



ASU Submission

National Disability Insurance Agency

Annual Pricing Review 2022-23 Consultation Paper

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The ASU

The Australian Services Union ('ASU') is one of Australia's largest unions, representing approximately 135,000 members.

ASU members work in a wide variety of industries and occupations in both the private and public sector. Relevantly, the ASU is the largest union of workers in the social, community and disability services sectors. Our members predominantly work in non-government, and not-for-profit organisations that support people experiencing or at the risk of experiencing crisis, disadvantage, social dislocation, or marginalisation. The ASU is the largest union in the disability sector and the National Disability Insurance Scheme ('NDIS'). We played a leading role in the Fair Work Commission's review of the *Social, Community, Home Care and Disability Services Award 2010* ('SCHADS Award').

Executive summary and recommendations

NDIS pricing arrangements for supports delivered by disability support workers need significant reform. The current pricing arrangements for the NDIS encourage disorderly, fragmented and exploitative working arrangements to the detriment of participants, providers and workers. The poor working conditions in the sector must be changed or the NDIS will struggle to recruit and retain the hundreds of thousands of skilled and motivated staff it desperately needs. We propose the inclusion of portable leave and training arrangements to encourage workers to stay in the sector.

NDIS Pricing Arrangements must be reformed to provide clear rules to ensure that disability support workers are paid the appropriate minimum legal rates of pay for the work they perform. The NDIA must set clear expectations that employers will pay their employees the correct minimum rate of pay for the work that they perform. Further, the NDIS Disability Support Worker Cost Model ('**DSW Costs Model**') must be amended to account for all basic minimum legal safety net entitlements.

The temporary loading of 2% needs to continue to recognise the variable costs and challenges of 'COVID Normal' as well as ensuring providers can cover the costs of the new SCHADS Award provisions, including the entitlement to ten days of paid family and domestic violence leave as per the National Employment Standards.

Recommendations

1. NDIS pricing assumptions should be reformed so that the NDIS pricing arrangements:
 - a. encourages permanent employment, including full-time employment;
 - b. ensures disability support workers are not misclassified as home care employees;
 - c. ensures disability support workers are not under classified at Level 1 of the SCHADS Award;
 - d. reflects the true cost of disability support work (including appropriate classifications for the work performed, the intensity of support, adequate time allocated for tasks, administration, supervision, training etc.);
 - e. can meet minimum Award entitlements and the National Employment Standards;

- f. Establishing a separate and protected Capacity-Building Fund, housed within the NDIA, to fund training activity across the sector – including courses for individual workers, and group training and capacity-building at the as detailed in The Australian Institute's *A Portable Training Entitlement System for the Disability Support Services Sector* report.¹
2. Provide portable entitlements to paid annual leave, personal leave and long service leave.
3. The DSW Cost Model must include funding for 10 days paid Family and Domestic Violence Leave as per the National Employment Standards.
4. The ASU should be invited to participate in the working group examining the DSW Costs Model and the implications of the variations to the SCHADS Award.

Pricing disability support work

Funding arrangements for disability support services are tied to the minimum wage levels provided by clause 16 and the classification system in Schedule B of the SCHADS Award. The SCHADS Award is a safety net instrument that provides the legal minimum pay and conditions for the disability sector. The minimum rate of pay for each classification is the minimum wage for the type of work in Australia. For each type of worker in each industry, there is one applicable award and one applicable rate of pay.

When an employer pays an employee less than the minimum rate of pay that applies to the work that employee performs, they break the law. That employer could be subject to civil penalties running to tens of thousands of dollars. The Australian Services Union actively enforces the minimum workplace standards in Australian employment law, but our activity is undermined by the weak NDIA rules concerning pricing.

The NDIA pricing arrangements set prices for the work of disability support workers by reference to the minimum wages for that work. However, they permit employers to claim the full value of that price even if they have not paid the employee what they are entitled to for performing that work. There is no scope for an employer to argue that the minimum wages do not apply to the service they provide. They have either failed to deliver the service or they are underpaying their employee.

The NDIA's pricing arrangements for disability support work risks establishing a disability services market characterised by low paid, irregular and low skilled work. It can address these issues directly by building clear business rules about pay and classifications into its funding arrangements for price-regulated supports provided by disability support workers. Disability services providers should be required to pay (at the minimum) the pay rate for the classification to which the NDIA has pegged funding for that work.

Below we address specific forms of wage theft in the disability sector.

Misclassification at Level 1 of Schedule B

A common practice amongst disability providers is to classify employees at Level 1 of Schedule B – Social and Community Services Employees. This permits the employer to pocket up between \$7 and \$19 per hour depending on the type of service provided.

Level 1 is not the appropriate classification for any type of disability support work. Level 2 SACS was accepted by the Fair Work Commission Equal Remuneration Order Decision of 2012² to be the

¹ https://futurework.org.au/wp-content/uploads/sites/2/2022/11/ASU_Training_Report_Formatted.pdf

² Fair Work Commission, Decisions and statements for the Equal remuneration case [online]

<https://www.fwc.gov.au/hearings-decisions/major-cases/equal-remuneration-and-work-value-case/decisions-and->

appropriate minimum classification of disability support work on the Award, but this is only appropriate for low intensity supports. The classification descriptors in Level 2 of the SCHADS Award also reflect the minimum expectation of work as outlined in the NDIS Code of Conduct³ which is mandatory and the NDIS Commission's Workforce Capability Framework⁴ which sets out the Commission's expectation of work in the sector. There are no support items involving disability support work that are based on employing a worker at SCHADS SACS level 1.

MacDonald and Douglas (2022)⁸ found many disability support workers are employed and under-classified as SACS level 1 employees when they should in fact be classified at Level 2.

“The SACS level 1 classification has a very limited application to disability support work as shown by the comparison of SACS level 1 and SACS level 2 employee and job requirements”⁹

“at SACS level 1, an employee is likely to have limited or no experience, require close supervision and direction and be undertaking extensive on-the-job training. Their work activities are clearly defined and an experienced Level 1 employee’s exercise of judgement is limited to planning their own work within well-established procedures, with assistance readily available and no scope for interpretation. This description is inconsistent with most support work requirements and practice described in the evidence presented during the SACS Equal pay case. It is also highly inconsistent with the expectations of disability support workers in the contemporary context”

MacDonald and Douglas (2022) also found that disability support workers who are classified at Level 2 but are required to exercise “initiative in the application of established procedures, a requirement to solve problems of limited difficulty with reference to documents, and where a sound knowledge of procedures is required”¹⁰ should be classified at SACS level 3.

They argue that contemporary expectations of disability support work such as: NDIS Quality and Safeguarding Framework; NDIS Code of Conduct; NDIS Workforce Capability Framework; and NDIS pricing arrangements do not support the classification of disability support workers as a SACS level 1 worker.¹¹ Both actions by employers result in disability support workers being underpaid.

This is documented in the Deloitte Financial Benchmarking Survey Final Report¹² which was provided to the NDIA in May 2022. Over 1,000 disability service providers, who provided NDIS funded disability supports in the financial year 2020 – 2021, were surveyed as part of the preparation of this report. The report demonstrated 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 – level 2.1 base permanent rate without any loadings).

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

statements

³ NDIS Code of Conduct [online] <https://www.ndiscommission.gov.au/about/ndis-code-conduct>

⁴ NDIS Workforce Capability Framework [online] <https://workforcecapability.ndiscommission.gov.au/>

⁸ Fiona MacDonald and Karen Douglas: Disability support workers & the classification of their work in the Social, Community, Home Care & Disability Services Industry Award, February [online] <https://cpow.org.au/wp-content/uploads/2022/02/RMIT-DSW-Classification-Final-Report-Feb-2022.pdf>

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Deloitte, Financial benchmarking survey of disability service providers in the National Disability Insurance Scheme [online] <https://www2.deloitte.com/au/en/pages/economics/articles/financial-benchmarking-survey-disability-service-providers-national-disability-insurance-scheme.html>

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 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.

Misclassifying disability support workers as Home Care Employees

A common practice amongst disability providers is to classify employees at under Schedule C – Home Care Employees. Similarly, this would allow an employer to claim between \$10 and \$20 per hour depending on the type of support and the employer's choice of classification under the home care classification stream.

Wage theft in the NDIS is occurring due to ambiguous pricing arrangements. The current DSW Costs Model notes that the NDIA 'recognises that some Disability Support Workers are classified as Home Care Employees'¹⁴ even though disability support work is classified under the Social and Community Services Employee stream. Any disability support worker being paid as a home care employee is being underpaid. Indeed, 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.

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

¹⁴ NDIS Pricing arrangements [online] <https://www.ndis.gov.au/providers/pricing-arrangements#disability-support-worker-cost-model>

worker rate. This is wage theft.

The SCHADS Award pay rates at the time of writing sets out that a disability support worker (level 2.1) would be paid \$30.46 per hour (base rate of permanent employee). A Home care worker (level 2.1) would be paid \$24.26 per hour (base rate of permanent employee).¹⁵

It is not appropriate to classify disability support work under the home care stream at Schedule E of the SCHADS Award. Like level 1 of the SACS stream, the classification description refers only to domestic duties and personal care. The 'home care sector', as defined in clause 3 of the SCHADS Award, is 'the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence'. It does not refer to implementing participants' skills and activities programmes and supporting participants to live independently, which is central to the NDIS.

While home care support items are included in the NDIS Price Guide, these are only in relation to maintenance of the home environment. For example:

Assistance with Household Tasks:

These support items enable participants to maintain their home environment. This may involve undertaking essential household tasks that the participant is not able to undertake.

Disability support work outlined in the NDIS Price Guide includes:

Assistance with Self Care Activities:

These support items provide a participant with assistance with, or supervision of, personal tasks of daily life **to develop skills of the participant to live as autonomously as possible.** [emphasis added]

Participation in Community, Social and Civic Activities:

These support items enable a participant to engage in community, social and recreational activities.

This aligns with the SACS stream, rather than the home care stream.

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.

Issues with under-classification

You cannot recruit and retain workers to the disability sector if there is a growing number of providers underpaying their workers, and you cannot lift wages across the sector if compliance with the minimum award rates of pay is poor. Furthermore, you cannot build a stable and qualified workforce without building greater recognition in the award classification structure for more complex support worker roles,

¹⁵ Fair Work Ombudsman, Social & community services industry pay rates [online] <https://www.fairwork.gov.au/pay-and-wages/minimum-wages/social-and-community-services-industry-pay-rates>

and specialisations that exist beyond level 2, into levels 3 and 4.

There needs to be a greater focus on the quality of supports and services provided under the NDIS. Currently there is no requirement for any training or professional development in the NDIS despite it being a heavily regulated system in many other respects. For example, there is a Code of Conduct, and workers can be fined or banned from working in the sector if they breach it.

Workers and people with disability will be better served by a NDIS Code of Conduct that is underpinned by a skill and capability development approach within an environment of training and professional development.

The NDIS DSW cost model has had significant consequences for training and development in the sector and for the capacity of providers to participate actively in providing a high standard of training and supervision – or any training at all. There have been cut-backs in the time allocated for training; team meetings have all but disappeared; supervision has been severely curtailed; and large numbers of casual workers are being newly employed with almost no supervision at all.

Not only is there no requirement for training, there is no ongoing professional development for the sector, a sector that is meant to provide a range of services to meet the diverse needs of people with disability. How can the NDIS reach its promise when DSWs are not supported with access to quality accreditation and training to do their job? Accordingly, the ASU commissioned research by the Australia Institute Centre for Future Work who found there is a strong case for funding training and professional development for the sector from a separate and ring-fenced Capacity Building Fund that is not tied to participant plans. The Fund would have two broad areas to direct investment:

- Funding directed towards training individual disability support workers to develop their skills and knowledge on the basis of nationally recognised qualifications. Individual training opportunities would be delivered in three stages: induction training, foundation training, and an ongoing portable training entitlement to facilitate career-long training and upgrading.
- Funding for building training and professional development capacities in the industry as a whole, at an organisational level. This would provide fiscal support to providers to build their internal capacity to deliver high-quality supervision and professional development in support of quality standards within their workplaces. It would also support the development of training capacity within RTOs to deliver training to workers in the skills associated with the NDIS's consumer-directed model.

A copy of the report can be viewed [here](#).

The real cost of high turnover

The Consultation Paper highlights the current Labour market and noted that the 'Health Care and Social Assistance was projected to grow by 301,000 (or 15.8%) over the five years to November 2026'. However, the NDIS National Workforce Plan anticipated the NDIS will lose approximately 213,000 workers by 2025¹⁸. "When considered together, the challenge facing the sector to attract, recruit and, importantly retain workers is considerable"¹⁹

A recent survey by the Behavioural Economics Team of the Australian Government found 42% of NDIS workers plan to leave their current job some time within the next 3 years, with 21% planning to leave in the next 12 months.²⁰ Out of those planning to leave 1 in 4 cited the lack of learning or

¹⁸ NDIS National Workforce Plan 2021-2025 [online] <https://www.dss.gov.au/disability-and-carers-publications-articles/ndis-national-workforce-plan-2021-2025>

¹⁹ NDS Submission - Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [online] <https://www.nds.org.au/news/nds-raises-concerns-regarding-lack-of-consultation-with-federal-fair-work-bill>

²⁰ Behavioural Economics Team of the Australian Government [online] <https://behaviouraleconomics.pmc.gov.au/sites/default/files/projects/ndis-workforce-retention-survey.pdf>

career progression opportunities as a reason for leaving the NDIS workforce.²¹

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 just 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 cost of replacing an employee is estimated to be between 1.5-2.5 times an employee's annual salary, leading to financial losses for NDIS providers.²²

²¹ Ibid.

²² Chandler Macleod, The Billion dollar HR opportunity in Australia [online] <https://www.chandlermacleod.com/blog/2017/02/the-billion-dollar-hr-opportunity-in-australia?source=google.com> & <https://www.bentleys.com.au/knowledge-centre/cost-of-high-employee->

The NDIS pricing model needs to urgently be amended to reflect the components of quality service delivery and support including on-the-job training and professional development of workers. Professional development is the key to reducing employee turnover as employees who feel like they are constantly learning and growing are more likely to continue with their employer. Employees who constantly expand their skills are more likely to be happy in their jobs.

Portable entitlements

The characteristics of employment in the Community Services Sector are widely documented as low paid; largely female; and sustained by short term funding arrangements - resulting in short term tenure for employees; often with multiple employers, but paradoxically long-term service within the industry.

A portable entitlements scheme would go some way towards recognising some of the challenges inherent in working in the disability support sector. Portable entitlements mean that all workers can access entitlements regardless of how they are employed, where they work, or if they change jobs.

A portable entitlement scheme should not only include long service leave but should be expanded to include other types of leave, including sick leave, annual leave and redundancy protections for all workers; including those on insecure work arrangements in the industry.

NDIS pricing already allows for the maximum utilisation of leave, it just needs to be structurally set up in a way that will allow workers to accrue and carry entitlements with them as they continue to work for multiple NDIS participants and providers. We believe the NDIS is a great pilot for a national portable entitlements scheme as it is Commonwealth funded and can form part of the DSW Cost Model.

Domestic Violence Leave

The DSW Cost Model must include funding for 10 days paid Family and Domestic Violence Leave as per the National Employment Standards.

The Fair Work Commission's Report: Survey analysis for the family and domestic violence leave review 2021²³ found only around 7 per cent of respondents answered that they had employees who had taken unpaid family and domestic violence leave in the last 12 months. The majority of respondents reported it was only 1 employee (63.3%) who had taken unpaid family and domestic violence leave in the last 12 months and after taking into consideration the total number of employees across all survey respondents it was noted "around 0.05 per cent of employees had taken unpaid FDV leave in the last 12 months."²⁴

The NDIA should ensure the Disability Support Worker Cost Model Assumptions and Methodology is updated to reflect the new FDV leave entitlement. Costs should be based on the Fair Work Commission's research report.

turnover/#:~:text=The%20true%20cost%20of%20replacing,1.5%20times%20their%20annual%20salary.

²³ Fair Work Commission, Survey analysis for the family and domestic violence leave review 2021 [online] <https://www.fwc.gov.au/documents/sites/family-domestic-violence-leave/am202155-report-survey-analysis-101221.pdf>

²⁴ Ibid.