



# NDIS Planning

Submission to Joint Standing Committee on the  
National Disability Insurance Scheme

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National Legal Aid Secretariat  
GPO Box 1422  
Hobart TAS 7001  
[nla@legalaid.tas.gov.au](mailto:nla@legalaid.tas.gov.au)  
03 6236 3813

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## Introduction

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

NLA and the individual LACs welcome the opportunity to contribute to the Joint Standing Committee on the National Disability Insurance Scheme (NDIS) Inquiry into NDIS Planning.

Our submission will address those terms of reference that are relevant to our experience in assisting clients in the NDIS planning process.

## About National Legal Aid and Australia's legal aid commissions

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA's purpose is:

- To lead and encourage a national system of legal aid which allows people experiencing disadvantage to obtain access to justice; and
- To 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 the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- 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.

LACs are the main providers of legal assistance services in Australia.<sup>1</sup> In the 2017-18 financial year, LACs provided in excess of 2.3 million services in all law types to people across the country.

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<sup>1</sup> Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No 72, vol 2 667.

## Our work with Australians with disability

LACs offer specialist legal services that provide advice and representation at courts, tribunals and psychiatric hospitals for people with disabilities. LACs receive funding from the Department of Social Services to provide legal representation in NDIS matters on review at the Administrative Appeals Tribunal (AAT).

Since 2013, Victoria Legal Aid (VLA) and Legal Aid NSW (LANSW) have provided legal representation to over 370 people with NDIS AAT appeals. This work, across all LACs, has increased over time.

A significant proportion of clients of LACs are people with disability. For example, across all of LANSW's practice areas, in 2017-18, 21% of in-house grants of legal aid for casework, and 40% of extended legal assistance services, were to clients who identified as having a disability. In 2017-18, 26% of all VLA's clients identified as having a disability.

## Response to the Terms of Reference

Our organisations recognise the great opportunity that comes with the NDIS and our work is targeted at ensuring the NDIS functions at its best for the people we assist. In our work in the AAT, our aim is to ensure that our clients' NDIS plans reflect their needs, their circumstances and the guiding principles of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

Where the NDIS does not work as intended, and where NDIS planning processes do not work, our clients experience uncertainty, delays and gaps. Because NDIS support is vital for participants, these problems have real and serious consequences including deterioration in health, family breakdown and prolonged and inappropriate time in custody or in other institutions.

## Key recommendations

Our key recommendations, informed by the experiences of our clients, are:

### Planning process

1. That NDIS planners are trained to understand the impacts of disability, and specific disabilities and functional needs, to make NDIS planning processes as appropriate and efficient as possible.
2. That the number of specialised, trained planners working in institutional environments (such as prisons and mental health inpatient settings) is increased.
3. That operational guidelines are more regularly reviewed to incorporate developments in case law and ensure consistency with the legislative criteria.

4. That NDIS planning processes are focused on the participant and facilitated in a way that maximises their participation and their opportunities to provide information in support of their needs.
5. That participants are afforded the choice of how planning conversations are held, whether that be face to face, over the telephone or on the papers.
6. That participants are advised prior to the approval of the statement of participant supports in their NDIS plan, what supports will be included in the plan, what decision will be made about management of funding under the plan, and at what rate the NDIS amounts in their plan will be calculated.
7. That planning is conducted in accordance with the legislative criteria, and that individual plans are not adjusted according to typical support packages.
8. That processes concerning the incorporation of supports that require additional justification, such as processes for seeking home modifications and for seeking assistive technologies, are streamlined and give participants clear information about their review rights.
9. That the level of support in a previous plan is considered to be the benchmark for what is reasonable and necessary for the participant, and is given substantial weight in preparing the next plan in the absence of evidence to support a change.

#### Review processes

10. The review of decisions internally by the National Disability Insurance Agency is maintained, but processes are improved, so that:
  - a) a defined time limit is imposed for all decisions on reviews of reviewable decisions (s 100(6) NDIS Act);
  - b) subject to an express preference to the contrary, communication between a reviewer and a participant/their nominee/child representative is mandated before an internal review decision is made;
  - c) reviewers are directed to consider the exercise of powers under the NDIS Act to assist participants, including to assist participants financially to obtain reports.
11. That participants whose access to the NDIS is revoked have access to supports throughout the review process.
12. That procedures for distinguishing between s 48(2) and s 33(2) NDIS Act reviews are consistently and appropriately applied.

## Terms of Reference

### **a) and b) the experience, expertise and qualifications of planners, and the ability of planners to understand and address complex needs**

In order for planners to develop appropriate individualised plans with participants, they must have skills, training and expertise in both the application of the NDIS legislation and in the impact of specific disabilities and impairments on participants.

For participants with complex needs, there should be more time taken and greater assistance in preparatory stages of planning. If information is needed to evaluate support needs, participants should be given the support to collect it. For participants with complex needs intensive independent case management in the lead up to a planning conversation could significantly improve the quality of plans and the efficiency of the planning process.

### Assessing the impact of a disability

Planners should recognise that the full functional impact of a disability will not necessarily be apparent from a single planning conversation and should be encouraged to consult widely in determining appropriate supports.

### **Considering all information**

Albie (not his real name) lives independently in regional NSW. He has an intellectual disability and psychosocial disabilities. Under his first NDIS plan, Albie had between 6-7 hours of support a day with self-care and social participation.

Coming up to his plan review, Albie's support network knew that he needed more support and that he could, at times, come across as managing better than he was. They organised for an adaptive behaviour assessment to be carried out for him, and it demonstrated his need for greater support. His plan review was conducted before the results of the assessment were known and his planner refused to consider them when preparing the plan. Under his new plan, Albie's supports were reduced by 15 hours a week.

We also see the consequences of planning that does not set people up well from the outset, which can include services withdrawing.

Victoria Legal Aid, together with Legal Aid Queensland and the Northern Territory Legal Aid Commission, prepared a submission to the Department of Social Services and the National Disability Insurance Agency's NDIS 'Thin Markets' Project in June 2019 (VLA Thin Markets Submission). That submission referred to VLA's client John (not his real name).

John has an acquired brain injury and a diagnosis of schizophrenia, and his disabilities have contributed to past substance misuse, lack of employment, and limited community engagement. He has a history of offending, most commonly at the lower level. John's plan initially only included nine hours of core supports, which were largely consumed with taking John to multiple weekly appointments. Without more intensive supports in place, he committed further offences and was taken into custody. He was unable to secure housing or

bail and spent 10 months in prison. His ability to access post-release housing and supports was affected by the complexity of his needs and delays in plan review. Eventually, after his plan was reviewed by a worker with greater experience and skill in relation to John's disability, his NDIS funding was increased to cover more intensive services, including 24/7 support.<sup>2</sup>

The VLA Thin Markets Submission identified:

*In many of our clients' cases, a lack of appropriate planning at the outset of their participation in the NDIS meant they were not set up with the supports they needed to live well and independently. Their disability needs were not well met and the intensive core supports they needed were not funded, which put pressure on the services that were funded and created a risk of those services withdrawing.*

*Equipping, resourcing and overseeing skilled planning, that facilitates supports that are appropriate to the particular person and their needs, is critical to the effectiveness of the NDIS.<sup>3</sup>*

### Participants in custody

LACs have previously identified issues in relation to planning for participants in custody,<sup>4</sup> and we have welcomed initiatives to introduce specialised planners and skilled support coordinators to assist clients with complex needs, particularly in institutional settings.

We would encourage an increase in specialised planners in institutional settings and in their training. It is important however that these planning processes adequately consider the participant's long term plans upon release and informal support networks.

#### **Planning in custody**

Jimmy (not his real name) has an intellectual disability and significant mental health issues. He is a forensic patient in custody. His disability support needs are not being met in custody and his father and legal representatives are trying to assist him to move to supported accommodation. He also has a public guardian.

The National Disability Insurance Agency (NDIA) conducted a planning process with Jimmy alone, without consulting his legal representatives, his father or the guardian. Because of his intellectual disability, Jimmy would have had difficulty communicating his needs and

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<sup>2</sup> Victoria Legal Aid, *Ten stories of NDIS 'Thin Markets': Reforming the NDIS to meet people's needs*, Submission to the Department of Social Services and the National Disability Insurance Agency's NDIS 'Thin Markets' Project, June 2019, 8 – 10 (available at: <http://www.legalaid.vic.gov.au/about-us/news/reforming-ndis-to-meet-peoples-needs>) (VLA Thin Markets Submission).

<sup>3</sup> Ibid 3.

<sup>4</sup> Victoria Legal Aid, *The NDIS: Six Priority Issues and Models that are Working Well*, Submission to the Joint Standing Committee on the NDIS: Inquiry into General Issues around the Implementation and Performance of the NDIS, March 2019, referring to NDIS, 'Improved NDIS planning for people with complex support needs' (16 November 2018) (available at: <https://www.ndis.gov.au/news/1002-improved-ndis-planning-people-complex-support-needs>).

his plans on his own. His informal support network doesn't know what assessments have been conducted, what goals are recorded in his plan or what supports are included in his plan.

In the absence of proactive discharge and pre-release planning, discharge or release can be (a) delayed, causing people to be stuck in prison or mental health inpatient units; or (b) ineffective, because poor planning or subsequent market failure means a person exits with inadequate supports and is more vulnerable to re-offending or readmission.

For example, in NSW the NSW Operational Guidance for Mainstream Services indicate that assistance with plan reviews will be provided six months prior to the person's earliest release date.<sup>5</sup> For many prisoners, there is only a short period between the imposition of a sentence and their final release date, once time spent on remand is taken into account. Forensic patients found not guilty on the grounds of mental illness may be particularly disadvantaged because they do not have a release date until the Mental Health Review Tribunal determines that they can be released.<sup>6</sup>

The VLA Thin Markets Submission featured the stories of Sam, Thomas, and Joseph (client of the Northern Territory Legal Aid Commission),<sup>7</sup> which show the importance of planning for a person's release before their sentence is complete or discharge is imminent so that supports are in place to facilitate successful discharge or release and reduce risk of reoffending or readmission.<sup>8</sup>

### Primary disability

A number of our clients have reported that planners refer to a 'primary disability', or a disability that most impacts upon them. In some instances, planners have refused to include supports in a plan that relate to a 'secondary disability' or have limited a participant's access to supports on this basis.

This approach is not compatible with the legislation, which contains no reference to primary or secondary disabilities, nor with appropriately supporting clients with complex needs. Planners should recognise the ways in which multiple disabilities can compound the difficulties for participants in accessing supports and supports should not be limited to a single primary impairment.

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<sup>5</sup> NSW Operational Guidance for Mainstream Services on the Interface with the National Disability Insurance Scheme November 2016, page 69.

<sup>6</sup> Inquiry into the implementation of the NDIS and the provision of disability services in NSW – Legal Aid NSW submission to Portfolio Committee No 2 Health and Community Services, September 2018, 15-16 (available at <https://www.parliament.nsw.gov.au/lcdocs/submissions/62320/0351%20Legal%20Aid%20NSW.pdf>).

<sup>7</sup> Thomas and Joseph's names had been changed.

<sup>8</sup> VLA Thin Markets Submission, above n 2, part 4.



NLA understands that the NDIA's business system may be contributing to this misunderstanding, as it requires details of one 'primary disability' to be entered, which then informs the approach taken by planners.

### Whether a support is most appropriately funded by the NDIS

An issue frequently encountered by LACs assisting clients to obtain appropriate support is whether a support is most appropriately funded by the NDIS or another system of support. Planners should receive specific training in how this requirement should be applied to support requests, which should involve a direction to consider whether a support is offered by another support system.<sup>9</sup>

Disputes and confusion about responsibility between the NDIS or State and Territory funded service systems (including health, justice and transport) can create delays and mean people's needs are not being met. In the most serious cases, people are spending protracted periods in prison, mental health units or hospitals while decisions about funded services are being made.

We encourage the work that is taking place toward a system-wide approach to issues arising at the interface between the NDIS and mainstream services, including clear pathways and principles for resolution of issues, to make sure that it is government agencies – not NDIS participants – that are working to join up multiple regimes.

We are aware that planners can and do seek technical advice in relation to certain supports and impairments. Where that advice is sought and relied upon for planning decisions, it should be provided to the participant for response.

### Improving the tools that planners use to make decisions

When making decisions about plans, planners refer to and rely on Operational Guidelines produced by the NDIA. Those guidelines are not always reviewed and updated to incorporate legal developments.

For example, more than two years ago, the Federal Court made its decision in the matter of *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (McGarrigle), which clarified how decision making about supports, and particularly, transport supports should be conducted. This decision stands for the broader proposition that once a support is found to meet the reasonable and necessary criteria it should be fully, rather than partially, funded. The Operational Guideline on Transport which informs NDIA decision-makers (as well as participants and their advocates), sets out caps in transport funding, and has not been updated to reflect the McGarrigle decision or the subsequent decisions that uphold it.<sup>10</sup>

The LACs continue to advise and assist participants who have had caps applied to their requests for transport and other funding contrary to the Court's decision. The NDIA also

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<sup>9</sup> See *Burchell and National Disability Insurance Agency* [2019] AATA 1256.

<sup>10</sup> [#12](https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport).

applies a cap to funding for training disability support workers through shadow shifts.<sup>11</sup> This practice of applying caps continues to burden NDIS participants with uncertainty in relation to the funding of reasonable and necessary supports.

Where decisions of the AAT or Federal Court are likely to affect future planning decisions, there should be a process by which guidelines are updated and these changes are communicated swiftly to planners. Such measures would allow for more consistency in decision making and reduce unnecessary appeals and litigation.

### **Recommendations**

1. That NDIS planners are trained to understand the impacts of disability, and specific disabilities and functional needs, to make NDIS planning processes as efficient as possible.
2. That the number of specialised, trained planners working in institutional environments (such as psychiatric inpatient settings) is increased.
3. That operational guidelines are more regularly reviewed to incorporate developments in case law and ensure consistency with the legislative criteria.

### **e) participant involvement in planning processes and the efficacy of introducing draft plans**

Under the NDIS Act, the role of the participant in planning is central – the participant prepares their own statement of goals and aspirations (s 33(1)) and their statement of participant supports must also be prepared with them (s 33(2)).

A major factor in allowing participant involvement in planning is time. Several LACs have, in previous submissions, expressed concerns about issues with the length of time allocated to planning conversations, and the reported disconnection between planning conversations and produced plans.<sup>12</sup>

As well as providing adequate time for planning, we propose that participants should be afforded the choice of how planning conversations are held, whether that is face to face, over the telephone or on the papers.

We support greater transparency in planning decisions, which should involve a participant being advised by the NDIA decision-maker, prior to the approval of the statement of participant supports:

- What supports will and will not be included in their plan (and the reasons why certain supports are not included);

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<sup>11</sup> NDIA Price Guide 2019-20, page 22.

<sup>12</sup> See, for example, Legal Aid NSW Submission to the Inquiry into the Implementation of the NDIS and the Provision of Disability Services in NSW, September 2018.

- What decision will be made about the management of funding under their plan; and
- At what rate the NDIS amounts in their plans will be calculated.

This would not only allow certainty for participants about the supports they will receive, it would make it possible to correct errors quickly without reliance on a review process.

### Supported Independent Living

There are some support decisions where we consider a participant should have greater involvement, particularly Supported Independent Living (SIL) funding. SIL funding is funding for assistance with daily tasks, delivered in the home on a shared or individual basis.

In 2018, the NDIA removed price guidance for SIL from its price guide and asked SIL providers to instead submit quotes for the provision of that support for participants. While this measure was designed to increase individualisation of SIL funding, for many participants this process is not transparent, and the SIL funding amount they receive does not appear in their NDIS plan.

If the funding approved for independent living is lower than what has been requested, the participant is reliant on the provider to assist them to challenge the decision. The fundamental task of establishing the day-to-day needs of a person with disability can be conducted with inadequate input of the participant themselves.

### Assistive technology, home modifications and specialist disability accommodation

A further issue arises with supports that require technical input, including assistive technology, home modifications and Specialist Disability Accommodation (SDA). Usually where a participant requests these supports as part of planning conversation, the NDIA requests further information and/or assessments to make a decision about the appropriateness of the support and the funding amount that should be included.

In order to implement a plan in a timely way, the planner will usually specify that some further information is required in relation to that support. When a participant provides that information, there is no clear mechanism for the funding to be incorporated into the plan. Often a participant will wait months for a decision about funding for the support, and in some cases will be told that the information does not demonstrate a “change of circumstances” warranting review of the plan.

#### **Planning and assistive technology**

Carmel (not her real name) is 62 and has a cognitive impairment and severe mobility problems as a result of a stroke. She cannot leave the house without a mobility device, and has requested one in her NDIS plan. In October 2018, as part of her planning conversation, the NDIA approved an assessment by an occupational therapist to recommend an appropriate device.

The therapist completed and submitted an assessment in December 2018, recommending a scooter. The NDIA did not respond to the recommendation for over 6 months, during

which time Carmel rarely left her room. Her providers called the NDIA regularly, seeking urgent review, concerned that she would need to be transferred to a nursing home prematurely if she did not get the technology. In the weeks leading up to its approval, Carmel was hospitalised several times due to falls. The scooter was approved 9 months after it was first requested.

While we recognise the importance of appropriately evaluating and prescribing equipment for people with disabilities, the staged process gives participants limited ways to expedite decisions about essential technology and modifications.

#### Adjusting plans using typical support packages

We understand that the NDIA has developed a number of typical support packages (TSPs) which can be used as a reference for planners to compare the decision they have made for a participant against a benchmark. Concerningly, we have seen examples where planners are directed to adjust their decisions to within 10% of the TSP, despite a decision that a participant needs a higher level of support.

This method of decision making does not align with the task of determining the reasonable and necessary supports for an individual and does not involve a participant in the decision making process.

#### **Typical Support Packages**

Greg (not his real name), 60 years old, has an acquired brain injury and has been living independently for 7 years after the injury. He needs a high level of assistance each day to access the community, make decisions and maintain his health and wellbeing.

Each year when his plan was reviewed Greg received a lower and lower level of support. For his most recent plan, Greg's providers said they were concerned that they could not provide enough care and with the assistance of his family, he appealed the decision to approve the supports in his plan. When his plan was reviewed by the Agency, support was increased but not to the level he needed, and he appealed further to the AAT.

When his matter reached the AAT, it was clear that the planner who originally met with Greg had decided a much higher level of support was needed. Because the plan exceeded the typical support package used as a reference for Greg's disability, it was sent to another planner for review and reduced by close to a third. In the AAT, the result of Greg's matter was that he received support close to what was originally recommended.

## **Recommendations**

4. That NDIS planning processes are focused on the participant and facilitated in a way that maximises their participation and maximises their opportunities to provide information in support of their needs.
5. That participants are afforded the choice of how planning conversations are held, whether that be face to face, over the telephone or on the papers.
6. That participants are advised prior to the approval of the statement of participant supports in their NDIS plan, what supports will be included in the plan, what decision will be made about management of funding under the plan and at what rate the NDIS amounts in their plan will be calculated.
7. That planning is conducted in accordance with the legislative criteria, and that individual plans are not adjusted according to typical support packages.
8. That processes concerning the incorporation of supports that require additional justification, such as processes for seeking home modifications and for seeking assistive technologies, are streamlined and give participants clear information about their review rights.

### **f) the incidence, severity and impact of plan gaps**

Under the NDIS Act, a plan continues to be in effect until it is replaced (s 37(2) NDIS Act).

The problem that many participants face, when plan reviews are not completed to coincide with the date on which the plan must be reviewed, or where a decision of the AAT is not implemented immediately, are ones of systems and not of law. We approve of recent announcements that the NDIA intends to improve processes so that participants will be able to continuously access funding for supports,<sup>13</sup> as intended by the legislation.

### **g) the reassessment process, including the incidence and impact of funding changes**

Under the NDIS Act, each plan must have a date by which it is to be reviewed. When it is reviewed, a new statement of participant supports is created and a new date for review is set.

We are frequently told by our clients that in subsequent plans they receive a lower level of funding for their supports without explanation and without a change in their circumstances. This can be extremely distressing, with severe consequences for participants' health, wellbeing, access to secure housing and access to the community.

There have been instances of participants or their family members challenging planning decisions at the AAT and successfully increasing the level of support they receive, only to have that support reduced again at the next review.

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<sup>13</sup> <https://www.ndis.gov.au/news/3406-removing-gaps-between-plans>

We are also concerned to learn of cases where support coordination is being reduced or removed for clients at plan reviews, including clients with complex needs.<sup>14</sup> For clients with complex needs and behaviours of concern, innovative, skilled support coordinators play a crucial role in problem-solving and thinking creatively about supports. In our view, support coordination should not be seen as only an initial or introductory requirement for those with complex needs but should be recognised as the foundation that keeps other supports in place, either until they are clearly established, or ongoing.

We consider it is appropriate that when a plan is reviewed the previous level of support is taken as a benchmark for the participant's next plan, unless and until there is a demonstrated change to the participant's circumstances or needs. We note that the NDIS Act itself requires planners to consider the operation and effectiveness of any previous plans.<sup>15</sup>

#### **Recommendation**

9. That the level of support in a previous plan is considered to be the benchmark for what is reasonable and necessary in the next plan unless and until there is evidence to support a change.

#### **h) the review process and means to streamline it**

There are, and have been for some time, significant delays in internally reviewing decisions under the NDIS Act. In May 2018, the Commonwealth Ombudsman produced a report in relation to delays in decision making. The report found that the Agency was at the time receiving over 600 requests for review each week, and that reviews were taking up to 9 months to be completed.<sup>16</sup>

Despite efforts to expedite reviews, delays are still extremely common for our clients. The legislation requires reviews to be completed as soon as reasonably practicable, but our clients can wait the entire length of their plan (and beyond) before they receive an outcome.

There is currently uncertainty about whether a participant can apply to the AAT without having received an internal review decision which means that currently participants have limited options to expedite their reviews, even if the supports they seek are needed to keep them safe and well.

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<sup>14</sup> Recognising the potential benefits of effective planning for participants with complex support needs, we welcome the commencement of the Complex Support Needs Pathway and look forward to working with the specialised planners and skilled support coordinators and understanding the impact and outcomes of this program. See NDIS, 'Improved NDIS planning for people with complex support needs' (16 November 2018) (available at: <https://www.ndis.gov.au/news/1002-improved-ndis-planning-people-complex-support-needs>).

<sup>15</sup> Sub-section 33(5)(f) of the NDIS Act.

<sup>16</sup> Commonwealth Ombudsman, Administration of Reviews under the *National Disability Insurance Scheme Act 2013*, May 2018 [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0029/83981/NDIS-NDIA-Final-report-on-administration-of-reviews-under-the-Act.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0029/83981/NDIS-NDIA-Final-report-on-administration-of-reviews-under-the-Act.pdf)

We consider that an internal review can and should be a cheap, accessible and informal mechanism for a participant to challenge a decision about their supports. For it to work effectively, decisions must be made quickly, with full consideration of the participant's circumstances, an opportunity for the participant to present their case and detailed, considered and consistent reasons.

#### Time limit for internal review decisions and deemed decision

Currently, when a participant seeks a review of a 'reviewable decision' (including the decision to approve a statement of supports) a delegate of the Agency's CEO must consider the review and make a decision to confirm, vary or set aside that decision 'as soon as reasonably practicable': s 100(6) NDIS Act.

There is no way for a participant to be certain that a decision maker has not made a decision *as soon as reasonably practicable* other than to request an AAT Tribunal Member so find. The *Administrative Appeals Tribunal Act 1975* (AAT Act) provides a mechanism by which, when a decision has not been made within a prescribed period, an affected person moves on to the next stage of review: s 25(5) AAT Act.

Following the decisions of *KRBG and National Disability Insurance Agency* [2019] AATA 144 and *FJKH and National Disability Insurance Agency* [2018] AATA 1294, it is currently unclear whether a participant may make use of the AAT deemed decision provision and ask the AAT to finally resolve their review.

If the NDIS Act provided a set time limit for a review to be completed and an explicit provision that a failure to complete the review within that time would give rise to a deemed decision, participants would have certainty and a clear avenue for review. This issue may be addressed in the review being conducted by the Department of Social Services in relation to the establishment of a 'Participant Service Guarantee'.<sup>17</sup> NLA would welcome an amendment of this sort, which would remove an unnecessary barrier to meaningful review.

While the ultimate aim should be timely and considered internal reviews, these changes would provide a clear and streamlined alternative for participants to resolve issues in relation to their plans.

#### How reviews are conducted

There are a number of other improvements that could be made to the review process.

The first is resources: a greater number of delegates performing reviews would reduce waiting times and streamline the review process.

Secondly, we consider internal reviews could be enhanced by a requirement that a reviewer must communicate with the participant before completing the review and must consider the general power under the NDIS to provide support and assistance (including financial

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<sup>17</sup> See the discussion paper at <https://engage.dss.gov.au/review-of-the-ndis-act-and-the-new-ndis-participant-service-guarantee/ndis-act-review-and-ndis-participant-service-guarantee-discussion-paper/>

assistance) to participants in relation to doing things under the Act (s 6 NDIS Act). That is, if the reviewer is not satisfied that there is sufficient evidence in relation to a support, they ought to consider whether to assist the participant (financially or otherwise) to obtain that evidence.

#### **Making appropriate enquiries to streamline reviews**

Tom (not his real name) is a 10 year old boy who has an intellectual disability and autism spectrum disorder. His occupational therapist and behavioural psychologist both recommended that the NDIS fund a wheelchair for him to access the community and avoid safety risks while out and about.

The support was not included in his NDIS plan, and an internal review upheld that decision on the basis that there was not enough information from the OT in relation to the risks of the technology and the options that had been trialled.

Tom's family lodged an application to the AAT. The NDIA organised a teleconference with the occupational therapist and asked her questions about the wheelchair, the trials she performed and safety considerations. On the basis of that conversation, the NDIA agreed to fund the wheelchair.

The process of lodging and resolving the matter in the AAT took an additional 5 months.

#### Access to supports throughout a review

We consider that participants should have access to supports throughout their review and that where increased levels of support are agreed, those changes should be implemented as soon as possible.

The NDIS Act allows the NDIA to revoke the status of a participant at any time if the CEO is not satisfied that the person meets the disability or early intervention criteria (s 30 NDIS Act). Practically, this means that if a person's status is revoked and they seek an internal review of that decision (and subsequently a Tribunal review) they have no access to supports throughout that review process. This puts significant pressure on applicants to pursue their appeal rights without support. If the decision is later reversed, their mechanism to seek reimbursement for supports they otherwise would have been entitled to is unclear.

We recommend that the NDIS legislation be amended to include a provision similar to s 131 *Social Security (Administration) Act 1999* under which payment for supports would continue pending the review.

#### **Access to supports throughout review**

Hamid (not his real name) is a young man with an intellectual disability. He became a participant in the NDIS in October 2017. In his first plan he received more than \$80,000 in funding for a variety of supports, including attendance at a day program. His participant



status was revoked in November 2018.

Hamid appealed this decision to an internal reviewer and was ultimately re-instated as a participant in the NDIS in June 2019. During the course of the review, the NDIA acknowledged that the revocation decision had been made in error. During the 8 months that the revocation was being reviewed, Hamid was without funded supports, placing significant strain on his informal supports.

### Recommendations

10. The review of decisions internally by the National Disability Insurance Agency is maintained, but processes are improved, so that:
  - a) a defined time limit is imposed for all decisions on reviews of reviewable decisions (s 100(6) *NDIS Act*).
  - b) subject to an express preference to the contrary, communication between a reviewer and a participant/their nominee/child representative is mandated before an internal review decision is made.
  - c) reviewers are directed to consider the exercise of powers under the *NDIS Act* to assist participants, including to assist participants financially to obtain reports.
11. That participants whose access to the NDIS is revoked have access to supports throughout the appeal process.

### **i) the incidence of appeals to the AAT and possible measures to reduce the number**

The number of applications to the AAT about NDIS decisions has increased significantly over time – from 215 lodgements in 2016-17 to 802 lodgements in 2017-18.<sup>18</sup> This increase is certainly in part due to the staged introduction of the Scheme, but in our casework experience is also as a result of participants seeking review of their second or third plans, due to decreased funding for supports.

We consider that the AAT provides a valuable mechanism for review and that independent consideration of support decisions is necessary. We also consider that the improvements to internal decision making, outlined above, could reduce the number of unnecessary appeals to the AAT.

Further, there are a significant number of decisions under the NDIS legislation that are primarily procedural or jurisdictional, concerning issues such as:

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<sup>18</sup> AAT Annual Reports, 2016-2017: <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-At-A-Glance-2016-17.pdf>; 2017-2018: <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-At-A-Glance-2017-18.pdf>

- Whether the decision before the Tribunal is a decision to approve the statement of participant supports in a plan (s 33(2)) or a decision not to conduct a plan review (s 48(2));<sup>19</sup>
- Whether the Tribunal has jurisdiction and if so, over which plan;<sup>20</sup> and
- What happens to a plan when the review date occurs during the Tribunal process.<sup>21</sup>

These steps, which come about because of uncertainties in the NDIS legislation and in practice, can add months to the NDIS review process.

#### A decision about supports or a plan review?

A frequent complication in NDIS AAT matters concerning supports is the type of review that is being sought. When a statement of supports is approved, a participant can seek a review of that decision and the internal review (and any subsequent AAT review) can consider what was and was not approved: s 33(2) and s 99 NDIS Act.

Under s 48 of the Act, at any time in the life of a plan a participant can request that the NDIA review it and the NDIA can decide whether or not to do so. If it refuses, or is deemed to have refused, the participant can also appeal that decision.<sup>22</sup>

Because both processes are called ‘reviews’, and the considerations are largely the same, there can be confusion on the part of either the participant, the reviewer or both about what is being sought. If the matter reaches the Tribunal, it must determine what decision has been made and what powers it has in relation to that decision.

Deputy President Forgie of the Tribunal has commented on the resources required and confusion involved in determining these matters (emphasis added):<sup>23</sup>

*In this case, I have set out the steps that the NDIA has taken to illustrate the confusion that would seem to permeate the process of review. To a large extent, **the confusion would seem to arise from the structure of the NDIS Act.... To distinguish between decisions regarding the plan and its reassessment and decisions regarding the substance of what it is to which a participant is entitled and which is set out in a statement of participant supports in his or her plan, seems an unnecessary distinction. It is a distinction that leads to cases such as this***

<sup>19</sup> See for example: *ZKTN and National Disability Insurance Agency* [2017] AATA 744; *Simpson and National Disability Insurance Agency* [2018] AATA 1326; *BSLR and National Disability Insurance Agency* [2018] AATA 1282; *Hassett and National Disability Insurance Agency* [2018] AATA 4; 74 AAR 112; *Eccles and National Disability Insurance Agency* [2017] AATA 1457; 72 AAR 565; *Nairn and National Disability Insurance Agency* [2017] AATA 242; 71 AAR 439.

<sup>20</sup> See for example: *KRBG and National Disability Insurance Agency* [2019] AATA 144; *LQTF and National Disability Insurance Agency* [2019] AATA 631; *FJKH and National Disability Insurance Agency* [2018] AATA 1294; *Simpson and National Disability Insurance Agency* [2018] AATA 1326.

<sup>21</sup> See for example: *SHGH and National Disability Insurance Agency* [2018] AATA 674; *FFVQ and National Disability Insurance Agency* [2018] AATA 1968; *Williamson and National Disability Insurance Agency* [2019] AATA 2944.

<sup>22</sup> <https://www.ndis.gov.au/about-us/operational-guidelines/planning-operational-guideline/planning-operational-guideline-reviewing-and-changing-participants-plan#15>, see in particular 15.2.1 and 15.7.

<sup>23</sup> *LQTF and National Disability Insurance Agency* [2019] AATA 631 at [4].

*in which time must be spent to work out what has been decided rather than to work out what it is to which a participant is entitled.*

This is a confusing and unnecessary step for participants who simply want a decision about their support needs. It could be improved through training, changes in terminology and forms and/or through a presumption that a request for review lodged within 3 months is a request for a review of a reviewable decision under s 33(2).

#### **Recommendation**

12. That procedures for distinguishing between s 48(2) and s 33(2) *NDIS Act* reviews are consistently and appropriately applied.

## **Conclusion**

Thank you for providing the opportunity to provide a submission to the Joint Standing Committee's Inquiry into NDIS Planning.

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](mailto:nla@legalaid.tas.gov.au)

Yours sincerely



Brendan Thomas  
Chair