

The National Disability Insurance Scheme: Recommendations in response to the *What we have heard* report

Submission to the Independent Review of the
National Disability Insurance Scheme

21 August 2023

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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 people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to respond to *What we have heard*, an interim report released by co-chairs Lisa Paul AO PSM and Professor Bruce Bonyhady AM on behalf of the Independent Review of the National Disability Insurance Scheme (NDIS) ('the NDIS Review').
2. The ALA acknowledges the work of the NDIS Review since October 2022, as well as the significant contributions already made by stakeholders across Australia to the NDIS Review. Those contributions are in addition to the countless submissions stakeholders, including the ALA, have made to previous inquiries and reviews conducted since the inception of the NDIS.
3. Substantial reform is now needed in order to guarantee appropriate outcomes for NDIS participants and also the sustainability of the NDIS moving forward.
4. As such, the ALA will respond in this submission to the six 'priority areas for improvement' from *What we have heard* that are consistent with the skills and experience of our members and their clients:
 - a. Applying and getting a plan;
 - b. Defining reasonable and necessary;
 - c. The support and service marketplace;
 - d. Measuring outcomes and performance;
 - e. Supported living and housing; and
 - f. Participant safeguards.
5. Of course, there are a myriad of other well-reported issues and problems with the NDIS (and solutions thereto) that are more appropriately raised directly by NDIS participants, their families and support networks, as well as by the disability sector.

Applying and getting a plan

6. The first step for people living with disability in seeking support through the NDIS is to apply to be a participant within the NDIS. If they are eligible for that support, then they will proceed to developing a plan.
7. Those are the first points of contact people living with disability, many of whom are incredibly vulnerable, have with the NDIS. As such, all interactions and processes should be clear, fair, safe and participant-focused. Currently, and as reflected in *What we have heard*,² the status quo does not reflect clarity, fairness, safety, or a focus on NDIS participants.
8. This section will address those four criteria, as well as noting ongoing problems with NDIS planners which is affecting NDIS decision-making. Finally, the ALA will offer our recommendations for reform in relation to applying and getting a plan through the NDIS.

Clarity in key features underpinning the NDIS

9. The ALA submits that everyone who engages with the NDIS will benefit from clarity around eligibility criteria and key terms.
10. In order for the NDIS to operate efficiently, it must be made clear through the NDIS' primary eligibility criteria exactly who is eligible for support through the NDIS, and who is not eligible for that support.
11. Further, the definitions of key terms are often confusing, which affects those trying to navigate the NDIS. For example, terms like “substantially reduced functional capacity”, “permanent” and “stabilised” in relation to eligibility criteria are opaque and open to misinterpretation. They can also take on different meanings depending on the context – “permanent” may mean very different things to a medical professional and an NDIS participant, for example.
12. The ALA also notes there has not been substantial judicial examination of those definitions, which would ordinarily have offered much-needed clarity around key aspects of legislative schemes like the NDIS.

² NDIS Review, Australian Government, *What we have heard* (Report, June 2023) 6
<<https://www.ndisreview.gov.au/sites/default/files/resource/download/what-we-have-heard-report.pdf>>.

Fairness for NDIS participants and prospective NDIS participants

13. Presently, the ALA does not believe that NDIS participants and prospective NDIS participants experience fair treatment through the NDIS.
14. Clarifying the eligibility criteria and the features of the NDIS will also contribute to greater fairness within the NDIS for NDIS participants and prospective NDIS participants. It will set clear expectations for everyone involved and promote fair decision-making.
15. In order to promote fairness for NDIS participants and prospective NDIS participants, the ALA strongly contends that any changes to the NDIS' application and planning processes must be: transparent; enshrined in legislation and subordinate instruments only after thorough consultation with stakeholders; and must provide appropriate review and appeal rights for NDIS participants and prospective NDIS participants.

The NDIS should be a safe and respectful space for everyone

16. People living with disability from a culturally or linguistically diverse background, and from Aboriginal and Torres Strait Islander communities require specialised expertise and cultural competence from the National Disability Insurance Agency (NDIA) and from NDIS service providers. The ALA currently has serious concerns about the treatment of those groups within the NDIS by the NDIA and service providers alike, and how safe and respected those groups can feel in the NDIS.
17. For example, Aboriginal and Torres Strait Islander peoples living with disability are often refused plans through the NDIS or are given NDIS plans which lack adequate resourcing and do not address their specific needs, including not accounting for the importance to Aboriginal and Torres Strait Islander NDIS participants of maintaining connection to land, culture and community.³
18. *The ALA will discuss further safety concerns concerning the NDIS later in this submission in our sections addressing the support and service marketplace, and participant safeguards.*

³ Griffis, Damian, 'In traditional language, there is no word for disability', *The Guardian* (online, 21 November 2019) <<https://www.theguardian.com/commentisfree/2019/nov/21/in-traditional-language-there-is-no-word-for-disability>>; Kylie Stevenson and Tamara Howie, 'The land the NDIS forgot: the remote Indigenous communities losing the postcode lottery', *The Guardian* (online, 5 November 2019), cited in the ALA's 2021 submission <<https://www.lawyersalliance.com.au/documents/item/2088>>.

Participant-focused

19. Once accepted into the NDIS, the involvement of NDIS participants in the planning process is essential. The current absence of opportunities for NDIS participant involvement undermines trust in the NDIS.
20. 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 NDIS.⁴ It also increases costs and the administrative burden on the NDIS due to high levels of complaints and reviews.

NDIS planners

21. The quality of NDIS service provision starts with NDIS planners.
22. NDIS planners, employees of the National Disability Insurance Agency (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.
23. 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 NDIS and is causing significant problems for NDIS participants.
24. 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.
25. 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.
26. 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

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

atmosphere at the planning stage, something that has been reported in the multiple inquiries into the NDIS to date.

27. 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. This increases the numbers of external appeals to the (current) Administrative Appeals Tribunal (AAT) and to the Federal Court of Australia.
28. The ALA contends that an investment in NDIS planners with better skills and qualifications will result in:
 - a. Fewer complaints;
 - b. Fewer internal reviews;
 - c. Fewer external reviews;
 - d. A narrowing of the issues to be determined upon internal and external review; and
 - e. Less distress for NDIS participants.

Recommendations

29. **The ALA has provided more detail on problems associated with NDIS application and planning processes in many of our previous submissions.⁵**
30. **We refer the NDIS Review to those earlier submissions and present our recommendations regarding future reform in this respect as follows:**
 - a. **That any changes arising from the NDIS Review in relation to NDIS application and planning processes must be transparent, enshrined in legislation only after thorough consultation with stakeholders, and must provide appropriate review and appeal rights for NDIS participants and prospective NDIS participants;**

⁵ See, eg, Australian Lawyers Alliance, Submission to Joint Standing Committee on the National Disability Insurance Scheme, *Capability and Culture of the NDIA* (15 December 2022) 21–23 <<https://www.lawyersalliance.com.au/documents/item/2367>>.

- b. **That the NDIS' primary eligibility criteria key operational terms should be reviewed and clarified as a matter of priority. This should include greater guidance for medical and allied health professionals providing evidence on behalf of prospective NDIS participants;**
- c. **That NDIS employees and service providers should all be required to undertake cultural competency training so that they can safely engage with people living with disability who are from a culturally or linguistically diverse backgrounds, and people living with disability who are from Aboriginal and Torres Strait Islander communities;**
- d. **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;**
- e. **That the NDIA should consider sourcing professional development for NDIS planners from the relevant health industry peak bodies; and**
- f. **That the NDIA develop a process that guides and assists participants in obtaining evidence from medical and allied health professionals in support of their application, whether in the form of primary evidence (i.e. medical records) or specific reports tailored to the NDIS eligibility criteria.**

Defining reasonable and necessary

- 31. The ALA understands that the NDIS review is seeking feedback on defining the 'reasonable and necessary' test for support funding.
- 32. Currently, determining what supports meet the reasonable and necessary test requires access to and an understanding of how to interpret the:
 - a. *National Disability Insurance Scheme Act 2013 (Cth)*, especially section 34;
 - b. *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth)*;

- c. *National Disability Insurance Scheme (Plan Management) Rules 2013* (Cth); and
- d. all relevant case law, for example *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121.

33. This matter has thus been a point for confusion for clients of ALA members since the NDIS' inception and is often the issue at the centre of external appeals through the AAT and the Federal Court of Australia.

34. More specifically, the ALA also submits that there is a lack of clarity on key criteria outlined in section 34 of the *National Disability Insurance Scheme Act 2013* (Cth), in particular: "value for money",⁶ "support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide",⁷ and "most appropriately funded or provided through the National Disability Insurance Scheme".⁸

- a. As a direct result of that lack of clarity, ALA members report that the NDIA frequently applies those criteria inappropriately or incorrectly, often in ways that are inconsistent with AAT and Federal Court of Australia precedents. This leads to NDIS participants being unfairly denied funding and unnecessary AAT appeals. Those appeals are costly and also consume a lot of time for NDIS participants, lawyers, occupational therapists and the NDIA.

Recommendations

35. **The ALA recommends the following in relation to defining terms like reasonable and necessary in relation to NDIS supports:**

- a. **That greater detail and clarity are provided around key terms and criteria, especially those in section 34 of the *National Disability Insurance Scheme Act 2013* (Cth);**
- b. **That any changes arising from the NDIS Review in relation to defining reasonable and necessary in relation to NDIS supports must be transparent, enshrined in**

⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 34(1)(c).

⁷ *Ibid* s 34(1)(e).

⁸ *Ibid* s 34(1)(f).

legislation only after thorough consultation with stakeholders, and must provide appropriate review and appeal rights for NDIS participants;

- c. That, in the interests of fairness and accountability, neither the Minister for the National Disability Insurance Scheme nor the NDIA CEO should be afforded power to unilaterally determine what should constitute reasonable and necessary supports, a decision which has significant consequences for what supports are funded by the Government and the content of NDIS participant plans; and**
- d. That the NDIS should publish outcomes from AAT appeals that are resolved informally or ‘settled’. Releasing this information would help overcome the relative dearth of AAT and Federal Court of Australia jurisprudence and assist subsequent NDIS participants by clarifying the NDIA’s position on certain supports. In turn, this would also narrow the scope of future disputes.**

The support and service marketplace

36. The ALA affirms the issues identified by stakeholders, as summarised in *What we have heard*,⁹ in relation to the NDIS’ market-based system for services provision. Further, the ALA strongly supports any attempts to address and prevent criminal conduct within the NDIS by dishonest service providers. The NDIS was designed to help vulnerable NDIS participants, and the ALA is disturbed by cases of roting and fraud.

37. In doing so, however, the Government must ensure that the NDIS is still accessible to NDIS participants and smaller service providers. ALA members report that there is significant concern among NDIS participants that the NDIS is becoming dominated by larger services providers, reducing competition and choice for NDIS participants. Any increased administrative burden and bureaucracy may result in smaller service providers exiting the NDIS, which will further limit how NDIS participants can exercise choice over how and where their supports are delivered.

38. This section of our submission will address issues arising from the casualisation of the disability workforce.

⁹ NDIS Review, Australian Government, *What we have heard* (Report, June 2023) 14–15
<<https://www.ndisreview.gov.au/sites/default/files/resource/download/what-we-have-heard-report.pdf>>.

The 'Uberisation' of the disability workforce

39. The 'Uberisation' of the disability workforce is established and accelerating. This phenomenon has been well reported,¹⁰ including the use of online disability services providers.
40. Within the so-called 'gig' economy, workers are highly vulnerable to exploitative conduct by entities that connect those individuals (in this context, care providers) with consumers (in this context, NDIS participants). 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.
41. These insecure working arrangements are likely to be unattractive to many qualified disability workers, or potential members of that workforce. Those highly-skilled and often very experienced workers are instead accepting roles in the aged care sector, which constantly needs more skilled and qualified carers.
42. This creates a workforce vacuum within the NDIS services sector, likely to be filled with inexperienced, under-skilled and underpaid workers. This has obvious consequent risks for quality and safety for NDIS participants. The latter will be addressed further in the final section of this submission.

Recommendations

43. **The ALA recommends the following in relation to the NDIS support and service marketplace:**
 - a. **That any changes to the NDIS' requirements for service providers or additional bureaucratic requirements for service providers do not make involvement with the NDIS unviable for smaller service providers, who play an important role especially in regional, rural and remote parts of Australia;**
 - b. **That the NDIA accept and acknowledge that the existing market-based approach is insufficient to meet needs and address existing issues with service provision. The**

¹⁰ 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/precariety-and-job-instability-on-the-frontlines-of-ndis-support-work>>.

NDIA should explore and implement alternative methods, particularly in regional, rural and remote parts of Australia;

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

Measuring outcomes and performance

- 44. The ALA submits that transparency and accountability are essential to assess whether the NDIS adequately delivers services for NDIS participants, and that changes are actually made when things go wrong.
- 45. 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 NDIA and, by extension, trust in the NDIS. Above all, it also ensures that NDIS participants get the right outcomes.
- 46. The current lack of true accountability within the NDIS and the NDIA, however, 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. The remainder of this section will focus on this matter, which the ALA notes is not a new issue – 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.¹¹
- 47. The ALA also notes that NDIS participants cannot enforce their rights within the system, especially against service providers, if they are not aware of or assured of those rights.
 - a. *The ALA refers the NDIS Review to our recommendation in the next section of this submission regarding mandatory services agreements.*

¹¹ Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013* (Report No. 3, May 2018) 4.

Problems with internal and external review and appeals processes

Internal review

48. The NDIA's 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.
49. 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.
50. There are a number of problems that make the internal review processes within the NDIA so ineffective, and even contrary to the underlying principles of the NDIS.
- a. *The ALA refers the NDIS Review to a detailed account we provided of multiple problems with the NDIA's internal review processes as part of the ALA's submission to the Joint Standing Committee on the National Disability Insurance Scheme's inquiry into the Capability and Culture of the NDIA in December 2022.*¹²
51. 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.

External review

52. ALA members report problematic and obstructive conduct by the NDIA and their legal representatives during external review processes. The reported behaviour often appears designed to frustrate NDIS participants and cause delays.
53. Examples of this conduct by the NDIA and their legal representatives include:

¹² Australian Lawyers Alliance, Submission to Joint Standing Committee on the National Disability Insurance Scheme, *Capability and Culture of the NDIA* (15 December 2022) 8–9 <<https://www.lawyersalliance.com.au/documents/item/2367>>.

- 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. persisting with arguments that have been rejected in previous AAT decisions and/or insisting on the denial of funding for supports when those same supports have been funded in other very similar or even identical cases for other NDIS participants;
- c. 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;
- d. attending hearings and case conferences without preparation, including not reading paperwork;
- e. 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
- f. ultimately, in many cases, then even requesting that further evaluations are undertaken, including with experts chosen by the lawyers for the NDIA.

54. The ALA refers the NDIS Review to recent comments from Federal Court Justice Debra Mortimer about the role and conduct of the NDIA (and by extension the NDIA's lawyers) in review processes.¹³ 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.

55. ALA members report numerous other issues with external review processes, including the barriers NDIS participants (who are often self-represented) find in accessing merits review of decisions made by the NDIA (which has historically been represented by large commercial firms and, more recently, by the Australian Government Solicitor).

- a. *The ALA refers the NDIS Review to detailed accounts we have provided of those problems within current external review processes as part of the ALA's submission to*

¹³ *National Disability Insurance Agency v Davis* [2022] FCA 1002 [43]–[44], [46].

the Joint Standing Committee on the National Disability Insurance Scheme's inquiry into the Capability and Culture of the NDIA in December 2022,¹⁴ as well as to the ALA's May 2023 submission to Commonwealth Attorney-General's Department as part of the Federal Government's ongoing work on administrative review reform.¹⁵

56. The sunlight of tribunal and judicial scrutiny of NDIA conduct is a critical disinfectant to the present lack of accountability of the NDIA and more needs to be done to help it operate effectively. At the same time, more needs to be done to minimise the number of AAT appeals and encourage correct decisions at the original decision-making stage.

Recommendations

57. The ALA recommends the following in relation to measuring outcomes and performance within the NDIS:

- a. That the NDIA's review process be made more accessible and effective with the implementation of the following measures:**
 - i. Reduce the number of internal review requests by addressing the problems with the NDIA's planning and decision-making processes;**
 - ii. 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**
 - iii. 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).**
- b. That the NDIA engage lawyers who will cooperate fairly during external review processes and approach those processes in good faith;**

¹⁴ Australian Lawyers Alliance, Submission to Joint Standing Committee on the National Disability Insurance Scheme, *Capability and Culture of the NDIA* (15 December 2022) 10–14 <<https://www.lawyersalliance.com.au/documents/item/2367>>.

¹⁵ Australian Lawyers Alliance, Submission to the Attorney-General's Department, *Administrative Review Reform* (12 May 2023) 22–23 <<https://www.lawyersalliance.com.au/documents/item/2472>>.

- c. **That the NDIA be liable for legal costs where they have unsuccessfully defended an appeal through external merits review;**
- d. **That the Federal Government and NDIA replicate for the NDIS the model that is in place for appealing Comcare decisions to external review (currently through the AAT); and**
- e. **That the NDIA develop KPIs and/or strategies designed to reduce and/or minimise the number of AAT appeals being lodged per year.**

Supported living and housing

58. Providing or securing appropriate housing and accommodation for NDIS participants – and making that housing available in a timely way – is essential, including so that NDIS participants are not left languishing in hospitals for months or even years after their medical discharge date.¹⁶

59. Additionally, ALA members report instances where previously-approved funding for NDIS participants in supported independent living has then been reduced by the NDIA, which causes service providers to reconsider whether they can continue to offer supported independent living to that participant. This occurs despite recommendations made by allied health professionals as to the necessity for that funding.

- a. Changes in NDIS plans cause significant cost and anguish to NDIS participants, especially when an NDIS participant feels comfortable, safe and at home in a particular space. The ALA submits that cutting funding to someone who is already settled goes against the core principles and values of the NDIS.

¹⁶ 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>>; 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>>; 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>>.

60. In relation to Specialist Disability Accommodation (SDA), the ALA submits that the provision of SDA has had a positive impact on addressing the significant societal issue of providing appropriate housing to people living with disabilities.

61. SDA has had the appropriate effect of attracting commercial builders to the sector. However, a number of issues have arisen. Without addressing these issues, it is likely that investors will leave the sector and people living with disabilities will be left either without housing options or in inappropriate housing. Some of these ongoing issues include:

- a. Repeated attempts by the NDIA to exclude certain groups from SDA, particularly:
 - i. NDIS participants who own a home and want to be self-providers (or families who own a home and want to be providers for a family member). There is nothing in the NDIS legislation or Rules that prohibits this; however, ALA members report the NDIA arguing in appeals that NDIS participants who own a home are not eligible for SDA. The ALA submits it is discriminatory to prevent people who own their own home from accessing SDA if they otherwise meet the eligibility criteria; and
 - ii. NDIS participants who are under the age of 18: ALA members report that there are many children under the age of 18 with catastrophic injuries who want to access SDA, either because they have their own home (as a result of compensation) or their parents want to be providers. There is nothing in the legislation or Rules that prohibits an NDIS participant under the age of 18 from SDA funding but the NDIA frequently makes this argument to deny funding.
- b. Slow approvals of SDA packages and a lack of transparency of the value of the SDA package, as well as unreasonable delays of up to 12 months to appeal a decision regarding SDA eligibility or funding to the AAT, are all leaving participants without options during those interim periods.
- c. Not only is it taking too long for NDIS participants to access SDA, but ALA members also report that once SDA is finally included in an NDIS participant's plan and if there is then a deterioration in that participant's skills, that NDIS participant needs to go through the whole application process again to change SDA categories.

- d. SDA packages are not retrospectively reimbursed, so organisations which support participants with housing while they wait for the SDA approval or AAT appeals, are not reimbursed once SDA approval is provided.
- e. Lack of guidance by the NDIA in terms of providing visibility about what NDIS participants require in terms of SDA, including the type of housing, location of housing, number of residents and quality of supports included, as well as transparency or mapping of the builds in progress to ensure there is not an oversupply to the market in any given location. This lack of proactive insight to the market results in low tenancy rates in some builds, while in other areas NDIS participants are left without any housing solutions. Builders are also being left without any reasonable guidance which compromises the long-term sustainability of builders within the sector.
- f. Families have been left disadvantaged and often separated as SDA policies do not properly reflect the needs of families.
- g. Inconsistency in building compliance and standards resulting in participants having to “accept” a substandard build.
- h. A lack of builds in rural and remote locations due to lack of insight as to demand.

62. The ALA contends that continued inadequate planning by the NDIA and a lack of coordination between the NDIS and other sectors (examples include the healthcare sector and aged care) in relation to housing for NDIS participants will jeopardise the Federal Government’s ongoing attempts to remedy these issues.¹⁷

Recommendations

63. **The ALA recommends the following in relation to supported living and housing:**

- a. **That there is greater transparency around housing and supported independent living funding decisions;**

¹⁷ See, eg, the introduction last year of 54 NDIS Specialised Hospital Discharge Planners and 50 Hospital Liaison Officers dedicated to improving NDIS participants’ experiences of leaving hospital: Minister Bill Shorten, ‘Getting NDIS participants home from hospital’ (Media Release, 20 October 2022) <<https://ministers.dss.gov.au/media-releases/9471>>.

- b. That turnaround times are improved and processes made more transparent in relation to SDA eligibility criteria, approvals, package amounts and appeals;**
- c. That, rather than moving NDIS participants repeatedly, the NDIA should prioritise funding accommodation where NDIS participants will be able to stay even if their skills change and even when they age;**
- d. That the NDIA provide guidance on SDAs, including guidance on the number, type and location;**
- e. That the NDIA consult with relevant stakeholders around allowing access to information to providing greater transparency concerning demand vs build, including such possibilities as mapping builds in progress;**
- f. That the NDIA liaise with stakeholders on creating models to better accommodate families and ensure that it is financially viable for families to stay together when this is their preferred option;**
- g. That the NDIA liaise with stakeholders about building in better quality and compliance frameworks to ensure the quality of SDA builds;**
- h. That planning and decision-making processes within the NDIA are improved, in order to ensure NDIS participants have access to secure and appropriate housing; and**
- i. That the interface between the NDIS and other services must be reviewed and work undertaken to clarify the respective roles and responsibilities of all involved, with a view to improving coordination when an NDIS participant transfers from one service to the NDIS (or vice versa).**

Participant safeguards

64. There have been and remain risks to the safety and wellbeing of NDIS participants as a result of structural problems, workforce issues, NDIA decision-making and the planning process.
65. Many of those issues have been identified and discussed throughout this submission. This section of our submission will focus on the impact of those issues on the safety of NDIS participants.

Safety risks arising from workforce casualisation

66. As canvassed earlier in this submission, the ALA is concerned about the impact of the increasing casualisation of the disability workforce as a result of the NDIS' preferred direct engagement model and focus on a market-based system. Proper choice and control can only be exercised by NDIS participants in the context of a properly-skilled and regulated workforce, which does not compromise on the safety of vulnerable NDIS participants.
67. However, the 'Uberisation' of the disability workforce creates a number of safety risks for NDIS participants.
68. 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.
69. 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.
70. 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.

71. 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.
- a. However, ALA members are aware that there have been instances of casual support workers, namely those procured through online platforms, 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.
 - b. The ALA firmly believes that the Federal Government and the NDIA have an obligation to ensure they do not inadvertently create an environment in which a culture of exploitation and abuse can exist.
72. The ALA is especially concerned about the rise of online disability service providers and the risk this creates for NDIS participants. The ALA is concerned that online, decentralised platforms exacerbate the risk of a poorly regulated workforce. The NDIA’s approach to service provision creates a need and environment for such services, which highlights a fundamental problem with the NDIA’s approach.
73. When developing the NDIS, minimal attention seems to have been paid to workforce infrastructure planning – dating back to the original Productivity Commission report and its recommendations. More than a decade later, the NDIS remains without an effective, holistic workforce plan.
74. 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.
- 75. 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.**
- a. The ALA contends that there must not be a ‘lowest common denominator’ approach to the provision of services to people living with disability.

- b. 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.

Service agreements

- 76. Currently, the NDIA “recommends” written service agreements between NDIS service providers and NDIS participants (or a nominated person);¹⁸ however, with the exception of Specialist Disability Accommodation, those written service agreements are not mandatory.¹⁹
- 77. The ALA submits that service agreements are important for setting expectations for all involved and also providing clarity around the rights of NDIS participants especially.

Recommendations

- 78. **The ALA recommends the following in relation to safeguarding NDIS participants:**
 - a. **That the Federal Government and 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;**
 - b. **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; and**
 - c. **That written service agreements between NDIS service providers and NDIS participants should be mandatory, so that NDIS participants are aware of their rights in that relationship and NDIS service providers are held to account for breaches or harm caused.**

¹⁸ National Disability Insurance Agency, *Service agreements* (Web Page, 9 May 2022) <<https://www.ndis.gov.au/providers/working-provider/connecting-participants/service-agreements>>.

¹⁹ Ibid.

Conclusion

79. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide the above response to the *What we have heard* report.

80. The ALA is available to provide further assistance to the Independent Review of the National Disability Insurance Scheme on the issues raised in this submission.



Shaun Marcus
National President,
Australian Lawyers Alliance



Tom Ballantyne
Chair, NDIS Special Interest Group,
Australian Lawyers Alliance