

National Disability Insurance Scheme Consultation Paper: Access and Eligibility Policy with independent assessments

Submission to National Disability Insurance Scheme

23 February 2021



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1. Executive Summary

National Legal Aid (NLA) welcomes the opportunity to contribute to the consultation on proposed changes to access and eligibility in the *Consultation Paper: Access and Eligibility Policy with independent assessments*.

NLA brings together the practice experience of the eight Australian state and territory legal aid commissions (LACs). In the 2019-20 financial year, LACs provided around 1.9 million legal services to people across the country.¹ We have enclosed the NLA Booklet which provides some further background to NLA and LACs.

The aims of the proposed changes – to shorten wait times for access decisions, to minimise the burden on NDIS applicants and to promote consistency in access decisions – are all changes that would improve the experience for prospective participants seeking to access the National Disability Insurance Scheme (NDIS).

However, we consider that those aims will be better met if independent assessments are not made compulsory. Independent assessments should be offered to applicants who are experiencing barriers to NDIS access and would benefit from assistance to show the impacts of their disability on their functional capacity.

We are concerned that the current proposal, which still requires an applicant to provide evidence of their impairments and the permanency of those impairments before an independent assessment will be required, may have the unintended consequence of increasing delays in decision making, splitting and prolonging the review process and increasing the burden on NDIS applicants.

We are particularly concerned that prospective participants who are experiencing disadvantages and vulnerabilities that compound their disabilities – who have language and cultural barriers, who live in remote areas, who identify as Aboriginal and/or Torres Strait Islander, who do not have capacity and/or lack informal support – could find it difficult to engage with the independent assessment process and could therefore be unintentionally excluded from the NDIS.

Our response to the Consultation Paper will draw on examples from our experience in assisting clients with disability to provide recommendations about how the proposed policy could be changed to better support applicants in the NDIS application process.

¹ National Legal Aid, 2019-20 data, *National Legal Aid Statistics* <https://www.nationallegalaid.org/> *National Partnership Agreement on Legal Assistance Services 2015-2020*, 2019-20 data. In 2019-20 COVID-19 impacted the number of “in person” services including at courts and tribunals (e.g. duty lawyer). However, there was a rise in the number of more intensive services delivered.

2. Our work with Australians with disability

2.1 About National Legal Aid and state and territory legal aid commissions

LACs are independent, statutory bodies established under state or territory legislation and funded by governments to provide legal assistance services to people who cannot afford a lawyer.

NLA represents the directors of the eight state and territory LACs in Australia.

NLA's purpose is to:

- Lead and encourage a national system of legal aid which allows people experiencing disadvantage to obtain access to justice.
- Provide a forum for engagement at a national level with governments, stakeholders, and the community, and for the individual LACs to engage with each other about best practice of delivering legal aid.

NLA aims to ensure that people's legal rights and interests are not prejudiced because they cannot:

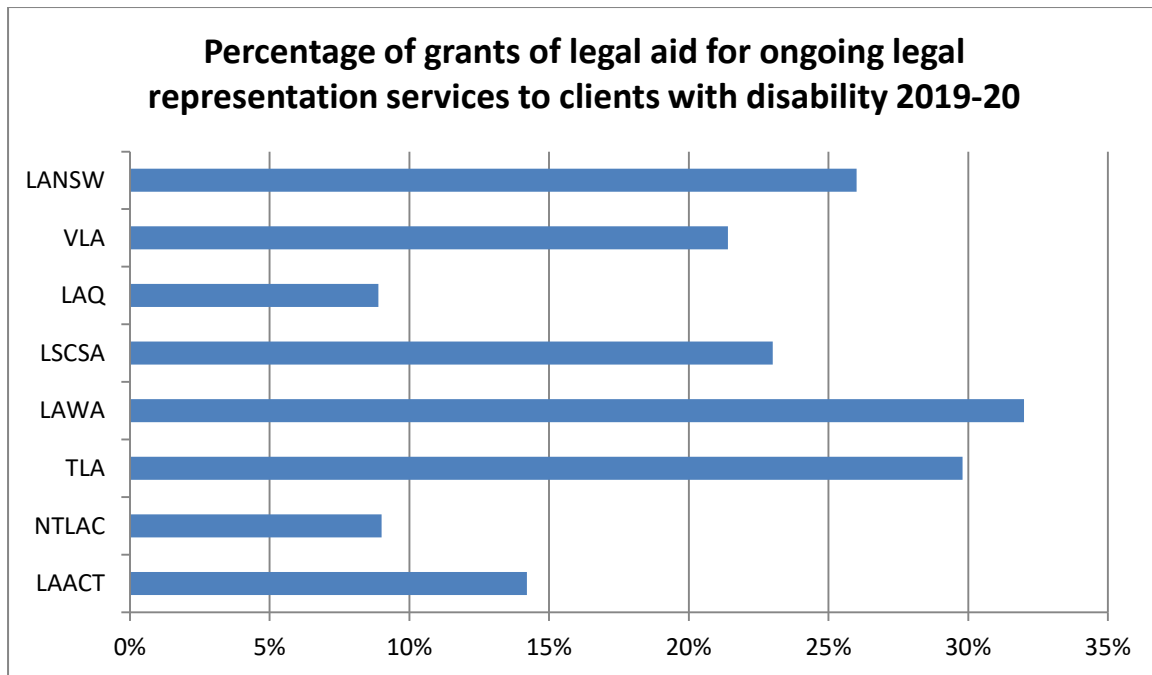
- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

2.2 Free legal help for people with disability, their carers and families

LACs are the largest provider of legal services to people with disability across Australia. Through this work we observe firsthand how the NDIS is not yet living up to its promise.

LACs offer specialist legal advice and representation in courts, tribunals and mental health inpatient units for people with disability. In addition, LACs receive funding from the Department of Social Services to provide legal representation in NDIS matters on appeal before the Administrative Appeals Tribunal (AAT).

In the 2019-20 financial year, LACs provided large numbers of more intensive legal services to people with disability.⁴ The following table reflects the percentage of grants of legal aid for ongoing representation services to people with disability. Data in the table will be a significant undercount as the data relies on the self-identification of the service user as a person with disability. The legal assistance sector is currently working with the Commonwealth Attorney-General's Department to support improved data collection including in relation to the delivery of services to people with a disability.



Many of our clients are eligible for receiving services under the NDIS and have overlapping legal needs. Through this work we see how the NDIS functions for the most disadvantaged members of our communities. When the NDIS works, it provides vital supports for our clients to live well and safely. When the NDIS fails, it can lead to people struggling to get through each day, losing care of their children or being deprived of their liberty.

3. Background

3.1 Previous submissions

NLA has made policy submissions in response to prior NDIS enquiries and consultations, including:

- [Putting People First: Removing barriers for people with disability to access NDIS supports - Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee](#), November 2019.²
- Joint Standing Committee on the National Disability Insurance Scheme on [NDIS Planning](#), September 2019.

Additionally, individual LACs have made submissions to the NDIS Thin Markets Project in June 2019, to the Joint Standing Committee on the NDIS on Market Readiness for the provision of services under the NDIS and to the Productivity Commission on NDIS Costs.³

² The Legal Services Commission of South Australia made an additional submission to the Review, which sits alongside the national submission.

³ See for example: submission on the Thin Markets Project by [Legal Aid NSW](#) and [Victoria Legal Aid](#) in June 2019; Legal Aid NSW, Submission to the Joint Standing Committee on the National Disability Insurance Scheme

Our recommendations in this submission should be read in conjunction with previous responses, particularly the [Putting People First](#) submission, Chapter 5 “Access and Eligibility” pages 27-31.

In that submission, we recommended:

Outreach, education and engagement: The Participant Service Guarantee should require the NDIA to engage in education, outreach and engagement activities to support access through improving awareness of the NDIS and how and why to access it.

Assistance with access requests: The Participant Service Guarantee should require the NDIA to provide accessible, timely practical assistance for people completing the access request including more specific guidance accompanying the access request forms and requests for supporting evidence.

Requests for further information: The Participant Service Guarantee should ensure that requests for further information are only made when strictly necessary to obtain information required to establish the eligibility criteria under the NDIS Act.

Facilitating access and assistance with reports: The Participant Service Guarantee should facilitate access to the NDIS by helping people to provide evidence of their disability, including contacting treating health practitioners or other support people provided the person consents, and including criteria for when funding will be provided for necessary reports.

Reasons for refusing access: The NDIA should ensure that letters refusing an access request provide a person with reasons for the decision, refer to the evidence considered in making the decision, provide information on all their options, and provide information on disability advocates and legal advice.

We maintain that a holistic response, that includes education, outreach and assistance to participants and their treating health practitioners, clarity of expectations and reasoning behind decisions, is essential to improving prospective participants’ experience of accessing the NDIS.

3.2 The Tune Review Report

In December 2019, David Tune AO PSM published the results of that review in a report entitled “Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee” (The Tune Review). The Tune Review report found that there were issues with the way in which information about disability under the Scheme is requested, interpreted and applied. The report said:

on Market Readiness for provision of services under the NDIS, March 2018 by [Legal Aid NSW](#) and [Victoria Legal Aid](#); Submission to the Productivity Commission on NDIS costs by [Legal Aid NSW](#) and [Victoria Legal Aid](#), July 2017.

More generally, the culture of the NDIA and its Partner workforce needs to appreciate that people with disability (and the people providing functional capacity assessments on their behalf) are experts in their disability.⁴

The Tune Review supported the further use of independent assessments to promote consistency in decision making. However, it recommended a number of “key protections” that needed to be implemented along with any expansion of assessments:

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

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

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

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

The review also noted that one of the risks of implementing independent assessments was the risk of disengagement from the system. It said:

As with the NDIS as a system more generally, this is a particular risk for Aboriginal and Torres Strait Islanders, those from CALD backgrounds and those with psychosocial disability.⁶

The overall recommendation of the Tune Review was that independent assessments be discretionary and recommended that guidelines be developed to help decision makers decide when a functional assessment would be required.⁷

4. Responses to the Consultation Paper

4.1 What will people who apply for the NDIS need to know about the independent assessment process? How is this information provided?

To be most effective, we consider that assessments should be offered to prospective participants, not required of them. This is in keeping with the findings of the Tune Review

⁴ David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019 (The Tune Review), page 62.

⁵ The Tune Review, page 66.

⁶ The Tune Review, page 67.

⁷ The Tune Review, [4.39].

and is the most appropriate way to assist applicants to access the Scheme. It will also likely realise efficiencies for the Scheme, avoiding unnecessarily funding independent assessments when a prospective participant has already provided evidence that they have substantially reduced functional capacity or psycho-social functioning.

The process should be:

- A decision maker should assess whether there is sufficient information to show that s 24(1)(c) *National Disability Insurance Scheme Act 2013* (NDIS Act) is satisfied.
- If not, those applicants who would benefit from assistance from the Agency to evidence the impacts of their disability on their functional capacity should be offered assistance to undergo a functional assessment, including a functional assessment undertaken by a treating practitioner.
- If an assessment is refused by the prospective participant, the decision maker should make an access decision, not treat the access application as withdrawn.

Applicants should have a choice about whether they undergo an assessment and should be offered options about the mode of assessment and who performs the assessment. Independent assessment may in some cases be a means of resolving uncertainties as to eligibility for access. In our experience, applicants, where directed to an independent assessor after thoughtful engagement with their individual case, and after having had an opportunity to speak to the question of whether, and by whom, an independent assessment should be conducted, often welcome the opportunity to show that they meet the access criteria.

Information about assessments should be available in community languages, in plain language formats and accessible to people with hearing and vision impairments.

Education and training should be offered to support organisations working with vulnerable applicants, including people in custody, people from culturally and linguistically diverse backgrounds, people who identify as Aboriginal and/or Torres Strait Island and people with cognitive disabilities and psychosocial disabilities. This is also in keeping with the concerns expressed in the Tune Review about disengagement from the process and from the NDIS in general.

If mandatory independent assessments are introduced, it is crucial that prospective participants receive information about:

- their entitlement to request an exemption; and
- the consequences of failing to attend or participate in an assessment (i.e. deemed withdrawal of their access request).

4.2 What should we consider in removing the access lists?

The Productivity Commission Study Report into NDIS Costs in October 2017 considered the role of the lists. It noted that the lists brought benefits - less onus on the applicant to

demonstrate potential eligibility, certainty for participants and their families that they would be supported by the NDIS and a reduction in the administrative burden on the NDIA.⁸

In responses to the Costs Inquiry, the NDIA itself as well as several public interest organisations supported keeping Lists A, B and D. The report concluded that:

“Given the broad support for the lists, and little evidence that the lists are leading to people entering the scheme who would not meet the wider eligibility criteria, there seems to be value in maintaining the lists.”⁹

The report did recommend a process to review and amend the lists if new information becomes available, which it noted would be relatively straightforward because they are contained in the Operational Guidelines.

NLA recommends that Lists A, B and D be retained and reviewed by medical professionals to ensure their accuracy and completeness. The review should consider whether those lists reflect medical opinion about conditions that are likely to cause severe limitations in functional capacity and/or to be permanent, and whether the delineation between conditions on Lists A and B is correct.

We consider that the lists have a role to play in assisting applicants with longstanding and/or significant disabilities access supports as quickly as possible. We note that the lists say that conditions will “generally” be considered to meet the requirements, which allows discretion to be exercised by the decision maker.

The proposed changes to the access process would make it two staged – first, a person must provide their own evidence that they meet requirements under s 21, 22 and 24(1)(a) and (b), and then, if the decision maker decides, an assessment process is conducted.

Even if the Agency considers that assessments should be compulsory for all applicants, there is benefit to applicants and to the Scheme generally in streamlining the first stage of this process as it applies to impairments and conditions that the medical community agrees are generally permanent.

For List C, NLA also recommends a review to determine its relevance and accuracy. The review should look at whether the programs listed are all current and operational and their access requirements.

4.3 How can we clarify evidence requirements from health professionals about a person’s disability and whether or not it is, or is likely to be, permanent and lifelong?

In our *Putting People First* submission to the Tune Review we relayed a number of the difficulties our clients experience in putting forward evidence about the permanency of

⁸ Productivity Commission Study Report – National Disability Insurance Scheme (NDIS) Costs, October 2017, page 168.

⁹ Productivity Commission Report on NDIS Costs, page 168.

their impairments. We said that we often see forms completed by medical practitioners with sufficient information for the NDIA to determine whether the applicant meets the criteria, only to have the NDIA request further, more detailed information from the same practitioners.

If further information is needed to establish that there are no known, available and appropriate treatments for the permanency of a condition (for example, a full treatment history, where currently the form asks for a brief description of treatment), practitioners should be asked directly, provided that the prospective participant consents.

As we previously submitted, requiring people with disability to obtain new medical documentation when existing reports are sufficient, or requiring specific language to be used by their clinicians (often at the person's own cost), excludes people who would and should otherwise be eligible for NDIS supports.

Case study: The burden of providing evidence

Belinda (*not her real name*) is a loving grandmother who for many years has lived with a disability that significantly affects her mobility. This means she has difficulty accessing the community. She made a request to get on the NDIS for some extra support. She provided a lot of information to the NDIA, including reports from allied health practitioners, her GP and a specialist. The NDIA then asked Belinda for more evidence. Belinda complied with this request. The evidence Belinda provided to the NDIA confirmed that she lives with a permanent and significant disability that substantially affects her ability to mobilise. Despite this, the NDIA again asked for more evidence. At this point Belinda gave up – she felt like she had provided so much information already and was exhausted by the process. Belinda's NDIS application is taken to have been withdrawn, as she did not respond to the request for further evidence. She is now getting help to make a new request.

NDIS law delineates between treatment that is likely to remedy an impairment and treatment that continues after the permanency of a condition is established (see *National Disability Insurance Scheme (Becoming a Participant) Rules 2016 r 5.6*). The attention of practitioners should be drawn to this distinction between different forms of treatment and, if the NDIS applicant is receiving treatment, practitioners should be asked to comment about the purpose and expected outcomes of the treatment the applicant is receiving.

Decision makers in the Agency should be directed to consider and/or seek clarification about whether treatments are likely to remedy a prospective participant's impairments. They should not refuse applications merely because a treatment is mentioned. We frequently see access decisions where applicants are refused access to the NDIS on the basis that they are not engaging in the sort of maintenance support that is provided by the NDIS, for example physiotherapy, or occupational or speech therapy.

We note that the evidentiary burden that is outlined in the consultation paper also extends to prospective participants providing evidence of the permanency of their impairments, particularly if they are asked to do so multiple times. The Agency should provide assistance

where needed to facilitate and/or fund the provision of information about the permanency of impairments. Because this information will be used to make choices about a functional assessment, including the right type of assessor, the duration and location of the assessment and the tools used, it is important to assist applicants at this stage of the process as well.

We repeat the recommendations that we made in our *Putting People First* submission for the following practical improvements:¹⁰

- Accessible booklets explaining the eligibility criteria for prospective participants and their treating practitioners;
- Support for participants to complete the required forms (for example through Local Area Coordinators);
- Online and telephone support for an applicant or practitioner to speak or webchat with a NDIA representative;
- Providing and distributing useful resources, for example the Self Advocacy for the NDIS (Mental Health) resource booklet developed by Victoria Legal Aid's Independent Mental Health Advocacy service in partnership with consumers,¹¹ and the NDIA's own resources on mental health access, including the recovery principle.
- Consulting with applicants directly, with carers and family members or treating health practitioners, provided the applicant consents, to better understand the impact of the applicant's impairments.

4.4 How should we make the distinction between disability and chronic, acute or palliative health conditions clearer?

The NDIS gives effect to the United Nations *Convention on the Rights of Persons with Disabilities*, which draws from the social model of disability, and which does not seek to distinguish how a person with disability acquired that disability.

The United Nations *Convention on the Rights of Persons with Disabilities* Article 1 says that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201, the Federal Court said, at [16]:

The use of both the term "disability" and the term "impairment" in their context indicates that one matter the Act is not concerned with, at least in terms of access to

¹⁰ Putting People First submission, page 29.

¹¹ Independent Mental Health Advocacy, *Self-Advocacy for the NDIS (Mental Health)* (August 2019) <https://www.imha.vic.gov.au/about-us/news/support-for-people-with-mental-health-conditions-to-access-ndis>.

the NDIS as a participant, is how a person came to have a disability. Whether it be through birth, disease, injury or accident, all persons with disabilities who meet the access criteria can be participants, and all persons with disabilities may be otherwise assisted in the way contemplated by Ch 2 of the Act.

When a chronic, acute or palliative health condition causes an impairment which hinders a person's full and effective participation in society that, for the purposes of assessing their NDIS application, is a disability. Treating practitioners should be encouraged to provide a full picture of an applicant's conditions for the purposes of assessing whether they meet the disability requirements.

The Independent Assessment Framework derives many of its principles from the World Health Organisation *International Classification of Functioning, Disability and Health* (the WHO ICF).¹² The WHO ICF "conceptualises functioning as a '**dynamic interaction** between a person's **health condition, environmental factors** and **personal factors**'".

It says:

In classifying functioning and disability, there is not an explicit or implicit distinction between different health conditions...By shifting the focus from health condition to functioning, the ICF places all health conditions on an equal footing, allowing them to be compared, in terms of their related functioning, via a common framework.

We are aware that the Agency has previously made decisions that an applicant has a health condition and not a disability, or a palliative condition and not a disability, regardless of the impacts of those conditions. We consider that decisions relying on such binary distinctions are not supported by the legislation or by international law. Seeking to make that distinction or asking treating practitioners to make that distinction could cause confusion and lead to incorrect decisions about applicants' eligibility.

Section 34(1)(f) of the NDIS Act and rules 7.4 and 7.5 of the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (the Supports Rules) allow the Agency to determine whether supports are more appropriately funded by the NDIS or by the health system. This consideration is not relevant in assessing whether the access criteria are met. Member Parker confirmed this view in *Ray and National Disability Insurance Agency* [2020] AATA 3452:

The Tribunal does not consider an appropriate approach, when assessing a person's degree of impairment or need for assistance, to do so by reference to the availability of supports or otherwise that could be provided through the public health system. Again, this is a consideration which will become relevant subsequently in determining what supports are reasonable and necessary for a person should they become an NDIS participant, but they should not form the basis for an opinion that a person's

¹² [International Classification of Functioning, Disability and Health \(ICF\) \(who.int\)](#); and see [Independent Assessment Framework | NDIS](#), August 2020.

impairments do not count (for the purpose of assessing whether the access requirements are met), because they can be addressed by other means.

Case study: Disability and health condition

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 (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.

We consider that it is at the stage of determining what supports should be provided to a participant that the Agency should assess how the applicant can be supported respectively by the NDIS and the health system. At the stage at which an applicant is seeking access, applicants and their treating practitioners should be encouraged to provide as much information about their conditions and the functional impact of those conditions as possible. Excessive reliance on a distinction between health conditions and disabilities at the access application stage risks confusion, and/or encourages incomplete sharing of information.

4.5 Undertaking an independent assessment

The traits and skills of an assessor should be determined on a case by case basis, with a strong emphasis on the preferences of the applicant.

It is vital that assessors are given sufficient time to explore the needs and context of the applicant. Where a person has multiple impairments, it may be appropriate that several skilled assessors contribute to the assessment.

Recently, the Tribunal has highlighted the limitations of assessments that are done over a short period of time, particularly in contrast to information from a treating practitioner who knows the applicant well.

In *Arnell and National Disability Insurance Agency* [2019] AATA 4778, the Tribunal found that the applicant's doctors, who had spent many hours treating her, were able to provide useful evidence about her functional capacity, and that evidence was to be preferred over that of an assessor who had spent limited time with the applicant.¹³

¹³ *Arnell and National Disability Insurance Agency* [2019] AATA 4778 at [53]-[66].

In *Ray and National Disability Insurance Agency* [2020] AATA 3452, the Tribunal preferred the evidence of the applicant's former treating psychologist, who had seen her 50 to 60 times, to that of an occupational therapist, who had performed a functional assessment over one three hour visit for the purposes of assessing her access application. In areas such as communication, self-management and social interaction, the Tribunal was assisted more by observations from those who knew the applicant well about her functional limitations. Over the course of hearing from the assessor, the Tribunal "los[t] confidence" that the occupational therapist's opinions "were based on an accurate understanding of Mrs Ray's background, past achievements and her current state of mental health": at [148].

For assessments to be accurate, comprehensive and relevant, the assessor should, where appropriate (and with consent) be able to consult with (and consider the evidence and opinion of) treating practitioners and with others who know the applicant well, including family, carers and service providers. Applicants should be encouraged to provide information to help the assessor understand them better.¹⁴

We understand that the NDIA has adopted a series of assessment tools that are applicable to a range of disabilities and have not selected tools that require additional specialist training, for example the DSM-V, or tools usually employed for specific impairments, for example, the Motor Assessment Scale.¹⁵ Where the results of those tools are available, they should be provided to the assessor and incorporated into the assessment to make it as comprehensive as possible.

It should be recognised that for an applicant in a custodial environment, or an environment where they receive substantial support (such as a supported accommodation placement that is due to cease), an environmental assessment will not necessarily give an accurate picture of functioning. Assessors should be encouraged to consider how the prospective participant would function with and without support (as contemplated by the World Health Organisation *International Classification of Functioning, Disability and Health* (WHO ICF)).

The recommendation of an assessor as to whether a person has substantially reduced functional capacity, as well as other elements of the assessment, will depend in part on the interpretation of the Rules and Guidelines. It is essential that the assessors properly understand the legal tests relevant to elements of the assessment and that these are applied consistently. Tools explaining the key legal tests to be applied should be publicly accessible, and where a particular legal interpretation is applied, that should be clearly evidenced in the assessment. In addition, any settings and tools must be updated in response to relevant decisions of the AAT or the Federal Court so that recommendations properly reflect the law.¹⁶

¹⁴ See [How independent assessments will work | NDIS](#) – applicants are not currently encouraged to provide further information.

¹⁵ NDIA, Independent Assessment Selection of Assessment Tools, September 2020 at page 64 and 92.

¹⁶ See our Putting People First submission "Operational Guidelines should be consistently reviewed and reflect court decisions, page 64.

4.6 Exemptions

NLA's recommendation is that independent assessments be voluntary, not compulsory. If, despite this, they are made compulsory, to work effectively there must be a wide discretion to exempt an applicant from having an independent assessment. In NLA's view, it would be too narrow to limit exemptions to exceptional circumstances.

Discretion should be exercised in circumstances including, but not be limited to:

1. Where there is sufficient information already to determine that the impact of a person's impairment on their functional capacity or psycho-social functioning in a relevant area is substantial.
2. Where there is a risk to the participant, their safety, wellbeing or health.
3. Where the applicant has a cultural objection to the assessment.
4. Where it is not possible to ascertain whether the person consents to the assessment, including where the person has no capacity or is a child.
5. Where an in-person assessment is appropriate but geographical considerations make this impracticable e.g. remote Aboriginal communities.

LACs have assisted a number of applicants in the Tribunal to oppose further assessment when there is already sufficient information about their functional capacity. In these cases, the Tribunal recognises that undergoing an assessment can be invasive and can come at a risk to the participant. It is essential that a decision maker consider risk – which could include exacerbation of conditions, delay in an access decision, and/or distress – comprehensively.

Case study: Assessment and capacity

Tamara (*not her real name*) was a 14-year-old participant in the NDIS. She had a severe intellectual disability, epilepsy, severe autism spectrum disorder, severe behavioural issues and is non-verbal, with limited communication through a tablet with communication software. Supported by her family, she sought review of her NDIS plan to include further supports including modifications to her home environment for safety. She provided evidence from her psychiatrist of more than five years, her behaviour support practitioner and her occupational therapist, including in response to specific issues raised by the Agency.

The Agency requested that the applicant have an independent assessment with a psychiatrist over video. Tamara's parents were concerned about her reaction to the unfamiliar situation, which could cause her to get distressed and harm herself and others.

The Tribunal refused the NDIA's request for another assessment. It recognised both the risk that this would pose for a non-verbal child and the limited assistance an assessment with an unfamiliar person over video would provide.

4.6.1 Assessing the available information

The first step in determining whether an assessment is required should be an evaluation of the information already provided about the applicant's functional capacity: if there is already sufficient information to show that the person's functional capacity is substantially reduced, the NDIA should make a determination that the applicant is entitled to access. This would ensure that access decisions are timely and that no unnecessary strain is put on the new system of assessments.

The current Operational Guidelines state that the NDIA will only request further information or require a prospective participant to undergo an assessment where it is "reasonably necessary" to determine whether the person meets the access criteria.¹⁷ The guideline makes it clear that assessments would only be needed in limited circumstances and that the power to request further information must be exercised carefully. We consider that this guideline strikes the right balance in allowing the NDIA to obtain information where necessary.

Case study: Assessment where there is sufficient information about functional capacity

Evan (not his real name) had severe mental health issues and lived in accommodation where he got daily support from a charitable organisation with cooking, shopping, cleaning, medication management and social engagement for many years. When his placement was due to end, the support workers helped him to apply for the NDIS.

With his NDIS application were included support letters from his support workers, outlining the tasks they assisted him with, letters from a registered nurse, a caseworker from Partners in Recovery, and his psychiatrist, all of which were consistent about the level of support he required. His access request form also supported his need for assistance in self-management, self-care, social interaction and learning with several specific examples.

His request for access was denied and the decision proceeded to the Tribunal. At the Tribunal, his support workers provided even more detailed information about the tasks they assisted him with. The NDIA did not accept the information and requested a functional assessment. Because Evan had communication difficulties, most of the information in the assessment was provided by the support workers. The assessment made the same findings about Evan's need for assistance as the rest of the information he provided. Once the assessment was completed, the NDIA agreed that Evan should have access to the scheme.

Case study: Assessment and existing reports

Julie (*not her real name*) had severe mental health issues arising out of a history of physical and sexual abuse. Her application for access to the NDIS included letters and reports from a neurologist, psychologists, and psychiatrists, all indicating her need for NDIS support. The basis for the practitioners' assessment was the manifestation of Julie's symptoms, which included behaviour well outside 'limits accepted by others' and her difficulty making herself

¹⁷ Operational Guidelines – [Access to the NDIS - Determining whether a prospective participant meets the access criteria | NDIS](#) – 10.2 Requesting Further Information or Reports to Inform the Access Decision, last updated 16 July 2019.

understood. The Agency refused access even in light of this volume of evidence and Julie was required to go through an independent review process, which she felt failed to recognise the depth of her impairment, well evidenced in the reports of well qualified professionals.

4.6.2 Applications should not be taken to be withdrawn if no assessment

If an applicant declines to undergo an assessment and a decision maker decides that an exemption does not apply, the Agency will treat this as a withdrawal of the access request. This is notwithstanding that the decision maker will have embarked on assessing the access criteria (having found that the residence, age, impairment and permanency criteria are met). Accordingly, in NLA's view, the applicant should receive a reviewable decision, indicating that access is refused. Because the Agency does not propose that a decision not to exempt an applicant from independent assessment will not of itself be a reviewable decision, to treat a refusal to attend as a withdrawal is to force an applicant to choose to attend an assessment against their will, or to give up on NDIS access.

The Tune Review examined the rules around deeming applications to be withdrawn if the CEO requests information and/or an assessment and the prospective participant does not provide the information within a certain timeframe (s 26(3) NDIS Act). The review recommended the period to provide further information be extended to 90 days. It also said:

Importantly, a prospective participant's access request should only be withdrawn if the prospective participant indicates they do not wish to be a NDIS participant and/or cannot be contacted after all reasonable measures have been taken.

5.40. The NDIA has an important role to play in supporting prospective participants through the access process. It cannot be assumed that people with disability have the capacity to navigate the access process without help and that a failure to provide the information within the requested timeframe is an indication they no longer wish, or do not need, to access supports under the NDIS.¹⁸

The same principle should be applied to independent assessments. A decision maker will have decided that the prospective participant meets the age, residence, impairment and permanency criteria, that an assessment is needed, and that no exemption applies. This constitutes a decision about the access application which should entitle a prospective participant to a review.

4.7 How should we provide the assessment results to the person applying to the NDIS?

Prospective participants should be given a copy of the assessment report after their assessment, unless they do not wish to, or prefer to receive the information therein in

¹⁸ The Tune Review Report, page 80.

another format. The assessment will form a part of the decision maker's reasoning about whether the person meets the eligibility criteria.

If there are obvious errors in the assessment which affect the conclusions made, the applicant should be given the opportunity to correct them before a final decision about their eligibility is made. The Agency should also recognise that, in some circumstances, an independent assessment should be disregarded or given diminished weight.

4.8 The review process

NLA has concerns about the introduction of what is essentially a two stage access eligibility test and its impact on the review process. The policy provides that if a decision is made that the prospective participant does not meet the 'initial eligibility requirements' (age, residence, impairment and permanency), they do not proceed to have an independent assessment. This decision is a reviewable decision that the NDIS access criteria are not met.¹⁹

If the participant seeks review of that reviewable decision and that decision is confirmed, the participant can then seek review by the Tribunal. The Tribunal would make a decision about the entirety of section 24 and 25 NDIS Act, not just the 'initial eligibility requirements'. This means the applicant would not have the benefit of the Agency's reasons about subsections 24(1)(c)-(e) NDIS Act. Further, it is unclear whether an independent assessment would occur as part of the Tribunal process, or whether the decision would be remitted for an assessment. The former could add delay to the Tribunal process, and the latter would create a split review process, where a participant may have to apply for review to the Tribunal twice about the access decision. Neither approach supports the goal of working towards a simpler system.

4.9 Consequential changes – revocation

The Consultation paper refers to the Agency's power to revoke the status of a participant under section 30 of the NDIS Act when the Agency is no longer satisfied that the participant meets the disability or early intervention criteria. It says that where an assessment indicates a significant improvement to functional capacity, a reassessment will take place and be used to inform an eligibility reassessment decision.

As part of the consultation on this policy, NLA recommends that the Agency should also review the procedures around revocation decisions. Currently, if a participant's status is revoked, the decision is made without prior notice to the participant. A participant can seek review the decision but has no access to supports while the review is ongoing, a process which can take a significant amount of time.²⁰

¹⁹ Consultation Paper: Access and Eligibility Policy with Independent Assessments, page 14.

²⁰ See the Case Study: Disability and Health Conditions, above, and the case study in our *Putting People First* submission at page 52.

If the Agency intends to revoke a participant's status, the participant should be notified and given the opportunity to submit further information before that decision is made.

The NDIS Act should be amended to include a provision under which payment for supports would continue pending a review, similar to section 131 of the *Social Security (Administration) Act 1999* (Cth).

5. Conclusion

NLA supports the NDIA's efforts to improve decisions about access to the NDIS, and to better support applicants to evidence the impacts of their impairments on their functional capacity.

Based on our experience supporting, advising and advocating for people with disability, including in Tribunal reviews of NDIS access decisions, we have made recommendations about how the Eligibility and Access Policy could be amended.

Our recommendations are as follows:

Recommendations

1. That assessments be optional, not compulsory, and undertaken by an assessor of the prospective participant's choosing, including (if they prefer) a treating health practitioner.
2. That optional assessments be offered to applicants who need support to show the impact of their impairments on their functional capacity or psycho-social functioning.
3. That Lists A, B, C and D be retained, subject to reviews of their content.
4. That expectations of treating practitioners about the information required in relation to permanency be clarified, so that:
 - a) If a list of all treatments undertaken is required, that is made explicit.
 - b) The distinction between treatment likely to remedy an impairment and treatment after permanency is established is clearly explained.
 - c) Practitioners are expressly asked to address whether any proposed treatment is likely to remedy the impairment.
5. That if compulsory assessments are maintained, there should be the ability to provide for an exemption that includes a non-exhaustive list of factors.
6. That if a decision maker considers that an applicant has refused an assessment and an exemption does not apply, they should decide to refuse the access application, not treat it as withdrawn.
7. That a copy of an assessment is always provided to an applicant before their access

decision is made, unless the applicant does not want to receive a copy of an assessment or would like to receive the assessment in a different format. Applicants should be able to correct any errors affecting the assessment before a decision is made.

8. That changes are made to the revocation process, including the opportunity to provide information about why the criteria are met before a revocation decision is made, and supports pending review.

Thank you for the opportunity to provide feedback on the Consultation Paper: Access and Eligibility Policy with independent assessments.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,

A handwritten signature in black ink that reads "Suzan Cox". The signature is written in a cursive, flowing style.

Suzan Cox OAM QC
Chair