


Our reference: DN:LW

 telephone: (03) 9269 0659 fax: (03) 9269 0209



Melbourne Office

Level 9, 570 Bourke Street
Melbourne VIC 3000

GPO Box 4380
Melbourne VIC 3001

DX 210646 Melbourne VIC

t: 03 9269 0234

www.legalaid.vic.gov.au

ABN 42 335 622 126

14 July 2017

National Disability Insurance Scheme (NDIS) Costs study
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2600

Dear Commissioners

Productivity Commission inquiry into National Disability Insurance Scheme Costs

Victoria Legal Aid (**VLA**) welcomes the opportunity to contribute to the Productivity Commission's inquiry into National Disability Insurance Scheme (**NDIS**) costs.

We note the Commission's preliminary findings that there are signs the NDIS rollout schedule is compromising the National Disability Insurance Agency's (**NDIA**) ability to implement the NDIS as intended, putting the financial sustainability of the scheme at risk. Proper financial management of the scheme is critical to enable the legislation governing the NDIS to achieve its objectives and principles.

About Victoria Legal Aid

VLA is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of provide assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA is the leading provider of legal advice and advocacy to people seeking assistance with social security matters in Victoria. Our Commonwealth Entitlements program is one of the two largest advice and advocacy social security practices in Australia. In 2016/17 we provided legal advice on 2,297 social security matters and funded 69 grants of aid. VLA is funded by the Federal Government to provide legal services for NDIS cases that are complex or novel. To date VLA has assisted in over 50 NDIS appeals. We provide advice and representation to applicants who challenge NDIA decisions at the Administrative Appeals Tribunal (**AAT**).



VLA is also the leading provider of legal services to Victorians with disabilities and mental illness. In 2016-17, 22,849 clients – or 26 per cent – disclosed that they fall within this category. Our Mental Health Disability Law sub-program provides expert legal advice and advocacy to people diagnosed with mental health issues, including cognitive neurological, intellectual and psychosocial disabilities.

VLA specialist services also include the Independent Mental Health Advocacy program, a state-wide non-legal advocacy service for people receiving compulsory treatment under the *Mental Health Act 2014* (Vic). IMHA advocates support and assists people to make or participate in decisions about their assessment, treatment and recovery.

Summary of submission

VLA's submission focuses on the Commission's request for information at 4.1 pertaining to 'reasonable and necessary supports', and draft finding 2.4 that not all participants are benefiting from the scheme, in particular participants with psychosocial disabilities.

Our contribution to this inquiry reflects the key objectives under section 3 and the general principles under section 4 of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**). It is informed by our significant experience in the provision of legal services to NDIA clients and people in receipt of forensic disability services in the mental health system.

Our submission draws on our recent experience in the case of *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (**McGarrigle**) in which VLA acted for Liam McGarrigle in the Federal Court of Australia (**FCA**) on appeal from the AAT. The FCA ruled that laws governing the NDIS do not allow the government to fund only partially supports that are found to be 'reasonable and necessary'; that is, the supports that people with a disability need for independence and meaningful social and economic participation.

Reasonable and necessary supports

Our submission focuses on the Commission's request 4.1 which asks for information pertaining to 'reasonable and necessary supports' based on the following five questions.

Is the NDIS Act sufficiently clear about how or whether the 'reasonable and necessary supports' criterion should be applied?

The Commission has commented on mainstream support costs including transport, a central tenet in the recent case of McGarrigle. Consistent with VLA's position and the findings in McGarrigle, we contend that:

Recommendation 1: The NDIS Act is sufficiently clear about how or whether the 'reasonable and necessary supports' criterion should be applied. The legislation has sufficient checks and balances in place. It is not necessary for the NDIS agency to impose additional tests when it decides to fund supports.

The applicable legal test for deciding whether to approve a statement of participant supports is found in sections 33 and 34 of the NDIS Act, as well as the criteria prescribed in the NDIS (Support for Participants) Rules 2013 (**the Rules**).

Section 33 provides that a participant's plan must include a statement of supports, prepared with the participant and approved by the CEO, that specifies the general supports (if any) that will be provided and the reasonable and necessary supports (if any) that will be funded under the NDIS. The supports may be specifically identified in the plan or described generally, whether by reference to a specified purpose or otherwise. Section 33(5) of the NDIS Act provides those aspects to which a CEO must have regard and be satisfied with in deciding whether or not to approve a statement of participant supports.

Is there sufficient clarity around how the section 34(1) criteria relate to the consideration of what is reasonable and necessary?

In *McGarrigle v Justice Mortimer* considered what 'reasonable and necessary' support means. Her Honour applied the general principle of construction that each word in a statute should be assumed to have, and be given, work to do.¹

Her Honour found that whether a support is 'reasonable' requires a different assessment to whether a support is 'necessary'. While Her Honour was not exhaustive in defining the scope of this concept, she found that:

"...it is enough to observe that using the concept of necessity would appear to tie one aspect of the CEO's assessment to an evaluation of the kinds of factors set out in s 34(1)(a) and (b) and (d). The word 'reasonable' would appear to be directed at factors such as those set out in s 34(1)(c) and (f). That is not to say the meaning of each word is exhausted by the factors set out in s 34(1): rather, it is to illustrate the different work that each concept does as an adjective in the phrase "reasonable and necessary supports".²

In respect of those factors illustrated by s 34, a support is **reasonable** if it represents value for money and is most appropriately provided or funded through the NDIS and not another system or support service as part of a universal service obligation or in accordance with discrimination laws. A support is **necessary** if it relates to those factors including assisting the participant to pursue their goals, objectives and aspirations, it facilitates the participants social and economic participation, and the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice.

¹ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at 89.

² *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at 91.

The function of s 34(1) is to assist the CEO of NDIA in forming a state of satisfaction about whether a support is reasonable and necessary for a particular participant. Once that satisfaction is formed the scheme requires that the support *will* be funded in whole.³

Legislation governing the NDIS does not allow for supports to only be partially funded. There are no references in the provisions to contributions from the participant, or the participant's family or carers or community. It would be inconsistent with the purpose of the scheme for a support to be made conditional on either the provision or the funding by another person of a portion of the relevant support. 'Support' must be given a broad construction and is a practical description of the means by which a person with disability is assisted.

Is better legislative direction about what is reasonable and necessary required?

The concept of 'reasonable and necessary supports' is not specifically defined in the NDIS Act, nor does it provide direct guidance on how to determine whether a support is a reasonable and necessary support. Nonetheless, we say that the legislation provides sufficient direction about what is reasonable and necessary. In this regard, we note again the judicial consideration of this concept in *McGarrigle*. VLA agrees with the Commission that what is 'reasonable and necessary' will ultimately be shaped by court and tribunal decisions over time, and will affect the types of supports funded and scheme costs. *McGarrigle* is on appeal and will be heard by the Full Court of the Federal Court in August 2017.

Recommendation 2: The legislation provides sufficient direction about what is reasonable and necessary. To give true effect to the objectives of the NDIS Act, the legislation must provide sufficient flexibility to allow for each participant's individual needs and requirements to be considered. Any amendments to the legislation around the test for 'reasonable and necessary' must be clear about how it will be applied and consider the impact on individual participants.

If so, what improvements should be made? Consistent with *McGarrigle*, in our view the legislation governing the NDIS does not allow for supports to only be partially funded. Section 34(1)(e) does not authorise the NDIA CEO (or delegate or Tribunal) to be satisfied that a support which has otherwise been concluded to be 'reasonable and necessary' should be only partially funded because others can make up the funding difference. Given that the concept of 'reasonable and necessary supports' has already been given some content in *McGarrigle*, and will likely be further clarified in future cases, no legislative clarification is required at this stage.

³ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at 94.

What would be the implications of these changes for the financial sustainability of the scheme?

The general principles guiding the NDIS Act at s 4 outline a number of considerations that need to be taken into consideration. Regard must be given to ensuring the financial sustainability of NDIS when performing functions and exercising powers under the Act. The principles also require that people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development, that they be supported to participate in and contribute to social and economic life to the extent of their ability, and should be supported to receive reasonable and necessary supports, including early intervention supports⁴. People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.⁵ The NDIS was introduced on the promise that people would not be worse off.

Recommendation 3: People with a disability and their families should not be forced to bear the financial burden of costs incurred by engaging with their NDIS plan.

Participants with psychosocial disability at risk of experiencing poor outcomes

Our practice experience indicates that participants with psychosocial disability, and those who struggle to navigate the scheme, are most at risk of experiencing poor outcomes. The Commission's draft finding at 2.4 that not all participants are benefiting from the scheme, that participants with psychosocial disability, and those who struggle to navigate the scheme are most at risk of experiencing poor outcomes raises genuine concern.

In March this year VLA submitted a paper to the Joint Standing Committee's inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition⁶. That paper focused on the way in which NDIS services might assist improving clear, effective and individual pathways back into the community for people who have been confined in mental health facilities or detained in forensic settings. The recommendations below are consistent with that paper.

Barriers to understanding and accessing the scheme

In our experience, the nature of the NDIS as an 'opt-in' scheme can present particular barriers for individuals with mental health conditions, particularly those who are in institutions, as it necessarily requires access to personal information (including historical information) and ongoing coordination between an applicant, treating practitioners, and the NDIA. In effect, this means that a person's ability to access the NDIS can be dependent on the availability of support, and the willingness of treating practitioners or other professionals to advocate for their

⁴ NDIS Act s 4(1), (2) and (5).

⁵ NDIS Act s 4(3)

⁶http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MentalHealth/Submissions

clients. Systematic and technological barriers can also exist to prevent individuals in institutions from accessing the NDIS making it difficult to navigate the system.

Recommendation 4: Tailored information and support to facilitate access to the scheme should be properly costed out and provided.

The need for clear criteria

Preliminary data from the NDIA indicates that the rate of rejection for NDIS access requests for those with a psychiatric impairment is significantly higher than other disability types.⁷ Based on our experience, this may relate to a lack of specialised knowledge among assessors within the NDIA, as well as potential difficulties relating to the application of the legislative criteria.

One issue may be related to the requirement in the Act that an impairment must be permanent (or likely to be permanent) in order for a person to meet the eligibility criteria. There is no definition of 'permanent' offered in the Act, and while s 24 makes some provision for an impairment to be variable in nature, there is no further guidance for decision makers on how to interpret this provision. Some psychosocial disabilities are highly episodic, and many manifest in different ways depending on context. Neither of these features warrants the refusal of access requests by persons with psychosocial disabilities.

Similarly, there is also little available guidance on the meaning of 'substantially' reduced functional capacity in the context of psychosocial disability. Based on our experience, clients with psychosocial disability present with unique experiences and challenges that are distinct from other disability types. Again, the fact that a person's social circumstances provide some amelioration of an underlying condition which impacts functional capacity, should not be used as a basis for a refusal of an access request.

Further difficulties can occur – and have occurred – as a result of the additional residence requirements that apply during the full-scheme transition period. Rule 4.1⁸ requires a person to satisfy additional residence requirements in order to become a participant in the NDIS. Schedule 1 to the Rules set out when a person meets the additional residence requirements by virtue of residence in a prescribed area at a prescribed time. Currently, there is uncertainty as to how these rules will be applied to individuals who normally reside in a prescribed area but who are detained in a non-prescribed area, and vice versa. This uncertainty can act as a

⁷ *IAC advice on implementing the NDIS for people with mental health issues* accessed online: <https://www.ndis.gov.au/about-us/governance/IAC/iac-advice-mental-health>

⁸ *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*

further barrier to providing timely intervention for individuals in temporary or indefinite detention.

Recommendation 5: Clear guidelines or policies, or NDIA rules, should be developed in order to provide certainty. These should reflect the episodic nature of some kinds of psychosocial disability and the consequences for individual circumstances.

The place of informal supports in identifying ‘reasonable and necessary’ supports

In VLA’s experience, difficulties have arisen when determining the reasonable and necessary supports available to participants with mental health conditions. These include, among other things, identifying appropriate family, carer and ‘informal’ supports, and locating appropriate accommodation.

In order for a support to be funded under the NDIS Act, it must meet the criteria in section 34 of the Act. This includes, among other things, that there is evidence that the support is likely to be effective and beneficial for a participant, that the support takes account of what is reasonable to expect families, carers, networks and the community to provide, and that the support is most appropriately funded or provided through the NDIS rather than other systems of service delivery such as the health system. Additionally, a support will not be funded if it is deemed to be a ‘day to day living cost’ or is likely to cause harm to a participant.

Since, in VLA’s experience, individuals with psychosocial disability (especially people in long-term detention) not infrequently have limited social support, carers and the community should be encouraged to engage with and support individuals to maximise independence and dignity, rather than being considered ‘informal supports’ who are able to bear the financial burden of care. The use of these provisions to justify substantially reduced funding for participants with psychosocial disabilities, would militate against the achievement of the scheme’s objectives of dignity and independence.

Recommendation 6: The NDIA provide clear guidance on the application of the reasonable and necessary supports criteria in cases of psychosocial disability. This guidance should reflect the principles of independence and dignity embodied in the Convention on the Rights of Persons with Disabilities and other legislation.

Challenges caused by the interface of the NDIS and the health system

Currently, there is a high level of uncertainty surrounding the interface between the health system and the NDIS. For example, the NDIA has indicated that it will not fund clinical services and treatment for ‘health conditions’, medications, post-acute care and psychogeriatric care.⁹

⁹ NDIS ‘Mainstream interface: Mental health services’ Fact sheet, accessed online : https://www.ndis.gov.au/html/sites/.../supports_ndis_fund_mental_health2_0.docx

This is the case even if these services are not funded under the health system. This is likely to create particular difficulties for individuals transitioning from detention, and it is anticipated that there will be a high proportion of people who will not receive funding for vital mental health services and support.

Lack of clarity in this area has resulted in unnecessarily lengthy and complex tribunal cases, and continues to be a challenge for VLA clients. While clarification of the meaning of the legislation in cases is appropriate and necessary (and already well-advanced), the perpetuation of litigation because of a lack of clarity as to health services available is unnecessary and unproductive. In our experience, clients are often advised that the NDIA will not fund a particular support without receiving any support or information about how that support may be funded under alternative systems. Better coordination between services is vital to ensuring that clients with psychosocial disability do not slip through the cracks.

Recommendation 7: We recommend that where the NDIS cannot fund a health related support, participants with mental health issues should be given support or referral to services to assist them to navigate the interface between the NDIS and other health services.

Conclusion

The NDIS is based on principles of rights, choice and certainty. It aims to support the independence and social and economic participation of people with disability, and give control over the care and support they receive. The legislation has been designed to ensure that people with disability can access reasonable and necessary supports, that they have assurance that they will receive this support over the course of their life, and that the scheme itself remains sustainable over the long term.

Yours faithfully

DAN NICHOLSON

Executive Director, Civil Justice, Access and Equity
Executive Director for the Western Suburbs region