at that time (\$28.41).⁴³

We provide below two case examples that are illustrative of the many cases we have seen in the sector of underpayments and misclassification of workers. While some cases have been resolved by the ASU, we are still progressing dispute resolution procedures at many others. It should be noted that it is often the case that our members are fearful of pursuing their employer for underpayments in case they lose shifts or their employment because of taking action. The highly casualised and precarious nature of work in the NDIS, together with the lengthy processes to report, investigate and prosecute underpayments to relevant regulators (such as Fair Work Ombudsman, NDIA and NDIS Quality and Safeguards Commission) means that we suspect many providers are getting away with not paying their workers properly and pocketing the difference.

ADS Care

ADS Care is a provider of disability support services in NSW. It pays its disability support workers as homecare workers under Schedule E of the SCHADS Award. It is funded by the NDIS to pay disability support workers the correct rate as a disability support worker under the SCHADS Award, which includes paying the Equal Remuneration Order (ERO) under Schedule B.

The ASU raised our concerns on behalf of our members with management at ADS Care. Management refused to accept the NDIA Pricing Guide definitions and refused to pay the correct rate, which included the ERO, to workers who were employed as disability support workers.

It is worth noting that the casual workers who raised their concerns with the ASU subsequently had their rostered shifts cut.

Disability Quality Services Ltd (DQS)

Until December 2021, DQS was a provider of Supported Independent Living (SIL) in NSW. In 2021, ASU members employed at DQS reported that they were not being paid minimum Award rates or other Award entitlements. For example, Team Leaders at DQS reported that they were being paid at Level 1 under the SCHADS Award, despite the correct classification being minimum Level 3. Upon investigation, it became clear that DQS was being funded by the NDIA to pay their Team Leaders at the correct minimum rate – level 3 under the SCHADS Award.

When the ASU contacted DQS management and requested a meeting to discuss our concerns, we were refused a meeting. The ASU reported our concerns about wage rates and other issues at DQS to the NDIA. We also reported our concerns to the Fair Work Ombudsman (FWO) and the NDIS Quality and Safeguards Commission. The FWO and NDISQ&SC commenced separate investigations within

⁴³ <https://www.ndis.gov.au/providers/pricing-arrangements/making-pricing-decisions/financial-benchmarking>

weeks of being contacted by the ASU. Soon after these investigations were commenced, DQS ceased operations and the owner of the company reportedly left the country. The outcome of this action by the company saw workers lose their jobs and entitlements and NDIS participants lose continuity of service by their disability support workers.

Investigations of the complex range of issues at DQS took around six months but could not be resolved because the company owner was not available to the investigators, having relocated overseas. Despite having been contacted at the same time as the NDISQ&SC and the FWO, the NDIA Fraud Team did not contact the ASU until October 2022 – almost ten months after having been originally contacted by the Union. By this time of course it was too late for any positive action to be taken against the company or its owners.

While the issues at DQS were complex, they were made more difficult and confronting for the workers at DQS because of the convoluted reporting processes. Many of the workers were international students. Many did not speak English as a first language and were not familiar with Australian regulatory processes. Many had very negative conceptions of government agencies based upon their own experience elsewhere. Like so many workers in the disability services sector, they relied upon their very low wages to support themselves and their families and feared reprisals if they were identified as having lodged a complaint. Despite assistance and support from the union, those workers found it extremely difficult to raise their concerns and even more difficult to pursue them. When the company and its owners disappeared, they found work elsewhere. When the NDIA finally contacted the ASU to commence their investigation of DQS, the workers were no longer available to participate. Most have since left the sector after this experience.

Misclassification and under-classification of support workers is a problem for the achievement of system goals as well as undermining workers' pay and conditions. We note comments by the Minister for Disability Services, Hon Bill Shorten, who recently told media: *the “shocking” scale of fraud strengthened calls for a multi-agency criminal taskforce*⁴⁴ and welcomed initiatives announced in the recent Budget: *The federal government is creating a “fraud fusion taskforce” to try to claw back nearly \$300m from national disability insurance scheme providers, amid warnings the NDIS could cost more than \$50bn annually within four years. The new body, which will replace the existing NDIS fraud taskforce, will target “fraud and serious non-compliance” with the help of law enforcement, regulatory and intelligence agencies.*

NDIS– an important social reform that should not be reliant on wage theft and exploitation.

The NDIS is an important social reform that should not be founded upon wage theft or fraud. Despite the precarious nature of work, and the combination of permanent, casual, contractor and sole trader employment models, all NDIS support work is funded via Government which has the levers to create portable entitlement system and regulate that all providers – whether ‘employers’ or ‘matching platforms’ contribute into this system. A minimum safety net, together with access to portable entitlements, would help deliver the true promise of the NDIS to people with disability – a secure

⁴⁴ <https://www.afr.com/politics/shorten-pledges-taskforce-to-combat-scourge-of-ndis-fraud-20220815-p5b9yy>

workforce of skilled professionals who are able to respond effectively to the needs of the people they support without having to worry about living in poverty or being exploited themselves.

The ASU has worked closely with our members in the disability sector to develop proposals that we believe will work to both prevent and address issues of wage theft and fraud where these are the deliberate action of a provider who contrives to avoid and evade their responsibilities to their employees in the disability services sector.

At the outset, it is important to say that some of the problems to which we have referred could and should have been resolved in the very early stages. Had this been the case, it is likely that the issues concerned would not have developed in the manner they did, resulting in a withdrawal of services to participants, a loss of wages and jobs for workers and a costly fraud visited upon the NDIS. It is our very strongly held view, based upon our regular and practical experience that many of the issues that are raised with us 'fall through the cracks' of responsible agencies when they are reported.

The NDIS Code of Conduct mandates that workers report to specific agencies when they believe there is an instance of abuse, neglect or exploitation of a person with disability. Clearly this would include reporting instances of fraud, such as underpayment of a worker compared to the price charged to the person with disability in the way that has been outlined above. In our experience, workers do report these issues in the manner required – first raising the issues with the provider and then with the NDIS Quality and Safeguards Commission and the NDIA. Unfortunately, none of these agencies is directly responsible for resolving issues related to a worker's wages or conditions. While the worker might properly raise their concerns about their own wages with the Fair Work Commission (FWC), the FWC does not deal with matters of fraud and is likely to deal with this sort of issue as an individual misclassification issue rather than systemic abuse or a matter of fraud against the NDIS. This problem is exacerbated because of the reliance of the FWC on definitions of an 'employee'. With precarious employment being such a central feature of the disability sector, many workers are forced to supplement their wages as sole traders or 'platform' workers with their own ABN and so are often not considered to be an 'employee' under the Fair Work Act. In addition to impacting their workplace health and safety rights, as discussed below in part four of this submission, this definitional problem also limits a worker's rights under industrial legislation.

Clearly there is an inherent imbalance of power in this arrangement. A low paid worker, dependent upon every shift to secure even a modest standard of living for themselves and their family is highly unlikely to raise concerns with their employer about pay rates for fear of losing further shifts– even if they knew that the rate was incorrect. Since many workers in the sector are working multiple jobs while balancing family and other responsibilities, they are very unlikely to have the time, or capacity to pursue remedy through the Fair Work Commission or the Fair Work Ombudsman. In these circumstances, exploitation is inevitable and a powerful incentive for workers to seek an alternative career path without ever resolving underpayments and other issues. It falls to government then to ensure that there is an agency appropriately resourced to proactively monitor and enforce minimum payrates at a sector level.

The ASU is very keen to contribute our experience in the design of procedures that can prevent these problems. In the meantime, we have worked with our members to develop a proposal that we believe can deal with many of the issues around wages theft that we have raised in this submission.

Summary and recommendations

There has been an alarming increase in reports of disability sector providers mis-classifying and under-classifying their employees as 'homecare workers' rather than disability support workers. In some instances, this is caused by inexperience of the employer. In many instances it appears to be deliberate action by the employer to evade and avoid their financial responsibilities. In some instances, there is a clear fraud as providers charge the participant at a higher rate than is paid to the worker who delivers services.

1. The requirement that registered NDIS providers comply with all applicable requirements imposed by a law of the Commonwealth or a law of the State or Territory in which the person or entity operates as a registered NDIS provider (s.73F(2)(a) of the NDIS Act) should explicitly state that this includes payment of the correct minimum Award rates of pay.
2. The NDIA should include updated Award pay rates in its Pricing Guide and enforce these in its pricing controls as it has previously done in relation to higher pay rates required for high intensity supports
3. While the NDIA Price Guide makes clear that support worker rates are charged for different categories of support, there is no requirement currently in the NDIS Act for providers who charge those rates to participants to pass on the correct Award rate as pay to the workers who deliver the services.
4. The NDIS Act should be amended so that all disability support workers in the NDIS, regardless of the nature of their employment, are deemed to be covered by the relevant modern Award – the SACS stream of the SCHADS Award. This would provide a basic safety net for all workers, including 'gig' and 'platform' workers in the NDIS.
5. The NDIS Q&SC, the Fair Work Commission and Fair Work Ombudsman must be adequately resourced to enable proper access to workers and enforcement of relevant industrial legislation and instruments, becoming in effect a one-stop-shop for all workers within the NDIS, regardless of the nature of their employment.
6. The National Disability Insurance Agency (NDIA) should establish a 'minimum funding approach to its cost models which includes sufficient funding for all providers, including 'platform' providers to comply with industrial and workplace health and safety standards components of the relevant support being priced.

Part 2: The importance of providing portable leave entitlements to the disability sector to promote workforce recruitment, retention and sustainability of quality disability services

When ASU members won the Equal Remuneration Order in February 2012, workers in the community and disability sectors were told by Government that they had won ‘equal pay’ with their colleagues in the public sector for doing the same work. This was a just decision for which ASU members had campaigned for a decade. However, while they certainly did win the right to be paid the same hourly rate as their colleagues in the public sector, they did not truly achieve “equal pay”. By any definition, a worker’s pay is more than their hourly rate of pay. Pay includes the accrual of entitlements, including sick pay, annual leave, long service leave, paid parental leave, pandemic leave, and importantly long service leave. Most workers in the community and disability sectors will never receive any of these entitlements, although they may work in the sector, often for multiple employers at any one time, for their entire working life. This is particularly the case in the disability services sector, in which the workforce is overwhelmingly employed in casual and part time work and in which funding contracts are notoriously short term, so that workers frequently move between employers. There is no doubt that this lack of access to accrued entitlements is unfair. Importantly, it is also an issue to which many workers in the disability services sector refer when they explain why they are leaving the sector to find employment elsewhere that is better paid and more secure. Having spent a lifetime working for very low wages, and without the capacity to accrue leave entitlements, the overwhelmingly feminised and casualised workforce finds it almost impossible to save for retirement or for the vicissitudes of life in the sector. It is no coincidence that many of those workers retire to join the burgeoning numbers of homeless women aged over 55 years.

The NDIS is ultimately unsustainable in the long term while it cannot attract and retain an experienced and skilled workforce, committed to a career in the sector. Without a commitment to the sector, workers will not invest in training and upskilling to ensure that they are delivering best practice standards of service. Without a workforce that is skilled, experienced, and stable, there can be no certainty that issues of abuse, neglect and exploitation will be identified and dealt with in a professional and timely manner.

While the lack of capacity to accrue entitlements acts as a powerful disincentive for recruitment and retention to the sector, it is also an important issue for the safety of the workforce and for people with disability. The ongoing pandemic has taught some sobering lessons about the need for leave entitlements so that workers who may have been exposed to infection such as COVID can have leave to recover and ensure that they are not exposing their highly vulnerable clients and participants to infection. No worker should be forced to make the choice between paying their rent and feeding their family or taking time off to ensure that they are not exposing their clients and colleagues to infection.

Workers in the disability sector take their professional responsibilities seriously. Yet in a highly precarious sector, in which low paid workers often work for multiple employers in order to earn even a modest income, there is a disincentive for workers to take time off when they are sick. Workers often report to the Union that if they are unwell, they fear asking for leave in case they are not offered another shift. Alternatively, given the acute staff shortages confronting many workplaces, disability

workers also worry that if they are unable to go to work, there will be no one available to support their participants and clients. As casuals and contractors without paid sick leave, annual leave, or long service leave, and even as part time workers, with no access to paid pandemic leave offered to public sector workers, disability workers in the NDIS are often exhausted and unwell, working with highly vulnerable people. It is not an exaggeration to say that this is entirely counter to even the most basic principles of workplace health and safety for disability workers and their colleagues. It certainly does not demonstrate a commitment to ensuring high standards of safety and infection control for vulnerable participants and their families.

Below we provide deidentified case examples that illustrate the problems for disability support workers who do not have leave entitlements enjoyed by other workers such as public sector workers.

Claire is an experienced disability support worker, who works as a sole trader. She has been working with the NDIS for more than seven years, but has no long service leave, no annual leave or sick leave. Claire says: *portable leave entitlements would mean that I could uphold my duty of care for my clients while continuing to support my family, especially during the pandemic. This would make a real difference to me and to so many other workers who are employed [in insecure work] in the NDIS.*

Laura has been employed in the disability sector for more than twenty years. She is aged over 70 years. Laura said: *I am still paying my mortgage on my very small home. I have no savings and almost no super or long service leave. I cannot see myself ever being able to retire because I just cannot afford it. I love my work. But I think I will be working until I drop. I have no alternative. I do not know what I would do if I got sick or injured.*

Jo has worked in the community sector for 37 years in the disability services sector, including as a Local Area Coordinator. Jo says: *I can't plan to do anything with my life, and I certainly don't think about myself having a career, even though I have worked in this sector for so long. I can't even consider enrolling in a course because I don't know how long I will be here. Portable entitlements would mean financial security to me. I could think about myself having a 'career' rather than a 'job'. I worked in the same program for five years with two employers because of [end of grant] re-tendering. I never took sick leave or annual leave, but when the provider changed, I lost everything and had to start again – even through the pandemic. I have worked in the sector for almost my whole working life, yet I still do not have any long service leave. If entitlements could roll over, it would help to alleviate burn out and exhaustion.*

Portable entitlements schemes already operate in other sectors, including the security industry, manufacturing and construction and cleaning industries. It is worth noting that there are already state based portable long service leave schemes for the disability sector in QLD, the ACT and Victoria and SA is about to introduce their own portable long service leave scheme. All of these came from advocacy from the ASU.

Informal portable entitlement schemes also operate in the NSW community sector among women's health centres and some environmental advocacy organisations. All of these schemes reflect an understanding in those sectors that workers in precarious employment do not accrue entitlements and that as well as being an individual problem, it is a public issue, being an important disadvantage in terms of the stability of the sector in terms of recruitment and retention of employees. The implementation of portable long service leave schemes in other states has been found to be a positive incentive to workers to enter the industry and remain, thereby stabilising the sector and reducing recruitment and retention costs over time to employers. It is worth mentioning that over time, as funds accrue interest, similar schemes have been able to reduce the cost very significantly to employers and in some instances are now paying a dividend to those employers and re-invest into the industry by way of training and job support projects.

We have referred previously to the issues confronting providers – and indeed the Government as they struggle to recruit or retain workers to the disability sector. As it becomes increasingly apparent that the very sustainability of the NDIS is at risk, many employers are also recognising the false economy of employing people without entitlements.

While there is no 'formula' that we have been able to identify used by providers to quantify the cost of replacing staff who leave and need to be replaced to respond to client needs, one medium - large regional QLD provider told us:

'This is something we have never quantified. As a provider it is something we just "do" to ensure the participants are able to receive their support needs; but at a quick calculation':

- *Advertisement: \$350*
- *Time to shortlist (assume 2 hours at \$70/hr) \$140*
- *Time to interview (assume 4 interviews at \$70/hr) - \$280*
- *Reference check & Worker Suitability Screening etc. (assume 2 hours at \$70/hr) - \$140*
- *Letter of offer and induction preparation (assume 2 hours at \$70/hr) - \$140*
- *Induction (assume 8 hours with an average of \$90/hr inclusive) - \$720*
- *Initial Buddy Support (assume 3 hours at \$50/hr) - \$150*
- *Probation Reviews (3- & 6-month mark at \$120/hr (employee and supervisor) - \$240*
- *So a conservative guess would be \$2,130 not inclusive of any additional individualised training or participant specific buddy supports.*
- *This is with an additional online induction program (which costs us \$7,000/year; which if I average this cost out over the number of people who undertake induction over the year works out to be an additional \$50/pp)"*

A medium sized regional NSW provider told us:

'The total cost to recruit, onboard and train new Disability Support Workers is related mainly to wages cost. It generally takes a full month of working before they reach acceptable competence.

- *Cost of advertisement: approximately \$350*
- *HR time to advertise, select and telephone interview: approximately \$120*
- *2 managers on interview panel for 2 hours: approximately \$120*
- *HR probity checks: approximately \$70*
- *Online induction training: approximately \$170*

- *Site orientation: approximately \$320*
- *On the job training to reach competence: approximately \$350*
- *Team Leader and other DSW time taken to provide on the job training/support for the first month of employment: approximately \$1,800*
- *Total cost to recruit, onboard and train DSW: \$3,320*

It is worth noting that these costs were provided in June 2021. The costs of recruitment and induction are likely to be rising over time, given increased regulatory requirements and the increasing difficulty in finding suitably qualified and experienced candidates. A further problem arises when new recruits leave very soon after being employed, so that the process needs to start again. This is particularly an issue in regional areas, where recruitment is a major issue.

The ASU is campaigning very actively for the introduction of a portable entitlement scheme for the disability sector at a scheme level. Our proposal for the establishment of a portable leave scheme, similar to the schemes operating so successfully in other states would not be an impost on the packages of NDIS participants, as leave entitlements are already factored into NDIS pricing arrangements. The fact is that while they are factored into pricing, since they are rarely if ever paid, long service leave entitlements in particular are effectively a government subsidy to NDIS providers who accrue the benefit of the rarely-if-ever-paid funds.

Paying workers fairly and providing for them to accrue entitlements does not in any way mitigate against the commitment to *choice-and-control* that underpins the NDIS. Public sector workers who deliver essential services in other areas frequently change jobs in order to advance their career, specialise, or move to another location. For example, police officers, nurses, teachers, fire fighters and other similar essential service providers all have access to portable entitlement schemes as they move around their respective sectors. No one questions the standard of service they deliver, or the professionalism of their work. In fact, those sectors have a stable workforce in which people have made a career choice and commitment that works well for their employing organisation, their respective sectors and for the community in general. It hardly seems reasonable that professional disability workers should be treated any differently.

Establishing a portable leave scheme, or leave bank, for workers in the NDIS is an important and innovative way to build decent working conditions at a scheme level within the parameters of a flexible choice-and-control framework. It would essentially recognise service to the scheme and no matter how workers are engaged to support a participant. We believe it would go a long way to address the recruitment and retention issues facing the sector as it would provide greater job security within the sector.

Summary and recommendations

When community and disability sector workers won the Equal Remuneration Order, they won the right to be paid the same hourly rate as their colleagues who do the same work in the public sector. However, they did not win the same pay. The disability sector workforce is designed to be highly precarious and inevitably unstable. This is justified as essential to provide 'choice-and-control'. However, we argue that is neither essential nor fair. Insecure work without the capacity

to accrue entitlements is undermining the stability of the sector and is a major obstacle to recruitment and retention of skilled workers, ultimately threatening the capacity of the NDIS itself to deliver on its promise to participants and their families.

A portable entitlements scheme operates very successfully in many industries with a precarious workforce and notably in the disability services sector in some states for long service leave. Leave entitlements are already factored into the NDIS Pricing Guide, but rarely if ever paid directly to workers. It would therefore be cost neutral to the scheme but build decent working conditions and secure work arrangements within the choice-and-control framework of the NDIS.

1. The Commonwealth Government should work with the States and Territories to establish a portable leave scheme or leave bank for disability workers in the NDIS. This is consistent with the new Commonwealth Government's election policy objective of establishing portable leave schemes in sectors that are insecurely employed.
2. This scheme should be co-designed by participants, providers, unions and Government and should cover all workers in the scheme to access and accrue on an hour-by-hour basis as they work in the scheme across providers and participants.
3. The scheme would be cost-neutral as leave entitlements are already factored into NDIS pricing but rarely flow directly to workers. It would no doubt save the scheme over time as the leave scheme accrues interest and as retention is improved in the sector.

Part 3: Workforce development and training initiatives including a portable training entitlement for disability sector workers to promote and ensure quality disability services

The highly insecure nature of employment in the disability sector is widely regarded as a major factor supporting the current skills shortages across the sector, particularly in regional areas. In regional areas more likely to have been impacted by recent fires, floods, severe economic downturn and shifting populations, skills shortages have been exacerbated by the closure of TAFE colleges and access to technology for online training has been problematic. This has meant that despite having a locally skilled workforce, regional areas have been experiencing real difficulty in providing accessible training opportunities that would allow local workers to upskill to take advantage of new job opportunities in the growing disability services sector. Similarly, new workers and those re-entering the jobs market find difficulty accessing appropriate training that would allow them to apply for local jobs or move to another region to apply for jobs in growth areas such as the health, and disability services sector, where the most common reasons given for difficulties in filling vacancies was a lack of suitable or qualified candidates.⁴⁵

The instability of work in the sector highlights the need for a systematic and comprehensive approach to training. It is impossible to imagine that the NDIS will be able to fulfil its potential in improving the lives of people with disabilities, based on a workforce that is so overwhelmingly employed in casual, part-time, high-turnover roles. Workers need an opportunity to accumulate skills, and that requires some basic assurances of stability and predictability in future employment. The advancing age of the existing disability support workforce only reinforces the need for a comprehensive and ongoing training system for the industry, to replace the skills and experience of those older workers who will be retiring within the next few years. By providing disability support workers, especially those working for multiple employers or moving to new positions, with a mechanism to accumulate recognised and portable qualifications, the training strategy proposed here could play an important role in stabilising and uplifting the whole sector's employment practices.⁴⁶ NDS data confirms that, in the face of increasing demand driven by the NDIS rollout, there is strong growth in employment in the sector of around 11 percent per year (NDS, 2018), making it clear that providing a portable training mechanism for new and existing disability support workers is also a reliable and sustainable way to attract and retain a skilled workforce in those regional areas where traditional employers such as the agricultural sector and tourism have been declining or devastated during recent disasters, while ensuring a sustainable source of income for the community and assisting those most vulnerable to recover.

The Union therefore strongly supports an approach that would place emphasis on investment for capacity-building; attracting people into the industry by supporting long term development of a skilled workforce through providing opportunities for training to allow workers to deliver high quality services that make a difference in the lives of people with disability, allow them to build a stable career in the

⁴⁵ Ryan R and Stanford J A Portable Entitlement Training System for the Disability Support Services Sector. The Australia Institute Centre for Future Work 2018 pp 12 - 15

⁴⁶ Ibid pp 13-14

sector and coincidentally assist their local community to grow their jobs market and regional economy.⁴⁷

The Code of Conduct and NDIS Practice Standards, supported by the Workforce Capability Framework set expectations for the way supports and services under the NDIS will be delivered. The Code and Practice standards require NDIS providers and support workers to have the skills necessary to deliver the supports that they are providing. The NDIS National Workforce Plan 2021-2025 also refers to the expectation of government and NDIS participants that there would be a well-trained and qualified workforce to deliver NDIS services.⁴⁸ However, there are some important practical obstacles that impede people employed in the disability services sector from enrolling and completing accredited qualifications. These include:

- Workers in the disability services sector are most likely to be employed in precarious employment.
- Unreliable shift patterns mean that it is difficult to plan to attend classes, practical workplace experience and undertake projects, essays, study and exams.
- Workers who refuse a shift most often find that they are not offered a second or replacement shift.
- Workers prefer to undertake study with a reputable, accredited training organisation, such as TAFE, and to complete accredited courses. These courses are often expensive for a worker who is employed in the disability services sector, where pay rates are low and work is insecure.⁴⁹
- While since COVID there are many more courses provided online, it is still difficult to locate a TAFE or other reputable RTO that can deliver many courses that are relevant to the disability services sector.

A Portable Training Entitlement scheme for disability workers that we outline below was developed in 2017 in response to consistent advice from participants and their advocates, and from our members and the organisations for which they work. The demand for a training scheme that would be genuinely accessible in terms of cost and the other issues that confront workers in the sector was overwhelming.

Terry is an experienced disability support worker in the Far West of NSW. He says: *Training is essential. We need a partnership of some sort with TAFE so that we can have proper accredited training that is specialised to the disability sector. We cannot rely upon the providers for this sort of training, and it needs to be provided by TAFE rather than a private company. We need skills that we can take with us no matter where we work and only TAFE can do that and be relied upon to provide the training at the right standard. All employers would respect training that was provided by TAFE. No one really respects so-called training from private companies – you have no idea who they are, whether they will be there in six months' time and what standard they are teaching. No. It **must** be TAFE.*

⁴⁷ Ryan R and Stanford J (2018) op cit pp 18-20

⁴⁸ <https://www.dss.gov.au/disability-and-carers-publications-articles/ndis-national-workforce-plan-2021-2025>

⁴⁹ Depending upon the jurisdiction and the availability of fee subsidies, course costs range from a minimum of \$300 per day accredited online 'essential' short course training. Costs will also depend in some instances on how many students attend a course. In addition to fee subsidies in some instances, there are also fee payment options. The cost of a Cert III ranges from \$900 for 100 hours online learning and Cert IV \$1200 for 120 hours online learning.

Margaret is a disability support worker in the Hunter Valley. She was an experienced nurse before becoming a disability support worker and has worked in the sector for many years. She is now employed by a large disability support provider and works as an internal trainer. Margaret speaks passionately about her work: *There is a vicious cycle in this sector. People want to make a career as a disability worker. They know that they need to be trained to do the sort of specialised work that is needed. They want to do that training. But they cannot do it because they are employed only on a casual basis with short contracts and so must work for several organisations just to make ends meet. This means that they cannot refuse a shift because they cannot risk losing that job. If they cannot get time off, they cannot do training. If they do not do training, they cannot get more shifts – because they do not have the specialised training needed for the work. How do they win? I know one young man who is a father of three young children. He is never at home. He is too scared to knock back a shift because he needs the work to pay the rent and feed his kids. How can he plan to do training, or do anything with his kids or even take a day off when he or the kids are sick? This is no way to attract people to this sector. He might just give up and look for work elsewhere – why would he stay in this sector if he has no security, no prospects and is missing out on seeing his kids grow up? That would be a real pity because he is a great disability support worker.*

A Portable Training Entitlement for all workers will change the disability sector.

A summary of the Portable Training Entitlement is outlined below, and we have attached the full prospectus of the program as designed by the Centre for Future Work in consultation with our members in 2017. Underpinning this proposal is a necessary commitment by government to an investment in the workers who deliver the NDIS, which would allow them to become skilled professionals, with a secure career path as necessary prerequisites for job and economic security for themselves, their families, and their communities. This economic security is also the best means by which to ensure a sustainable disability workforce and a sustainable disability sector, which are fundamental to the success of the roll out of the NDIS and delivery of high-quality choice-and-control services for people with disability. It is also the only reliable means by which to ensure that potential abuse, neglect and exploitation can be identified, prevented and dealt with in a timely and professional manner.

In this respect it is worth noting the developing national discussion around registration of workers in the disability services sector. This discussion has broadened beyond the sector and is now a live public debate, in large part arising from the current Royal Commission's reports and commentary. This reflects some of the same debates and discussion undertaken in the child protection and out of home care sectors, in which there were also Royal Commissions and Parliamentary Inquiries. In our view, a system of worker registration that is working well is the system for registration of child protection workers, which is risk-based and linked with accredited training and qualifications requirements. We discuss worker registration in more detail below. Since there is already a worker screening program for workers in the disability services sector, the architecture for worker screening, training and registration already exists across all jurisdictions and is demonstrably working well in the best interests of participants, workers and providers. While clearly no system is faultless or fool-proof, the ASU is

keen to work with participants and other stakeholders, together with the NDIA and NDISQ&SC to co design a registration system that will work in the disability services sector.

The premise is that all workers in the NDIS would have an entitlement to three stages of training as they work in the NDIS, providing an opportunity for workers in the disability services sector to have genuinely accessible professional development, enabling them to build the skills and specialisations they need to develop a professional career in the sector. Of critical importance is that the design, curriculum and delivery of this professional development program would be codesigned with people with disability and importantly would not be funded by an impost upon participant packages. The portable training entitlement scheme for the NDIS proposes three stages of training:

- Stage 1: Accredited foundation training as they enter the NDIS workforce on fundamentals that they complete within first 6 months of working (e.g., Human Rights of People with Disability, NDIS Code of Conduct, WHS etc).
- Stage 2: Each worker can then build on this accredited foundation training over 18 – 24 months to complete a Certificate III or IV qualification in disability.
- Stage 3: Once a base qualification is established, each worker in the NDIS then accrues training credits for each hour worked in the scheme that they can use to undertake accredited professional development as ‘stackable’ ‘micro-credentials’, building over time to further qualifications. Those micro-credentials would be based on emerging areas of practice in disability and have a clear link to career specialisations that should be co-designed by people with disability. It is critical that they are accredited, and industry-recognised so they are portable across providers, participants and within the scheme itself.

The portable entitlement is envisaged at scheme level. All NDIS workers regardless of their engagement in the scheme can access training and professional development (e.g. part time, full time, casual, working across providers, finding work on platforms, working as a sole trader would all accrue the training credits). The portable training entitlement could be funded from a combination of federal and state contributions. Note that the funding for the training itself would already be available via various state and federal training initiatives prioritising the disability sector – although that funding may need to be repurposed for this initiative. There would need to be funding support for the worker to take the time to complete the study – a critical component to support course completion in a low-wage, insecurely employed, fragmented workforce.

Support for a portable training entitlement in the NDIS

The ASU proposal for a portable training entitlement has received bi-partisan support at a federal and state level, twice being recommended by the Commonwealth Joint Standing Committee on the NDIS⁵⁰ and has also been recommended by an NSW Upper House Inquiry into NDIS workforce⁵¹. Importantly,

⁵⁰ See both Joint Standing Committee on the National Disability Insurance Scheme Market readiness for provision of services under the NDIS, September 2018, Recommendations, page ii and Australian Government response to the National Disability Insurance Scheme Workforce Interim Report of the Joint Standing Committee on the National Disability Insurance Scheme 2021, Recommendation 3.102

⁵¹ Implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales, June 2018, Recommendation 16, p 147

it has also received the support of some of the largest NDIS providers, advocacy groups and participants.

Case Study – ASU NSW pilot of portable training with NSW Training Services

While the ASU has been campaigning nationally for a portable training scheme for NDIS workers since 2017, in the last 12 months we have piloted a small-scale version of portable training in the disability sector in NSW. Under this pilot program, the ASU has been working with Training Services NSW to deliver four accredited modules for workers in the disability services sector. The modules are ‘micro credentials’ that provide specialist skills to those workers and can be utilised either as bespoke ‘stackable qualifications’ for a worker in the sector or recognised as part of another sector-specific qualification, including a Certificate III, Certificate IV or a Diploma. This is like Stage III of the Portable Training Entitlement plan discussed above.

The ASU surveyed over 400 support workers in December 2021 to find what areas for further training were most desired by the workforce. The top four areas for further study were:

- o Mental health
- o Case management
- o Team leadership
- o Responding to domestic violence & trauma informed care

The results of this survey were shared with Training Services NSW who then mapped the training areas with currently accredited skills sets (micro credentials) that are also on the Job Trainer priority skills lists of approved courses. The Skills-Brokers then sourced VET providers to deliver the skills sets at no cost to the worker as they are part of subsidised Job Trainer courses. The ASU requested that the VET providers be able to deliver the courses online and on-demand, as without the component of funded study time, workers need to be able to complete the course as flexibly as possible. Once the VET providers were sourced the ASU then advertised the program to its members to source enrolments. From just one email to over 10,000 support workers we received 500 registrations. Training Services NSW sought funding for an initial 15 places in each course. The ASU sourced employer references supporting this training initiative in NSW which were used by Training Services to confirm Commonwealth & state funding support for the trial from the Job Trainer program.

The ASU’s role has been critical not just in sourcing the workers but also in providing administrative and case management support for each student (e.g., assisting with the enrolment process, being a bridge between the colleges and the students, and even attending all the course inductions to support the students). This has been of financial cost to the union that we are bearing without support from the program. Each of the four courses are now underway with the initial 15 cohort of students enrolled. We are now in the process of expanding to an additional 20 places per skill set with a view to further places beyond that.

Specialisation	Accredited skill set	Link to NDIS career for support workers
Mental Health	Statement of Attainment in Mental Health #2 CHCMHS001 Work with people with mental health issues	Higher intensity support roles and recovery coach roles
Case Management	Case Management Skill Set CHCCCS004 – Assess co-existing needs CHCCSM004 Coordinate complex case requirements CHCCSM005 Develop, facilitate and review all aspects of case management CHCCSM006 Provide case management supervision	Support coordination and Local Area Coordinator and Plan Management roles
Team Leadership	Statement of Attainment in Business BSBLDR411 Demonstrate leadership in workplace BSBLDR414 Lead team effectiveness BSBOPS402 Coordinate business operational plans	Team leader and management pathways for support workers
Responding to domestic violence and trauma informed care	Statement of Attainment in Community Services (Recognise/respond to domestic violence/Family violence, Professional practice and work effectively in trauma informed care) CHCDFV001 Recognise and respond appropriately to domestic and family violence CHCPRP003 Reflect on and improve own professional practice CHCMHS007 Work effectively in trauma informed care	Emerging areas of practice and specialisation for support workers – reflected in outcomes of Women’s Safety Summit and National Disability Strategy

Beyond this initial pilot project, the ASU is also working with regional institutes of TAFE and with Charles Sturt University to develop a flexible range of bespoke courses and access to fee-free accredited training that can become ‘stackable’ micro credentials in an accredited TAFE qualification, as well as being recognised prior learning towards a degree at university. These projects are still in their early formation phases. However, the enthusiasm and commitment of the Institutes of TAFE and of Charles Sturt University, reinforced by an overwhelmingly positive response from our members to these courses lead us to believe that these will be relevant, accessible, and extremely popular among our members. These case studies show that there is significant good will in the training sector to work with the disability sector to establish bespoke training schemes such as a portable leave entitlement that can provide accredited foundational and ongoing training for workers in the NDIS. The missing

link is coordination and support at a national scheme level that also covers the costs of workers taking the time to complete their training as a supported function and entitlement of working in the scheme.

Summary and recommendations

The disability sector has a critical skills shortage. In order to deliver on the promise of the NDIS, the sector needs a portable training entitlements that would genuinely provide access to workers to establish foundation skills, upskill, develop specialist skills and develop career pathways. It would also ensure that the workforce could meet the contemporary expectations of quality disability services as articulated by the NDIS Commissions Workforce Capability Framework and Practice Standards. A portable training entitlement:

- # Provides access to training to all workers – no matter how they work – over their career.
- # Provides a more responsive system to NDIS participants so that their goals and aspirations can be met.
- # Harnesses the jobs and economic growth of the disability sector, particularly in regional areas.
- # Enables greater security of employment for workers in the growing disability sector by supporting development of meaningful career paths.
- # Addresses critical skills shortages and job vacancies, particularly in regional areas, by attracting new workers, particularly from declining industry sectors, supported with induction and ongoing development.
- # Supports the development of accredited professional skills and greater specialisation in the disability sector, enabling the NDIS rollout to be genuinely responsive to the needs and aspirations of NDIS recipients and their families.
- # Would encourage local workers and their families to remain in their local communities, especially young people and families who might otherwise be forced to move to capital cities in search of training and employment.
- # Would retain innovative local services in regional areas, delivered by local people who understand and are committed to provision of best practice standards of service delivery to vulnerable individuals, families, and communities.
- # Would facilitate recruitment and retention, by providing a nationally consistent, portable entitlement while reducing the onus on employers to train and assess potential employees.
- # Would build a more mobile, skilled workforce, assisting to address skills shortages and unfilled vacancies from outside the sector.

The ASU is keen to work with government, the NDIA and stakeholders, including people with disability to design and implement a portable training entitlement that is funded independently from participant packages. We believe The Review should recommend such a scheme be developed and implemented.

Part 4: Ensuring safe systems of work in the disability sector to protect the safety of both people with disability and the workers who support them

The NDIS Quality and Safeguards Commission (NDIS Commission) is an independent agency established to improve the quality and safety of NDIS supports and services.⁵²

The NDIS Commission:

- Responds to concerns, complaints and reportable incidents, including abuse and neglect of NDIS participants
- Registers and regulates NDIS providers and oversees the new NDIS Code of Conduct and NDIS Practice Standards
- Monitors compliance against the NDIS Code of Conduct and NDIS Practice Standards, including undertaking investigations and taking enforcement action
- Monitors the use of restrictive practices within the NDIS with the aim of reducing and eliminating these practices
- Implements a national NDIS Worker Screening check

The NDIS Commission has among its tools the NDIS Code of Conduct and NDIS Practice Standards to underpin its compliance and enforcement functions in relation to any issues that might undermine the delivery of services at best practice standards to people with disability within the NDIS. The Code of Conduct and the Practice Standards are the means by which service delivery by a provider or disability worker can be measured and if found wanting, investigation and enforcement can follow. This is a good thing. The Union absolutely supports a standard against which professional delivery of best practice standards of service can be measured. Unfortunately, there is no concomitant commitment to educate NDIS participants, workers and providers on their rights and responsibilities under relevant workplace health and safety standards. Some of these issues have been discussed previously and the illustrative case of DQS provided above. Regardless of whether a disability worker is providing a service in a participant's home, supported independent living arrangement (SIL), a day program, in the community or any other location, there is a symbiotic relationship between the safety of the disability worker and their participant or client. If the disability worker is unsafe, then so is their participant or client.

It is critical to all aspects of the quality and safety of services to people with disability, including informal support, provided by governments, institutions and the community to people with disability, that both providers and workers in the NDIS are aware of their rights to a safe workplace and their obligations to each other. The charter of the NDIS Quality and Safeguards Commission cannot be seen to 'omit' the safety of workers employed within the NDIS, not only because it is unreasonable that a disability worker should not have the same rights to a safe workplace as any other worker, but also because their safety and wellbeing is so critical to the safety and wellbeing of NDIS participants. We acknowledge that the NDIS Quality and Safeguards Commission has a principal obligation to participants. However, given the mutual dependence of a participant's wellbeing and that of their

⁵² <https://www.ndis.gov.au/providers/becoming-ndis-provider/how-register/role-ndis-quality-and-safeguards-commission>

support worker, in our view there should be a much stronger relationship between the Commission and the SafeWork authority in the relevant jurisdiction. As with our other recommendations, we take a very pragmatic view of this arrangement. Both the NDIS Quality and Safeguards Commission and SafeWork authorities in the relevant jurisdictions must be adequately resourced to educate participants, workers and providers on their respective rights and responsibilities and those agencies also need to be resourced to investigate reports of breaches and then enforce appropriate standards.

Workplace health and safety is a major issue across the disability services sector. Workers employed on low wages and in precarious employment are less likely to be trained in even basic workplace health and safety policies, procedures and practices. They are also less likely to complain about safety issues when they are reliant upon their low wages to support themselves and their families and fear reprisals if they are seen to be a ‘problem’. This unhealthy situation is exacerbated for those who are employed as so-called platform or ‘gig’ employees. Health, safety, and workers’ compensation arrangements for platform workers depend in part on the status of the worker. In the instance of a workplace accident or injury, employees have access to state-based workers’ compensation schemes. In the Victorian Inquiry there was concern and confusion about who was responsible for the health and safety of non-employee caring platform workers, especially given they may be entering and working in care recipients’ homes. The Inquiry asked the NDIS QSC about health and safety and was informed that the health and safety of on-demand care workers rested with those responsible for administering health and safety laws. For non-employee workers, this means they must take responsibility for their own health and safety; including when they are entering and working in domestic settings. It suggests they may be in a precarious and unsupported situation if something goes wrong. It was not clear to the Victorian Inquiry that this policy issue has been properly considered.⁵³

The Victorian Inquiry also sought information about the training, health, and safety of workers; particularly platform workers from the NDIA. The NDIA confirmed that when participants engage a provider, be they a sole trader or organisation, it is the provider’s responsibility to comply with health and safety laws. However, it indicated it was seeking advice about the responsibilities of participants when they choose to employ a worker to provide supports. The Inquiry requested further detail, including about action taken to provide information about work health and safety responsibilities to workers they engage directly, as employees or otherwise. At the time of writing, the NDIA had not responded.⁵⁴

The need for legislative change to protect the workplace health and safety of workers in the NDIS

Workers who are employed in precarious employment through the NDIS, and in particular those who are employed as ‘platform’ or ‘gig’ employees are subject to greater risks to their health and safety than directly employed workers. Since workers in the disability services sector are most likely to be in precarious employment, this is a major workforce issue for the sector. The Victorian Inquiry into insecure work pointed to growing evidence that ‘agency workers’ are at a greater risk of injury than other workers undertaking the same task yet are more likely to be denied protection under WHS legislation as the ‘triangular’ labour hire relationship and the temporary nature of most placements

⁵³ *ibid*

⁵⁴ *ibid*

pose serious problems for government agencies in enforcing health and safety standards.⁵⁵ Precarious workers experience more WHS issues than those in more stable employment due to a combination of economic pressures which can lead to corners being cut, disorganisation such as inexperience and poor communication, and regulatory failure. Factors contributing to this, include:

- agency workers do not generally participate in the WHS consultation and representation process
- shared responsibility between the agency, provider, worker and even the participant leads to confusion and blame-shifting between parties
- the high turnover of small agencies and providers that cease operation once prosecuted
- the complex nature of working relationships at workplaces involving multiple parties
- temporary agency workers' vulnerability to termination for reasons other than job performance
- (contingent) workers' poor knowledge of legal rights and obligations, as well as their limited access to WHS and workers' compensation rights
- a greater prevalence of fractured or disputed legal obligations in workplaces with multiple employers and
- non-compliance coupled with a lack of regulatory oversight, which is often an outcome of insufficient resources.⁵⁶

Specific factors that apply in the disability sector include the fact that home-based disability support work often occurs in settings that are highly unlikely to be visited by a WHS inspector. The fact that disability support workers who are employed as agency workers suffer emotional stress and physical injuries as well as irregular and long working hours and poor workplace health and safety management in this work is symptomatic of emerging trends in the service sector toward widespread precarious work, poorly understood and managed workplace health and safety hazards, and weak regulation of even basic OHS standards.⁵⁷

The role and definition of a PCBU - The National Model Occupational Health and Safety Laws

The National Review into Model Occupational Health and Safety Laws was conducted following an agreement between the Federal Government, states, and territories in 2008 to explore national harmonisation of health and safety laws. It considered whether an entity's status as 'employer' was the appropriate conceptual mechanism through which to impose health and safety duties. In its first report, the Review Panel stated: *'...using the employment relationship as the determinant of the application of the primary duties under OHS legislation is no longer valid. The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under a contract of service'*.⁵⁸

⁵⁵ Ibid; see also Richard Johnstone and Michael Quinlan, The OHS regulatory challenges posed by agency workers: evidence from Australia. Working Paper 38 The OHS Regulatory Challenges Posed by Agency Workers: ANU

⁵⁶ How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers
Elsa Underhill and Michael Quinlan Industrial Relations Quarterly Review 2011

⁵⁷ Ibid

⁵⁸ [https://www.vgls.vic.gov.au/client/en_AU/VGLS-public/search/detailnonmodal/ent:\\$002f\\$002fSD_ILS\\$002f0\\$002fSD_ILS:551736/one?qu=Casual+labor+--+Victoria.&ic=true&ps=300&h=0](https://www.vgls.vic.gov.au/client/en_AU/VGLS-public/search/detailnonmodal/ent:$002f$002fSD_ILS$002f0$002fSD_ILS:551736/one?qu=Casual+labor+--+Victoria.&ic=true&ps=300&h=0)

The Review Panel recommended that: To ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships and arrangements, the duty should not be limited to employment relationships. The duty-holder is any person conducting the business or undertaking.⁵⁹ Similarly, the Review Panel considered that the persons to whom a duty is owed should be sufficiently broad so that it: ...allows broad coverage of the primary duty of care. The definition of 'worker' should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.

The Model Work Health and Safety Act, which has been adopted (with some variations) in all Australian jurisdictions except for Victoria and Western Australia, gives effect to each of these recommendations. It provides that the primary duty-holder is a 'person conducting a business or undertaking' (PCBU). Duties are owed to 'workers', which includes employees, contractors, and a broad range of other types of work situations. A person is a worker under the Model Act 'if the person carries out work in any capacity for a person conducting a business or undertaking, 'including 'an employee of a labour hire agency who has been assigned to work in the person's business or undertaking.'

The Model Act also makes express provision for circumstances in which two or more parties hold concurrent duties. It provides that each duty-holder must comply with its duty to the standard required by the Act and must discharge its duty to the extent it has the capacity to influence and control the matter (or would have had that capacity but for an agreement purporting to limit or remove it). The Model Act further imposes a duty on joint duty-holders, so far as is reasonably practicable, to consult, cooperate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

As we note above, in a labour hire employment arrangement, both the labour hire agency and the host hold a range of duties in respect of the labour hire employees and/or the workplace. However, the precise boundaries of the duties of each party will depend on the circumstances in each case and there has been uncertainty in relation to the NDIS as to whether 'platform' agencies and a person with disability who directly employs a disability support worker should be considered to be a 'PCBU'.

At a broader scheme level, rather than seeing the regulatory activities of the NDIS Commission or NDIA as separate to the regulatory responsibilities of Safe Work authorities, it could be argued that the NDIS Commission and the NDIA are themselves PCBUs in the context of disability support work. This means that they also hold direct responsibilities for ensuring safe workplaces and systems of work throughout the scheme no matter how participants packages are managed or how support workers are engaged.

This is because the NDIA funds NDIS services and sets NDIS prices. It has statutory function to approve participant plans and then funds those plans accordingly. It therefore has elements of control over the provision of services and the way they are carried out via its funding and planning role.

⁵⁹ Johnstone and Quinlan (2006). Underhill and Quinlan, (2011), 111. Ibid. For background on the harmonisation process and the development of the model work health and safety legislation, see Stewart et al (2016), [18.23]- [18.26]. Australian Government, National Review into Model Occupational Health And Safety Laws, First Report To The Workplace Relations Ministers' Council, October 2008, 62-3. Ibid, 62. 134 Victorian Inquiry into the Labour Hire Industry and Insecure Work

For the NDIS Commission, it establishes a Code of Conduct that all workers and providers must follow, and it also regulates registered NDIS providers. It therefore provides for systems and rules that are elements of control over the work that is performed in the NDIS.

Both descriptions above of the roles of the NDIA and NDIS Commission within the scheme suggest they are also PCBUs in the model WHS laws.

If the NDIA and NDIS Commission are both considered PCBUs in the provision of disability support to a participant, then there are responsibilities on them to meet their duties at a scheme level that need to be addressed more proactively and in coordination with Safe Work authorities, unions and employers. This includes provision and maintenance of a safe work environment, safe systems of work, accessible and adequate facilities, provision of instruction / training / information / supervision, and monitoring worker health and conditions at work.

When it comes to safety of both workers and participants, Safe Work, the NDIA and NDIS Commission cannot see their roles in silos – rather they must collaborate better in improving standards at a scheme level on training, education, investigation and enforcement of safety standards in the NDIS.

Summary and recommendations

Workplace health and safety is a fundamental right for any working person. Disability support workers should not be expected to operate as if the NDIS has ‘opted out’ of workplace health and safety obligations under relevant legislation. Indeed, both the NDIA and the NDIS Commission should be considered PCBUs for the provision of disability support work in the scheme.

In the same way, people with disability should not be expected to suffer standards of workplace health and safety that are any different to any other client of any other service. The nature of the professional relationship between a disability worker and their client or participant means that the safety and wellbeing of a disability worker is critical to their client or participant. A fatigued, stressed worker, without safe systems of work cannot deliver quality services at best practice standards.

Workers in precarious employment are more likely to be injured and less likely to register concerns about workplace health and safety issues. They are also less likely to participate in workplace health and safety training or consultation. The disability services sector has a highly precarious workforce, engaged in low paid, highly demanding work, with an increasing dependence upon non-traditional engagement in ‘platform’ and ‘gig’ employment. This has clear risks in relation to the workplace health and safety for those workers.

- The Model Work Health and Safety laws make it clear that a person is a worker under the Model Act ‘if the person carries out work in any capacity for a person conducting a business or undertaking.’
- The Model Act also makes express provision for circumstances in which two or more parties hold concurrent duties, as is often the case in the disability sector, for example where a person is engaged by a platform such as *Mable*.
- It is our very strongly held position that a PCBU owes a duty of care to the worker, regardless of that worker's work status, and this extends by the very definition of PCBU to the NDIA and NDIS Commission holding a concurrent duty to workers in the scheme.

- There should be amendment and harmonisation across all jurisdictions of Model Workplace Health and Safety legislation reflecting the broadest possible definition of a PCBU as being any person who engages any other person in an employment relationship, including direct employment, platform work, contract work, agency work or any other employment arrangement.
- WHS Regulators must be funded appropriately to allow access to workers and enforcement of workplace health and safety legislation for all workers within the NDIS, regardless of the nature of their employment.
- All providers, including 'platform' providers operating within the NDIS, should be considered to be PCBUs for the purposes of workplace health and safety legislation, regardless of the jurisdiction
- There should be better coordination and support between Safe Work authorities and the NDIS Quality and Safeguards Commission to provide guidance and education to workers, participants, and providers on their respective rights and responsibilities under safety legislation. This should also include better resourcing of these agencies to support enforcement of safety standards and work together to do this in the disability sector.

Part 5: Procurement of disability services outside the NDIS (such as the Partners in Community Program and advocacy services) that assist people with disability to navigate the NDIS and raise concerns about quality and safety

Outside the NDIS itself, the Government directly commissions disability services to support people with disability navigate the NDIS and other services. This includes the NDIA's contracted Partners in Community Program, and several programs provided by the Department of Social Services (DSS) including funding for advocacy and representative organisations for people with disability. Workers providing these services are employed by NGOs and the ASU is their union in every jurisdiction.

The largest component in all not-for-profit sector funding is labour costs. For most grant funded organisations providing disability services outside the NDIS, this is around 70% - 80% of the total value of the tenders they receive from the NDIA or DSS. Since the 1990s, government procurement at all levels, including the disability services sector, has been based upon 'competitive tendering'. This has resulted in organisations competing against each other to win government funding. As organisations strive to have the lowest cost in this tender race, inevitably minimum industrial standards and conditions are impacted.

Competitive tendering favours larger, established, and for-profit organisations that have more staff and resources to devote to tender writing. In fact, some larger organisations now employ full time tender writers and even smaller organisations often pay to employ professional tender writers when important tenders are due. This squeezes out smaller organisations and 'niche' organisations that respond to specific community needs. For example, a small disability service in a remote First Nations community, which provided Local Area Coordinators (LACs) for the local population is likely to have very different needs and resources to a well-established, large faith-based organization delivering the same service. Neither is more or less important. Neither community needs fewer services. However, both organisations are clearly very different in terms of resources and how they can deal with a competitive 'template' tender process upon which each will rely for essential funding. In addition to the obstacles created for smaller organisations, this approach to competitive tendering also tends to create a one-size-fits-all sector that does not address the needs of communities, especially people and communities that do not 'fit' the template nature of modern tenders.

Impact of the NDIA and DSS procurement model on workers in the broader disability services and advocacy sector

Governments argue that competitive tendering encourages 'efficiency', and the 'best' will win tenders, leading to improvement in service quality by providing users with 'choice' about the services they access. The ugly reality is that competitive tendering has led to a downward pressure on disability services sector funding, particularly on labour costs. Competitive tendering among grant funded services has directly led to:

- A significant proportion of employees in the sector being engaged on a part-time, fixed term contract or casual basis.
- There is almost non-existent access to paid overtime.

- There is a high turnover of employees due to short grants and contracts.
- Short term funding grants and contracts result in very limited access to long service leave (except in states like the ACT, Victoria and Queensland which have implemented portable long service leave schemes for community sector workers)
- Low wages mean limited accumulation of superannuation benefits.
- There are very high levels of unpaid work.
- Little or no training, or employees undertaking unpaid training in the employees' own time.
- Little or no professional (clinical) supervision
- Little or no non-work support (training leave, Paid Parental Leave, Family and Domestic Violence Leave, COVID leave etc)
- Little or no end-of-employment support (redundancy, outplacement etc)

A clear case in point demonstrating the impact and implications of competitive tendering is the role of the Local Area Coordinator (LAC) in the NDIS Partners in Community program.

Not for Profit organisations compete for tenders that are offered in grant cycles to deliver local area coordination services. The wages and conditions offered to their employees vary very considerably between these providers as they compete to win available contracts. With wafer thin margins on all NDIS tenders, there is very little else that can be cut other than wages. From conception, the role of the Local Area Coordinator (LAC) has been both critical and central to the fundamental principle of ensuring choice-and-control to people with disability, their families, and communities. The NDIA website sets out the role of the Local Area Coordinator in the following terms that makes clear their central and critical role in coordinating services and ensuring genuine access, choice-and-control for people with disability: ⁶⁰

⁶⁰ <https://www.ndis.gov.au/understanding/what-ndis/whos-delivering-ndis/lac-partners-community>

If you are aged 7 and above, one of our partners may deliver LAC services, which includes linking you to the NDIS and to mainstream and community supports in your area.

Role of Local Area Coordination (LAC)

LACs can help you to:

- Understand and access the NDIS – This can include workshops or individual conversations about the NDIS.
- Create a plan – If you are eligible for a NDIS support plan, your LAC will have a conversation with you to learn about your current situation, supports, and goals to help develop your plan. It is important to know that LACs cannot approve a NDIS plan, this is done by someone from the NDIA.
- Implement your plan - Your LAC will help you to find and start receiving the services in your NDIS plan. Your LAC can also provide assistance throughout your plan if you have any questions.
- Changing your plan – Your LAC will work with you to make changes to your plan through a plan reassessment. This generally occurs 12 months after your plan is implemented. At any time during the plan dates they can request an unscheduled review if they do not agree with the funding or if there is not enough funding to continue the services.

Linking you to information and support in your community:

LACs will help you:

- Learn about support available in your local community;
- Understand how the NDIS works with other government services – this is supports like education, health, and transport;
- Sustain informal supports around you – this is family, friends and local community members.

This is part of Information Linkages and Capacity Building (ILC).

You can ask your LAC about the supports available in your community, even if you're not eligible for a NDIS support plan. Partners delivering LAC services will also work to make your community more welcoming and inclusive.

In practical terms the LAC is the one-stop professional contact for people with disability and their families as they try to navigate the NDIS, as well as for those people with disability and their families who are not NDIS participants. This is highly skilled, emotionally, and physically demanding work. LACs are also responsible for ensuring the integrity of the system, providing their participants with at least three options for providers and services and taking whatever action is necessary to ensure that people with disability are assured of genuine choice with accountability and transparency when engaging services.

Most LACs are employed on a fixed term basis, with short term funding contracts. It is common in the sector for organisations that employ LACs to lose their funding to another provider that offers a lower labour cost as part of the tendering process. At these times, the skilled and experienced workers are sometimes employed by the newly funded organisation, but often with a different

hourly rate and an increased workload. This is also very disruptive for NDIS participants and their families.

As workloads have increased across these types of services due to the roll out of the NDIS and growth of people navigating the scheme, there has been a reduction in the capacity of those workers to fulfil their role as it was intended. LACs have continued to deal with rapidly increasing workloads by working unpaid overtime hours, limiting their breaks, and often taking calls from participants in their own time. While the caseload for LACs was intended to be around 120 to 140 participants, ASU members have reported their caseloads to be in excess of 200 in some instances. By any measure this is an impossible caseload to manage professionally or effectively.

There has also been a 'blurring' of roles as key workers are forced to fill gaps in services for people with disability due to skills shortages and excessive workloads. The blurring of roles and inadequate resources, including lack of skilled workers has meant that the NDIS ecosystem that was intended to ensure people with disability genuinely could exercise choice-and-control over their own lives is critically fractured.

LACs play a critical role in the network of carers, advocates and other key people providing support to a person with disability. The fact that they cannot play the part that was intended for them as part of the NDIS ecosystem directly threatens the delivery of best practice support to participants and their families. Local Area Coordinators illustrate the broader issue that confronts all aspects of quality and safety of services, including informal support, provided by governments, institutions, and the community to people with disability. While ever competitive tendering is the means of procurement in the NDIS, there can be no real choice-and-control for participants. There can only be 'this is all I can afford'. Procurement in the NDIS must place participants at its centre. Ensuring that organisations are funded at a base line that allows workers to be paid fairly means that they can compete on innovation in their service delivery rather than how far they can exploit their workforce.

Miriam is an experienced LAC in metropolitan NSW who works with many people with disability who are from diverse language and cultural backgrounds:

"Many of the people I work with do not speak, read or write in English. Many of them cannot use a computer. I need to arrange an interpreter, but this is not within our budget. It also means that I really do need to meet with these people in person. It won't work in any other way. This is very time consuming and means it is hard to manage the huge caseload that I am carrying in the way that I think it should be done. I know that our service had to compete to get this contract and the best way to do that is to do it at a cheaper rate than the other services. But in the end, this just means cutting back on what we can do and leaving us with impossible caseloads.

It also means that some providers pay their LACs better than others. This does not seem fair. We all do the same work, and all have the same issues to deal with. It is also the reason that people are leaving this work and don't want to work as a LAC, even though we love our work and our clients."

In response to this deteriorating situation arising from competitive tendering, the ASU has proposed that all tenders awarded by NDIA and DSS to disability coordination and advocacy services should be based upon a *floor price* below which no tender will be accepted. This would mean that rather than a

‘race to the bottom’ by organisations, competing for vital funds by cutting back on essential workforce expenses, all tenders would be required to include funding provision for basic industrial standards. As we continue to struggle through a pandemic and a potential global recession, this new floor price will act to provide organisations and their employees, who are themselves helping vulnerable people and communities to survive and rebuild, with job security, protection when they are ill, injured or their employment is ended. A floor price for government funding will encourage workers in the sector to develop a career and so support workforce development, sector stability and a better trained and qualified workforce. A floor price below which no organisation can tender will encourage organisations in the sector to collaborate and share resources, working together rather than against each other in an endless competitive spiral downwards. This approach is therefore also in the best interests of people with disability, their families, and communities. We propose a model floor price, based upon six elements:

1. Wages for all workers, cannot be lower than Federal Award (SCHADS Award) rates including:
 - Annual minimum Award wage increases as determined by Fair Work
 - Correct classification stream and level
 - Allowances
 - Penalties and loadings
2. Provision will be made in the price for accrual of portable leave entitlements including:
 - Workers’ compensation
 - Annual leave including 5 weeks annual leave for shift workers.
 - Personal leave
 - Long service leave
 - Paid Parental Leave
 - Paid family and domestic violence leave (due to commence for all employees, regardless of the nature of their employment in February 2023).
3. Adequate overhead costs for all workers, regardless of the nature of their employment, including:
 - Provisions for adequate supervision ratio depending on nature of service.
 - Professional (clinical) supervision
 - Provisions for onboarding of staff – induction, buddy shifts
 - Provisions for regular team meetings
 - Provisions for ongoing professional development and training
 - Provisions for Workplace Health and Safety Representatives at a reasonable ratio to be trained and perform their work in accordance with legislation.
4. End of contract considerations for all workers, who do not receive a casual loading, including:
 - Redundancy and notice requirements in case of contract not renewed
 - Outplacement services.
5. Continuity of service provisions including:
 - Reflecting recently proposed changes to the Fair Work Act, NDIS Price should be modelled on maximising permanent employment (Fulltime and Part time) rather than casual or fixed term contracts or rolling contracts.
6. Providers required to comply with industrial law, including:
 - Requirement to consent to arbitration in contract.

- Capacity for disputes to be raised with the relevant funding body if industrial entitlements are not followed.

Summary and recommendations

Competitive tendering has led clearly and directly to a significant and consistent downward pressure on disability services sector funding, particularly on labour costs. This has undermined the provision of services to NDIS participants and is a major obstacle to the delivery of the NDIS promise of choice-and-control for those participants.

All grants, tenders and commissioning of services in the disability services sector, should be underpinned by a minimum 'floor price'. This procurement policy should also promote secure work arrangements linked to longer term funding.