

# National Disability Insurance Scheme costs

Legal Aid NSW submission to  
the Productivity Commission  
Position Paper

*July 2017*

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## 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) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

Since the NDIS was piloted from 1 July 2013, Legal Aid NSW has been funded to by the Commonwealth Department of Social Services to provide legal representation services for applicants before the Administrative Appeals Tribunal where their National Disability Insurance Scheme (**NDIS**) matters raises a complex or novel issue.

Legal Aid NSW welcomes the opportunity to make a submission to the Productivity Commission's Position Paper on NDIS Costs. Should you require any further information, please contact:

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## How is the scheme tracking?

### The scale and pace of the NDIS rollout

#### DRAFT FINDING 2.1

The scale and pace of the National Disability Insurance Scheme (NDIS) rollout to full scheme is highly ambitious. It risks the National Disability Insurance Agency (NDIA) not being able to implement the NDIS as intended and it poses risks to the financial sustainability of the scheme. The NDIA is cognisant of these risks.

Legal Aid NSW agrees with this draft finding. In our experience, the timing and pace of the NDIS rollout has led to poor outcomes for many participants. The focus on participant numbers has compromised the quality of the planning process, and often, participants are left frustrated and dissatisfied with their plans. This in turn, leads to internal reviews and appeals, with flow on costs to the National Disability Insurance Agency (**NDIA**), legal service providers such as Legal Aid NSW, and the Administrative Appeals Tribunal (**AAT**).

### Participants not benefiting from the scheme

#### DRAFT FINDING 2.4

Early evidence suggests that the National Disability Insurance Scheme is improving the lives of many participants and their families and carers. Many participants report more choice and control over the supports they receive and an increase in the amount of support provided.

However, not all participants are benefiting from the scheme. Participants with psychosocial disability, and those who struggle to navigate the scheme, are most at risk of experiencing poor outcomes.

Legal Aid NSW agrees that people with psychosocial disability are struggling to access and navigate the NDIS. The scheme works well for those participants who are able to advocate for themselves, or for participants who have family members or others who are able to advocate for them. However, people with severe mental illness need support to enter the scheme, and engage with the NDIS effectively. To reach and benefit these participants, the NDIA needs to take a more proactive approach that involves community engagement, and outreach with organisations such as psychiatric institutions and guardianship tribunals. Participants with psychosocial disability would also benefit from the support of skilled, trained and paid advocates.

## Scheme eligibility

### Data collection

#### DRAFT RECOMMENDATION 3.1

When determining that an individual is eligible for individualised support through the National Disability Insurance Scheme under the disability requirements, the National Disability Insurance Agency should collect data on which of the activity domains outlined in section 24 of the *National Disability Insurance Scheme Act 2013* (Cwlth) are relevant for each individual when they enter the scheme.

Legal Aid NSW agrees with this draft recommendation. It would be useful, from both a policy and service delivery perspective, to understand the areas in which participants have substantially reduced functional capacity.

### Maintaining List D

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#### INFORMATION REQUEST 3.1

*The Commission is seeking feedback on the advantages and disadvantages of maintaining 'List D — Permanent Impairment/Early Intervention, Under 7 years — No Further Assessment Required' in the National Disability Insurance Agency's operational guidelines on access. Feedback is sought on the extent to which the list:*

- *reduces the burden on families to demonstrate that their child will benefit from early intervention and/or provides certainty that support will be provided*
- *reduces the burden on the National Disability Insurance Agency of assessing whether children are eligible for early intervention support under the National Disability Insurance Scheme Act 2013 (Cwlth)*
- *may be contributing to supports being provided to children who are unlikely to benefit from such supports*
- *may be discouraging or inhibiting exit from the scheme.*

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Legal Aid NSW considers that List D appropriately reduces the burden on families to demonstrate that their child will benefit from early intervention. Families of children with disabilities are invariably stressed. In our experience, it can be frustrating, painful and sometimes insulting for parents to have to explain in detail the way in which their child has impaired functioning. Maintaining List D avoids this additional burden. It also reduces the assessment burden on the NDIA. In our view, the benefits of List D outweigh any risk of over-servicing.

We do not consider that maintaining List D results in supports being provided to children who are unlikely to benefit from such supports. The issue of supports should be addressed at the planning stage, in that a participant's plan should only contain supports which are reasonable and necessary.

Legal Aid NSW acknowledges there are concerns around some children remaining in the scheme after there is no benefit from early intervention, or after early intervention benefits have been realised. However the NDIA's Operational Guidelines at 9.6 outline a process to be followed to prevent this from occurring. The Operational Guidelines provide that when a person becomes a participant under the early intervention requirements, the NDIA will assess their circumstances when reviewing their plan (plans generally last between 12 months and two years). The NDIA is to identify if early intervention supports still provide a benefit to the person. If the person no longer meets the early intervention requirements the NDIS will consider if they should continue to access the NDIS under the disability requirements. If not their access can be revoked. Legal Aid NSW considers the approach outlined in the Operational Guidelines provides a better mechanism to address the concerns about children inappropriately remaining in the scheme than removing List D.

Where a child has entered the NDIS through the early intervention requirements because they have developmental delay, at their first plan review after they after they turn seven the NDIA will consider whether the child has either: (a) an identified intellectual, cognitive, neurological, sensory or physical impairment that is likely to be permanent<sup>1</sup>, or (b) an identified psychiatric condition which is likely to be permanent.<sup>2</sup>

## Maintaining List A

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### INFORMATION REQUEST 3.2

*The Commission is seeking feedback on the benefits and risks of maintaining 'List A — Conditions which are Likely to Meet the Disability Requirements in section 24 of the NDIS Act'. In particular:*

- to what extent does List A reduce the burden for people with permanent and significant disability of entering the National Disability Insurance Scheme under the disability requirements?*
- is there any evidence that people who do not meet the disability requirements are entering the scheme under List A?*

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Legal Aid NSW considers that List A reduces the evidentiary burden for people with permanent and significant disability to an appropriate extent.

We have not seen any evidence that people who do not meet the disability requirements are entering the scheme under List A. We note that List A is indicative rather than determinative: it sets out conditions that are "likely" to meet the disability requirements of the NDIS. In our view, it is also a tight list. For instance, it specifies the levels of severity required in conditions such as cerebral palsy, intellectual disability and autism.

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<sup>1</sup> NDIS Act, section 25(1)(a)(i).

<sup>2</sup> NDIS Act, section 25(1)(a)(ii).

## Section 24(1)(e) of the NDIS Act

Although not addressed in the Productivity Commission's Position Paper, Legal Aid NSW would like to raise a concern regarding section 24 of the *National Disability Insurance Scheme Act 2013 (NDIS Act)*. This section sets out the disability requirements of the NDIS. Sub-section 24(1)(e) provides that the person meets the disability requirements if the person "is likely to require support under the National Disability Insurance Scheme for the person's lifetime". Legal Aid NSW is concerned that this aspect of section 24 has no utility, and also causes confusion.

Sub-section 24(1)(a) of the NDIS Act already requires the relevant impairment or impairments to be permanent, or likely to be permanent. Therefore in our view, it is not necessary to have an additional factor that requires the person to be likely to require supports "for the person's lifetime".

Further, the reference to requiring supports under the NDIS in sub-section 24(1)(e) overlaps with the criteria for funded supports in section 34. It was clearly envisaged that a person may meet the access criteria to become a participant in the NDIS but not receive any funded supports from NDIS under section 34 of the Act. Section 33(2) refers to a participant's plan setting out matters including "the reasonable and necessary supports (if any) that will be funded" and "the general supports (if any) that will be provided". Having a reference to funded supports as an access criteria at section 24(1)(f) therefore confuses a person's disability with the support they are likely to require or should be provided under the NDIS.

The support a person should receive under the NDIS is also adequately and appropriately addressed in section 34 of the NDIS Act. Relevantly, sub-section 34(f) of the NDIS Act states that in order to be reasonable and necessary, the CEO must be satisfied that:

*the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:*

- (i) *as part of a universal service obligation; or*
- (ii) *in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.*

We also note that the AAT has expressed concern over what is required by section 24(1)(e), and its potential overlap with the issue of what funded supports should be provided under the NDIS.<sup>3</sup> The Federal Court has also commented:

*The determination of what kind of assistance a person should receive under the NDIS is subject to an entirely separate aspect of the legislative scheme, and one which is relevant only after a person has been found to be a participant.*<sup>4</sup>

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<sup>3</sup> See *Mulligan and National Disability Insurance Agency* [2014] AATA 374 (13 June 2014), at [52]-[57].

<sup>4</sup> *Mulligan and National Disability Insurance Agency* [2015] FCA 544 (3 June 2015) at [40]

## Scheme supports

### Reasonable and necessary criterion

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#### *INFORMATION REQUEST 4.1*

*Is the National Disability Insurance Scheme Act 2013 (Cwlth) sufficiently clear about how or whether the 'reasonable and necessary' criterion should be applied? Is there sufficient clarity around how the section 34(1) criteria relate to the consideration of what is reasonable and necessary?*

*Is better legislative direction about what is reasonable and necessary required? If so, what improvements should be made? What would be the implications of these changes for the financial sustainability of the scheme?*

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Legal Aid NSW would support redrafting of section 34 to improve its clarity. We consider that section 11A of the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), from which the NDIS criterion was adapted, is clearer and could provide a basis for any redrafting. In this regard, we would endorse the Productivity Commission's suggestions that the NDIS Act:

- explicitly state that individualised supports funded under the NDIS must be, or assessed to be, reasonable and necessary in the circumstances, and
- explicitly frame the criteria in section 34(1) as considerations for determining whether an individualised support is reasonable and necessary in the circumstances.

Legal Aid NSW considers that there is still some uncertainty about how to interpret the consideration in sub-section 34(1)(b) (the support will assist the participant to undertake activities, so as to facilitate his or her social and economic participation) and questions whether it is a useful criteria for assessing whether a support will be funded. One of the main objects and general principles of the NDIS Act is that the scheme will support the social and economic participation of people with a disability. However when this general statement of intent is prescribed as a criteria against which each funded support must be assessed, it becomes difficult to apply in practice. A participant must show a support will facilitate both social **and** economic participation. For a person who is severely disabled and has no work capacity, it is unclear how the term "economic participation" can be considered, aside from the fact that if a person is given funded supports they become a 'consumer', as they purchase disability services and supports with their NDIS funding.

We also note that the considerations in sub-sections 34(1)(c) and (d) are complex to determine, given the sheer number and range of disabilities and the different therapies involved. Assessing supports against the evidence base can be a challenging task.

Ultimately, legislative amendment may not be the most appropriate or effective way of addressing these concerns with sub-sections 34(1)(c) and (d). However, Legal Aid NSW

would support measures being taken to address this aspect of the NDIS, including further and updated operational guidelines, practice guides and work practices to help planners.

## Delegating plan approval functions

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### *INFORMATION REQUEST 4.2*

*Should the National Disability Insurance Agency have the ability to delegate plan approval functions to Local Area Coordinators? What are the costs, benefits and risks of doing so? How can these be managed?*

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Legal Aid NSW is of the strong view that plan approval functions should not be delegated to Local Area Coordinators. While we accept that some aspects of NDIA service delivery, namely the planning process, have been contracted out, we do not support the contracting out of decision-making to external agencies. In the interests of consistency and transparency in decision-making, this function should remain with the NDIA. Legal Aid NSW considers that delegating plan approval outside the NDIA will result in larger variances in what is considered “reasonable and necessary” and what is then funded to each individual in the scheme.

## The planning process

### DRAFT RECOMMENDATION 4.1

The National Disability Insurance Agency should:

- implement a process for allowing minor amendments or adjustments to plans without triggering a full plan review
- review its protocols relating to how phone planning is used
- provide clear, comprehensive and up-to-date information about how the planning process operates, what to expect during the planning process, and participants’ rights and options
- ensure that Local Area Coordinators are on the ground six months before the scheme is rolled out in an area and are engaging in pre-planning with participants.

Legal Aid NSW agrees that it should be possible to make minor amendments or adjustments to plans without triggering a full plan review. In our view, this change would require legislative amendment, not just a new NDIA process. Section 37(2) of the NDIA Act states that a participant’s plan “cannot be varied after it comes into effect, but can be replaced under Division 4”. Under Division 4, a participant may request a review of his or her plan at any time and may revise the participant’s statement of goals and aspirations at any time, which results in the replacement of the plan. The process of reviewing the plan in its totality when only a small change is required gives rise to unnecessary delay and additional costs, and is frustrating for participants. We therefore recommend amending the NDIS Act to enable minor amendments or adjustments to plans without a full plan review.

Legal Aid NSW also agrees that the NDIA should review its protocols relating to how phone planning is used. Phone planning is not accessible or effective for many people with disabilities, and in particular those with additional barriers such as those from different cultural and linguistic backgrounds, refugees, and Aboriginal and Torres Strait Islander people. The concept of planning over the phone also runs counter to recent consumer protection campaigns which have educated people not to disclose personal information over the phone.

We also agree with the draft recommendation for the NDIA to provide clear, comprehensive and up-to-date information about how the planning process operates, what to expect during the planning process, and participants' rights and options. We have clients who have been confused about this process and have, for instance, not realised that their phone conversation with a planner was the actual planning process until they received their plan in the mail.

We have also observed that the right of participants to internal review is not adequately publicised. For instance, in our experience it can be difficult to find information about internal reviews and appeals to the AAT on the NDIA website. It is important that participants are aware of these review and appeal rights so that they can exercise them when necessary.

Finally, we agree that Local Area Coordinators should be on the ground six months before the scheme is rolled out in an area and engaging in pre-planning with participants.

## Planners' knowledge

### DRAFT RECOMMENDATION 4.2

The National Disability Insurance Agency should ensure that planners have a general understanding about different types of disability. For types of disability that require specialist knowledge (such as psychosocial disability), there should be specialised planning teams and/or more use of industry knowledge and expertise.

Legal Aid NSW agrees with draft recommendation 4.2. We share the concerns of the submissions cited in the Position Paper about the skills, experience and training of planners in general. This contrasts with the pre-NDIS landscape, where government agencies contracted specialists to work with people with certain types of disability. We accept that it is unrealistic to expect planners to have specialised knowledge of all disabilities, given the vast range of disabilities that will be experienced by NDIS participants. However, it is reasonable to expect and require general knowledge about different types of disability, and common disabilities. Specialised teams are also appropriate for certain types of disability, such as psychosocial disability.

## Boundaries and interfaces with the NDIS

### Continuity of support and services

#### DRAFT RECOMMENDATION 5.2

The Australian, State and Territory Governments should make public their approach to providing continuity of support and the services they intend to provide to people (including the value of supports and number of people covered), beyond supports provided through the National Disability Insurance Scheme. These arrangements for services should be reflected in the upcoming bilateral agreements for the full scheme.

The National Disability Insurance Agency should report, in its quarterly COAG Disability Reform Council report, on boundary issues as they are playing out on the ground, including identifying service gaps and actions to address barriers to accessing disability and mainstream services for people with disability.

Legal Aid NSW remains concerned about the interface between NDIS and State and Territory services, and the uncertainty around service gaps that may arise after the full NDIS roll out. Some of the emerging areas of concern include:

- People in or exiting the criminal justice system, including those with intellectual and/or psychosocial disability on limiting terms who are seeking to transition out of custody.
- Education. For instance, we are seeing uncertainty around who will pay for the training of teachers' aides for children with disabilities attending school.
- Transport. We understand that some taxi subsidies have been cancelled (for example in Queensland), but the NDIS will not necessarily cover these costs for participants.

We endorse draft recommendation 5.2 as it will bring greater certainty and transparency to this area.

## Addressing boundary issues through COAG Councils

### DRAFT RECOMMENDATION 5.3

Each COAG Council that has responsibility for a service area that interfaces with the National Disability Insurance Scheme (NDIS) should have a standing item on its agenda to address the provision of those services and how they interface with NDIS services. This item should cover service gaps, duplications and other boundary issues.

Through the review points of National Agreements and National Partnership Agreements under the Federal Financial Relations Intergovernmental Agreement, parties should include specific commitments and reporting obligations consistent with the National Disability Strategy. The Agreements should be strengthened to include more details around how boundary issues are being dealt with, including practical examples.

For the reasons above, we support draft recommendation 5.3.

## Provider readiness

### Price regulation

#### DRAFT RECOMMENDATION 6.1

The Australian Government should:

- immediately introduce an independent price monitor to review the transitional and efficient maximum prices for scheme supports set by the National Disability Insurance Agency (NDIA)
- transfer the NDIA's power to set price caps for scheme supports to an independent price regulator by no later than 1 July 2019.

Legal Aid NSW supports this recommendation for an independent price monitor to improve transparency around how prices caps are set, and allow the NDIS to focus on delivering and administering the NDIS.

## Thin markets

### DRAFT FINDING 6.1

In a market-based model for disability supports, thin markets will persist for some groups, including some participants:

- living in outer regional, remote and very remote areas
- with complex, specialised or high intensity needs, or very challenging behaviours
- from culturally and linguistically diverse backgrounds
- who are Aboriginal and Torres Strait Islander Australians
- who have an acute and immediate need (crisis care and accommodation).

In the absence of effective government intervention, such market failure is likely to result in greater shortages, less competition and poorer participant outcomes.

Legal Aid NSW agrees with draft finding 6.1. Many of Legal Aid NSW clients suffer multiple forms of disadvantage, including the particular groups of people with disability outlined above. Even though the NDIS is at an early stage, we are confident that there will be very small markets, or in some instances no markets, to service these groups.

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### INFORMATION REQUEST 6.1

*In what circumstances are measures such as:*

- *cross-government collaboration*
- *leveraging established community organisations*
- *using hub and spoke (scaffolding) models*
- *relying on other mainstream providers*

*appropriate to meet the needs of participants in thin markets? What effects do each have on scheme costs and participant outcomes? Are there barriers to adopting these approaches?*

*Under what conditions should block-funding or direct commissioning of disability supports (including under 'provider of last resort' arrangements) occur in thin markets, and how should these conditions be measured?*

*Are there any other measures to address thin markets?*

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As the Position Paper acknowledges, the features of thin markets under the NDIS will vary, and there will be no 'one-size-fits all' approach to address the needs of participants in those markets. Legal Aid NSW would support transparent identification and reporting on this issue so we can understand where thin markets exist and/or which participants are not being serviced adequately. Targeted measures, including those outlined in information request 6.1, can then be taken in response. We would support block funding/direct commissioning of disability supports as one of these measures, for instance in remote areas, and for participants with highly challenging behaviours. While we acknowledge that resorting to block funding may not give participants choice, we consider that providing a service through these measures is preferable to participants receiving no service at all.

## Participant readiness

### Support coordination

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#### *INFORMATION REQUEST 8.1*

*Is support coordination being appropriately targeted to meet the aims for which it was designed?*

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Support coordination is the main way by which the NDIS seeks to enhance the readiness of participants with complex needs. Legal Aid NSW would support improvements to this process. We have observed that support coordination is not occurring early enough: while assistance implementing plans is beneficial, some people also need support to prepare their plan. It is also difficult for participants to choose a support coordinator. Participants are referred to a long list of registered NDIS providers which lists support coordinators in alphabetical order. There is no other information to help a participant select a coordinator from the list that is suited to their needs.

We also appreciate that support coordinators are not intended to be advocates but in our view this is not a realistic expectation. Some degree of advocacy is needed to ensure that participants with complex needs, and/or those that do not have peer or family supports, receive the supports they require.

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#### *INFORMATION REQUEST 8.2*

*Is there scope for Disability Support Organisations and private intermediaries to play a greater role in supporting participants? If so, how? How would their role compare to Local Area Coordinators and other support coordinators?*

*Are there any barriers to entry for intermediaries? Should intermediaries be able to provide supports when they also manage a participant's plan? Are there sufficient safeguards for the operation of intermediaries to protect participants?*

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Legal Aid NSW agrees that there is scope for disability support organisations and private intermediaries to play a greater role in supporting participants. We acknowledge that there is potential for a conflict of interest where an intermediary is providing or may provide supports under a plan, but we are concerned that many people will miss out if someone is not paid to advocate for them at this stage.

## Governance

### Changes to the NDIS Rules

#### DRAFT RECOMMENDATION 9.1

The requirement that changes to National Disability Insurance Scheme Category A Rules have unanimous agreement from the Australian Government and all host jurisdictions should be relaxed.

Legal Aid NSW acknowledges concerns around delay in changes to the NDIS Rules, but is not supportive of relaxing the requirement for unanimous agreement from the Australian Government and all host jurisdictions. We see this requirement as an important safeguard. If all host jurisdictions were not required to agree to changes, we see a risk that the Commonwealth would make changes to the Rules to contain costs.

### Reporting on reviews

#### DRAFT RECOMMENDATION 9.3

The National Disability Insurance Agency should publicly report on the number of unexpected plan reviews and reviews of decisions, review timeframes and the outcomes of reviews.

Legal Aid NSW strongly supports this recommendation. We are concerned in particular about the length of time that it takes for the NDIA to conduct an internal review. We have clients who have waited five months for an internal review of a 12 month plan. Reporting requirements in this area may highlight performance issues such as these, increase accountability, and prompt system and process improvements at the NDIA.

We largely attribute delays in internal reviews to staffing numbers and structure in the NDIA. We understand that the NDIA has no staff designated to undertake internal reviews, and that internal reviews are allocated to officers in the agency who have many other duties. This results in not only delays, but also poor review decisions, with inadequate reasons. This in turn leads to more appeals, with flow on costs to legal service providers and the AAT.

We recommend that the NDIA allocate internal reviews to designated internal review officers, who are trained and skilled in this task. This would reduce delays and result in higher quality review decisions, with proper reasons that participants can understand. The internal review system at Centrelink would provide a good basis for the NDIA to mirror or adapt.

As noted above, we also recommend that information about the internal review process be made more accessible, including through the NDIA website.

## Slowing down the roll out of the NDIS

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### *INFORMATION REQUEST 9.1*

*The Commission is seeking feedback on the most effective way to operationalise slowing down the rollout of the National Disability Insurance Scheme in the event it is required.*

*Possible options include:*

- prioritising potential participants with more urgent and complex needs*
- delaying the transition in some areas*
- an across-the-board slowdown in the rate that participants are added to the scheme.*

*The Commission is also seeking feedback on the implications of slowing down the rollout.*

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On balance, Legal Aid NSW would prefer an across-the-board slowdown in the rate that participants are added to the scheme. It would potentially be a fraught and contested process to identify which participants have “more urgent and complex needs”. Delaying the transition in some areas is also likely to result in perceptions of unfairness, and may lead to people moving in an attempt to access the NDIS earlier.

Regardless of how any slowdown is managed, it is critical that state and territory based services continue for those not yet in the NDIS.

If a slowdown is not operationalised, we see a risk that negative experiences with the NDIS will affect public confidence in, and support for, the NDIS. This in turn may have implications for public funding of the scheme.

## Funding

### Staffing cap

#### DRAFT RECOMMENDATION 10.2

The Australian Government should reconsider the staffing cap on the National Disability Insurance Agency, given the importance of developing internal capability and expertise.

Legal Aid NSW supports this recommendation. As noted above, we see the staffing cap as a key contributing factor to the poor quality of the internal review process. It also has implications for the quality of the planning process.