

12 July 2017

Review of NDIS Costs  
Productivity Commission  
GPO Box 1428  
BARTON ACT 2600

Dear Commissioners,

**Maurice Blackburn Submission in response to  
*National Disability Insurance Scheme (NDIS) Costs*  
Position Paper (the “Position Paper”)**

Maurice Blackburn annually represents thousands of injured and disabled clients. We are in a unique position to understand the challenges that face the injured as we have seen firsthand the human cost of injury in the workplace, on our roads and in other environments.

Maurice Blackburn welcomed the creation of a National Disability Insurance Scheme (NDIS) and a separate National Injury Insurance Scheme (NIIS) in 2013, which were intended to further fund the disability sector and alleviate significant levels of unmet need. However, we were critical of some aspects of the proposed scheme, as framed by the earlier Productivity Commission.

We appreciate the engagement of the Commission in our submission based on the earlier Issues Paper and welcome this further opportunity to play a constructive role in discussing the issues which require rectification and offer a policy or program response where possible.

Yours sincerely

**Rod Hodgson**  
Principal  
**MAURICE BLACKBURN**  
Accredited Specialist Personal Injury Law





**Maurice  
Blackburn**  
Lawyers  
Since 1919

**Submission to the  
Productivity Commission  
in response to the  
National Disability  
Insurance Scheme Costs  
Position Paper**

**July 2017**

## About Maurice Blackburn

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions. Maurice Blackburn employs over 1100 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

## General comments

Consistent with our previous public engagement on the rollout of the National Disability Insurance Scheme (the NDIS), our comments in response to the Position Paper are made largely in sorrow rather than in anger.

The success of the NDIS and its accompanying costs and policy frameworks is critical to the dignity and wellbeing of hundreds of thousands of our fellow citizens. More specifically, it is central to the ongoing interest of many of our current and former clients.

Every day we work with Australians who have suffered severe and catastrophic injuries, assisting them to access justice, compensation and support as they attempt to rebuild their lives. We assist them in navigating the law, social insurance schemes and private sector insurance. We engage with their families, friends and carers as they rally to assist our client.

Our comments that go beyond sorrow are based on our passion and commitment to these people and the frustrations that they have lived as the NDIS has been rolled out.

Our long engagement in the scheme's design trial sites and rollout has informed our understanding of the scheme. We know that the NDIS can make a significant difference to our current and former clients, but there are real challenges ahead.

The first step in meeting these challenges for the National Disability Insurance Agency (NDIA) and particularly its leadership is to be accountable for the failures that have occurred.

We believe this accountability needs to include an apology.

For instance, we were shocked to read of the Alzheimer's Australia submission that set out the experience of those with neurodegenerative diseases known to the organisation:

- Of Annie who felt rushed by the over the phone planning session and she felt the assessor did not get a clear indication of her needs.
- Or when Annie first applied for disability support that even though she had a degenerative neurological condition she was "not disabled enough".
- A person with Multiple Sclerosis was asked at a planning meeting "How long will MS last?", or
- A person with MS with only head movement was asked at their planning meeting if they would be able to hang out their own washing.

This is consistent with the experience of our clients and the organisations we work with; and it is clear there are significant system and workforce development failures in evidence.

Of course these issues around rollout and workforce and the development of participant plans were not some recent development, and they have previously been foreseen. They should have been mitigated by the NDIA leadership.

The Capability Review of January 2014 stated:

*Sector capacity building and workforce strategy: The Productivity Commission highlighted the need to ensure the capacity of the sector to adapt to the NDIS was prioritised as their business models would need to transform for a competitive market. In addition, the Productivity Commission recommended the development of a workforce strategy to plan for a dramatic increase in workers required to deliver services under the NDIS. These plans were to be developed from June 2013 to July 2014. While these matters are being addressed, the focus on operations and a lack of permanent National Office staff has hindered the capacity of the Agency to genuinely prioritise these tasks. It has recently outsourced the scoping of a workforce strategy.*

*The inability to undertake this preparatory work has become a major pressure point for the Agency as it attempts to build its capability.*

...

*The current plan is to complete 93 per cent of the eligibility assessments and activate almost 300,000 participants over a three year period commencing 2017-18. This mammoth increase in activity will put huge pressures on the available workforce in the sector, let alone the Agency. A realistic reassessment of these plans should be done sooner rather than later.<sup>1</sup>*

The NDIA response to the Review in March 2014 was silent on these specific matters.

This was in keeping with the previous approach by the NDIA leadership. Their mantra over the past four years has been *on track and on budget*:

*“Work is already underway on this aspect of Scheme implementation and I am confident that it will be put in place so that the NDIS achieves its goals.” NDIA Chair, Bruce Bonyhady, June 2013<sup>2</sup>*

*“Now, as we celebrate the first anniversary of the Scheme, the achievements are ground-breaking...The NDIS is laying the foundations for success...With the first full year of the trial phase for the Scheme now completed, we are well positioned for planning the implementation of the full scheme.” Bonyhady, July 2014<sup>3</sup>*

*“The rollout of the NDIS is currently on time and on budget – with a satisfaction rating of more than 90 per cent from participants.” Bonyhady, October 2015<sup>4</sup>*

*“The rollout of the Scheme is, therefore, on time...The NDIS is also on budget.” Bonyhady, September 2016<sup>5</sup>*

But as clients and groups that support the clients are emerging through this process to be critical of the client experience, the NDIA is now choosing 2017 to deflect accountability by hiding behind the rollout timetable. To explain all of their failures by pointing to a decision made in December 2012 by the then Prime Minister and State Premiers is a deflection from failures in design, assessment, planning, workforce development and transparency.

The appropriate response would have been to acknowledge the failures, make amends with clients and to develop the response, working in collaboration with the Australian Government and the appropriate external advisers.

## The experience of our clients and community partners

We engage with the NDIS in three ways:

- Through direct engagement on behalf of our clients
- Through the experience of service providers who work with our clients (for example in allied health), and
- Through the experience of other organisations we work with, typically health advocacy and support organisations.

The feedback we have received in relation to the NDIS and the NDIA and planners is broadly consistent with the observations and recommendations of the position paper.

Three key themes have emerged in this feedback.

Firstly, there have been consistent and shocking failures in planning processes.

The phone consultations have been a debacle and they have led to dissatisfaction, disputes and unnecessary duplication. The use of reference packages has undermined confidence in the process, and specifically undermined notions of choice and client-centricity.

The NDIA submission to this process describes the use of reference packages as “relatively blunt” but then states that they will continue to form the basis of quality assessment and initial plans of participants. The vast majority of people with disabilities have complex needs. The processes for plan development is not respectful of that reality. Holistic and bespoke plans are instead being replaced by minimalist, cookie-cutter versions. The NDIS staff are compelled to apply this model.

Participants’ “choice and control”, a mantra for the NDIS for years, is set aside. This is hardly surprising: the NDIA achieving numerical targets, keeping a lid on the package costs, and deficient internal workforce planning, all combine to ensure that the NDIA controls the planning process, and that participants’ choice is largely illusory.

The lack of training and support for staff undertaking planning has also undermined the process. The experiences articulated by the Alzheimer’s Australia submission are consistent with the feedback we have received regarding inappropriate time, knowledge and sensitivity to the conditions of the participant.

We also have concern regarding transparency. There are multiple aspects to this.

Firstly, the consequences for those Australians with a disability outside the NDIS are unknown. Services are changing due to the NDIS but for those outside it is a reduction in services.

The review and appeals regime is poorly understood and difficult to access. The NDIS has failed to properly educate participants about the process and creates barriers by not following their own requirements, for example, by not providing reviewable decisions in writing or not informing participants that a particular decision is reviewable. Further, funding for advocacy is still not adequate. In any new government insurance scheme, it is critical participants have a voice in advocating for change and retentions of aspects of the NDIS.

While we do not know Ya’el Frish from the Council of Social Services NSW, they very articulately explained the shortcomings of the current arrangements in May 2015:

*At COAG, Australia's disability ministers recently agreed that some support related to individual advocacy would be funded by the NDIS on a "user-pays" basis.*

*I will be eligible for an NDIS funding package to cover my personal care supports but is it right that I am asked to choose between a daily shower and money for advocacy, "just in case" something goes wrong?*

*The need for advocacy will become more acute as people with disability experience increased choice and control under the NDIS and the best way to do this is for state and commonwealth governments to fund these services outside the NDIS.<sup>6</sup>*

Thirdly, there is next to no legal support available for participants to challenge the NDIA's definition of "reasonable and necessary supports". Again, in any new system the decisions made should be tested by advocacy and adjudication. But at present, the access to justice is very limited to participants despite the fact a positive decision regarding these supports, in some instances, may make a significant difference to their quality of life. From the first Productivity Commission NDIS report in 2011, we can clearly discern a "participants' representatives (including lawyers) out; the agency knows best" ethos.

In a related issue, there is currently no timeframe in which the NDIA has to respond to a formal request for internal review. The NDIA states they have to respond as soon as practicable – which is in stark contrast to the timeframes in which the client has to make the request.

This creates a number of difficulties. Firstly, it creates enormous uncertainty for participants. It also leads to poor outcomes because, as we understand, the plans are suspended while a review is on foot. Finally, it undermines the appeals process because, as it has been described to us, the NDIA can defer the review until the plan expires or comes up to its scheduled review. The Authority then issues a new plan and if the support still is not funded, the participant has to start the review process again.

Finally, through our extensive network of offices in regional and rural communities, we are becoming increasingly aware of shortcomings in thin markets. We are seeing well established service providers closing or merging, taking away community connection. The NDIA needs to be up front about the differences in these markets and manage them differently. The pretence of all markets being the same cannot be sustained. This is a function of the NDIA's aim to be the price-setter for the provision of disability services nationally. That aim is unrealistic.

## **Response to draft recommendations, findings and information requests**

### ***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.*

Response:

Our previous submission stated that a prudent approach would be to consider a slower roll-out schedule to help minimise those risks. Given the cross-jurisdictional complexity, an extended phasing in would need to be re-negotiated on the basis of independent assessment of the preparedness of each jurisdiction and associated risks. This may involve a complete

cessation of the rollout on a regional basis for a period to enable the remedial work to be undertaken.

Aside from managing financial risks, a roll-out over an extended period would avoid significant frustration and distress for those living with disabilities and their families, and allow lessons learned from the early results to be incorporated into the scheme's final design.

**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.*

In addition to the feedback provided earlier in this submission, we alert the Productivity Commission to the complexities in navigating the scheme, even for the most sophisticated user. We refer specifically to the delays in securing calculation of the Compensation Reduction Amount - "CRA" for a client of our firm, and a potential or ongoing NDIS participant.

These arrangements recognise compensation that has been received through a legal process by a scheme participant. It helps reduce the NDIS' liabilities and secure its financial position.

Thousands of personal injury claims are determined each year for people who are likely to be eligible to receive funded NDIS benefits. However, before these claims can be settled, the legal representatives need an estimate of the potential repayment to the NDIS for past supports, and an estimate of the likely CRA. Without those estimates, the participant's legal representatives cannot advise their client on the impact of any settlement on their NDIS entitlements.

Through the first half of early 2017 we experienced significant delays in obtaining the information from the NDIA, preventing the timely settlements of claims.

For instance, we first contacted the NDIA in January 2016 on behalf of an adult client to confirm their CRA. We are yet to confirm a CRA in this case. This has followed a situation where it took over 12 months to get an estimate of the repayment for past benefits for this client. Then, months later, we were told the actual repayment was over four times the previous estimate.

This is a deeply frustrating set of circumstances for our client given this is effectively a straightforward actuarial calculation by the NDIA officer and a subsequent formal communication.

This is not isolated. We understand that the backlog of CRA matters is approximately 12 months.

It is clearly in participants' interests that the NDIS develop a consistent process for dealing with these requests in a timely and efficient way because it allows them to resolve their compensation claims and properly prepare for their future care needs. This is also in the interest of the NDIS as it allows legal representatives to inform our clients about the NDIS and properly manage expectations. It also means that repayments from compensation can be processed, mitigating the need for the NDIA to recover the money from clients directly.

**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?*

Response:

Our strong view is that the NDIA needs to actively support the testing and further exploration of all aspects of the definition of “reasonable and necessary” supports by clients through the AAT and the Federal Court of Australia.

One aspect of this is to better fund advocacy organisations; another is to make a contribution towards legal costs to provide better access to justice. The absence of entitlement to legal costs for participants’ successful appeals to the AAT exacerbates a profound power imbalance between participants and the NDIA.

Change is consistent with making the NDIA leadership accountable for its actions and the application of “reasonable and necessary” being more transparent. Encouraging and supporting external review of NDIA decisions and the scheme’s operation will also increase public confidence.

**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.*

**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.*

Response:

Based on our experience, we strongly agree with these recommendations. The situation to date, based on anecdotal and empirical feedback, is concerning.

The most disappointing aspect of this is that the NDIA was strongly encouraged by the 2014 Capability Review to consider the pressures of this activity.



The discussion paper's summary of the National Institute of Labour Studies evaluation that some are experiencing poorer outcomes under the NDIS, many are experiencing difficulty accessing supports and a significant proportion feel they have less control and choice is deeply concerning.

The discussion paper noted strong dissatisfaction with phone planning, consistent with feedback we have received. We congratulate the Commission for making the very clear point that phone planning is not appropriate for a wide range of participants for reasons that should not require explanation.

Something is clearly fundamentally wrong with the design and operation of the planning process and as such, significant change is required.

#### ***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.*

Response:

The experience of organisations we work with is consistent with the observations detailed in the position paper on page 30 onwards. Specifically, that there is significant concern that as programs are rolled into the NDIS, those using these existing services – who are not eligible for the NDIS - may no longer receive support. Mental health was provided as a specific example.

We have had ongoing engagement with key unions who covered these services and they hold significant concerns consistent with these observations and are seeing these concerns manifest as a real withdrawal of services.

#### ***INFORMATION REQUEST 5.1***

*The Commission is seeking feedback on a mechanism to ensure that the States and Territories bear the cost of participants who were intended to be covered by the National Injury Insurance Scheme.*

Response:

The Commission has, unfortunately, failed to interrogate the consequences of the NIIS as it was envisioned by the original Productivity Commission report. In essence, a New Zealand-like scheme was advocated. The profound economic folly of such a scheme has been fully articulated in our previous submissions. There are no obvious or natural funding streams, nor administrative infrastructure for any further expansion of the NIIS.

We offer four observations that are critical in considering any further potential mechanism.

Firstly, COAG decided to not proceed with the Medical Treatment stream of the NIIS at its meeting on June 6, 2017. It also requested Treasurers, in consultation with the Disability Reform Council, for advice on a general accident stream.

Secondly, notwithstanding commitments made with South Australia, the full scheme bilateral agreements do not require States and Territories to meet specific benchmarks beyond road and workplace accidents. As such, there is no obligation for States and Territories to go beyond those two pillars unless the Commonwealth wishes to reopen these bilateral agreements. Given the complexity of Federal-State relations, this is unlikely.

Thirdly, the NDIS is a safety net scheme that is committed to ensuring there is a last resort provision of services for anyone eligible for the scheme.

For those who have suffered a catastrophic injury in a “general” accident, for example, they will be able to access the NDIS on an ongoing basis, potentially including access to therapeutic services. As this represents the majority of their remaining lives, the current funding for the NDIS will be providing support for this relatively small number of clients.

Finally, any general accident pillar lacks scale, funding and wide demand.

Those who suffer catastrophic “general” accidents are already accessing Medicare support services in the immediate aftermath of their accident through the hospital system.

We also believe that the number of Australians in the “medical treatment” pillar who would not otherwise be supported through existing insurance and legal processes is only a few people each year.

In relation to funding such a pillar, State Governments are highly sensitive to any increase in local government rates and some States have even taken the step of legislated caps on rates. As such, they will not consider a new increase to rates.

If the priority is to create structures to create incentives to minimise risk, a more effective mechanism will be through engagement with the likes of ALGA and LGPro.

As such, to presume that the States and Territories will willingly reopen a negotiated agreement to take over the financial and operational responsibility for supporting this small group of people who would be under the fourth pillar is flawed.

In relation to a potential mechanism, the missing gaps in the system are sub-acute rehabilitation services for those who suffer catastrophic injuries away from roads and workplaces, and unable to access existing medical insurance and legal regimes. These are not currently funded via the NDIS.

We assert that based on insurance principles, the NDIS should be meeting these initial rehabilitation services needs post-hospital and prior to stabilisation of their disability and entry into the NDIS’ ongoing services.

We believe that such an approach will save money in the long run by improving outcomes, is the next best option given the COAG and negotiation positions, and reinforces the principles of the NDIS approach.

Time, resources and intellectual efforts ought first to be focused upon getting the NDIS right; before any reconsideration of the NIIS occurs.

***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.*

## Response

As reiterated earlier in this submission, through our network of regional offices and our ongoing relationships with local service providers, we believe the shifting structure of the market plus the existing thin markets in regional and rural communities may require strong and specific intervention by the NDIA.

We believe that the options being considered by the Commission, including leveraging established community organisations, using hub and spoke models and relying on other mainstream providers are all worthwhile considerations. But it needs to be done on the basis that staff are paid appropriately, engaged appropriately and that market rates can vary significantly between communities.

### *DRAFT RECOMMENDATION 7.1*

*The roles and responsibilities of different parties to develop the National Disability Insurance Scheme workforce should be clarified and made public.*

- *State and Territory Governments should make use of their previous experience in administering disability care and support services to play a greater role in identifying workforce gaps and remedies tailored to their jurisdiction.*
- *The Australian Government should retain oversight of workforce development, including how tertiary education, immigration and aged care policy interact and affect the development of the workforce. In doing so, the Australian Government should pay particular attention to immigration policy to mitigate workforce shortages over the transition period.*
- *The National Disability Insurance Agency should provide State and Territory Governments with data held by the Agency to enable those jurisdictions to make effective workforce development policy.*
- *Providers of disability supports should have access to a clear and consistent mechanism to alert those tasked with market development about emerging and persistent workforce gaps.*

This is a critical issue that was a key theme of our initial submission.

In a broad sense, this is not just an issue for clients and their carers and families; it is also a critical focus to protect employees.

We believe there is a danger of precarious employment, the emergence of piece rates and sham contracting and a specific danger of injury to participants and disability workers through non-compliance with Occupational Health and Safety laws and regulations.

### *DRAFT RECOMMENDATION 7.2*

*The National Disability Insurance Agency should publish more detailed market position statements on an annual basis. These should include information on the number of participants, committed supports, existing providers and previous actual expenditure by local government area.*

*The Australian Government should provide funding to the Australian Bureau of Statistics to regularly collect and publish information on the qualifications, age, hours of work and incomes of those working in disability care roles, including allied health professionals.*

Response:

We support any mechanism to increase transparency and particularly any emphasis on:

- The accreditation and experience of providers;
- Longitudinal understanding of employment in the sector, new entrants and exit by established providers; and
- Regional variations of service levels and gaps.

#### **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.*

Response:

Our previous submission stated that:

“... a prudent approach would be to consider a slower roll-out schedule to help minimise the risks associated with the introduction of the scheme. An extended phasing in of the scheme would need to be re-negotiated with the States on the basis of independent assessment of the preparedness of each jurisdiction and associated rollout risks. A revised rollout schedule could involve a complete cessation of the rollout on a regional basis for a specified period, to enable the remedial work to be undertaken, and a fresh analysis of readiness after that period.

Aside from managing financial risks, a roll-out over an extended period would avoid significant frustration and distress for those living with disabilities and their families, and allow lessons learned from the early results to be incorporated into the scheme’s final design.”

We stand by that view.

The problems with the NDIS are so serious and widespread, that courage will be required. Without a very significant recalibration of the rollout schedule, and major remedial work during that hiatus, the NDIS’s problems, and costs will escalate.

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<sup>1</sup> Bonyhady, B. NDIS, 19 February 2014, *The review of the capabilities of the National Disability Insurance Agency*, <https://www.ndis.gov.au/document/review-capabilities-n>

<sup>2</sup> Bonyhady, B. NDIS, 23 June 2013, *Speech from Disability Care My Choice My Control My Future Conference*, <https://www.ndis.gov.au/document/bruce-bonyhadys-speech-disabilityc.html>

<sup>3</sup> Bonyhady, B. NDIS, 9 July 2014, *National Press Club Address, Building the NDIS to last*. <https://www.ndis.gov.au/document/national-press-club-address-ndia-cha.html>

<sup>4</sup> Bonyhady, B. NDIS, 15-17 October 2015, *Claiming Full Citizenship 2015 International Conference Speech: 'Australia's National Disability Insurance Scheme: Its Design, Progress, Campaign Lessons, Challenges and Opportunities'*, <https://www.ndis.gov.au/chair-speech-ndia-design-progress-lesson.html>

<sup>5</sup> Bonyhady B, NDIS, 8 September 2016. *Early Childhood Intervention Australia Conference speech: 'The Accessible Country'*, <https://www.ndis.gov.au/bruce-bonyhady-speech-accessible-country.html>

<sup>6</sup> Frisch Y, ABC News, 21 May 2015. *We must protect advocacy in the NDIS transition*, <http://www.abc.net.au/news/2015-05-20/frisch-we-must-protect-advocacy-in-the-ndis-transition/6483020>