



Ageing, Disability and Homecare (ADHC) INDUSTRIAL REPORT

DEFENDING
DISABILITY SERVICES

March 2014

NDIS WORKFORCE IMPLICATIONS THE NSW CONTEXT

Introduction

This report is intended to provide PSA members with an overview of the National Disability Insurance Scheme (NSW Enabling) legislation and its industrial implications for the staff of Ageing, Disability and Home Care.

It is not a campaign update.

The PSA is deeply opposed to the privatisation of publically delivered disability and home care services and, building on the success of our Community Forum in Newcastle last year, will continue to campaign with other affected unions against privatisation.

While we will continue to campaign against privatisation, it is incumbent on the PSA to negotiate the most favourable arrangements for affected members. Our active participation in the *NDIS Implementation Joint Employee Relations Consultative Forum* is a necessary part of meeting that obligation.

Overview

The National Disability Insurance Scheme (NDIS) is a federal government initiative that will reshape the funding and delivery of disability services throughout Australia.

The NDIS was originally conceived as a means of improving funding for disability services through the introduction of a national levy, modelled on the Medicare Levy.

Following a Commonwealth Government review, it was determined that a new federally administered disability services system would be trialled with launch sites commencing in Tasmania, South Australia, NSW (Hunter region) and Victoria from July 2013. It is anticipated that the trial will continue until full national implementation in 2018.

NDIS Implementation – the NSW context

The NSW Government has confirmed plans to withdraw from frontline disability and home care services in NSW by 2018.

This is the result of an agreement signed by the NSW and Commonwealth Governments in December 2012 to create the National Disability Insurance Scheme (NDIS).

While the precise detail is unclear, it is anticipated that this will impact on around 14,000 public sector workers as the disability and home care services provided by ADHC are transferred to the Commonwealth, non-government and private sector.

The introduction of the NDIS is being used to explain the transition of disability services. However, there is no direct correlation between a new federally administered disability services system and the NSW Government's decision to cease the public delivery of these services in our state.

Legislation that facilitates the transfer of disability and home care services, staff and assets has passed the NSW Parliament.

An industrial stakeholder forum has been established with Unions NSW to address the NSW Government's legislative framework.

According to data prepared by FACS, Disability Support Workers in the public service earn approximately 25% more than their non-government equivalents.

The National Disability Insurance Scheme (NSW Enabling) Act 2013

The NDIS NSW Enabling Act facilitates the privatisation of disability services in NSW and allows for the transfer of assets and staff to non-government entities.

Part 3 of the Act provides for the forced transfer of ADHC staff to non-NSW Government employers, including NGO's, for-profit providers and the Commonwealth Government.

Staff have no immediate entitlement to transfer compensation and a transfer 'does not constitute a retrenchment, redundancy or termination of employment at the initiative of the Crown.'

While the Act allows the Minister to enter into 'transfer agreements' with new providers, which may provide an 'employment guarantee period', the scope of these agreements is limited to the terms and conditions of the transferred employees existing 'industrial instrument', meaning accrued redundancy entitlements may be forfeited on transfer. Long service leave may also be cashed out at the discretion of the Minister.

Importantly, any 'transfer agreement' is not an industrial agreement and has no effect on the extent of any inconsistency with any provision of the Fair Work Act 2009, or any instrument under that Act.' This means that the terms of a transfer agreement may only be enforced by a party to the agreement (that is, presumably, the NSW Government and new private provider) and not an employee (or union on their behalf), and a federal agreement made after the transfer may prevail over the terms of the transfer agreement. Effectively, if the new employer renegotiates its industrial arrangements with its workforce post-transfer (for example negotiates a new enterprise agreement), the employer's new enterprise agreement may replace the transfer agreement.

The Act also precludes any obvious legal avenue to protect redundancy entitlements such as an Award application.

Additionally, Part 2 of the Act allows for the establishment of implementation companies. The effect is presumably to break the sector up into neat and already-operational packages for the tendering process. Under this model staff entitlements may be forfeited if the company goes bust.

NDIS Implementation Joint Employee Relations Consultative Forum

Terms of Reference have been agreed to by Unions NSW and the Department of Family and Community Services.

The ToR addresses; Forum membership, purpose (principles), administrative arrangements, frequency of meetings, and time release arrangements for union delegates.

The PSA, Nurses Association and United Voice have made submissions relating to delegate time release. It is anticipated FACS will provide a response by 6 March 2014.

Meetings of the Forum have been scheduled fortnightly from 30 January 2014. The PSA is being represented by delegates and staff.

Unions NSW has proposed that a framework agreement be negotiated for staff affected by any transfer of services.

Additionally, because of the substantial pay differentials between the public and non-government sectors, discussions have also begun in relation to superannuation arrangements. There are around 800 staff who contribute to a defined benefits scheme (SSS and SAS) and separate legislative amendment will be required to protect their entitlements.

NDIS Framework Agreement – Priority areas for negotiation

Unions NSW and affiliates have tabled the following proposal to guide future negotiations around transitional arrangements for employees affected by the NDIS Enabling Act:

“NDIS Framework Agreement – Priority areas for negotiation”³⁹.

1. *No forced transfer.*
2. *Redundancy.*
3. *Retention period.*
4. *Redeployment and priority placement arrangements for non-transferring staff.*
5. *Transfer package with the following elements:*
 - a. *payment for all employees who transfer;*
 - b. *employment guarantee;*
 - c. *leave entitlements;*
 - d. *recognition of service;*
 - e. *Superannuation.*
6. *Contractual obligations on new employer regarding:*
 - a. *Execution of an enforceable Federal industrial instrument that applies at and from the point of transfer and which is no less than the terms and conditions of employment the employees enjoyed prior to transfer and reflects the conditions of transfer;*
 - b. *A process to deal with discrepancies in terms and conditions of employment between transferred staff and other staff of the new employer; and*
 - c. *Those elements of the transfer package requiring new employer cooperation.*
7. *Process for the variation of hours, shifts or location of work.*
8. *Dispute resolution process.*

**This list is not exhaustive.*

Additionally, unions have sought a commitment that the liability for superannuation and statutory leave entitlements (long service, extended and recreation leave) be underwritten/guaranteed by Government to ensure that no employee loses their entitlements if the new provider's business goes bust.

FACS and Treasury representatives have indicated that the proposal to negotiate a framework agreement will be put to Cabinet in March 2014.

NDIS Implementation Peak Union Consultative Forum Meeting, 13 February 2014

Items discussed included:

Union Delegate Release: Unions have previously been invited to provide further detail regarding the release of union delegates to support the work of the Forum. A process continues to take place to consider those proposals from the unions for the release of union delegates.

Paid Time Meetings: It was previously agreed that a 15 minute paid union consultation meeting will occur at monthly team meetings. These should now be occurring. Discussions continued about the best way to ensure unions can get the details of those meetings. FACS undertook to provide contact names for this purpose.

Transaction Scope: Information was supplied by FACS at the meeting to start to clarify how different groups of staff will be impacted by the transition to the NDIS. FACS will undertake further work before the next meeting and on an on-going basis to better identify impacted staff, including at the union's request; those groups of staff which are likely to fall outside of the transition to the NDIS. FACS confirmed that the following services are likely to be transferred ('in scope'): Large Residential Centres, Group Homes, Specialist Supported Living, Home Care Services and Aboriginal Home Care. Additionally, further clarification will be provided in relation to Centre Based Respite and Community Justice Program.

There are a number of service streams which are not included in the transfer scope including; Community Support Teams, District & Corporate streams.

Terms and Conditions of employment relating to transfer: The Forum had further discussion to start prioritising issues highlighted by the unions as focus areas for negotiations. It is anticipated a proposal regarding the concept and parameters of a Framework Agreement will be put to Cabinet in

March 2014. Further negotiations regarding the form of clauses regarding superannuation, leave and recognition of service will begin to be negotiated at the next meeting.

Superannuation: Superannuation was identified in previous discussions as an area where immediate work could occur. A representative from the Office of Finance attended the meeting and provided information on how access to the current superannuation schemes could be preserved.

Update on Hunter Launch: The unions sought clarity in relation to; client consent, representation for clients where there is no immediate family and staff participation in NDIA planning processes. This information will be provided by FACS at the next meeting.

Quality Framework: Some preliminary discussions took place regarding what processes are in place to ensure quality of care and professional wages are maintained after the transition.

Next meeting: The next meeting is scheduled for 6 March 2014.

ATTENDEES:

NSW GOVERNMENT REPRESENTATIVES

Department of Family and Community Services

Alastair Hunter, Deputy Chief Executive Service Delivery Programs (Chair)

Samantha Taylor, Deputy Chief Executive People and Choice

John Bailey, Director Employee Relations

Catherine Carvolth, Manager Employee Relations (Secretariat).

NSW Industrial Relations

Lolita Kepars, A/Executive Director NSW Industrial Relations

Anna Kulesz, A/Director Public Sector Industrial Relations.

UNION OFFICIAL REPRESENTATIVES

Unions NSW

Emma Maiden

United Voice

Mel Gatfield

NSW Public Service Association

Kerrie Butson, Industrial Officer

Thane Pearce, Industrial Officer

Paul James, Hunter Regional Organiser

Shane Elliott (A&R PSA Delegate)

Lyn Ling (A&R PSA Delegate)

Chris Harris (A&R PSA Delegate)

Tony Hay (A&R PSA Delegate)

Loretta Wilson (Home Care PSA Delegate)

Australian Services Union

(Apology)

Health Services Union

Ayshe Lewis

Australian Salaried Medical Officers Association

Dennis Ravlich

NSW Nurses and Midwives Association

Michael Wright

Wayne Baxter

Various Union Delegates.

NSW Plumbers Union, CFMEU, ETU, AMWU

Dave Broadley

CONTACT

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MEMBER SUPPORT CENTRE

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