



This is a joint initiative of the Division of Rehabilitation, Metro South Health, Menzies Health Institute Queensland and Griffith University.

Submission to the Productivity Commission Position Paper: National Disability Insurance Scheme (NDIS) Costs

Dr Kylie Burns, Griffith Law School

I am a member of Hopkins Centre Research for Rehabilitation and Resilience¹ and am pleased to have the opportunity to provide submissions in response to the Position Paper² on costs of the National Disability Insurance Scheme. Hopkins Centre Research for Rehabilitation and Resilience is committed to improving disability and rehabilitation practices, service delivery and systems by developing, translating and implementing interdisciplinary research evidence about real world problems. The Centre is located at Griffith University, Logan campus and Princess Alexandra Hospital, Metro Health South to facilitate opportunities for research exchange and excellence between clinical experts, practitioner researcher and academics. The Centre focuses on research of relevance to people living with the long-term consequences of acquired brain injury, amputation, persistent pain, and spinal cord injury as well as developmental, age-related and other life-long disabling conditions.

As a legal researcher with particular expertise in the operation of compensation systems and the legal framework of the NDIS I have recently conducted a study of the reported NDIS review cases which have been decided by the Administrative Appeals Tribunal (AAT) and Federal Court since the commencement of the NDIS.³ I have particularly examined those cases which have specifically considered the meaning of 'reasonable and necessary support' within the context of s 34 of the *National Disability Insurance Scheme Act* 2013. A summary of these 11 'reasonable and necessary' cases is included as Appendix 1 to this submission. There are several key points of significance to the Productivity Commission's Position Paper that emerge from my study:

¹ <http://www.hopkinscentre.edu.au/>

² <http://www.pc.gov.au/inquiries/current/ndis-costs/position> ('Position Paper')

³ My research was carried out on all publicly available NDIS cases on AUSTLII (<http://www.austlii.edu.au/>) decided in the AAT or Federal Court since the commencement of the NDIS. There have been 2 Federal Court cases and 19 AAT cases related to the NDIS decided since 2014.

- The majority of all NDIS cases appealed on review to the AAT⁴ appear to be resolved by agreement between the NDIA and applicants at the case conference, conciliation phase, or during the pre-hearing phase⁵ or are dismissed or withdrawn.⁶ Only a relatively small percentage of all NDIS cases appealed to the AAT proceed to ultimate determination by the AAT on review. The Position Paper notes that in the 77 (out of a total of 112) appeals that were resolved by 31 December 2016, the NDIA's decision in about half was varied or set aside (the participant was successful).⁷ Where the NDIA's decision was varied or set aside, that did not occur for the most part as a result of determination by the AAT, but presumably in the pre-hearing phase with the consent of the NDIA.
- There is no evidence that the AAT is adopting an expansionary approach to the meaning of 'reasonable and necessary supports' in the cases it has ultimately determined, or that there is presently likely significant impact on financial sustainability of the NDIS. In the 11 'reasonable and necessary' cases heard to date the NDIA was successful in 5 cases and partially successful in a sixth case. In addition, in a further case the applicant was successful after the NDIA made concessions before the AAT and did not lead medical evidence that contradicted the need for support.
- A number of cases where the applicant was successful raised the interpretation of key issues of statutory interpretation of the scheme for the first time before the AAT or the Federal Court. This is to be entirely expected in the first several years of new and complex legislation. These included whether partial funding of reasonable and necessary support is possible.⁸
- There are a number of 'reasonable and necessary' cases where issues in the NDIA planning and review process ultimately lead to the appeal by the applicant. Much of this was avoidable- for example through a better initial evidence based planning process, clear communication with the applicant, or through a proper internal review process.
- There are some significant issues in the review process as conducted within the NDIA.⁹ I identified 5 additional AAT cases¹⁰ where the essential complaint of the applicant was that they had not received reasonable and necessary supports within their plan. However, their review to the AAT to have their supports reviewed was denied on the basis that

⁴ The Position Paper notes at p 306 that as at 31 May 2017 there had been 161 external appeals to the AAT. My search of AAT NDIS cases on AUSTLII revealed only 19 cases have been determined by the AAT since 2014.

⁵ <http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Review-of-National-Disability-Insurance-Scheme-Decisions.pdf>

⁶ The AAT noted in its 2015-2016 Annual Report that 'since the trial phase commenced on 1 July 2013, the NDIS has been rolled out to some 30,000 people. Over the three-year period to 30 June 2016, 85 applications have been lodged with the AAT and 58 applications finalised: 28 by parties reaching an agreement, seven finalised by way of a Tribunal decision following a hearing and 23 applications withdrawn or dismissed.'

<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201516/AATAnnualReport2015-16-Chapter-3.pdf>, p 27.

⁷ Position Paper, p 306.

⁸ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (currently on appeal to the Full Federal Court); *McGarrigle and National Disability Insurance Agency* [2016] AATA 498.

⁹ These are further discussion of the emerging issues in relation to the review process in the Position Paper, p 303-307.

¹⁰ *Nairn and National Disability Insurance Scheme Agency* [2017] AATA 242 (28 February 2017); *Bridgland and National Disability Insurance Agency* [2017] AATA 69 (16 January 2017); *Rodrigues and National Disability Insurance Agency* [2016] AATA 1095 (20 December 2016); *QQNH and National Disability Insurance Agency* [2016] AATA 220 (23 February 2016); *Burston and National Disability Insurance Agency* [2014] AATA 456 (4 July 2014)

there was no technical review to the AAT available. This was because the NDIA had not correctly conducted the first internal review or had conducted a plan review rather than an internal review. In a number of cases the NDIA had misled or wrongly advised the applicant leading to the applicant wasting time, cost and energy on a fruitless review to the AAT.

- The definition and role of ‘financial sustainability’ in the determination of ‘reasonable and necessary support’ within the legislation is unclear. The term is not defined, it is not clear whether it is a separate and overriding consideration to be applied in addition to s34 considerations, and the nature of the evidence necessary to determine financial sustainability is unclear.

I make the following specific submissions based on my study:

Information Request 4.1 ‘Reasonable and Necessary’ Supports

Given the individualised nature of support funding under the NDIS, it would likely be impossible to prescribe what would be ‘reasonable and necessary support’ in all cases. This is particularly given that the supports provided to participants must be responsive to their own individualised ‘goals, objectives and aspirations’ and their ‘environmental and personal context’. (s 33 (1)).

There is no significant evidence in most of the decided cases that further prescriptive legislative definition of the term ‘reasonable and necessary’ would have given more clarity or prevented a review. Most of the cases depend on the nature of evidence base for the relevant support proposed in the particular case and whether in the individual factual circumstances of the applicant the requirements of s 34 could be satisfied.

There are several possible matters that could be further clarified to avoid confusion:

1. ‘Reasonable and necessary supports’ could be defined in the *National Disability Insurance Scheme Act* 2013 Part 4 as supports which satisfy the criteria provided in s 34(1). It would also likely assist to consider more clearly distinguishing reasonable and necessary supports from ‘general’ supports.
2. Section 34 does not presently include an additional and separate criteria that requires consideration of ‘financial sustainability’ of the applicant’s supports in the context of the whole scheme. There are two current views on the relevance of financial sustainability that can be identified in the AAT cases, and in *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (currently on appeal to the Full Federal Court). The first is that the s 34 (1) criteria already incorporate the object of financial sustainability (s 3 (3) (b)) such that neither applicants nor the NDIA need to separately prove how the individual’s supports also need to be measured in the context of the financial sustainability of the whole scheme. Other cases have however proceeded on the basis that there is a separate and additional requirement, even once the s 34 (1) criteria are satisfied, to consider the whole financial sustainability of the scheme. Given the scheme is individualised, person-centred and insurance based, this does not seem a correct approach. This issue should be resolved within the legislation to give clear guidance to the NDIA and applicants.

3. If 'financial sustainability' is to be considered a separate additional requirement to prove in order to show a support is reasonable and necessary, the term should be specifically defined in the legislation.
4. The definition of the term 'financial sustainability' should reflect the NDIA's current view that the term balances both the achievement of measures of economic and social participation, independence and services to provide quality of life for participants; and the affordability of costs and value of money to contributors to the scheme. There is evidence in the AAT cases decided to date that where 'financial sustainability' is raised it is normally only understood as involving imprecise estimations of rough costs of provision of services more broadly with little to no discussion of the financial and other benefits that will flow from the provision of services (eg broader economic participation of people with a disability).
5. There has been some discussion in several AAT cases of the role of NDIA policy material, including operational guidelines, in determining the meaning of 'reasonable and necessary' in the context of s 34. That matter is currently unresolved. However, there are a number of issues in NDIA policy documents that are likely to prompt AAT reviews in the future. For example, the use of capped transport costs¹¹ in planning seems potentially inconsistent with s 31, 33 and s 34. In addition, the current First Plan process may also produce outcomes which lead to reviews where reference packages are not sufficiently individualised and do not, for example, appropriately respond to participant's statements of goals and aspirations.

Information Request 4.2 Delegation of Approval Function to LACs

The Position Paper and many of the submissions to the Inquiry note difficulties with the current planning process, and issues arising from the delegation of planning function to inexperienced LACs. While there may be some efficiency in planning time to give delegation to approve plans to LACs, the risks and potential costs of this are substantial. It would be a poor process to delegate this form of governmental function to bodies outside government. It would reduce governmental oversight, reduce the ability to ensure consistency in planning across the NDIS, and potentially reduce public confidence in the NDIS. The experience of planning to date suggests that there should be more execution of planning within the NDIA (including in specialised planning panels) rather than more delegation of planning outside the NDIA. In addition, the shift of pre-planning to LACs would likely much more greatly benefit the planning process than delegation of planning to LACs.

Draft Recommendation 4.1 Planning Process

- As I note above, issues in the planning process are evident in the cases that have been reviewed to date in the AAT.
- I also note above my concern that the First Plan process and use of reference packages by the NDIA may lead to reviews and may breach s 31, 33 and s 34 of the legislation if they are not sufficiently individualised for applicants. Reference packages are based on

¹¹ <https://www.ndis.gov.au/document/participant-transport-funding-informati>

‘typical’ support packages, however it is clear that s 31, 33 and s34 operate on the basis of packages which are individualised to the participant. The use of reference packages which are not transparent and available to applicants may also create confusion and resentment in participants who legitimately understand the planning process to be highly individualised based on the provisions of legislation and the NDIS rules (which do not make reference to reference packages).

- I agree it would be desirable to implement a minor amendment or adjustment to the plan process without triggering review. This would assist in ensuring cases are not unnecessarily sent to the AAT for review (particularly where no technical review exists). More effective pre-planning and the ability for participants to check and comment on draft plans would also assist to prevent multiple plans having to be prepared and ultimately may prevent unnecessary reviews. The preparation of multiple ‘new’ plans is a feature in a number of the AAT cases I considered. This also creates difficulty in the AAT in determining exactly what decision is under review (particularly where significant time has passed before the AAT hears a review) and whether a technical review by the AAT is possible.

Draft Recommendation 9.3 Plan Reviews and Review Process

I suggest that systematic data on AAT and Federal Court reviews/ appeals and their outcomes should be kept. This will allow on-going analysis of whether further legislative changes are required.

Dr Kylie Burns, Griffith Law School, Griffith University

12 July 2017