Independent Assessments

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

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Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
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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.

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 provide this submission to the Joint Standing Committee on the National Disability Insurance Scheme ('the Committee') inquiry into independent assessments.

2. The ALA has serious concerns regarding the Federal Government's plan to require all future NDIS participants to undergo a mandatory assessment in order to access the scheme. The ALA holds similar concerns regarding the proposal for all existing participants to be progressively required to undergo the same assessment process before they receive their next NDIS plan and funds.

3. The ALA understand that these assessments will be used by the National Disability Insurance Agency ('NDIA') to decide who will be given access to the scheme and how much funding and support they will receive.

4. This submission will specifically respond to the following Terms of Reference: (a), (d), (e), (i), (j) and (k).

ToR (a) - The development, modelling, reasons and justifications for the introduction of independent assessments into the NDIS

5. The ALA is deeply concerned that the proposed changes to mandate independent assessment will cause irreparable damage to the individualised and personalised nature of the NDIS, resulting in an automated process that will not adequately consider individual need and circumstance. The ALA submits that the proposed changes will undermine the legislative intent of the scheme and will result in many people with disability unable to access the support they need.

6. Section 3 of the *National Disability Insurance Scheme Act 2013* ('the *NDIS Act*') provides for a key principle of the NDIS being to enable people with disability to exercise choice and control.[2] The ALA submits that the introduction of independent assessments, under the Government's current plan, actively erodes the principle of 'choice and control'.

[2] See for example NDIS Act: https://www.legislation.gov.au/Details/C2020C00392: Part 2, Clause 3(e) and Clause 4(4).

7. In addition, a key principle of the NDIS Act is the centrality of people with disability and the importance of co-design. This is clearly recognised in Section 17A of the *NDIS Act* which details the principles relating to the participation of people with disability:

> **Section 17A**
>
> **Principles relating to the participation of people with disability**
>
> (1) People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.
>
> (2) People with disability will be supported in their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised.
>
> (3) The National Disability Insurance Scheme is to:
>
> (a) respect the interests of people with disability in exercising choice and control about matters that affect them; and
>
> (b) enable people with disability to make decisions that will affect their lives, to the extent of their capacity; and
>
> (c) support people with disability to participate in, and contribute to, social and economic life, to the extent of their ability.

8. The centrality of people with disability and the importance of co-design was also supported by the recent Tune Review.[3]

9. The ALA submits that the introduction of independent assessments has not been done in the spirit of co-design nor the centrality of having people with disability in decision making. The ALA is concerned that the underlying motivation for these reforms is to cut costs.

10. In addition, the ALA notes the first stated objective of the *NDIS Act* to give effect to Australia's international human rights obligations under the *Convention on the Rights of Persons with Disabilities* (section 3(1)). In addition, under section 3(1)(i) of the *NDIS Act* the objects also include to give effect to certain obligations that Australia has as a party to:

    - *the International Covenant on Civil and Political Rights;*

[3] https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf: p.218

- *the International Covenant on Economic, Social and Cultural Rights;*
- *the Convention on the Rights of the Child;*
- *the Convention on the Elimination of All Forms of Discrimination Against Women;*
- *the International Convention on the Elimination of All Forms of Racial Discrimination.*

11. The ALA submits that the proposed reforms are not consistent with the human-rights based objects and principles that underly the *NDIS Act*, and serve to diminish the rights of people with disability.

12. The ALA further submits that the proposed reforms appear to be contrary to the recommendations of the Tune Review. Recommendation 7 of the Tune Review[4] reads as follows:

> *The NDIS Act is amended to:*
>
> *a. allow evidence provided to the NDIA about a prospective participant or participant to be used for multiple purposes under the NDIS Act, including access, planning and plan review processes*
>
> *b. provide discretionary powers for the NDIA to require a prospective participant or participant undergo an assessment for the purposes of decision-making under the NDIS Act, using NDIA-approved providers and in a form set by the NDIA.*

13. Significantly, Tune does not recommend the mandating of independent assessments. This is made explicit in paragraph 4.39 of his report:

> *Therefore, it is reasonable that the NDIS Act is amended to enable the NDIA to require the provision of a functional capacity assessment by a NDIA-approved provider, but that this power be discretionary. To support this, the NDIA will need to develop clear operational guidelines for decision makers in exercising this discretion.*

14. Tune noted the importance of participants having the right of participants to choose which NDIA-approved provider undertakes the functional capacity assessment, and also participants having the right to challenge the results of the functional capacity assessment:

[4] https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf: p.14

The NDIS Act should be amended to support the use of functional capacity assessments as proposed above. However, there are a number of key protections that need to be embedded as this approach rolls out, including:

a. *participants having the right to choose which NDIA-approved provider in their area undertakes the functional capacity assessment*

b. *participants having the right to challenge the results of the functional capacity assessment, including the ability to undertake a second assessment or seek some form of arbitration if, for whatever reason, they are unsatisfied with the assessment*

c. *the NDIA-approved providers being subject to uniform accreditation requirements that are designed and implemented jointly by the NDIA and appropriate disability representative organisations*

d. *the NDIA providing clear and accessible publicly available information, including on the NDIS website, on the functional capacity assessments being used by the NDIA and the available panel of providers.*[5]

ToR (d) - the independence, qualifications, training, expertise and quality assurance of assessors

15. The ALA is concerned that there cannot be a perception of independence of the assessors given that the assessments will be performed by an organisation/organisations contracted by the NDIA. We suggest that this creates a perceived conflict of interest causing continuing doubt about the purity of the decision making.

16. Under the current arrangements, the organisations and individuals who provide assessment reports are experts operating with total independence. There is no real or perceived conflict of interest.

17. The ALA is also concerned about the quality assurance of the assessors. Developing a complete and accurate understanding of the functional abilities of people with "invisible" or complex disabilities requires specialised skills and experience. We are not confident that the planned model takes this into account.

[5] Ibid, paragraph 4.34.

18. Under the proposed new scheme assessments will be carried out by outsourced private contractors using standardised tools in a session with limited time. Assessors will not be known to the person with the disability. The ALA submits that in these circumstances it will be extremely difficult to capture individual complexity or build a comprehensive and accurate picture of a person's particular needs and circumstances.

19. The ALA is also concerned that under the new process, there will be a significant reliance placed on the family members or carers of the person with disability to take part in the assessment. There will be circumstances when this is not appropriate. In addition, there will be people with a disability who will not have supportive family members or carers who can assist in providing accurate, reliable or independent information.

20. The ALA is also concerned that the assessors who are contracted to do these assessments will not be able to offer other services to NDIS participants. This will significantly reduce the number of qualified therapists available to support people with disability and their families, particularly in rural and regional areas.

21. The ALA again refers the Committee to the above comments referring to the Tune recommendation for a *discretionary* power to utilise independent assessment. These powers would be useful in situations where the applicant or participant does not currently have allied health professionals able to offer professional observations about that specific client's disability, or that the applicant or participant doesn't have the means to obtain such reports. The ALA submits that in other situations, it is not appropriate to mandate independent assessments for the reasons outlined above.

ToR (e) - the appropriateness of the assessment tools selected for use in independent assessments to determine plan funding

22. The ALA is concerned that the assessment tools selected for use in independent assessments are principally designed for screening or assessing functional capacity. Accordingly the ALA is concerned that it is not appropriate to use these tools to determine an appropriate level of support and allocation of funding or to determine a person's NDIS budget. In short, the ALA is concerned that the tools adopted by the NDIS are simply not fit for purpose. They were not designed to assist in the development of support budgets.

23. The ALA is also concerned that the tools were not specifically designed for use in the disability space and that they are not able to take into account the complexities of an individual's disability, particular those with cognitive disability.

ToR (i) - opportunities to review or challenge the outcomes of independent assessments

24. The ALA is concerned that under the new scheme, the results of the assessment cannot be challenged or appealed, and that individuals will not be given a copy of the full assessment report unless they apply to see it. This will mean that there will be very few circumstances where the plan and budget can be changed after the assessment is complete. NDIS planning meetings will instead focus on how to spend already allocated funds rather than examining what support people need.

25. As noted above, the Tune Review unambiguously asserted the importance of participants having the right to challenge the results of the functional capacity assessment, including the ability to undertake a second assessment or seek some form of arbitration if, for whatever reason, they are unsatisfied with the assessment.

26. The ALA has previously provided submissions to the Committee outlining its concerns regarding the existing Internal Review Process and the problems with the Administrative Appeals Tribunal process. These are outlined below.

Internal Review Process

27. 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.

28. 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.

29. There is a real risk 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.[6]

30. There are a number of problems that make the review process 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.

31. 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.

32. 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.

33. There have also been significant problems with delays during the internal review process. This was highlighted by the Commonwealth Ombudsman in its 2018 report.[7] 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,[8] 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.

34. 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

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

[7] Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013*', May 2018.

[8] Ibid.

review,[9] requests for a review triggering a new plan, which restarts the whole process[10] and the Agency providing incorrect advice about review rights.[11]

AAT Appeals

35. 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.

36. 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.

37. 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 when a participant is, in effect, forced to represent themselves against an experienced insurance legal representative.

38. 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.

39. Simply put, the process is grossly weighted in favour of the NDIA and completely undermines any sense of trust and accountability among participants.

[9] Ibid 4.34.

[10] Ibid 4.30.

[11] Ibid 4.16.

ToR (j) - The appropriateness of independent assessments for particular cohorts of people with disability, including Aboriginal and Torres Strait Islander peoples, people from regional, rural and remote areas, and people from culturally and linguistically diverse backgrounds

40. The ALA has concerns about the successful tenderers' capacity to provide appropriate services for people from regional and remote communities, Culturally or Linguistically Diverse (CALD) backgrounds and in Aboriginal and Torres Strait Islander (ATSI) communities. These concerns are the same as our concerns about the scheme's capacity to find suitable service provision for these cohorts, in the satisfaction of their plans.

41. People with disability from a CALD background, and from ATSI communities require specialised expertise and cultural competence from service providers. We are not confident that the proposed model has sufficient requirements for the assessments to be completed in a culturally sensitive way.

42. The ALA is concerned that the lack of services in remote Aboriginal and Torres Strait Islander communities means that either the community itself must bear the cost of providing necessary support services to Aboriginal and Torres Strait Islander people with disability, or that those people must leave the community and their Country in order to access the necessary services. The latter option presents a difficult dilemma for Aboriginal and Torres Strait Islander people with disability who, in order to access necessary support services, may then be unable to continue to participate in community, cultural and ceremonial activities.

43. The ALA is also concerned about the failure of the NDIS to meet the specific needs of Aboriginal and Torres Strait Islander people with disability who live in remote areas. The ALA has heard reports that NDIS plans for some of these Aboriginal and Torres Strait Islander people fail to address some of their specific needs, including access to basic amenities, the ability to afford food and/or electricity, and the importance of maintaining contact with culture, environment and community.[12] The ALA is concerned that these failures will be exacerbated under the proposed new scheme involving mandatory independent assessments.

[12] Stevenson, Kylie and Howie, Tamara (2019). *The land the NDIS forgot: the remote Indigenous communities losing the postcode lottery*. The Guardian, 5 November 2019.

ToR (k) - The appropriateness of independent assessments for people with particular disability types, including psychosocial disability

44. The ALA submits that it is essential for the independent assessors to have appropriate experience and expertise in the environmental factors impacting the individual they are assessing and also expertise in the specific disability type they are assessing.

45. The ALA is also concerned that the new arrangements for independent assessments will require people with disability to work with someone unknown to them. This will be particularly difficult, and possibly damaging, to those who have a history of trauma, abuse or violence. In addition, the possibility of trauma may not present until after an assessment has commenced. It is not clear if or how support will then be provided or what expertise is available to assist in such a situation.

Conclusion

46. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Committee's inquiry into independent assessments. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

Graham Droppert SC

President

Australian Lawyers Alliance