



## NDS Comments on the Competition Policy Review

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NDS appreciates the opportunity to comment on the Competition Policy Review Draft Report of September 2014.

NDS is closely engaged in the design and implementation of the National Disability Insurance Scheme (NDIS), which has considerable relevance to the application of competition policy in human services.

NDS supports the proposal in draft recommendation 2 to craft intergovernmental agreements on how competition policy should be implemented in the field of human services. This is because states and territories hold the knowledge and practical experience of implementing most human services. We have outlined seven matters that need to be carefully considered in the content of such an intergovernmental agreement:

1. Choice and competition can bring benefits to human services but implementation requires caution and careful thought;
2. Governments should retain a market stewardship function;
3. Structural reforms to introduce competition won't succeed without cultural change;
4. Funding, regulation and service delivery should be separate;
5. Conserving the not-for-profit sector's creation of social capital is essential;
6. Competition alone is not sufficient to drive innovation; research, knowledge dissemination, diversity and flexibility for service providers are critical; and
7. A balance between rules that respond to local conditions and national consistency that minimises compliance costs should be a goal.

### **1. Choice and competition can bring benefits to human services but implementation requires caution and careful thought**

The potential impact of market failure in human services cannot be tolerated by governments or the public, as it often impacts on fundamental human rights. Therefore, reform, including the introduction of choice and completion, must be introduced slowly with ongoing monitoring

#### **Learn from existing choice and competition reforms in human services**

The NDIS is a leading example of this kind of reform and NDS remains committed to its goals of nurturing a healthy market for disability services to improve the opportunities and choices of people with disability.

However, the NDIS market is still forming and the detailed design of the market infrastructure is undeveloped. What is clear from the experience to date, is that there are caveats that must be applied to notions of 'choice and competition' for this kind of human service reform to be effective. For example, there is a need to strengthen information provision to ensure informed consumer choice, especially for vulnerable

consumers and those with additional communication support needs. It is not appropriate to rely on provider marketing to ensure information symmetry under the NDIS.

Our submission outlines these caveats where we know about them. We are also mindful there is much we do not yet know as it is early days in the implementation of the NDIS.

## 2. Governments should retain a market stewardship function

### Human service markets are ‘quasi markets’ requiring facilitation and investment

In human services, governments (and regulators) cannot distance themselves from the quality of services in the same way that they can in some other industries. The resulting regulation means that human service markets are ‘quasi-markets’ and modelling based on ‘free markets’ cannot be accurately translated. We do not yet know what the best facilitative policy settings are and this lack of clarity must be addressed through investment in monitoring, facilitation and development initiatives.

### Acknowledge and address the deficits in knowledge of quasi-markets

It is important to invest in collecting information about the impact of ‘choice and competition’ reforms, not just on consumers but also on the whole sector. This information should be used to anticipate and address potential market failure. Some information needs in human services could include:

- market structure and composition (the make-up of not-for-profit, for-profit, large, medium, small and micro providers and cooperatives);
- financial sustainability of providers and changes to aggregate financial balances;
- the impact on volunteer hours and the impact on charitable giving;
- business confidence; and
- level of choice and change exercised by consumers and related transaction costs.

Most of this information is not measured at present in the disability sector yet it is critical to understand how the market is functioning under the NDIS, particularly during the transition phase. Market facilitation should not end with information collection. Governments, and the NDIS, should proceed slowly with implementing market approaches alongside investment in sector development.

**Establish a market stewardship function:** Where governments apply choice and competition principles in the field of human services there is a corresponding responsibility to invest in overseeing the impact of the policy on the market. Governments must also respond to findings and as required, adjust funding, investment in sector development and regulation settings.

## 3. Structural reforms to introduce competition won’t succeed without cultural change

It is clear from the experience of the NDIS that introducing a competitive market into the disability sector is a major structural reform that requires significant cultural change and careful thought about how concepts like choice apply.

An example of cultural change is that disability providers lack marketing skills because in a sector where demand exceeds supply marketing to consumers has little point. Similarly, consumers may be unused to exercising market choices around disability

support and may not be typical 'economically rational' consumers. For example, some people with disability are likely to choose providers based on their social needs and long-term relationships rather than price, or external notions of quality.

The following discussion outlines some of the key structural and cultural challenges with placing 'user choice' at the heart of disability sector reform.

### **Enabling 'user choice' requires investment**

In the NDIS, user choice enhances the lives of people with disability and their families and their opportunities for economic and social participation. Choice is also a quality safeguard as it creates a market incentive for providers to assure the quality of their services and charge efficient prices. The assumption is that participants will choose the level of quality they want and reject support providers that do not meet their standards. However, these choice based mechanisms will only work well when the following conditions are met:

- sufficient diversity of support and provider options to offer real choice;
- reliable information and advice (based on good research and quality assurance) to enable informed choice and market development
- participants are confident with their decision making capacity or have appropriate access to supports for decision making

Governments should monitor, protect and invest in these necessary conditions for ensuring adequate choice.

### **Sometimes 'choice' is not meaningful in human service contexts**

Some people with disability have challenging behaviours and a key goal for managing these behaviours is to reduce the need to use restrictive interventions. This can be done through investment in positive behavior therapies and strategies in the way the support is delivered, which pay off over the longer term in improved participation outcomes and reduced support costs. However, individuals with challenging behaviours and their families are not always ready and or willing to choose to invest in this intensive support and therapeutic environments. Indeed, often it would be dangerous to leave the decisions around support for managing challenging behaviours to 'user choice.'

For some families with complex needs the NDIS needs to provide earlier outreach or wrap-round interventions, such as intensive and proactive case management. This will likely require block funding and investment in coordination across services and agencies which does not easily fit individualised funding or 'user choice' models.

### **Sometimes 'choice' is expensive requiring different approaches in thin markets**

There are thin markets in disability support both because of the rarity of some specialised support needs and also due to sparse populations in rural and remote regions. Current essential human services in these market segments are often delicately stitched together from various funding sources and collaborations across various sectors. These markets are not able to offer choice and the services are at risk under the NDIS design unless non-individualised funding models are developed to complement the main scheme. For example, culturally effective disability services for Aboriginal people living in remote Australia need to collaborate across various government sectors and they need a base of secure ongoing funding.

### **User choice requires options for planning and decision making support**

A flaw in the current NDIS design is that despite planning processes being instrumental in the exercise of user choice, participants do not get a choice about who provides them with planning support. This should be reviewed. While determining eligibility and the level of funding is a core function for NDIA staff, participants should be able to choose who provides them with more detailed life planning and support for decision making. There is a range of specialist life planning and advocacy support expertise in the sector which people with disability and their families would benefit from.

**Invest in the cultural change that enables user choice:** The conditions that enable choice needs to be protected and where this is not possible alternative funding and regulatory models are required. Where support is required to exercise user choice there should be choice in the provision of that support.

### **4. Funding, regulation and service delivery should be separate**

NDS supports the principle of separating funding, regulation, and service delivery. A healthy independence between these functions can help government to focus on ensuring the overarching goals are being achieved. For example, if there is insufficient distance between the regulator and government there can be a tendency for bureaucracies to create unwieldy regulation in response to risk which reduces the effectiveness of service providers. Similarly it helps to ensure that market principles are applied fairly to all parts of the system. This means for example, that funders should not dictate prices to service providers.

#### **An independent monitoring and regulatory body can also be watched**

One of the benefits of separating the operational monitoring and regulation of the disability sector from the policy role is that governments can more effectively assess the job the regulators are doing (including but not limited to ACCC, ASIC, ATO, NDIA, Departments, Fair Work and commissioners). This should involve ensuring the regulatory processes are not distorting the market negatively through their impact.

It is important that the cost of monitoring the market is not worn by the sector through the creation of unreasonable bureaucratic burdens. Attempts to over monitor and control the development of a market can backfire when the demands of the bureaucracy end up driving market behavior rather than user choices and needs.

The Disability Employment Services (DES) system provides a palpable example of where government regulation goes wrong. The DES program aims to use competition levers to improve quality and price. Instead, heavy regulatory prescription stifles innovation and impedes competition related to quality outcomes. It is bound by more than 900 pages of policy and guidelines, underpinned by compliance requirements, assurance audits, site inspections and integrity audits. Smaller or specialist organisations lack the ability to defray the cost of compliance and are placed at a competitive disadvantage.

The result is a program that struggles to service its traditional client group and encourages perverse service outcomes. It fails in its core purpose and Australia continues to have relatively low employment participation rates for people with disability. DES requires a re-think of its competition policy and regulation.

## Deregulation of prices

Prices must be allowed to respond to forces of demand and supply in order to find a truly market driven efficient price even in a quasi-market. It is not appropriate for the funder or regulator to artificially set maximum prices. However, this kind of monopsony is the current situation with the NDIS which is equally as counterproductive as a monopoly would be on the disability market.

The NDIS certainly has a role in determining the size of consumer demand, through the size of individualised packages. To do this they need to respond to supply pressures and related changes in market prices to ensure packages are big enough to provide 'reasonable and necessary' support. NDS understands that during the transition to a quasi-market they may need to carefully manage this to ensure appropriate sized individualised packages based on a good understanding of reasonable costs rather than market prices that are not yet clear. However, the sooner prices reflect market forces, the more likely a viable and healthy market with efficient prices is possible. NDS is seeking to have price deregulation trialed.

## Facilitating level and fair labour standards

Wages are the most significant determinant of human service costs, requiring attention from funders and regulators as well as employers. Workers in many aspects of human services, including disability support, are paid at Award rates. This is different from many other sectors that have negotiated above Award agreements to compensate for increased flexibility. This poses an extra industrial challenge for the disability support sector which needs to change its working arrangements to implement the NDIS. For example, there will be a wider range of hours of work, and more fragmented shifts, in more diverse work settings. There is also a need for jobs in the sector to be attractive enough to draw twice as many workers, with more diverse backgrounds and skills.

NDS is seeking to have working arrangement flexibility considered in the review of Modern Awards (conducted by the Fair Work Commission), but the give and take of this negotiation will also need to consider overall wage outcomes and funding approaches. It is important that an appropriate minimum floor is equally enforced in the more dispersed disability workforce market. This will help to ensure competition is based on quality and price and not at the expense of minimum labour standards, including health and safety.

Another industrial challenge facing the disability market are conditions attached to the transfer of business from government. A number of States have indicated an intention to transfer their disability services to the non-government sector. In many cases receiving services will be required to preserve, for five years, the more generous and less flexible industrial conditions that transferring government workers have been working under. This creates significant barriers to maintaining a viable service and efficient market.

**Government should be clear about the roles of funders, regulators and service providers and ensure a fair application of market principles:** Only when the roles and goals are clear is it possible for governments to monitor agencies and ensure consistency with an overarching policy. For example, in the case of the disability sector it needs to be possible to make assessments about whether regulatory settings, such as barriers to entry and exit, are sufficient to maintain defined quality standards and to prevent predatory market behavior, while also allowing an agreed level of contestability. It should be clear that government agencies should not set prices, or create unfair or uneven regulatory settings in a market service design.



## **5. Conserving the not-for-profit sector's creation of social capital is essential**

NDS would like the implications of market design on the not-for-profit sector explored more fully. It is important that designers of a human service market recognise both the social and economic value of maintaining a thriving not-for-profit sector. Otherwise there is a very real risk that the major social and community infrastructure, built up over decades from stretching block-funding and philanthropic contributions, will disappear in the transition to a human service market.

The value that the not-for-profit sector brings cannot always be 'contracted for.' For example, community building and inclusion initiatives can build confidence and willingness in families to take on foster care responsibilities of children with disability. Foster care is inherently an unpaid activity with only extra expenses and support needs compensated. Reductions in foster parent availability have very significant social and economic consequences.

### **Understanding and marketing the benefits of a mission to build a civil society**

The distinctions between a not-for profit organisation and other players in the disability support market are not always well understood. The governance regime for an organisation is more or less irrelevant when you sign up as a business in the NDIS market and consumers are looking at quite different indicators to assess a provider.

It is the job of not-for profit providers to promote their mission and role in the community and use it in marketing strategies. However, funders, regulators, and governments as purchasers, also play a role in acknowledging and supporting the altruistic and community building missions of not-for profit providers. They can do this by offering some preferential treatments in market regulation and contract competition.

The draft report suggests that this can be achieved by contracting for Community Service Obligations (CSO) rather than relying on them as an externality. This could assist with funding some benefits such as volunteer coordination and community development (such as working with the local swimming pool to ensure people with disability can access it). However, care should be taken with the notion of itemising and contracting for every positive externality arising from mission driven organisations. The outcome focused nature of missions allows organisations to respond to changing and emerging needs to build communities and support individuals. This does not lend itself easily to pre-identified services or CSOs.

### **Retain co-ordination and collaboration within the not-for-profit sector**

While we anticipate the fair application of competition principles in the disability sector will enhance effective and efficient service provision, it is also important to consider the collaborative culture that has traditionally underpinned the not-for profit sector. Collaboration with local communities, local government, across sectors and non-government agencies, with common causes, is a rich source of social capital. It recruits volunteers, builds community engagement and enhances civil society.

Any regulation of competition in the disability sector must be designed to protect participation by small support service providers in the market without preventing collaborative approaches to community or service development and service offerings by not-for-profit organisations. This may require exemptions.

**Protect the production of social capital and a civil society:** Governments should recognise the risks to the not-for profit sector of an un-nuanced market approach and the limitations of solutions based on contracting for Community Service Obligations. A greater degree of collaboration and coordination should be permitted amongst not-for-profit providers and some preferential contracting or purchasing should acknowledge the added value of social capital infrastructure, for example, the use of volunteers.

## 6. Competition alone is not sufficient to drive innovation; research, knowledge dissemination, diversity and flexibility for service providers are critical

Competition will assist with innovation but it is not sufficient to drive the level of innovation required to radically improve the provision of human services. There is also a need for investment in co-design through funding for research and regulatory flexibility that allows services to develop and explore new service models.

The NDIS experience has indicated a need for investment in co-design processes to shape pragmatic innovation in the disability sector to meet the goals of the NDIS. This is where people with disability, their families, providers, funders and regulators work together to set the parameters for change and success and design innovations. It is not feasible to expect providers or researchers to self-fund this level of innovation at the same time as making the business model changes required in the transition to the NDIS market. Nor is it easy for providers to innovate if they are constrained by regulation.

An example of a necessary innovation that requires investment and regulatory flexibility is the development of new working arrangements that allow the NDIS participants to receive the support when they want, at the price funders and employers can afford, and that are attractive for workers. This could be explored under guidance of, and with leeway from, the Fair Work Commission as a research project. A service development process like this requires investment in the research and collaboration, as well as a willingness from the regulator to explore different rules and monitoring conditions.

In the DES space a process like this would require the government to allow providers to go outside of prescriptive contract conditions. It would require cooperation and trust as well as careful and funded monitoring.

**Invest in engagement and research:** Choice and competition principles in human services can be usefully complemented by investment in co-design based research to determine innovation that works and to spread understanding of best practice. It also requires flexibility and trust from regulators to allow providers to explore new service arrangements and perhaps new ways of assuring quality and addressing risk.

## 7. A balance between rules that respond to local conditions and national consistency that minimises compliance costs should be the goal

NDS supports the principle to reflect unique local conditions, especially in relation to pricing to reflect different jurisdictional costs. However, we also urge governments to better manage interfaces between different states and sectors, particularly for regulation around workforce which crosses sector and state boundaries. The NDIS as a national

initiative will lead to an increasing number of providers working across boundaries and the burden of some inconsistency and duplication in regulation will take a significant toll.

### **A case for nationally consistent staff screening requirements in human services**

Some regulation in human services is approached differently in every jurisdiction, and across related sectors, such as disability, aged care and child care, despite very similar requirements. This contributes to confusion, frustration and waste in a resource constrained environment. An example, of this is an employer required to pay for four police check screening processes for one worker who works in two states, with different age groups. Her police record is of course identical in every check.

There needs to be a more effective and efficient national screening system to meet the growing workforce needs of the disability and aged care sectors. The alternative is duplicated screening costs, lengthy delays in recruitment and the continued risk of unconvicted abusers moving across state and territory boundaries and across sectors.

#### **Manage interfaces between sectors and jurisdictions to ensure efficiency:**

Reflecting unique and local conditions when designing human service programs must be balanced with consideration of efficiency for providers working across borders.

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**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 990 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.