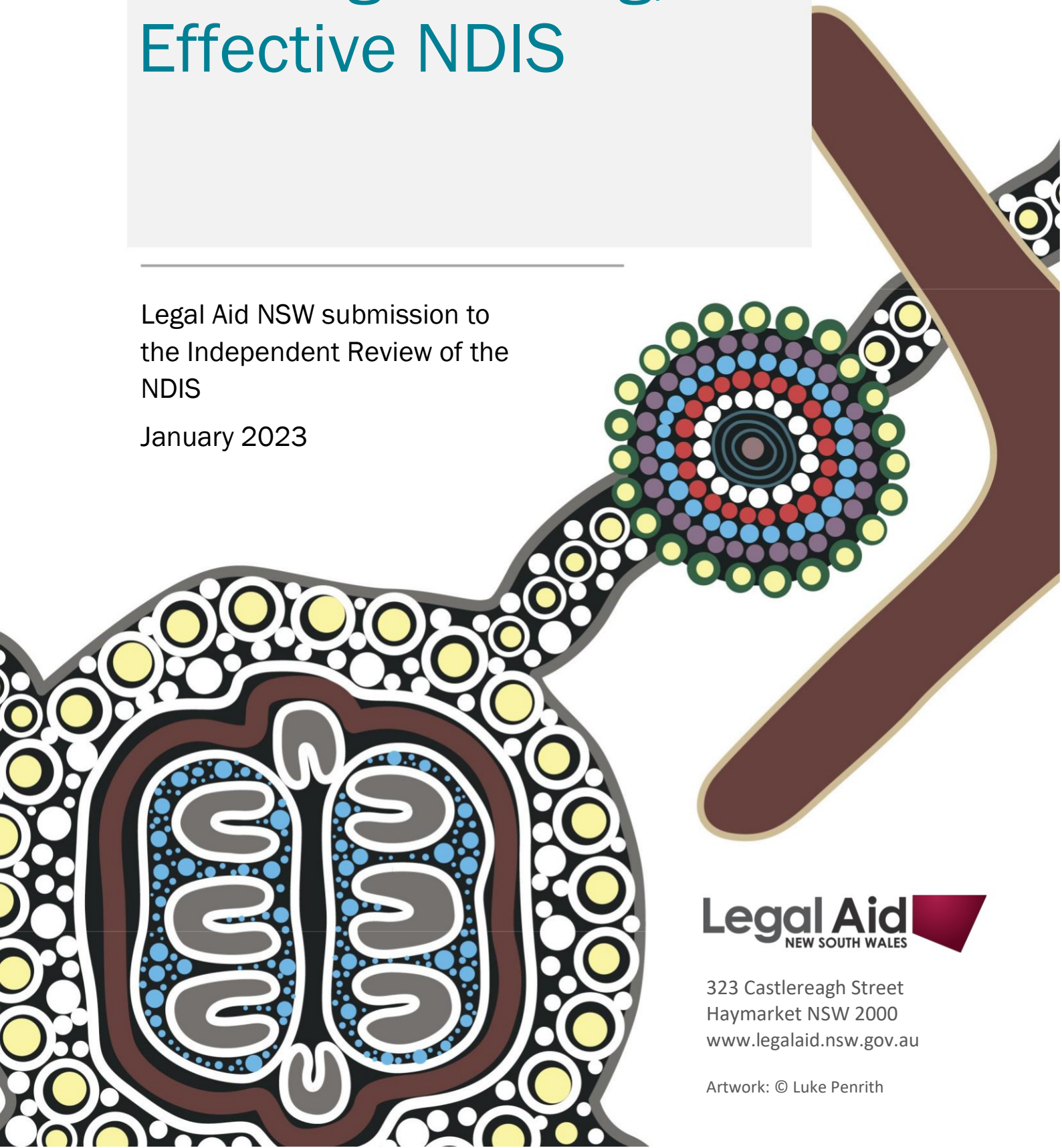


# The NDIS Review: Building a Strong, Effective NDIS

Legal Aid NSW submission to  
the Independent Review of the  
NDIS

January 2023



**Legal Aid**  
NEW SOUTH WALES

323 Castlereagh Street  
Haymarket NSW 2000  
[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

Artwork: © Luke Penrith

Acknowledgement .....	4
1. About Legal Aid NSW .....	5
2. Legal Aid NSW’s work with people with disability .....	6
2.1 Previous submissions on the National Disability Insurance Scheme .....	6
3. Executive Summary .....	8
Recommendations .....	8
4. Improving access to the NDIS .....	11
4.1 Barriers to access generally .....	11
4.2 Psychosocial disabilities .....	12
4.3 Prospective participants in custody .....	13
4.4 Access for children .....	14
4.5 Introducing a discretion to remain a participant while accessing aged care .....	14
4.6 Removing the presumption that an application for NDIS access is withdrawn when requested information is not supplied .....	15
5. Consistent, timely, accessible support .....	17
5.1 Improved oversight of the NDIS market.....	17
5.2 Providing support pending review of a negative decision .....	18
5.3 Introduce draft plans and reasons for refusing supports when a s 33(2) decision is made .....	19
5.4 Improve access to transition supports .....	20
5.5 Review the Supports Rules Schedule 1, to ensure that disability support needs do not fall in the gaps between systems .....	22
5.5.1 The health system .....	22
5.5.2 The mental health system .....	23
5.5.3 The justice system .....	23
6. Improved decision making under the NDIS Act .....	25
6.1 Improving internal review decisions .....	25
6.2 Simplifying the review mechanism for NDIS decisions .....	26

7. Improved consumer protections and complaint mechanisms for NDIS participants .....	28
7.1 Establish a purpose-built, binding NDIS consumer regulation body.....	28
7.2 Increased regulation of supports linked to housing.....	30
7.3 A National Framework for the oversight and use of restrictive practices.....	31

## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women’s Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children’s Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, NDIS, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children’s Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

[Redacted contact information]

## 2. Legal Aid NSW's work with people with disability

Legal aid commissions, including Legal Aid NSW, are the largest providers of legal services to people with disability across Australia. In the 2021-2022 financial year Legal Aid NSW provided more than 430,000 services (including legal representation, duty services, legal advice and assistance and information services) to people with legal need in NSW, including a significant proportion of services to people with disability.

The Commonwealth Government funds Legal Aid NSW to provide specialist legal advice and representation for reviews of the decisions of the National Disability Insurance Agency (**NDIA**) to the Administrative Appeals Tribunal (**AAT**). It also funds Legal Aid NSW to provide legal support to people with disability, their carers, families, supporters and advocates to engage with the Disability Royal Commission, as part of 'Your Story Disability Legal Support', a joint initiative of National Legal Aid and National Aboriginal and Torres Strait Islander Legal Services.<sup>1</sup>

### 2.1 Previous submissions on the National Disability Insurance Scheme

Our previous submissions about the National Disability Insurance Scheme (**NDIS**) include (as Legal Aid NSW or as part of National Legal Aid):

- [Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#) – National Legal Aid submission to the Royal Commission, November 2022.
- [Putting people first - Removing barriers for people with disability to access NDIS supports](#) - National Legal Aid submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, November 2019.
- [Exposure Draft - National Disability Insurance Scheme Amendment \(Participant Service Guarantee and Other Measures\) Bill 2021](#) - National Legal Aid submission to the Department of Social Services, October 2021.
- [Inquiry into the performance and integrity of Australia's administrative review system](#) – Legal Aid NSW submission to the Senate Legal and Constitutional Affairs Reference Committee, November 2021.
- [NDIS Consultation Paper: Planning Policy for Personalised Budgets and Plan Flexibility](#) - National Legal Aid submission to the National Disability Insurance Scheme, February 2021.

---

<sup>1</sup> Your Story Disability Legal Support, <https://yourstorydisabilitylegal.org.au/>.

- [NDIS Consultation Paper: Access and Eligibility Policy with independent assessments](#) - National Legal Aid submission to the National Disability Insurance Scheme, February 2021.
- [NDIS planning](#) - National Legal Aid submission to Joint Standing Committee on the National Disability Insurance Scheme, September 2019.
- [Inquiry into market readiness for provision of services under the NDIS](#) – Legal Aid NSW submission to the Joint Standing Committee on the National Disability Insurance Scheme, March 2018.
- [NDIS Thin Markets Project](#) - Legal Aid NSW submission to Ernst & Young Australia, June 2019.

Our submission to this review should be read in conjunction with our earlier submissions, which have sought to make recommendations for change to the NDIS based on our legal practice experience and the lived experiences of our clients.

### 3. Executive Summary

Legal Aid NSW welcomes the opportunity to contribute to the Independent Review of the National Disability Insurance Scheme (**NDIS**). We recognise that the NDIS has brought significant benefits to people with disability. We also recognise that there have been improvements to the NDIS from previous reviews, including through the introduction of the Participant Service Guarantee.

The recommendations in this submission reflect our experience of assisting and advocating for people with disabilities as they navigate the NDIS. This includes assisting people with issues in accessing the NDIS, in getting supports they need, in realising their consumer rights and in living safely and independently in the community.

#### Recommendations

**Recommendation 1:** *Improve access to the NDIS, including for children, people with psychosocial disabilities, people in custody and people in rural and remote areas.*

- The NDIA should provide more assistance to people applying for access, including using its powers under *National Disability Insurance Scheme Act 2013 (NDIS Act)* s 6 to provide financial assistance to prospective participants.
- There should be more training and guidance for decision makers in relation to permanence of impairments, especially in relation to psychosocial disabilities.
- The NDIA should provide more assistance for people in custody to apply for the NDIS.
- The Commonwealth Government should introduce a discretion for a person to remain a participant in the NDIS when they receive aged care services on a permanent basis.
- Applicants who do not provide requested information should have their applications considered refused rather than withdrawn, to allow them to pursue review rights if they later obtain the information or connect with services to assist them to apply.



**Recommendation 2: Ensure consistent, timely and individualised support under the NDIS for participants.**

- The NDIA should improve oversight of the NDIS market by instituting a safety net for when the NDIS market fails.
- Participants should continue to receive supports at the same level throughout a review of an adverse decision (including revocation, removal or reduction of a previously funded support).
- Draft plans should be introduced, and participants should be given reasons for any supports not funded when their plan is made.
- Access to transition supports for people leaving custody should be improved.
- The *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (the Supports Rules)* Schedule 1 should be reviewed to:
  - Improve the language about health support under the NDIS,
  - Improve the language about mental health support under the NDIS, and
  - Clarify responsibility for supports for participants in custody.

**Recommendation 3: Improve decision making under the NDIS Act**

- Provide clearer, more detailed reasons for review decisions.
- Make it mandatory for decision-makers conducting internal reviews to speak to the participant and to consider the NDIA's obligation to assist participants under the NDIS Act.
- Introduce a tier of review, similar to the Social Security and Child Support Division of the AAT or the Veterans' Review Board, where an applicant can talk directly to an independent decision maker with limited formality and with no right of appearance for an Agency representative.
- Ensure that in external review, reviews are handled consistently, expeditiously and fairly in accordance with the NDIA's obligation to act as a model litigant.

**Recommendation 4: Improve consumer protections and complaint mechanisms for NDIS participants**

- Establish a purpose-built consumer dispute resolution body with powers to involve participants, providers and the NDIA, to make decisions binding on providers and to stay court enforcement of debts against participants.

- Improve the regulation of supported accommodation arrangements through strengthened obligations on providers to ensure that changes in supports do not result in homelessness.
- Adopt a robust national framework for the regulation and oversight of the use of restrictive practices on people with disability that applies to all settings and aims to eliminate the use of restrictive practices in all settings.

## 4. Improving access to the NDIS

The NDIS supports more than half a million participants, but there are more than 4.4 million people in Australia with disability. We think the NDIA can do more to ensure that people with barriers to access, including people in custody, people in rural and remote areas, and people with psychosocial disabilities, can access the Scheme.

### 4.1 Barriers to access generally

Although there have been improvements in the process of applying for access to the NDIS, our clients continue to experience barriers, technological and financial, to accessing the Scheme. It can be difficult for prospective participants to meet the NDIA's requests for specialist reports, particularly in rural, regional and remote areas.

The language of the NDIS Act, consistent with the *Convention on the Rights of Persons with Disabilities*, is of disability and impairment. We continue to see access applications refused where doctors indicate that their patients' conditions are permanent and cause them substantially reduced functional capacity. Often, it's clear the applicant meets the access requirements, but the issue is the NDIA's restrictive interpretation of medical language.

It is important that decision makers have sufficient knowledge and training to appropriately assess applications for access. Requests for additional information should be limited to where information supplied is contradictory or ambiguous.

Some measures we recommend the NDIA take to improve access to the Scheme include:

- Providing information booklets explaining the eligibility criteria to prospective participants and their treating health practitioners,
- Supporting participants to complete the forms and obtain requested supporting information (including through additional funding for Local Area Coordinators),
- Online and telephone support for people to speak to a representative of the NDIA throughout the access application process, and
- Consulting with the prospective participant directly, or with their family members or treating practitioners (with consent), to better understand the impact of a person's impairments.

The NDIA should use its powers in s 6 of the NDIS Act to provide support and assistance, including financial assistance, to prospective participants. In our work in the AAT, we often see the NDIA unwilling to fund medical reports for people who are unable to pay for reports themselves, notwithstanding legislative power to do so. This imposes an increased burden, including an administrative burden, on the resources of other

agencies, such as state health services, therapists, disability advocates, the AAT, and legal aid commissions.

Applications for access should not be refused because a decision maker determines there is insufficient evidence about a person's impairments. Instead, decision makers should be directed to use the powers in s 6 of the NDIS Act to help prospective participants to supply the information needed so that an informed decision is made.

## 4.2 Psychosocial disabilities

Previous reviews of the NDIS, particularly the Tune Review, have highlighted the difficulties for people seeking access for psychosocial disabilities. One of the reasons for the difficulty is that best practice in psychosocial care emphasises a person's strengths and abilities, and focuses on recovery and improved wellbeing,<sup>2</sup> which does not always square well with the requirement that there are "no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment".<sup>3</sup>

In July 2022, some positive changes to the access requirements were introduced, including the replacement of the term "psychiatric condition" with "psychosocial disability" and the express recognition that some permanent impairments can fluctuate in severity, but still meet the access requirements.<sup>4</sup>

Unfortunately, we continue to see prospective participants with psychosocial disabilities having their access applications refused despite having long-standing, debilitating psychosocial impairments. This is often because decision makers don't differentiate between ongoing consultation with a psychologist or psychiatrist, which can be essential to mental health recovery, and treatment likely to remedy an impairment.

The NDIA has developed a number of resources to assist prospective participants with psychosocial disabilities and their doctors to present information about the impact of their disabilities. We consider that further support and training is needed to ensure that people with psychosocial disabilities can access the NDIS while pursuing mental health recovery. NDIA decision makers should not refuse access to prospective participants on the basis that they continue to consult a psychologist or psychiatrist, but should

---

<sup>2</sup>David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013, Removing Red Tape and Implementing the Participant Service Guarantee*, December 2019, page 74; NDIA, '[Mental health and the NDIS | NDIS](https://www.ndis.gov.au/understanding/how-ndis-works/mental-health-and-ndis)' (Web Page, current at 18 May 2022 < <https://www.ndis.gov.au/understanding/how-ndis-works/mental-health-and-ndis>>).

<sup>3</sup> *National Disability Insurance Scheme Act 2013* s 24 and *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* r 5.4.

<sup>4</sup> *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022 (Cth)* Sch 2 clause 16-23.

appropriately and thoroughly consider the prospective participant's treatment history, and whether the prospective participant's impairment is enduring.<sup>5</sup>

### 4.3 Prospective participants in custody

There is a high level of unmet need for disability support in prisons, and our clients face significant barriers accessing the NDIS while in custody. Advocacy and legal services are difficult to access, providers may be unwilling to assess a person in custody, and assessments are difficult to facilitate. It can be difficult to assess a person's functional capacity while they are detained in prison, which can limit the information the NDIA has to make access decisions. These issues create difficulty and delays in accessing the NDIS. The effect is to impede transition planning and unnecessarily prolong the detention of people with disability.

There has been some positive feedback about the NDIA's Justice Liaison Officer roles specifically assigned to youth justice, particularly with regard to the provision of additional resources, connection and facilitation of access to the NDIS that would otherwise be difficult to navigate. Additional resources to promote, enhance, and expand Justice Liaison Officer roles in youth justice settings could better support young people to access the NDIS and disability supports.

The NDIA should ensure that all eligible people have access to the NDIS while in custody, by supporting people in custody to access the NDIS, ideally at intake, and with an emphasis on ensuring that supports are in place prior to determination about parole and release. This would support rehabilitation and better address the needs of prisoners with disabilities, including children.

#### ***Dan: limited access to FASD assessment while in custody<sup>6</sup>***

Dan is a 16-year-old Aboriginal young person with a mild cognitive disability who has had frequent interactions with the criminal justice system which has seen him in and out of custody.

Dan's support workers suspected that he has FASD. During the brief periods where Dan was out of custody, his supports were unable to contact him to arrange the FASD assessment. With Dan spending significant periods of time in custody, the support workers attempted to make use of the opportunity to

---

<sup>5</sup> See *National Disability Insurance Agency v Davis* [2022] FCA 1002 at [76]-[100].

<sup>6</sup> Not his real name. This case study also appears in [Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – National Legal Aid submission to the Royal Commission, November 2022](#).

arrange a FASD assessment to take place in juvenile detention. However, the assessment was unable to be facilitated.

Without the assessment, Dan is unable to access NDIS supports necessary to break the cycle of further detention. An assessment and diagnosis would assist caregivers, educators and authorities better understand and respond to Dan's behaviour and assist to provide better supports for Dan as he transitions to adulthood.

#### 4.4 Access for children

The NDIS has provided the opportunity for children and young people with disabilities to access the supports they need to develop, to participate in the community and to help their families support them.

Legal Aid NSW routinely sees failures of the NDIA to provide these necessary supports to children and young people with disability. For families trying to obtain appropriate supports for their children, the review process can be complex and burdensome. For children waiting to access the Scheme, or seeking supports be reinstated, this can result in developmental delays, decreased social skills and increased behavioural challenges.

Even where children have diagnoses, have reports from highly experienced treating practitioners, and are in secure accommodation due to concerns, we have observed there are still significant delays in obtaining an approved NDIS plan. In NSW, the Supreme Court has urged the NDIA to expedite applications of children with disability, particularly where the absence of a plan has led to 18-year-olds remaining in secure accommodation because they are unable to access the care they need.<sup>7</sup>

The NDIA should ensure that children with disability have access to adequate and timely NDIS and other disability supports, wherever they live (including regional, rural and remote areas).

#### 4.5 Introducing a discretion to remain a participant while accessing aged care

If a person becomes a participant in the NDIS before they turn 65, it is intended that they can elect to remain a participant after they turn 65. NDIS Act s 29 outlines the circumstances in which a person ceases to be a participant, including where the person

---

<sup>7</sup> There is a series of reported decisions that deal with this issue in the matter of *Re Millie*. See, eg, *Re Millie; Secretary Department, Family & Community Services & Minister for FACS* [2019] NSWSC 1110.

starts receiving home care on a permanent basis, or takes up residence in a residential aged care facility and this first occurs after the person turns 65.

Legal Aid NSW has spoken to participants who have transferred to residential aged care facilities, often because of a lack of other housing options, without the knowledge that the move makes them ineligible for NDIS support.

Section 29(1)(b) operates to remove people from the NDIS who rely on NDIS support for social interaction, equipment and care. It operates automatically without recourse for a participant to review. We recommend that s 29(1)(b) NDIS Act is amended to allow a participant to demonstrate a continued need for NDIS support when they begin to receive aged care services, and that decisions that a person cease to be a participant in these circumstances be reviewable.

In general, we support a review into the interaction between the NDIS and the aged care system to ensure that people with disability continue to get the support they need as they age.

#### 4.6 Removing the presumption that an application for NDIS access is withdrawn when requested information is not supplied

Under s 26 of the NDIS Act, the NDIA can ask a participant to provide further information in support of an access request. If the NDIA requests a participant provide further information or undergo an assessment and the information is not provided within 90 days (previously 28 days), the application for access is taken to be withdrawn.

When a decision maker makes a s 26 NDIS Act request, they should be directed to consider the NDIA's powers to assist applicants, including financially, to obtain the requested information.

If the information is not provided, we recommend that s 26(3) be amended such that an application is formally refused, rather than deemed to be withdrawn.<sup>8</sup> Refusing the application allows an applicant to seek review of that decision rather than being unsure of the status of their application or beginning the process of applying for access again. Considering an application withdrawn rather than refused disadvantages people in unstable housing situations, in custody or without consistent access to help to advance their applications. It can cause confusion and delay when prospective participants are seeking to determine whether an application is still being considered or has been withdrawn.

---

<sup>8</sup> This is consistent with the approach to determining claims for Centrelink payments. Where an applicant has not supplied requested information, the claim is determined, not considered withdrawn.

If the NDIA were to issue a refusal decision to a person who has not supplied requested information under s 26 NDIS Act, it would provide certainty and reduce delay by allowing prospective participants to seek review of the decision.

**Recommendation 1:** *Improve access to the NDIS, including for children, people with psychosocial disabilities, people in custody and people in rural and remote areas.*

- The NDIA should provide more assistance to people applying for access, including using its powers under *National Disability Insurance Scheme Act 2013 (NDIS Act)* s 6 to provide financial assistance to prospective participants.
- There should be more training and guidance for decision makers in relation to permanence of impairments, especially in relation to psychosocial disabilities.
- The NDIA should provide more assistance for people in custody to apply for the NDIS.
- The Commonwealth Government should introduce a discretion for a person to remain a participant in the NDIS when they receive aged care services on a permanent basis.
- Applicants who do not provide requested information should have their applications considered refused rather than withdrawn, to allow them to pursue review rights if they later obtain the information or connect with services to assist them to apply.



## 5. Consistent, timely, accessible support

Well-funded, individualised NDIS support packages can support people with disabilities to be safe, healthy, connected to their communities and connected to employment and education. We consider that disability supports can work better if the NDIA improves oversight of the NDIS market and provides more transition supports. We recommend that the Supports Rules Schedule 1 is reviewed to clarify the relationship between the NDIS and other systems, particularly the health, mental health and justice systems. We also recommend that when the NDIA intends to make a decision reducing or removing supports, a participant is given notice of that decision and given an opportunity to seek review of it before it takes effect.

### 5.1 Improved oversight of the NDIS market

Previous reviews of the NDIS have focused on ‘market failure’ or ‘thin markets’, which continue to be a significant issue for the NDIS. We have seen service providers withdraw from or decline to provide services to people with complex support needs, especially those involved in the criminal justice system. This is particularly an issue where choice of providers is limited, including in rural, regional and remote areas.

Where providers decline to provide services to participants with complex support needs there can be significant consequences – for some, risks to health and safety or prolonged time in custody.

Thin markets can also impact on support decisions – if a participant is unable to access funded supports in their area and their plan is underutilised, funding in subsequent plans can be reduced. When making decisions about supports, NDIA decision makers are directed to consider the effectiveness of previous plans (s 33(5) NDIS Act) and should also be directed to consider whether a lack of accessible services has contributed to an underspend.

Urgent work is required to address the gaps between the NDIS and mainstream services. There is a need for a service safety net in urgent cases where market failure leads to people with complex needs entering the criminal justice system. There is a clear need for stronger NDIS market oversight, including by monitoring changes in the NDIS market which may indicate emerging risk, and monitoring and mitigating the risk of unplanned service withdrawal.

The *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022* inserted a new general principle, that:

*In exercising their right to choice and control, people with disability require access to a diverse and sustainable market for disability supports in which innovation,*

*quality, continuous improvement, contemporary best practice and effectiveness in the provision of those supports is promoted.*

In order to assist people with disability to access a diverse and sustainable market for disability supports, the NDIA should:

- Institute a safety net that is responsive, accessible and has clear accountability. The NDIA must intervene in situations where a person cannot secure supports due to the unavailability of market providers to ensure the participant receives the support they need.
- Equip, resource and oversee skilled planning that facilitates appropriate, well-reasoned support decisions.
- Ensure that skilled and experienced support coordinators are an ongoing part of the Scheme for people with complex needs and behaviours of concern.
- Invest in training, engagement and capacity building for services in rural and regional areas.
- If needed, purchase services directly on behalf of participants, and
- Adjust pricing to accommodate the costs of delivering support to people with high and complex needs, as well as the cost of delivering supports in rural, regional and remote areas.

## 5.2 Providing support pending review of a negative decision

Decisions to revoke a participant's status, to remove a previously funded support or to reduce the level of support a person receives can not only risk a participant's health, safety and independence, but can also make it difficult for a participant to pursue their review rights. Currently, when these decisions are made, they are of immediate effect. A person seeking to review a decision to revoke their status as a participant or reduce their supports must do so without having access to the support they once had.

We recommend that before a decision is made, a participant should be advised of the intention:

- To revoke their participation in the NDIS under s 30 NDIS Act,
- To remove a previously funded support, or
- To reduce the level of support in a plan.

A participant should be able to have the decision reviewed before any reduction or revocation takes place.

Under the *Social Security (Administration) Act 1999*, people who apply for review of adverse Centrelink decisions can continue to be paid income support payments pending

the outcome of the review.<sup>9</sup> This is to mitigate against severe financial hardship, ensure the person can continue to support dependent children, access medical treatment and remain housed.

Losing access to supports under the NDIS can also cause severe financial hardship and affect a participant's ability to maintain their health and housing. Giving notice of the intention to make an adverse decision and continuing supports until the review process is completed would support participants and allow them to participate effectively in the review process.

### ***Bernadette: a year to reinstate NDIS supports***

Bernadette (not her real name) is a participant in the NDIS. She has a bowel disease, which had led to part of her bowel and intestines being removed and left her with problems with fatigue, mobility, temperature regulation and a limited ability to work. She has a small amount of part time work through an Australian Disability Enterprise (**ADE**) (an organisation assisting people with disability to engage in work tasks). The ADE placement was supported through NDIS funding.

Bernadette's status as a participant was revoked on the basis that her impairment "was not deemed as a disability" and "was not covered by the NDIS".

It took over a year for the decision to be reversed, during which time Bernadette had no access to supports.

## **5.3 Introduce draft plans and reasons for refusing supports when a s 33(2) decision is made**

In our submission to the Tune Review, we submitted that the NDIS Act should require a planner to provide a draft plan with reasons for the decision making to the applicant and their nominated support people for discussion of the plan before it is finalised. We recommended this change because in our experience it is often difficult for a participant to know what supports have been funded under a particular plan budget.

---

<sup>9</sup> See *Social Security (Administration) Act 1999 (Cth)* subsection 131(1).

The Tune Review ultimately recommended that draft plans be introduced with sufficient time for a participant to review the content,<sup>10</sup> but the recommendation is yet to be implemented.

Additionally, if plan budgets (even if they were fully flexible) always included an explanation of what supports the decision maker approved, this would make it easier for a participant to use their plan and to identify any shortfalls and seek a review if necessary. This is particularly important as the NDIA moves towards longer plan periods.

If a decision maker has determined that a particular support should not be funded, the participant should get reasons for that decision. We consider that this would help participants to understand the decision made and reduce unnecessary reviews.

Where the NDIA has sought technical advice about a support decision, for example in relation to decisions about assistive technology or Specialist Disability Accommodation, that advice should always be provided to a participant.

The NDIS Act directs a decision maker to consider the effectiveness of previous plans (s 33(5)(f) NDIS Act). This consideration should be given more weight in planning decisions, with reductions or removals of previously funded supports only when there has been a change that means they no longer meet reasonable and necessary criteria.

#### 5.4 Improve access to transition supports

Legal Aid NSW represents many clients with disability awaiting discharge or release from prisons or inpatient units. While we recognise that the introduction of Justice Liaison Officers has created a single point of contact for workers in the justice system to coordinate support for NDIS participants, our clients still face a number of issues in accessing transition supports.

In our experience, there is:

- inadequate transition planning, especially for people on short or fixed term sentences,
- limited coordination and planning between systems (e.g., fragmented health information systems inhibit information-sharing between custodial and community health providers, creating gaps in service provision when people leave custody),

---

<sup>10</sup>David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013, Removing Red Tape and Implementing the Participant Service Guarantee*, December 2019, page 54.

- difficulties arranging NDIS plans, and a lack of clear processes, accountability and responsibility for NDIS plans, and
- lack of support for people making applications for parole.

These issues can delay discharge or release from prison or inpatient units. They also increase the risk of a person being released into homelessness or inappropriate accommodation without supports, putting them at risk of breaching any conditions of their release, further offending, and readmission to some form of custody.

For forensic patients without a fixed or clear release date, it can be particularly difficult to arrange a NDIS plan to support transition to the community. In particular, the NDIS disability/justice support gaps have significantly restricted forensic patients, who only have a cognitive disability, from accessing less restrictive care in the community. For example, even where the Mental Health Review Tribunal agrees a person is ready for conditional release, that person will not be released without appropriate support.

We also see the NDIS refuse supports or give lower priority to cases where the individual is already “supported” in custody or detention. This has resulted in delayed release into the community of NDIS participants in long-term detention (as forensic patients or prisoners).

We recommend that the NDIA assist people with disability to transition to the community by:

- urgently identifying people with disability who remain in custodial, forensic or mental health settings due to a failure to secure disability services,
- developing integrated teams with specialised, trained planners to assist people with disability to access NDIS supports,
- adopting clear processes for obtaining access to NDIS supports and planning for a person’s release before their sentence is complete or discharge is imminent, and
- funding supports for transition prior to release, so that supports are in place to facilitate successful discharge or release and reduce their risk of reoffending or readmission.

Additionally, we recommend that policies around medium-term accommodation are revised to increase access to the support for people transitioning from custody. Currently, the NDIA’s policy on medium-term accommodation requires a person to already have a long-term housing solution available.

Medium term accommodation is an essential support for people with disability transitioning from custody. It can help to overcome the difficulties of performing functional assessments for people in custody by providing an environment where a person with disability’s functional independence can be assessed. Assessments can help determine what accommodation model will work best, whether it is Supported Independent Living,

Specialist Disability Accommodation or social or private housing with drop-in support. If medium term accommodation is restricted only to those who already have approval for a form of disability housing, it can't be used to help establish needs and facilitate the transition back into the community for people with disability in custody. We recommend that the medium-term accommodation policy is amended to remove the requirement to already have identified a long-term housing solution.

## 5.5 Review the Supports Rules Schedule 1, to ensure that disability support needs do not fall in the gaps between systems

To work effectively and to ensure that people with disabilities are adequately supported, the NDIS must work with other systems such as the health and mental health systems, the justice system, education and housing.

The Supports Rules Schedule 1 governs when the NDIS and when another system will be responsible for providing a support to a person with disability. These rules were developed by the Council of Australian Governments,<sup>11</sup> and most recently revised on 27 November 2015.

In practice, in many areas the divide between the responsibility of the NDIS and of other systems has been unclear. This results in participants not getting the support they need when no system considers a support is its responsibility.

### 5.5.1 The health system

In relation to the health system, there were many improvements when the NDIA introduced a policy on disability related health supports, recognising that it was responsible for health supports related to the functional impact of a participant's disability. However, it is not uncommon for decision makers to refuse support to a participant such as psychological support, physiotherapy or occupational therapy, because a limited number of sessions are available under a chronic disease management plan or mental health care plan, even when the need for the support is disability related and is not related to the time-limited, goal-orientated treatment of a condition. We recommend that the wording of rules 7.4 and 7.5 of the Supports Rules is revised to provide greater clarity on the responsibilities of the health system and the NDIS.

---

<sup>11</sup> *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth), note to rule 7.3; and see Department of Social Services, [The Applied Principles and Tables of Support to Determine Responsibilities NDIS and other service | Department of Social Services, Australian Government \(dss.gov.au\)](#), 27 November 2015.

### 5.5.2 The mental health system

For the mental health system, the Supports Rules say that support will be available under the NDIS if it is not ‘clinical in nature’: r 7.6. Because ‘clinical’ relates to treatment, the rule is out of step with the recovery model of mental health, under which a person might continue to have treatment with a psychologist or psychiatrist after it is recognised that they have a permanent and significant disability. We frequently see participants with psychosocial disabilities denied the mental health support they need to participate in the community on the basis that the support is delivered by a psychologist. We consider that the wording of the rule needs revision, consistent with changes that have already been made to the access criteria, to align the rule with best practice in mental health treatment and management.

### 5.5.3 The justice system

A further area where the Support Rules are unclear and are applied to deny participants disability supports is the justice system. Under Support Rules 7.23-7.25, the NDIA is not responsible for funding day-to-day supports while a person is detained in prison or a mental health facility and is responsible for other supports “to the extent appropriate in the circumstances of the person’s custody”. This lack of clarity makes it difficult to establish responsibility for supports and to ensure that our clients who are entitled to NDIS supports while in custody can access them. For forensic patients it can be difficult to establish what supports a person can receive under the NDIS where the provision of supports will result in a reduction in the patient’s risk to self or others. Without funding for disability supports, decision makers may be less likely to approve a forensic patient’s release, due to concerns about the level of support the patient will have in the community and how this may relate to the patient’s risk of harm to self and others.

We would welcome the opportunity to make further recommendations for amendments to the Supports Rules.

***Recommendation 2: Ensure consistent, timely and individualised support under the NDIS for participants.***

- The NDIA should improve oversight of the NDIS market by instituting a safety net for when the NDIS market fails.
- Participants should continue to receive supports at the same level throughout a review of an adverse decision (including revocation, removal or reduction of a previously funded support).
- Draft plans should be introduced, and participants should be given reasons for any supports not funded when their plan is made.

- Access to transition supports for people leaving custody should be improved.
- The *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (the Supports Rules)* Schedule 1 should be reviewed to:
  - Improve the language about health support under the NDIS,
  - Improve the language about mental health support under the NDIS, and
  - Clarify responsibility for supports for participants in custody.



## 6. Improved decision making under the NDIS Act

At present, specified decisions of the NDIA under the NDIS Act are reviewable in AAT. The way NDIS decisions are reviewed is changing, with both the proposed replacement of the AAT<sup>12</sup> and the introduction of Independent Expert Review of NDIS decisions, which began in December 2022.

We consider that there is an opportunity to make the review process simpler, quicker and more accessible to NDIS participants and applicants. Changes to the review process should be based on co-design principles, with broad consultation with people with disabilities to ensure the process is fit for purpose.

### 6.1 Improving internal review decisions

We consider that the first step in improving the review of decisions for people with disabilities is to improve the initial internal review of decisions under ss 99-100 NDIS Act. In our experience, participants continue to get decisions with pro forma reasons that don't help them to understand why a decision has been made to refuse access to the Scheme, or not to fund particular supports.

Decisions continue to refer to and rely on factors that have no legislative basis, for example the concept of 'primary disability'. Reliance on this concept, which does not appear in the NDIS Act, has led to several participants seeking to apply to the NDIS when they are already participants in an effort to have their disability needs recognised.<sup>13</sup>

Review decisions could be improved by:

- Requiring a reviewer to communicate with the participant prior to completing the review,
- Making it mandatory for a reviewer to consider the powers available under the NDIS Act, including s 6 NDIS Act, to provide support and assistance to participants in relation to doing things under the Act, and
- More clearly directing reviewers to consider the effectiveness and operation of previous plans (including any market reasons why supports might not have been used) when making planning decisions.

---

<sup>12</sup>'Reform of the federal administrative review system', Administrative Appeals Tribunal (Web page, 16 December 2022) <https://www.aat.gov.au/news/reform-of-the-federal-administrative-review-system>.

<sup>13</sup>For example *Goodliff and National Disability Insurance Agency* [2021] AATA 5022

If the reviewer is not satisfied that there is sufficient evidence for a support, they should support the participant, including financially, to obtain the required evidence.

## 6.2 Simplifying the review mechanism for NDIS decisions

Legal Aid NSW has previously recommended an additional tier of review of NDIS decisions, with similar, informal procedures to the Social Security and Child Support Division of the AAT or the Veterans' Review Board.<sup>14</sup> This is because many review applicants are seeking to have their basic disability needs met, including low-cost pieces of technology, small changes to care arrangements or restoration of previously funded supports, and should be given the opportunity to communicate their needs directly to a decision maker in a forum with limited formality.

Introducing a tier of review where there was no right of appearance for a departmental representative would:

- Make reviews quicker, more economical and more accessible for applicants with disabilities,
- Allow applicants a fair opportunity to put forward their needs and to have the benefit of inquisitorial processes that elicit the information needed to make a decision, and
- Reduce the number of reviews advancing to formal determination. This would allow a focus of scarce legal resources at the second tier of review, which would likely be fewer in number and are more likely to involve cases with more complex factual and legal issues.

We recommend that appeal be as of right to a second level of review, and that the second level body have:

- The ability to appoint a representative (such as a tutor) where an applicant does not have capacity to represent themselves,<sup>15</sup>
- Powers to control and limit summoning of documents to within reasonable limits,

---

<sup>14</sup>[Inquiry into the performance and integrity of Australia's administrative review system – Legal Aid NSW submission to the Senate Legal and Constitutional Affairs Reference Committee, November 2021.](#)

<sup>15</sup>Under the *Administrative Appeals Tribunal Act 1975* (Cth), the AAT does currently have an express power to appoint a tutor/litigation guardian. See LA NSW submission on this issue: [Inquiry into the performance and integrity of Australia's administrative review system – Legal Aid NSW submission to the Senate Legal and Constitutional Affairs Reference Committee, November 2021](#), at pages 3-5.

- The ability to manage cases and list matters for hearing and appropriate alternative dispute resolution processes early,
- Provision for legal and non-legal advocacy where required, and
- Mechanisms for assisting applicants to pay for reports where necessary.

These measures would promote quick, fair, just and economical resolution of disputes for people with disabilities.

In participating in reviews, the NDIA must ensure it meets its model litigant obligations, including:

- Ensuring that it assists the decision-making body to come to the correct and preferable decision, by limiting the issues in dispute, participating fully in alternative dispute resolution, by avoiding delay and by correctly characterising the decision under review.
- Acting consistently in the handling of reviews.
- Limiting reliance on summonses, including limiting the scope of any summonses requested.
- Implementing decisions as quickly as possible, including decisions that result in reimbursement of the participant.

### ***Recommendation 3: Improve decision making under the NDIS Act***

- Provide clearer, more detailed reasons for review decisions.
- Make it mandatory for decision-makers conducting internal reviews to speak to the participant and to consider the NDIA's obligation to assist participants under the NDIS Act.
- Introduce a tier of review, similar to the Social Security and Child Support Division of the AAT or the Veterans' Review Board, where an applicant can talk directly to an independent decision maker with limited formality and with no right of appearance for an Agency representative.
- Ensure that in external review, reviews are handled consistently, expeditiously and fairly in accordance with the NDIA's obligation to act as a model litigant.

## 7. Improved consumer protections and complaint mechanisms for NDIS participants

The introduction of individualised funding packages for many people has increased choice and flexibility in the provision of disability services. It also makes people with disabilities consumers, with rights and obligations under consumer law, and creates the need for protection and safeguards in the purchasing and use of supports.

### 7.1 Establish a purpose-built, binding NDIS consumer regulation body

Legal Aid NSW provides advice, assistance and representation to eligible consumers under consumer laws. Through that work, we have seen an increasing number of NDIS participants and their carers being pursued personally by NDIS service providers for debts arising from insufficient funds in NDIS plans.

Plan managers, allied health professionals and support coordinators may provide advice or recommendations to NDIS participants about engaging in services that are not included in a plan, or that cost more than the amount included in a plan.

We have seen NDIS participants and their carers receive letters from debt collectors on behalf of NDIS service providers and face litigation before tribunals and courts. In most cases these situations involve an issue with the plan funding as well as a consumer issue – that is, there is a support that is needed, but not funded, under the NDIS plan about which the participant can seek review. Courts and Tribunals in consumer matters cannot consider or order that the NDIA provide additional funding for amounts outstanding to a provider and can only order against a participant or carer personally.

In our experience, many NDIS participants would benefit from more assistance to understand:

- Contracts for goods and services, and their obligations under such contracts, and
- Engaging workers (whether employees or independent contractors) to provide support work services.

### *Margaret: carer pursued for debts in court<sup>16</sup>*

Margaret was a carer for her adult son who is a NDIS participant. She lived in social housing. Her son did not have capacity to make decisions for himself, and Margaret was his financial manager, guardian and NDIS nominee.

Margaret engaged a NDIS provider, who was a sole trader providing essential services like dressing and showering her son. All agreements were oral. There was a dispute about payment rates, and the NDIS money ran out early. Margaret believes this happened because the provider over-charged.

Margaret and the NDIS provider tried to get help from the plan manager and the NDIA but were not successful.

Soon after, Margaret discovered that over \$15,000 had been removed from her bank account under a garnishee order. The provider had served a statement of claim but had an incorrect address, so the provider was able to obtain a default judgment and garnishee order without Margaret knowing anything about the matter until her bank account was garnisheed. The money was her life savings and she needed it for another child with a disability.

With help from Legal Aid NSW and a pro bono solicitor, Margaret was successful in getting the NDIA to review her son's plan and include the funding needed to pay for the services and in getting the default judgment set aside.

Margaret's situation was made more difficult because there was no one forum where she could go to resolve her dispute. The NDIS Quality and Safeguards Commission can investigate complaints against providers, NSW courts and tribunals can adjudicate and enforce outcomes in consumer disputes and issues with NDIS funding are reviewed through the AAT.

---

<sup>16</sup> Not her real name. This case study also appears in [Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#) – National Legal Aid submission to the Royal Commission, November 2022.

We recommend that there be a specific dispute resolution forum created with powers to determine consumer disputes that arise in the course of providing NDIS supports. The forum, which could be overseen by the NDIS Quality and Safeguards Commission, should be able to convene dispute resolution processes that involve the participant, their carers, the provider, any support coordinator or plan manager involved and the NDIA.

We recommend that the forum work similarly to the Australian Financial Complaints Authority (**AFCA**). AFCA provides free, independent dispute resolution for financial complaints. When a consumer lodges a complaint with AFCA prior to a judgment being entered, court proceedings are stayed to facilitate the dispute resolution process. Decisions of AFCA are binding on lenders.

A specialised NDIS consumer body could work similarly by providing a robust and binding mediation process involving all affected parties and staying court action until a result is reached. An agreement to participate in the body and accept its recommendations could be part of the NDIS Code of Conduct which sets out the expectations for conduct of NDIS providers.

The NDIA should be required to be present in dispute resolution. This would allow for decisions to be made immediately to increase supports to cover shortfalls and avoid costly and time-consuming court processes for pursuing debt. While it may not always be that the NDIA considers it appropriate to increase funding in these circumstances, a body able to adjudicate over NDIS funding related disputes would:

- Allow for disputes that involve NDIS funding related issues and consumer issues to be resolved in one forum,
- Decrease the administrative burden on participants, the NDIA and providers,
- Reduce the likelihood that participants and their families are unfairly pursued for debts.

## 7.2 Increased regulation of supports linked to housing

Legal Aid NSW has assisted a number of NDIS participants with complex support needs who have faced unreasonable evictions from specialist disability accommodation (**SDA**) and other supported living arrangements. We see accommodation providers terminate client services at short notice in response to challenging behaviour, with insufficient consideration about whether less restrictive alternatives were possible, or of the potential homelessness of the participant.

Although a participant is responsible for meeting their own housing costs, including rent, a participant's ability to remain in certain forms of accommodation is often linked to ongoing NDIS funding at a certain level. If a participant's support level is reduced or a housing-related support is removed, it can lead to complete withdrawal of services and homelessness.

We welcome the introduction of new initiatives for supported independent living introduced in April 2022 which provide for a transition period of 12 weeks at the previous funding level to support the transition to new support arrangements.

We also welcome the Quality and Safeguards Commission's Inquiry into Aspects of Supported Accommodation.<sup>17</sup> We agree, based on our experience of advocating for clients, that specific regulation of group home settings is needed, and that participants need more support to make changes to their living arrangements.

We recommend that:

- As submitted above, where the NDIA intends to reduce support or remove a previously funded support, funding at the previous level be maintained until the participant has exhausted their review rights.
- The obligation on providers to work with participants to find alternative arrangements be strengthened, with an obligation for a provider to notify the Quality and Safeguards Commission if a support change is likely to lead to homelessness within 90 days, with notification to lead to mediation of any dispute.
- Policy should require suitable and long-term alternative accommodation be available before a service provider can ask a participant to leave.<sup>18</sup>
- There be an obligation on all providers of Supported Independent Living which let housing to participants to provide a written housing agreement to a participant (as is required for SDA providers), separate from any agreement for NDIS services.
- The NDIA develop best-practice contract clauses around the termination, variation and commencement of housing agreements connected to support arrangements.

### 7.3 A National Framework for the oversight and use of restrictive practices

Legal Aid NSW supports efforts to reduce the use of restrictive practices and compulsory treatments for people with disabilities. We continue to see the use of restrictive practices

---

<sup>17</sup>NDIS Quality and Safeguards Commission, *Inquiry Report: Own Motion Inquiry into Aspects of Supported Accommodation*, January 2023, <https://www.ndiscommission.gov.au/resources/reports-policies-and-frameworks/inquiries-and-reviews/own-motion-inquiry-aspects>.

<sup>18</sup>This obligation is imposed on residential aged care services in the aged care context – see s 6 of the [User Rights Principles 2014](#).

not in accordance with the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, including:

- Restriction of the lives of people with disability in residential services and group homes, such as restricted access to visitors and phone calls, whether and what they can watch on television, and when and in what circumstances they may access the community under staff supervision.
- The use of environmental restriction to protect from risk, due to a lack of staff and other resources to monitor risk. This can include locked doors and/or refusal to provide support to exercise freedom of movement.

It is highly likely that cases of restrictive practices are underreported. These practices are largely hidden from external sight, and some people subjected to restrictive practices in disability-specific settings may be unable to seek the advice and assistance that they need.

There is a lack of consistency and robustness in federal, state and territory legislation regarding a formal authorisation process for the use of restrictive practices including by NDIS providers on NDIS participants. We recommend that the NDIA, the Quality and Safeguards Commission and state and territory governments should adopt a national framework for the regulation and oversight of the use of restrictive practices that applies to all settings. The framework should aim to eliminate the use of restrictive practices in all settings and include effective mechanisms to ensure compliance.

***Recommendation 4: Improve consumer protections and complaint mechanisms for NDIS participants***

- Establish a purpose-built consumer dispute resolution body with powers to involve participants, providers and the NDIA, to make decisions binding on providers and to stay court enforcement of debts against participants.
- Improve the regulation of supported accommodation arrangements through strengthened obligations on providers to ensure that changes in supports do not result in homelessness.
- Adopt a robust national framework for the regulation and oversight of the use of restrictive practices on people with disability that applies to all settings and aims to eliminate the use of restrictive practices in all settings.





© Legal Aid Commission of NSW.

You may copy, print, distribute, download and otherwise freely deal with this work for a non-profit purpose provided that you attribute Legal Aid NSW as the owners. To reproduce or modify the work for any other purpose you need to ask for and be given permission by Legal Aid NSW.