

NDIS Planning

Submission to the Joint Standing Committee on the
National Disability Insurance Scheme

12 September 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

Many of our members act for clients who are also participants in the NDIS and have acted in the review and appeal process.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry being conducted by the Joint Standing Committee on the National Disability Insurance Scheme ('the Committee') into NDIS Planning.

Response to Terms of Reference (a), (b) and (c)

2. The experience of ALA members and their clients is that there is a clear skills and experience deficit among NDIS planners. This is undermining the effective operation of the scheme and causing significant problems for participants.
3. In our view, the primary problem is a lack of understanding of a participant's care needs, support available, the legislation and rules that underpin the NDIS. This results in plans being approved that do not meet the participants' needs. Other problems arising from the lack of skills and experience among planners include inappropriate communication and delays in assessing and approving care plans.
4. The problem is particularly stark for participants with complex care needs. These are also the most vulnerable cohort of participants. An appropriate, comprehensive and tailored care plan for such a participant demands a planner with sufficient training and significant experience.
5. In many cases, there also seems to be a fundamental lack of understanding of the legislation and rules that underpin the scheme. This leads to decisions that are incorrect at law and undermine the quality and appropriateness of the plans.
6. The background and experience of planners appear to be variable. While there are no doubt many who have the appropriate skills, there are many who do not. Anecdotally, we have been told that a participant's experience with the NDIS is largely defined by their planner – if you get a 'good' one, you are likely to have a positive experience. However, if you get a 'bad' one, your plan is unlikely to be sufficient nor appropriate, forcing you down the path of internal and external review.
7. It is entirely inappropriate that a participant's experience with the NDIS, and their prospects of receiving an appropriate plan, should be defined by chance. Yet this is exactly what seems to be occurring given the huge variance in capacity among the planners.

8. Poor planning also results in a significant administrative burden and financial cost for the NDIS because it increases the numbers of complaints and requests for internal review. It also increases the number of external appeals to the Administrative Appeals Tribunal (AAT) and Federal Court.
9. The ALA submits that urgent action is required to increase the skills and capacity of NDIS planners through training and professional development. The impact of disability can be complex and nuanced, and understanding the care and support needs of those living with disability requires specific training. While we acknowledge the barriers to hiring planners who already have the requisite experience, the NDIS must do more to train and develop those they do hire.

Response to Term of Reference (d)

10. ALA members have reported significant delays in the planning process. This suggests that there are not enough planners to meet demand. Such delays are clearly inappropriate when participants are relying on NDIS funding for their care and supports. The ALA encourages the Committee to pay particular attention to submissions made on this point by participants, carers and disability groups.

Response to Term of Reference (e)

11. Participant involvement in the planning process is essential and its absence undermines trust in the scheme. Participants who feel isolated or marginalised are also more likely to be dissatisfied with the outcome. This is contrary to the very principles of the scheme. It also increases the administrative cost and burden on the scheme through increased levels of complaints and reviews.
12. Anecdotal experience suggests that some participants feel like they do not have an adequate 'voice' in the process. They report providing instructions and input to the planner, then receiving a plan (from their perspective) that bears little resemblance to what was discussed in the planning meeting. Reports of mistakes or misunderstandings are common. However, once a plan is approved it is very difficult to have it changed. The idea of draft plans has merit as it would allow participants to provide further input and instruction before the plan is approved. It would also provide an opportunity to correct errors or misconceptions.

Response to Term of Reference (f)

13. No response to this term of reference.

Response to Term of Reference (g)

14. No response to this term of reference.

Response to Term of Reference (h)

15. The internal review process fails to provide an accessible, efficient and effective mechanism for challenging incorrect decisions, changing plans and resolving disputes. It is the experience of ALA members that real change is only effective once the internal review process has finished and the external review process is engaged.
16. As a result, the review process provides only a nominal level of accountability. Decisions that are clearly wrong at law are not corrected, forcing participants into the external review process to effect change.
17. An uncharitable assessment is that the internal review process is only effective as a barrier to change and accountability, tiring and frustrating participants to the point of giving up. Such a conclusion is not without evidence or merit because the NDIA's handling of internal reviews has been problematic. For example, the Commonwealth Ombudsman received 400 complaints about the Agency's handling of reviews in an 18-month period to January 2018, which represented 32.5 per cent of all complaints about the NDIS.²
18. There are a number of problems that make the review process so ineffective. It is generally unclear whether the person undertaking the review has any additional expertise or experience in disability support and care needs. If that is not the case the problems created by the original planner's lack of expertise are simply replicated. In our experience, this is particularly problematic in cases involving catastrophic disability and complex care needs.
19. The ability of participants to obtain additional expert evidence about their needs (for example, from an occupational therapist) is also extremely limited in most cases. It is therefore uncommon for the person conducting the internal review to have access to any new evidence that might better inform their decision.

² Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013*', May 2018, 2.3.

20. Finally, there seems to be significant confusion over the correct interpretation of the legislation and associated instruments across the NDIA. This leads to inconsistent application of the rules and different outcomes depending on who is making the decision at any point in time.
21. There have also been significant problems with delays during the internal review process. This was highlighted by the Commonwealth Ombudsman in its 2018 report.³ While participants must file a request for a review within three months of receiving a notice of the decision, there is no timeframe imposed on the Agency to actually complete the review. Many participants report waiting months for any response,⁴ by which time their current plan may have expired and the process has to start again. This is another example of the process providing limited accountability.
22. The Commonwealth Ombudsman also highlighted a number of other problems with the internal review process, including participants being encouraged or warned not to request a review,⁵ requests for a review triggering a new plan, which restarts the whole process⁶ and the Agency providing incorrect advice about review rights.⁷
23. The ALA notes with optimism the government's recent commitment to a NDIS Participant Service Guarantee to:
- ‘Introduce a new NDIS Participant Service Guarantee – setting new standards for shorter timeframes for people with disability to get an NDIS plan and to have their plan reviewed, with a particular focus on children, and participants requiring specialist disability accommodation (SDA) and assistive technology.’⁸
24. As to ways to ‘streamline’ the review process, the ALA is concerned by the chosen terminology. This process *must* be thorough, robust and detailed, which does not necessarily mean it can or should be ‘streamlined’.

³ Commonwealth Ombudsman, ‘Administration of reviews under the *National Disability Insurance Scheme Act 2013*’, May 2018.

⁴ *Ibid.*

⁵ *Ibid* 4.34.

⁶ *Ibid* 4.30.

⁷ *Ibid* 4.16.

⁸ <https://www.liberal.org.au/our-plan-support-people-disability>.

25. However, if the intent is to make the process more accessible and effective, the ALA recommends:

- Ensuring that the decision maker has specialist experience and qualifications, and has access to sufficient and thorough evidence from which to make an informed decision;
- Providing greater accountability for the NDIA when internal review decisions are subsequently overturned in the AAT process (for example, by obliging the NDIA to pay a participant's legal costs);
- Reducing the number of review requests by addressing the problems with the planning process outlined in our response to Terms of Reference (a), (b) and (c); and
- Implementing legislated time limits for the completion of an internal review, with the participant's request being upheld should the NDIA fail to comply.

26. In addition to being contrary to the principles of the NDIS, the problems with the review process are also extremely costly. Firstly, there is an administrative burden associated with each complaint. Secondly, the ineffectiveness of the review process leads to increased numbers of participants seeking external review in the AAT. The NDIA is invariably represented by private insurance legal firms in this process and thus incurs significant amounts of otherwise avoidable legal costs. If the initial planning and internal review processes are robust and thorough, then the reliance on the review system would be greatly reduced.

Response to Term of Reference (i)

27. If the original decision is affirmed in the internal review process, or the participant is not satisfied with the extent of any variation, a participant has 28 days to file an application in the AAT. This can only happen once an internal review has been conducted.

28. The AAT is also a 'no cost' jurisdiction (that is, the unsuccessful party is not obliged to pay the legal fees arising from the dispute) and is designed to be a conciliatory process.

29. The AAT appeals are case managed by the Tribunal and can involve a number of preliminary case conferences and alternative dispute resolution (ADR) via a conciliation conference. If the matter does not resolve at a conciliation conference, it will be listed for hearing by the Tribunal. Typically, the NDIS is legally represented by large and skilled legal firms. However, unless a participant has engaged their own legal representation, they will be self-represented.

30. It is also open to a participant to put new evidence to the NDIA through this process, which may take the form of new expert evidence or more evidence from the participant themselves and/or their support network.
31. There are a number of problems with the AAT process that undermine its efficacy and fairness. Firstly, the 'no costs' nature of the AAT largely prevents law firms from offering a 'no win, no fee' service in which the costs are recovered from the unsuccessful party, precluding most participants from accessing legal representation because of the prohibitive cost of paying themselves. Legal Aid has received some funding for these appeals but resources are notoriously scarce. A number of disability advocacy groups have also been funded to provide support but most are only able to provide advice rather than formal legal representation.
32. Most participants will therefore be self-represented. However, the value of support under dispute can amount to tens or hundreds of thousands of dollars *per year*. Many involve complex disabilities, high-care needs and require sophisticated expert evidence, which most participants will not be able to afford or arrange.
33. Further, the legislation and rules are difficult to interpret, subjective, and may involve complex questions of law. Some disputes involve questions of statutory interpretation, or the interaction between the NDIS and other sources of support (for example, Medicare and the health system). This further exacerbates the gross unfairness of forcing a participant to represent themselves against a large commercial insurance legal firm.
34. The barriers to participants engaging appropriate legal representation require particular attention. As noted, the NDIA engages private firms to represent them in every AAT appeal. This is both extremely costly and grossly unfair when the participants themselves are rarely represented. It is also entirely at odds with the principles of the NDIS.
35. Simply put, the process is grossly weighted in favour of the NDIA and completely undermines any sense of trust and accountability among participants.
36. As noted in our response to Term of Reference (i), the appeals process comes at a significant cost to the NDIS. However, it is also important to highlight that such a flawed process does nothing to improve decision-making within the NDIA. Instead of encouraging good decision-making (and thereby minimising legal disputes), this inequitable process simply protects the NDIA from accountability. It also slows the development of jurisprudence, meaning the scope and nature of disputes will not have

been narrowed by previous decisions. This will lead to unnecessary costs for the NDIA and ongoing uncertainty and hardship for participants.

37. While the 'no costs' status of the AAT also provides protection for participants should their appeal be unsuccessful, the balance of power remains grossly weighted in favour of the NDIA. Urgent action is required to improve the planning process, break down the barriers to participants engaging legal representation and ensure that the external review process provides a transparent and robust accountability mechanism.

38. One option is to make the NDIA liable for legal costs where they have unsuccessfully defended an AAT appeal. While we accept that the additional cost this represents may not be palatable, it would allow participants to access legal representation and level the playing field. Further, it is also likely to lead to savings in other areas; a penalty would encourage the NDIA to improve decision making at first instance and in the internal review phase, which would force a more considered view about which appeals should be defended.

Response to Term of Reference (j)

39. No response to this Term of Reference.

Response to Term of Reference (k)

40. No response to this Term of Reference.

Response to Term of Reference (l)

41. The precarious position of participants in rural and remote areas has been well documented, as have the challenges associated with effective service delivery. Thin markets are emerging and becoming entrenched and there is a glaring lack of workforce infrastructure.

42. ALA members report examples of regional and remote communities where there are no service providers to provide the services that participants need. So, participants have funding but no way of spending it. The ALA has also heard that transport support offered through the NDIS does not adequately address the needs of those in rural and remote areas.

43. Urgent intervention is required to address the workforce infrastructure problems. This must include more flexible approaches to planning and funding.

Response to Term of Reference (m)

44. The ALA is concerned that the scheme as it is currently structured replicates the inequities and frustrations of the past. In particular, the planning process is deeply flawed, leaving participants with a patently unsatisfactory choice: accept a substandard plan; or expend a tremendous amount of emotional and financial capital fighting the NDIA through an inefficient and unfair review system.

45. This effectively creates different classes of participants — those who have the understanding to identify a bad plan and those who do not. Those who have the emotional and financial resources to pursue bad decision making and those who do not. This is exactly the problem that the NDIS was supposed to address. There are a minority of participants who are able to arrange support, obtain the required expert evidence and fund legal representation. However, the issue is not whether it is *possible* but whether it is a fair demand to make of participants. The answer is unequivocally in the negative

Conclusion

46. The ALA welcomes the opportunity to have input into the review being conducted by the Joint Standing Committee into NDIS Planning. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

Andrew Christopoulos



President

Australian Lawyers Alliance