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Review of the NDIS Act
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Independent Review of the Operation of the *National Disability Insurance Scheme Act 2013*: Discussion Paper

The Mental Health Coordinating Council (MHCC) is the peak body representing community sector organisations supporting people affected by mental health conditions in NSW. Our members provide a range of psychosocial and clinical services, support programs as well as advocacy, education, training and information services with a focus on recovery-oriented practice. MHCC's membership consists of over 200 organisations whose business or activity is wholly or in part related to the promotion and/or delivery of services for the wellbeing and recovery of people living with mental health conditions. We work in partnership with both State and Commonwealth Governments to promote recovery and social inclusion, participate extensively in policy and sector development and facilitate linkages between government, community and private sectors in order to affect systemic change. MHCC manages and conducts research projects and develops collaborative projects on behalf of the sector, and is also a registered training organisation (MHCC Learning & Development) delivering nationally accredited mental health training and professional development to the community managed workforce across all human services.

Since 2011, MHCC have undertaken work in relation to the inclusion of people with mental health conditions within the National Disability Inclusion Scheme (NDIS) in NSW. In 2013 we partnered with the Mental Health Commission of NSW to further our work in this context through the 'NDIS and Mental Health Partnership Project'. From this project's findings a recent publication is now available: *Further Unravelling Psychosocial Disability: Experiences of the National Disability Insurance Scheme in the NSW Trial Site: A Mental Health Analysis* (August 2015).[1] The report describes MHCC's experiences and observations from a NSW community managed mental health sector trial site perspective across the first two years of NDIS implementation from June 2013 to 2015. We have also provided a number of submissions on various discussion papers and reviews that have arisen over the past four years, links to which are included in Appendix 1.

In response to the questions raised in the Discussion Paper (DP) MHCC comment as follows:

[1] Available: http://www.mhcc.org.au/media/67408/mhcc-hunter-trial-site-2yr-report-aug2015.pdf

Questions for stakeholders
1. Do the Objects and Principles of the NDIS Act provide a sufficient basis for giving effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities?

While the NDIS Act contains a list of principles, including a presumption of capacity and a focus on providing people with disability support to exercise capacity, we question whether the Act and the mechanisms and processes established under the Act to appropriately reflect equal recognition before the law and legal capacity.

In line with ALRC recommendations,[2] MHCC propose that reform of relevant Commonwealth, state and territory laws be consistent with National Decision-Making Principles (p.8):

Principle 1: The equal right to make decisions
All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support
Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights
The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards
Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

These principles reflect the standard indicated in the UNCRPD to recognise people with disabilities as persons before the law and their right to make choices for themselves. The emphasis being on self-determination of people who may require support in making decisions, driven by their preferences that others make on their behalf.

An emphasis on enhanced supported decision-making, as opposed to substitute decision-making (i.e., guardianship etc.,) is a practice essential to building a participant's capacity in addition to their formal and informal support networks. It is important to ensure that specific assessment for decision-making capacity is embedded in the rules and that participants are offered services that ensure supported decision-making can be enhanced.

The Objects and Principles fail to demonstrate how the Act will interface with mental health legislation in each state, or how it will operate in relation to, for example:

- National practice standards for the mental health workforce 2013[3]

[2] Australian Law Reform Commission 2014, *Equality, Capacity and Disability in Commonwealth, Summary Report* 124, Available: https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_summary_report_whole_pfd_.pdf
[3] Australian Government, Department of Health, National practice standards for the mental health workforce 2013, Available: http://www.health.gov.au/internet/main/publishing.nsf/content/mental-pubs-n-wkstd13

- The National Mental Health Standards 2010: Recovery Principles[4]

- And give effect to Australia's obligations under the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991, which is the Optional Protocol of the CRPD [5]

Questions for stakeholders 2. Does the design of the legislative framework (i.e., high level primary legislation supported by detailed NDIS Rules) enable government to further the objects and principles of the NDIS Act?

MHCC wholeheartedly support enabling of people with disability to exercise choice and control "in the pursuit of their goals and the planning and delivery of supports and services". Nevertheless, there is a concern regarding how this might play out for people with mental health conditions under community treatment orders (CTOs) in NSW.

The NDIS Rules (Support to Participants,) 2013 are scant on providing detail across all areas in Schedule 1. In relation to mental health (p.15) [6] there is a need to define exactly what is meant by treatment, rehabilitation and recovery/disability support and evidence-based practice interventions (i.e., NDIS and mainstream services and supports) which are being referred to. Likewise the skills/qualifications of the workers providing these services should be explained, since the use of the word 'clinical' is confusing in this context. While the acute treatment space is reasonable straight forward for both hospital and community this needs to be further explained as it relates to promotion/prevention/ early intervention and talking therapies. The Rules need to be updated to reflect the considerable learning in the mental health space over the more than two years and take into account particularly the learning and recommendations of the NDIS MH Reference Group and Operational Access Working Group.

We note from our experience in the Hunter site that NDIS practice in the area of funding for talking therapies varies enormously and there is no consistency in approach. This ranges all the way from a position that public mental health services and the Commonwealth mental health budget must cover all of this as a mainstream service through to a participant having all psychiatry and psychology fees covered and everything in-between.

We understand that the in-principle agreement for role delineations between NDIS and mainstream mental health services are under review.

[4] Australian Government, Department of Health, National Standards for Mental Health Services 2010, Principles of recovery oriented mental health practice, Available: https://www.health.gov.au/internet/main/publishing.nsf/content/CFA833CB8C1AA178CA257BF0001E7520/$File/servpri.pdf

[5] Appendix 1: United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, 1991, Available: http://www.health.wa.gov.au/mhareview/reports/synthesis/15%20MHA%20Synthesis%20%20-%20Appendices%201.pdf

[6] National Disability Insurance Scheme (Supports for Participants) Rules 2013, Available: http://www.ndis.gov.au/sites/default/files/documents/NDIS_(Supports_for_Participants)_Rules_2013.pdf

Questions for stakeholders
3. How well do the access criteria enable government to further the objects and principles of the NDIS Act? With particular reference to the following principles:
People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development
People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability
People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.
4. How clearly defined are the access criteria?
5. What amendments could be made to the legislative framework (if any) to:
    a. Enhance the clarity of the access criteria?
    b. Improve the effectiveness and/or efficiency of the access request process?

Under the category – Disability requirements: "The impairment or impairments are, or are likely to be, permanent; the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities: communication; social interaction; learning; mobility; self-care; self-management; the impairment or impairments affect the person's capacity for social or economic participation," we propose that there may be persons with permanent impairment/s that are nevertheless episodic. A person may be have the capacity for social or economic participation when well, and totally debilitated when they become unwell. MHCC agree with the concerns about concepts of permanence and that early intervention will necessarily reduce a person's future needs for supports stated in the DP.

Questions for stakeholders
6. How well does the legislative framework's definition of what constitutes 'reasonable and necessary supports' support the independence and social and economic participation of people with disability?
7. What amendments could be made to the legislative framework (if any) to:
    a. Improve the effectiveness and/or efficiency of the participant planning and assessment process (including review)?
    b. Ensure the NDIA has the required capacity to control costs in relation to participant plans?

Regarding Question 6 – Reviewing the definitions as described under s34, we comment as follows:

(c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
This definition will need to be further clarified as to what measures might be used to assess value for money and measure relative benefits against alternative supports.

(d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;
We question who will be tasked the role of assessing the support against best practice?

(e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;
Often people with mental health conditions living in the community are extremely socially isolated, have no family connections and are totally disconnected to the community as a whole. It should be

recognised that such individuals may have not informal networks and funding supports will need to take this into account.

(f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

(i) as part of a universal service obligation; or

(ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability

Services that people receive through general service systems generally also have limits to access. For example a person may access psychological services through the MBS, but clearly need and want to access greater support in this context, as is often the case with people with mental health conditions that relate to histories of childhood abuse. The NDIS should offer flexibility surrounding such services.

Regarding Question 7 - we comment as follows:

What amendments could be made to the legislative framework (if any) to:

a. Improve the effectiveness and/or efficiency of the participant planning and assessment process (including review)?

We refer back to earlier comments in answer to Question 1, that there is a need to align with National Decision-Making Principles (p.8): namely Principle 2.

b. Ensure the NDIA has the required capacity to control costs in relation to participant plans?

As it stands we have only sighted the ILC Policy Framework which is a broad based document that does not elaborate on final implementation plans, yet to be finalised.

Questions for stakeholders
8. How well does the legislative framework (including, but not limited to, the provider registration requirements) enable government to promote innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability?
9. Do the registration requirements strike the right balance between supporting principles of choice and control, including in relation to taking reasonable risks and the rights of people with a disability to freedom from abuse, neglect and exploitation?
10. How clearly defined is the NDIA's role in the registration of providers?
11. What amendments could be made to the legislative framework (if any) to enhance the effectiveness and/or efficiency of the provider registration process?

Service providers have multiple accreditation and registration requirements. MHCC supports establishing a consistent national registration framework, to insure quality improvement. Standards for a national registration framework must take into account the National Standards for Mental Health Services, to ensure that mental health is covered adequately. Accreditation against agreed standards is the preferred quality assurance pathway for organisational provider registration. Where services are provided for people with psychosocial disability related to a mental health condition, this should include the development of approaches for mutual recognition of both disability and mental health standards.[7]

[7] VICSERVE, 2015, https://engage.dss.gov.au/wp-content/uploads/2015/05/VICSERV-Submission-on-NDIA-QS-Framework-April-20151.pdf

However, the issue of 'sole providers' – of which there are a growing number - is of concern. While some of these will likely be Australian Health Practitioners Regulation Agency (AHPRA) registered health professionals the registration process does not necessarily ensure quality and safety. Furthermore, other providers will not be AHPRA registered (e.g., social workers, counsellors and psychotherapists, cleaners, drivers). Furthermore, it is likely that other 'sole providers' may not be AHPRA registered.

MHCC do not see how innovation is supported by the current legislative framework. Whilst market competitiveness should foster innovation and new business models. The legislative framework and registration requirements do not seem to demonstrate this. An important part of this will be the necessary doubling of the workforce to meet demand. Changes in business models will mean organisations need to consider organisational design and the core competencies needed by disability sector employees. Workforce development strategies will need to include change management, training, internal communications, recruitment and performance-based salaries.[8]

Questions for stakeholders
12. How well do the nominee provisions provide choice and control to, and protect the rights and wishes of, people with disability?
13. What amendments could be made to the nominee provisions (if any) to:
    a. Enhance effectiveness/and or efficiency
    b. Ensure the legislative framework interacts appropriately with State and Territory legislation?

There is no reference to the availability of supported decision-making in the Act. MHCC strongly endorse the findings of the ALRC report which is based on the concepts of supporters and representatives.[9] Even if the Act does ultimately include these concepts, the resources need to be made available to provide SDM available through an independent agency. The National Decision - Making Principles as recommended in Recommendation 3.1 should be included in the NDIS Act.

Questions for stakeholders
14. What amendments could be made to the legislative framework (if any) to enhance the effectiveness and/or efficiency of the merit review process?

We are unclear as to what is referred to in this question as the term 'merit review' is not defined or present in the Act, the Discussion paper nor the NDIS Rules (Supports for Participants) 2013.

MHCC propose that a Charter of Consumer Rights be included in the Act as an appendix referred to in the Objects of the Act. Whilst the UNCRPD outlines rights broadly, a Charter of Rights could more aptly demonstrate rights in the context of the NDIS including for those deemed ineligible to for a NDIS package.

[8] Business SA, Issue No. 75 - February/March 2014, Available: http://www.in-business.com.au/Magazine/issue-75-Briefs/75-All/ndis-opportunity-for-nfp-innovation#.VgjtNukcS70
[9] ALRC, 2014, *Equality, Capacity and Disability in Commonwealth Laws*, ALCR Report 124, August.

Questions for stakeholders
15. What amendments could be made to the legislative framework (if any) to
    a. Enhance the effectiveness and/or efficiency of the compensation and/or debt recovery processes?
    b. Ensure the NDIA has the required capacity to control costs in relation to the compensation and/or debt recovery processes?

MHCC are not in a position to comment on this question.

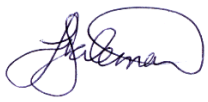
Questions for stakeholders
16. How well do the governance arrangements enable government to further the objects and principles of the NDIS Act?
17. What amendments could be made to the legislative framework (if any) to enhance the effectiveness and/or efficiency of the NDIS's administration?

The Governance arrangements weakly describe the relationship between agencies to provide the services across sectors and systems. In order to address a broader disability demographic to include people with psychosocial disability needs, MHCC recommend that the NSW Government review the MOU between Housing and Mental Health Agreement (HMHA) to articulate how cooperation can be fostered across agencies.

Questions for stakeholders
18. Are there any other aspects of the NDIS legislative framework that you believe are impacting on:
    a. Government's ability to further the objects and principles of the NDIS Act?
    b. The efficiency of the NDIS's administration?
    c. The capacity of the NDIA to control costs?
    d. Other legislation, including State and Territory legislation?
    e. The effectiveness of information sharing between the NDIA, jurisdictions and providers?

MHCC urge that the issue of outcomes and evaluation be addressed somewhere in the framework. It is important that data collection on outcomes and evaluation in addition to gathering inputs and outputs are made available for learning and quality improvement activities. This would need to include consumer perspectives on services received as well as with regards to complaints processes and outcomes of complaints.

MHCC thanks the Australian Government for the opportunity to respond to this discussion paper. However, we mention that the request for comment on 17 September and a deadline for feedback 9 October, somewhat limited our ability to consult with our member organisations and colleagues across service sectors. Please feel free to contact Corinne Henderson at corinne@mhcc.org.au should you require additional information in relation to this submission.



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Appendix 1

- Response to DSS: National Disability Advocacy Framework: Discussion Paper - July 2015
- Response to DSS - NDIS Quality and Safeguarding Framework: Discussion Paper – April 2015
- 2014
- Submission Australian Law Reform Commission. Equality, Capacity and Disability in Commonwealth Laws: Discussion Paper 81 - June 2014
- Mental Health Council of Australia. Providing Psychosocial Disability Support Through the NDIS - May 2014
- 2013
- Minister Families, Community Services and Indigenous Affairs, Disability Reform: Early intervention and the NDIS - April 2013
- FaHSCIA. MHCC comments NDIS Rules Consultation Paper - March 2013
- Department of Family and Community Services. Reforming NSW Disability Support: Legislative Structure and Content. Discussion Paper - February 2013

All submissions available from: http://www.mhcc.org.au/policy-advocacy-reform/influence-and-reform/mhcc-submissions.aspx