

Capability and Culture of the NDIA

Submission to Joint Standing Committee on the
National Disability Insurance Scheme

15 December 2022

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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.

ALA Members and Member firms work every day with and for people living with disabilities of all types.

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 peoples of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input into the Joint Standing Committee on the National Disability Insurance Scheme ('the Committee') inquiry on the capability and culture of the National Disability Insurance Agency (NDIA, or 'the Agency').
2. In response to all Terms of Reference prescribed for this inquiry, the ALA's submission will focus on issues about which we have direct expertise or experience, including:
 - Deficiencies with the review process and lack of accountability;
 - Safety risks faced by National Disability Insurance Scheme (NDIS, or 'the Scheme') participants;
 - The interface with other services, such as the health and aged care systems;
 - Poor planning by the NDIA; and
 - The interaction between the NDIS and other forms of compensation.
3. Of course, there are a myriad of other well-reported issues and problems with the NDIA and the NDIS that are more appropriately raised by NDIS participants, their families and support networks, as well as by the disability sector.
4. It is also important to highlight that many of these problems arise because of deep seated design flaws in the Scheme which date back to the original Productivity Commission report and recommendations. Many of the problems ought to have been obvious at the time but, unfortunately, the NDIS design was flawed from the outset.
5. In the ALA's view, significant reform is now needed in order to guarantee appropriate outcomes for NDIS participants and the Scheme's sustainability.

Deficiencies with the review process and lack of accountability

6. Simply put, the internal and external review mechanisms are broken. This is a legislative design problem compounded by the NDIA's behaviour. The design flaws date back to the aforementioned 2011 Productivity Commission report, upon which the NDIS was based, which started with the incorrect assumption that the system could be trusted to get things right.
7. In this respect, we note that the draft Productivity Commission report even went as far as recommending that the merits review process be limited to an internal review only, with no right to pursue AAT appeals, and appeals to the Federal Court were to be limited to questions of law only.² Thankfully, this recommendation was not ultimately pursued and the right to pursue merits review in the AAT was included in the final design.
8. However, despite this, more than a dozen major reviews into the NDIS have all concluded that the planning process remains defective and the system is getting it wrong far too often. In the ALA's view, an important reason for this is the lack of accountability for the NDIA for defective planning, behaviour and decisions. The internal and external review mechanisms deliver nothing in the way of accountability for the NDIA and the NDIS, nor fairness for NDIS participants.
9. The ALA contends that a robust, transparent, accessible, equitable and effective review process is essential for the NDIS' proper operation. This encourages good decision-making at first instance, accountability for the Agency and, by extension, trust in the NDIS. Above all, it also ensures that NDIS participants get the right outcomes.
10. The lack of true accountability for the NDIA's poor planning and questionable decision-making is most evident when one understands the inefficiencies and barriers to both internal and external review and appeals processes for NDIS participants wishing to contest plans and decisions made by the NDIA.

² Productivity Commission, *Disability Care and Support* (Draft Report, February 2011) vol 1, 32.

11. The ALA notes that these issues are not new. For example, the Commonwealth Ombudsman received 400 complaints about the NDIA's handling of reviews in an 18-month period to January 2018, representing 32.5 per cent of all complaints about the NDIS.³
12. In our view, the current review system is so bad that, not only does it fail to provide accountability and fairness, it actually encourages and facilitates bad decisions and behaviours on the part of the Agency. If the NDIA is not held accountable and if there are no consequences (including legal costs) for poor decisions, then the Agency will have no motivation to improve decision-making at first instance.
13. NDIS participants need an avenue to challenge decisions they think are incorrect or unfair that is accessible and allows both parties to approach the appeal on an equal footing. Equality in bargaining power is essential in the administration of this Scheme. This will only be possible if NDIS participants can access legal assistance in appealing decisions, where they feel it is necessary.
14. NDIS participants should have access to advocates, as needed, and payment of their legal costs when disputing NDIA decisions. The decisions made as a result of these reviews and appeals processes will assist the NDIA's planning for the future.
15. Supporting NDIS participants to dispute decisions will ensure that the NDIS is able to fulfil its potential and there will be long-term cost benefits to the NDIS, as questions and uncertainties will be clarified.
16. We elaborate on the problems with the review process in the sections below.

³ Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013* (Report No. 3, May 2018) 4
<https://www.ombudsman.gov.au/__data/assets/pdf_file/0029/83981/NDIS-NDIA-Final-report-on-administration-of-reviews-under-the-Act.pdf>.

Problems with internal and external review and appeals processes

Internal review

17. The NDIA 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 and our clients that the internal review process is highly unlikely to result in substantial change, and the external review process must invariably be engaged.
18. As a result, the internal review process provides only a nominal level of accountability. The original decisions are often rubber stamped and decisions that are clearly wrong at law are not corrected, forcing NDIS participants into the external review process.
19. There are a number of problems that make the internal review process so ineffective.
20. First, it is generally unclear whether the person undertaking the review has any additional expertise or experience in disability support and care needs, or whether they have any understanding of the legal framework underpinning the Scheme. If this additional experience does not exist, problems with the original decision are unlikely to be identified and resolved. In the experience of ALA Members, this is particularly problematic in cases involving NDIS participants with complex care needs.
21. Second, the ability of NDIS participants to fund and 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 the reviewer's decision.
22. Finally, there seems to be significant confusion over the correct interpretation of the legislation and associated instruments across the NDIA. This leads to an inconsistent application of the rules and different outcomes depending on who is making the decision at any point in time.
23. In addition to being contrary to the principles of the NDIS, the problems with the review process are also extremely costly. First, there is an administrative burden

associated with each complaint. Second, the ineffectiveness of the review process leads to increased numbers of NDIS participants seeking external review in the Administrative Appeals Tribunal (AAT). The NDIA is invariably represented by private insurance legal firms in this process and thus incurs significant amounts of otherwise avoidable legal costs.

24. The ALA contends that if the NDIA's initial planning and decision-making processes were robust and thorough, that would greatly reduce the reliance on the review system generally but especially the need to go to external review at the AAT.
25. We emphasise that our recommendations and observations below should not be misconstrued as advocating for any version of the former Government's attempt to introduce binding "independent" assessments or reviews. The ability of NDIS participants to appeal to the AAT and the Federal Court of Australia should be enhanced by accountability measures, including costs consequences, for the NDIA.
26. The sunlight of tribunal and judicial scrutiny of NDIA conduct is a critical disinfectant to the present lack of accountability of the NDIA. We expand on this below.

Recommendations:

- **That the NDIA's review process be made more accessible and effective with the implementation of the following measures:**
 - **Reduce the number of internal review requests by addressing the problems with the NDIA's planning and decision-making processes;**
 - **Ensure that the decision-maker has specialist experience and qualifications, and has access to sufficient and thorough evidence from which to make an informed decision; and**
 - **Provide 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).**

External review

27. Appeals of decisions under the Scheme are currently available to the AAT and then to the Federal Court of Australia on questions of law. If the original decision is affirmed in the internal review process, or the NDIS participant is not satisfied with the extent of any variation, that NDIS participant has 28 days to file an application in the AAT.⁴ This can only happen once an internal review has been conducted.⁵
28. ALA Members report problematic and obstructive conduct by the NDIA and their representatives during this review process. Examples include:
- a. demonstrating very limited understanding of fundamental aspects of the NDIS and available supports, medical concepts, as well as the legal framework governing decision-making;
 - b. submitting a flood of responses and evidence right before case conferences, which results in the NDIS participant (and their legal representative, if they have one) having minimal time to review that material;
 - c. attending hearings and case conferences without preparation, including not reading paperwork;
 - d. requesting more information from the NDIS participant (and their legal representative, if they have one) repeatedly and sporadically throughout the external review process, rather than at one point in time after careful consideration of all the evidence at hand (which also reflects the aforementioned lack of preparedness from the Agency's lawyers); and
 - e. ultimately, in many cases, then even requesting that further evaluations are undertaken, including with experts chosen by the lawyers for the NDIA.

⁴ National Disability Insurance Agency, 'Applying for external review of a decision to the Administrative Appeals Tribunal (AAT)', *Internal and external review of compensation decisions* (Web Page, 29 June 2022) <<https://www.ndis.gov.au/participants/compensation-and-your-plan/internal-and-external-review-compensation-decisions>>.

⁵ Ibid.

29. The reported behaviour often appears designed to frustrate NDIS participants and cause delays – AAT appeals often take several months, if not over a year, to reach hearing.
30. The ALA notes the following recent comments from Federal Court Justice Debra Mortimer about the role and conduct of the NDIA (and by extension the Agency’s lawyers) in review processes:⁶

The Agency’s closing submissions to the Tribunal constituted 442 paragraphs, and 51 pages, of densely compiled submissions, with 337 footnotes. That is on top of a statement of facts, issues and contentions of 137 paragraphs and 37 pages, and written opening submissions of 3 pages. **The Tribunal was deluged with contentions by the Agency.** To digest all of those submissions, and ensure it understood them all and did not overlook any, would have been a daunting task. In contrast, Ms D’s final submissions were 40 pages with 201 footnotes, itself a long document on a merits review, but more manageable than those filed by the Agency.

In a merits review the Agency would do well to remember its role. As a model litigant, and another part of the executive, it appears to assist the Tribunal to perform its function, which is to reach the correct or preferable decision on the material before it: *Drake v Minister for Immigration and Ethnic Affairs* [1979] FCAFC 39; 24 ALR 577 at 589, Bowen CJ and Deane J. While the Agency might seek to defend its internal decision-making, the Agency does not appear at the Tribunal as a true adversary in the sense of having private interests to defend and advance. It has a public, statutory function, expending public monies to administer the scheme of the NDIS Act. **It has no agenda to exclude people from the NDIS. Nor to admit them. Its role is to ensure that the legislative scheme created by Parliament is administered objectively and carefully, in accordance with Parliament’s intention, as objectively ascertained.** In that sense, it has no ‘stake’ in the outcome, other than assisting the Tribunal to reach the correct or preferable decision.

...

Although I have upheld one of the legal errors identified by the Agency in its questions of law, that conclusion should not be understood as critical of the Tribunal’s approach to an already complex merits review which was made significantly more so by the Agency’s approach.

[bold emphasis added]

⁶ *National Disability Insurance Agency v Davis* [2022] FCA 1002 [43]–[44], [46].

31. We emphasise parts of the above extract in bold because they aptly highlight the problem with the Agency's behaviour in the merits review process. The NDIA has too often acted as an adversary, advancing assertions, opinions and positions that are inconsistent with their legislative obligations. As Justice Mortimer points out, this is not the Agency's role.
32. In so many cases that ALA Members have handled for NDIS participants in the AAT, it is difficult to escape the conclusion that the NDIA has engaged in a war of attrition with NDIS participants and their families. The NDIA has a fundamental cultural problem if it considers that behaviour is humane and consistent with the objects of the NDIS Act.⁷
33. Moreover, if the eligibility or funding criteria are creating problems for the Scheme's financial viability, then this needs to be addressed by Parliament, not by inappropriate behaviour by the NDIA and the Agency's representatives in the merits review process.
34. The above issues are exacerbated by the merits review process being inaccessible and entirely unequal. The barriers to NDIS participants engaging appropriate legal representation require particular attention.
35. The Agency has historically been represented by large commercial firms and, more recently, by the Australian Government Solicitor. NDIS participants, however, have little to no access to appropriately-qualified representation due to:
- a) a paucity of Legal Aid funding and significant barriers to access what does exist across Australia;
 - b) there being no other funding for legal representation; and
 - c) the 'no costs' nature of the AAT jurisdiction.
36. Most NDIS participants will, therefore, be self-represented. However, the value of the support/s under dispute can amount to tens of thousands or hundreds of thousands of dollars per year, and many matters involve complex disabilities and high-care

⁷ See *National Disability Insurance Scheme Act 2013* (Cth) ss 3 and 4.

needs, thus requiring sophisticated expert evidence. Most NDIS participants will not be able to afford or arrange this evidence.

37. Further, the legislation and rules underpinning the NDIS 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 broader healthcare system). It is entirely inappropriate that self-represented NDIS participants face sophisticated legal opposition in these circumstances.
38. The 'no costs' nature of AAT disputes means that the unsuccessful party is not obliged to pay the legal fees arising from the dispute, which is problematic. In other areas of law, the ability to recover costs from the unsuccessful party has allowed private firms to expand access to justice by offering 'no win, no fee' costs arrangements. However, this has never been possible in the NDIS context and it is a fundamental legislative design flaw, which denies NDIS participants an opportunity to engage appropriate representation. This is unfair and will result in incorrect outcomes being forced on NDIS participants who are unable to pay for justice.
39. While the 'no costs' status of the AAT also provides protection for NDIS participants, should their appeal be unsuccessful, the balance of power remains grossly weighted in favour of the NDIA. Any risk to NDIS participants could also be cured by the Agency not pursuing legal costs in most circumstances, as already occurs with existing insurance schemes, such as Victoria's Transport Accident Commission (TAC) and WorkCover.
40. The ALA strongly contends that urgent action is required to improve the planning process, break down the barriers to NDIS participants engaging legal representation, and to ensure that the external review process provides a transparent and robust accountability mechanism. This will improve access to justice for NDIS participants and increase avenues for accountability for NDIA planning decisions and decision-making in general.

41. The NDIA should be liable for legal costs where they have unsuccessfully defended an AAT appeal. The ALA submits that with the prospect of adverse costs being awarded, the quality of decision-making will improve and appeals to the AAT will reduce. Costs accountability is thus an investment in better planning decisions and in NDIS participants' dignity and satisfaction. A legislated financial deterrent to bad decisions is essential.
42. The ALA submits that the model in place for appealing Comcare decisions to the AAT could appropriately be replicated for the NDIS. This could involve participants being entitled to 75 per cent of costs on the Federal Court scale if they are successful at the AAT, but no adverse costs being awarded if they are unsuccessful.

Recommendations:

- **That the NDIA engage lawyers who will cooperate fairly during external review processes and approach those processes in good faith;**
- **That the NDIA be liable for legal costs where they have unsuccessfully defended an Administrative Appeals Tribunal (AAT) appeal; and**
- **That the Federal Government and NDIA replicate for the NDIS the model that is in place for appealing Comcare decisions to the AAT.**

Summary

43. The conduct of the NDIA throughout a process that is already weighted in its favour completely undermines any sense of trust and accountability among NDIS participants.
44. This 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, as the scope and nature of disputes will not have been narrowed by previous decisions. This leads to unnecessary costs for the NDIA and ongoing uncertainty, distress and hardship for participants.

45. 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: either accept a substandard plan or expend emotional and financial capital fighting the NDIA through an inefficient and unfair review system.
46. The ALA reiterates that we consider this problem has arisen from design flaws that date back to the aforementioned Productivity Commission report and recommendations. From the outset, an incorrect assumption was made that NDIS participants without lawyers supporting them would receive equitable treatment from the Scheme. Plainly, that has not been the case to date, nor in the ALA's view will it be the case without major change.
47. The status quo effectively creates different classes of NDIS 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 a key problem that the NDIS was supposed to address.
48. A minority of NDIS participants 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 NDIS participants. The answer is unequivocally in the negative.
49. The ALA contends that a comprehensive, well-supported, external merits review process is essential to any insurance scheme. It increases transparency and encourages considered, appropriate, decision making, which then lowers the rate of disputes and related costs.
50. We submit that further support and changes are required to enshrine merits review in the NDIS and create a strong, robust, system. Restrictions on external merits review are invariably used as a tool by governments to limit entitlements and spending in the face of funding pressure. However, this only serves to erode trust in the Scheme and undermine the principles on which the NDIS is based.

Risks to NDIS participants' safety and wellbeing

51. There have been and remain risks to the safety and wellbeing of NDIS participants as a result of structural problems, workforce issues, Agency decision-making and the planning process.
52. The ALA is particularly concerned about the impact of the increasing casualisation of the disability workforce as a result of the NDIS's preferred direct engagement model and focus on a market-based system. The 'Uberisation' of the disability workforce is established and accelerating. This phenomenon has been well reported,⁸ and poses a number of safety risks for NDIS participants.
53. First, it makes training and quality assurance more difficult due to the independent and fractured nature of the workforce. Traditional means of supervision, guidance and training are far more difficult to enforce in this environment.
54. Second, it can be more difficult to assess and match a casual carer's skills and experience to the needs of the NDIS participants. For any NDIS participant – but especially those with complex care needs – there could be catastrophic consequences. An uncomfortable fact is that NDIS participants have died due to poor care and inadequate structural planning for care. The death of Ann-Marie Smith in South Australia received huge publicity, and ALA Members report many other adverse outcomes. More NDIS participants will die due to poor care and inadequate governance over that care, unless this design issue is given much closer attention.
55. Third, the direct engagement model can lead to gaps in service delivery due to staff shortages and unavailability, cancelled shifts and difficulty finding replacements. While this risk exists in any system, it is far more acute when NDIS participants are having to source and engage support workers themselves. It also creates problems with communication between service providers, which again creates safety risks for NDIS participants.

⁸ See, eg, Donna Baines et al, The Centre for Future Work at The Australia Institute, *Precarity and Job Instability on the Frontlines of NDIS Support Work* (Report, September 2019) <<https://futurework.org.au/report/precarity-and-job-instability-on-the-frontlines-of-ndis-support-work>>.

56. Fourth, it makes it more difficult to protect NDIS participants from fraud and financial exploitation – again, because of the fractured nature of the workforce. In ALA Members’ experience, the vast majority of those who work in the disability care sector are hardworking, caring, and have the best interests of those they care for at heart. However, ALA Members are aware that there have been instances of casual support workers, namely those procured through online platforms (an issue detailed further below), financially exploiting NDIS participants. This has included instances of casual support workers requesting money from NDIS participants, which NDIS participants are not required to pay out of pocket, such as for that casual support worker’s transport and food. The ALA firmly believes that the NDIA has an obligation to ensure it does not inadvertently create an environment in which a culture of exploitation and abuse can exist.
57. Finally, the ALA is especially concerned about the NDIA’s decision to feed into the casualisation – also known as, the ‘Uberisation’ – of the disability service workforce by utilising and being associated with online disability services providers, for example Mable. This creates risks for both disability support workers and participants.
58. Those matters ought to come, unfortunately, as no surprise given scant focus and attention has been paid to workforce infrastructure planning – again, dating back to the original Productivity Commission report and recommendations. The Scheme remains, more than a decade later, without an effective, holistic workforce plan.
59. Within the so-called ‘gig’ economy, workers are highly vulnerable to exploitative conduct by the entity connecting those individuals with consumers. Sham contracting is rife, with workers told they must be independent contractors rather than traditional employees. These individuals are then missing out on superannuation, insurance, workers’ compensation, award protections and the other workplace benefits Australian workers have come to expect.
60. Moreover, there are major risks inherent in relying on a casualised workforce and on those businesses that connect casual workers to consumers. For example, the collapse

of both food service Deliveroo and grocery delivery service Voly in November 2022 left tens of thousands of riders, restaurants, suppliers and customers in the lurch.⁹

61. The disability workforce and the care that support workers provide are too important and critical for NDIS participants' safety and wellbeing to rely on a casualised workforce facilitated by third party, private companies that are driven by commercial and investor interests.
62. The ALA submits that high quality care outcomes for NDIS participants will be facilitated by a workforce which has secure, long-term employment, as well as pay and conditions commensurate with the difficult and sensitive nature of the work they perform.
63. The ALA contends that there must not be a 'lowest common denominator' approach to the provision of services to people with disability. Rather – and with regard to the reality that the disability care sector is competing with other care sectors (including health and aged care) when recruiting – the employment conditions within organisations registered to provide NDIS services must be first rate to ensure that NDIS participants get the quality of service they deserve.

Recommendations:

- **That the NDIA urgently addresses any exploitation, including financial, of NDIS participants by support workers, especially casual support workers procured through online disability services matching providers; and**
- **That the NDIA's planning and decision-making processes explicitly require assessments are made about the safety of NDIS participants in relation to the sourcing and allocation of care support workers for the NDIS, and that those safety assessments are required to be actively considered by NDIA management and planners;**

⁹ Daniel Ziffer and Michael Janda, 'Deliveroo enters administration, leaving riders, restaurants and customers in the lurch', *ABC News* (online, 16 November 2022) <<https://www.abc.net.au/news/2022-11-16/deliveroo-enters-voluntary-administration/101661932>>; Ash Cant, 'Australian grocery delivery service, VOLY, folds', *The New Daily* (online, 18 November 2022) <<https://thenewdaily.com.au/life/eat-drink/2022/11/18/voly-delivery-groceries-australia>>.

- That the NDIA ensures that the Agency’s own employment processes are fair and prioritise full-time/permanent positions or, at least, higher minimum hours for staff; and
- That the NDIA ensures any business or organisation with which the Agency is associated for the procurement of care support workers for the NDIS is practising safe and fair employment processes, including pay and conditions.

Interface with other services

64. In the ALA’s view, the NDIA has an entrenched culture of attempting to ‘pass the buck’ to other services, particularly to the health and aged care systems. While we acknowledge that the NDIS is the insurer of last resort, this appears to be an ongoing problem that requires urgent attention and clarification.

65. For example, there are numerous examples of NDIS participants, who have needed to seek medical help in a hospital, ending up languishing in those hospitals for months – or even years – after their medical discharge date.¹⁰ Those NDIS participants were medically fit for discharge;¹¹ however, they could not leave hospital, as the NDIA had not planned accordingly (including in relation to securing appropriate accommodation for that NDIS participant after they leave hospital).¹²

66. The ALA contends that this is an unacceptable situation, which is causing distress to NDIS participants, adding to the pressure already on hospitals across Australia, and is also a costly exercise.¹³

¹⁰ Linda Silmalis, ‘NDIS patient stuck in hospital for five years while waiting for help’, *The Daily Telegraph* (online, 17 September 2022) <<https://www.dailytelegraph.com.au/news/nsw/an-ndis-patient-has-been-stuck-in-hospital-for-five-years-while-waiting-for-help/news-story/655aeb2f45d28b4a09ffeface0c08d7a>>.

¹¹ Sarah Ison, ‘Red tape and errors leave homes for NDIS sitting empty’, *The Australian* (online, 31 October 2022) <<https://www.theaustralian.com.au/nation/red-tape-and-errors-leave-homes-for-ndis-sitting-empty/news-story/84bab4cf620264a04460157fea01fe24>>.

¹² Ibid.

¹³ Di Winkler, ‘NDIS participants are left waiting for too long in hospital beds due to bureaucratic delays’, *The Conversation* (online, 10 August 2022) <<https://theconversation.com/ndis-participants-are-left-waiting-for-too-long-in-hospital-beds-due-to-bureaucratic-delays-188439>>.

67. The ALA welcomes the Government’s announcement of 20 October 2022 that there will be 54 NDIS Specialised Hospital Discharge Planners and 50 Hospital Liaison Officers dedicated to improving NDIS participants’ experiences of leaving hospital.¹⁴ The NDIA will be funding “interim plans that include medium term accommodation where applicable”.¹⁵ While this is a promising development, the ALA calls on NDIA to increase focus on fixing the Agency’s poor planning processes and slow decision-making, in order to best support NDIS participants, including those who need to go to hospital and leave (as soon as medically sanctioned).
68. ALA Members with experience in NDIS appeals also report that the Agency heavily relies on section 34(f) of the *National Disability Insurance Scheme Act 2013* (Cth) when defending decisions not to fund particular supports. This section requires that the support must be most appropriately funded through the NDIS and not another service and, in the experience of ALA Members, there appears to be significant confusion within the Agency about how this should be interpreted. For example, it is often applied without the Agency checking whether the supposed alternate service actually provides the support in question.
69. The boundary issues between the NDIA, healthcare and aged care require a comprehensive suite of rules, so that NDIS participants, their families and advisors know which scheme has responsibility.

Recommendations:

- **The interface between the NDIS and other services be reviewed and work undertaken to clarify the respective roles and responsibilities of each; and**
- **That the NDIA review its planning and decision-making processes in the context of NDIS participants who transition from one service to the NDIS, and vice versa.**

¹⁴ Minister Bill Shorten, ‘Getting NDIS participants home from hospital’ (Media Release, 20 October 2022) <<https://ministers.dss.gov.au/media-releases/9471>>.

¹⁵ Ibid.

Problems with the planning process

70. The quality of NDIS service provision starts with the planners.
71. NDIS planners, employees of the NDIA, determine a participant's entitlement to access various supports through the NDIS, and the quantum of the support to be made available to that NDIS participant.
72. The experience of ALA Members and their clients is that there is often a clear skills and experience deficit among NDIS planners. This is undermining the effective operation of the Scheme and is causing significant problems for NDIS participants. When combined with the lack of accountability for bad decisions, this results in poor outcomes in far too many cases.
73. The ALA contends that one problem is a lack of understanding of NDIS participants' care needs and the available support. It is our observation that many NDIA planners seem to lack specific knowledge in relation to the work of health specialists, such as physiotherapists and occupational therapists. The expert recommendations from specialists in these fields are, on many occasions, ignored by planners, who commonly lack relevant professional qualifications.
74. The problem is particularly stark for NDIS participants with complex care needs. These are also the most vulnerable cohort of NDIS participants. An appropriate, comprehensive and tailored care plan for such a participant demands a planner with sufficient training and significant experience.
75. This all results in plans being approved that do not meet NDIS participants' needs. Other problems arising from the lack of skills and experience among planners include inappropriate communication, as well as delays in assessing and approving care plans. Unfortunately, some NDIS participants have reported an obstructive or dismissive atmosphere at the planning stage, something that has been reported in the multiple inquiries into the Scheme to date.
76. Additionally, there also seems to be a fundamental lack of understanding among NDIS planners of the legislation and rules that underpin the NDIS. This leads to decisions

that are incorrect at law and also undermines the quality and appropriateness of the NDIS plans produced.

77. The background and experience of planners appear to be variable. While there is no doubt that there are many NDIS planners who have the appropriate skills, there are many who do not. Anecdotally, the ALA has been told that a participant's experience with the NDIS is largely defined by their planner – if you get a 'good' planner, you are likely to have a positive experience. However, if you get a 'bad' planner, your plan is likely to be neither sufficient nor appropriate, forcing you down the path of internal and external review.
78. 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 NDIS planners.
79. 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 numbers of external appeals to the AAT and to the Federal Court of Australia.
80. The ALA contends that an investment in planners with better skills and qualifications will result in:
 - Fewer complaints;
 - Fewer internal reviews;
 - Fewer external reviews;
 - A narrowing of the issues to be determined upon internal and external review;
 - Less pressure on AAT resources; and
 - Less distress for NDIS participants.
81. The ALA thus submits that urgent action is required to increase the skills and capacity of NDIA 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 NDIA must do more to train and develop those they do hire.

82. ALA Members have reported significant delays in the planning process. This suggests that there are insufficient planners to meet demand. Such delays are clearly inappropriate when NDIS participants are relying on NDIS funding for their care and support needs.
83. While the Participant Service Guarantee now contains some aspirational timeframes, we believe that these timeframes should be mandated. Delays of many months have been commonly reported. Whilst ALA Members report some improvement to those timeframes since the introduction of the Participant Service Guarantee, some delays are still being reported and a Participant Service Guarantee does not have the force of law. As such, legislative timeframes are preferable.
84. NDIS participant involvement in the planning process is essential and its absence undermines trust in the scheme. NDIS 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.¹⁶ It also increases costs and the administrative burden on the Scheme due to high levels of complaints and reviews.

Recommendations:

- **That urgent action, including comprehensive training, is required to remedy the clear deficit of skills and experience among some NDIA planners – particularly for planners working with NDIS participants with complex care needs, whose NDIS plans must only be prepared by NDIA planners with appropriate experience and training; and**
- **That the NDIA should consider sourcing professional development for NDIS planners from the relevant health industry peak bodies.**

¹⁶ See *National Disability Insurance Scheme Act 2013* (Cth) ss 3 and 4.

The interaction with other forms of compensation

85. ALA Members report great difficulty in attempts to interact with the NDIA on behalf of their clients. While we understand that this issue affects a small cohort of NDIS participants, problems with the compensation recovery and assessment process are causing delays in injured Australians obtaining compensation. It is also delaying the NDIS recovering money to which the Scheme is entitled.
86. There appears to be neither a consistent channel of communication nor any clear process for lawyers to actually engage with the Agency.

Repayments of past NDIS amounts

87. When an NDIS participant receives compensation for their injuries, that NDIS participant may be obliged to repay the NDIS for funding received in respect of the compensable injury. This is an appropriate mechanism to prevent people being compensated twice for the same care and supports.
88. ALA Members report significant delays when dealing with the NDIA and difficulties obtaining information about the potential repayment.
89. Most importantly, the NDIA appears unwilling or unable to provide a formal estimate or notice of a repayment amount before a compensation claim actually resolves. However, this information is crucial for legal representatives to provide comprehensive advice to their clients, and injured people are having to resolve claims without certainty about what it means for them. This is an unsatisfactory state of affairs.
90. This has proven particularly problematic in cases involving children or people under a legal disability, who require court approval of any proposed settlement. The Agency being unable to provide a notice of the repayment amount before settlement makes it very difficult for legal representatives to assess the adequacy of a proposal and

properly advise the Court. It also causes considerable delays after settlement, as Court approval cannot be sought until the final repayment notice is obtained from the NDIA.

Recommendations:

- **That clear channels of communication with the NDIA are established or clarified for lawyers seeking information on behalf of NDIS participants; and**
- **That the NDIA amends its processes to allow for confirmation of a repayment amount *before* settlement.**

Compensation Reduction Amounts

91. Like repayment of past supports, applying a Compensation Reduction Amount (CRA) when an NDIS participant receives compensation for future care and supports is an appropriate mechanism to prevent people being compensated twice. However, the way in which the CRA is calculated, and the amount being applied, can have significant ramifications.
92. The NDIA has not revealed key elements of its formula and process for calculating CRAs, which means how the NDIA ultimately calculates a participant's CRA remains deeply unclear. The NDIA continues to avoid attempts to elicit key material.
93. The ALA has repeatedly sought to better understand when and how the NDIA would be calculating CRAs, including seeking meetings with the NDIA about this matter. This was so that ALA Members could better explain the impact of a compensation payment on future NDIS funding to their clients.
94. However, there seems to be little willingness on the part of the NDIA for engaging with the ALA or with plaintiff lawyers generally, despite the important role that personal injury litigation plays in reducing NDIS costs. ALA Members have been surprised that the NDIA has not seemed to want to work cooperatively with the ALA on this matter, if for no other reason than to help keep NDIS costs down. If plaintiff lawyers do not

pursue compensation (which is then subject to a CRA calculation) on behalf of NDIS participants, then the entire costs of support would fall to the NDIS.

95. Regarding the specifics of the CRA, we note that this calculation is compulsory under the NDIS Compensation Rules.¹⁷ The elements that comprise the calculation are set out in the NDIS Compensation Rules, with more detail provided in the Guidelines.¹⁸
96. Despite the Compensation Rules and associated Guidelines, the ALA contends that how the NDIA ultimately calculates a participant's CRA is still non-transparent, as explained below.
97. The starting point under Rule 3.13 is the "compensation fixed under the judgement or settlement".¹⁹ It is not clear, though it should be, if this figure is inclusive or exclusive of costs and other elements, such as the cost of funds management.
98. The calculation allows the deduction of repayments to Medicare and Centrelink and some other state government repayments; however, the latter criteria is not clear.
99. The calculation allows a subtraction of the amount that the CEO considers reflects the value of any period of preclusion, such as a Centrelink preclusion period. Why has it not been made clear when the 50 per cent estimate applies, and when it does not? Further, if the 50 per cent estimate does not apply, how is the figure then calculated?
100. The calculation allows a comparison between the figure resulting from the above elements and "the expected lifetime" cost of NDIS funding. The ALA does understand that this is a figure provided by the Ongoing Support Assessment, but it is not clear how we might be able to challenge the figure if it appears to be in error – for example,

¹⁷ *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013* (Cth) r 3.5, made pursuant to *National Disability Insurance Scheme Act 2013* (Cth) s 35.

¹⁸ National Disability Insurance Agency, *Compensation Operational Guideline - Compensation Reduction Amount (CRA)* (Web Page, 13 August 2020) <<https://www.ndis.gov.au/about-us/operational-guidelines/compensation-operational-guideline/compensation-operational-guideline-compensation-reduction-amount-cra>>.

¹⁹ *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013* (Cth) r 3.13(a).

a dramatic change from one CRA calculation to the next with no known change from the NDIS participant's perspective.

101. Also, more recently this 'estimated lifetime cost' figure has not been openly stated. So, ALA Members are left to assume the estimate is a smaller number. However, this is not stated or made clear to the reader of a CRA calculation.
102. It is also not clear what type of evidence can be submitted to prove supports paid before joining the NDIS.
103. The ALA remains concerned that there is little visibility of the model used by the Agency to calculate life expectancy. We understand that it relies on a number of factors, including the type and extent of a participant's disability, but there is no information available about how these factors are taken into account and the statistical evidence underpinning the NDIA's calculations. We can only speculate about why the Agency's model is regularly assessing life expectancy at a lower level than the life expectancy assessments made by experts engaged in the personal injury claim.
104. Compensation for future care and supports in a personal injury claim are calculated with reference to multipliers that assume specific returns on investment over the injured person's expected life time. The life expectancy, therefore, provides the basis for the calculation of the compensation for future care and supports.
105. If the Agency later calculates a lower life expectancy for the purpose of the CRA, then the annual CRA contribution is higher, and the compensation lump sum diminishes at a faster rate. This can undermine the basis on which the compensation lump sum was calculated, which assumed investment returns over a longer life expectancy.
106. An underestimation of the NDIS participant's life expectancy could mean that NDIS participants run out of compensation earlier than expected due to lower than expected investment returns. This is a very concerning prospect for NDIS participants.
107. The ALA is very concerned that the Agency's assessment of life expectancy seems to be regularly at odds with evidence relied on by parties in litigation, evidence which

comes from medical and statistical experts with particular expertise in the assessment of life expectancy.

108. The CRA calculation also allows reductions to be made to the CRA based on special circumstances. ALA Members have had experience in claiming special circumstances, but the NDIA provides no general guidance. Examples of the types of relevant and not relevant factors would be very helpful in saving both the NDIA and NDIS participants time and money going back and forth about special circumstances.
109. Finally, the divisor number used to provide an annual CRA is increasingly unpredictable. Some guidance would help NDIS participants and their representatives recognise if an error has occurred or not. ALA Members have seen figures that often seem inexplicably overly long or short. As such, more information would be helpful.
110. Every day the CRA team at the NDIS are applying the Rules and Guidelines to prepare estimated and then final CRA calculations (and recalculations). Sharing information and working more cooperatively will help everyone. It will save the NDIA staff time in responding to queries, and save NDIS participants (and their representatives) time in asking questions.
111. More clarity will make CRAs more predictable. This will be good for both the NDIA and NDIS participants.
112. The ALA notes the existence of the NDIS CRA online estimator is better than nothing but has been described as producing “a worst-case scenario figure”,²⁰ which is unhelpful for injured people when they are deciding about pursuing litigation.
113. The lack of clarity more generally simply creates confusion and uncertainty. More queries need to be raised with the NDIA, taking up time and resources.

²⁰ Jane Campbell, ‘Helping lawyers inform clients about NDIS compensation reduction amounts’, *Opinion* (online, 29 September 2022) <<https://www.lawyersalliance.com.au/opinion/helping-lawyers-inform-clients-about-ndis-compensation-reduction-amounts>>.

114. The lack of clarity also means that unnecessary disputes will arise and many of those disputes will end up being appealed to external arbiters than might otherwise be the case if the NDIA was more transparent about CRA calculations and recalculations.

115. Overall, the ALA strongly believes that both the NDIA and NDIS participants would benefit from greater information and clarity in relation to all elements of the CRA calculations, and particularly those noted above.

Recommendations:

- **That the NDIA urgently provides greater visibility over the Agency’s model for calculating Compensation Reduction Amounts (CRAs); and**
- **That the NDIA meets with ALA representatives to discuss the calculation process for CRAs, including calculating life expectancy.**

ALA Members’ desire for a functional and collaborative relationship between lawyers and the NDIA

116. The ALA hopes that the above submission will be read in the spirit with which ALA Members have composed it – that is, with a strong desire for NDIA processes, culture and conduct to improve for the benefit of NDIS participants – and that the Agency embraces a functional and collaborative relationship with stakeholders, such as the ALA.

117. ALA Members’ represent NDIS participants across Australia, and we seek to work with the NDIA to improve service delivery and care for NDIS participants nationally.

Conclusion

118. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Joint Standing Committee on the National Disability Insurance Scheme (‘the Committee’) inquiry on the NDIA’s capability and culture.

119. A list of all the recommendations made by the ALA in this submission can be found overleaf. The ALA is available to provide further assistance to the Committee.

A handwritten signature in black ink, appearing to read 'T Ballantyne', with a long horizontal stroke extending to the right.

Tom Ballantyne

Chair, NDIS Special Interest Group

Australian Lawyers Alliance

Recommendations

The Australian Lawyers Alliance (ALA) recommends:

- 1) That the NDIA's review process be made more accessible and effective with the implementation of the following measures:
 - Reduce the number of internal review requests by addressing the problems with the NDIA's planning and decision-making processes;
 - Ensure that the decision-maker has specialist experience and qualifications, and has access to sufficient and thorough evidence from which to make an informed decision; and
 - Provide 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).
- 2) That the NDIA engage lawyers who will cooperate fairly during external review processes and approach those processes in good faith;
- 3) That the NDIA be liable for legal costs where they have unsuccessfully defended an Administrative Appeals Tribunal (AAT) appeal;
- 4) That the Federal Government and NDIA replicate for the NDIS the model that is in place for appealing Comcare decisions to the AAT;
- 5) That the NDIA urgently addresses any exploitation, including financial, of NDIS participants by support workers, especially casual support workers procured through online disability services matching providers;
- 6) That the NDIA's planning and decision-making processes explicitly require assessments are made about the safety of NDIS participants in relation to the sourcing and allocation of care support workers for the NDIS, and that those safety assessments are required to be actively considered by NDIA management and planners;

- 7) That the NDIA ensures that the Agency's own employment processes are fair and prioritise full-time/permanent positions or, at least, higher minimum hours for staff;
- 8) That the NDIA ensures any business or organisation with which the Agency is associated for the procurement of care support workers for the NDIS is practising safe and fair employment processes, including pay and conditions;
- 9) That the interface between the NDIS and other services be reviewed and work undertaken to clarify the respective roles and responsibilities of each;
- 10) That the NDIA review its planning and decision-making processes in the context of NDIS participants who transition from one service to the NDIS, and vice versa;
- 11) That urgent action, including comprehensive training, is required to remedy the clear deficit of skills and experience among some NDIA planners – particularly for planners working with participants with complex care needs, whose NDIS plans must only be prepared by NDIA planners with appropriate experience and training;
- 12) That the NDIA should consider sourcing professional development for NDIS planners from the relevant health industry peak bodies;
- 13) That urgent action, including comprehensive training, is required to remedy the clear deficit of skills and experience among some NDIA planners – particularly for planners working with NDIS participants with complex care needs, whose NDIS plans must only be prepared by NDIA planners with appropriate experience and training;
- 14) That the NDIA should consider sourcing professional development for NDIS planners from the relevant health industry peak bodies;
- 15) That the NDIA urgently provides greater visibility over the Agency's model for calculating Compensation Reduction Amounts (CRAs); and
- 16) That the NDIA meets with ALA representatives to discuss the calculation process for CRAs, including calculating life expectancy.