

NDIS Costs

Submission to the Productivity Commission

12 July 2017



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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the Productivity Commission's Position Paper on National Disability Insurance Scheme (NDIS) Costs (the Position Paper).
2. The NDIS is a revolutionary policy development. Its promise will fail to be realised, however, if it is not implemented well.
3. To date there have been over four years of planning involved to get us to the current point of NDIS rollout. We reiterate our concerns regarding the risks inherent in rushing the rollout of the Scheme.² While we understand that some participants are keen for the Scheme to be rolled out quickly, ultimately we believe that its long-term strength will be enhanced by a more considered approach. This challenge is clearly acknowledged in the Position Paper.
4. There is an urgent need for greater clarity around the Scheme and accountability for problems that have emerged. To this end, we reiterate our recommendation to limit the National Injury Insurance Scheme (NIIS) to those arms that are already established at the state and territory level, being injuries arising from motor vehicle and workplace accidents. Expanding the NIIS to medical and general injuries would import too much uncertainty into the Scheme. It would also constitute a significant financial burden, as costs which are currently being met by common law compensation could be shifted to the state if the NIIS were to be expanded.
5. In addition to NIIS concerns, the ALA would like to highlight concerns in four main areas: planning failures that are not adequately catering for the participants' needs,

² See, for example, Australian Lawyers Alliance, *Review of National Disability Insurance Scheme (NDIS) Costs: Submission to the Productivity Commission*, (March 2017), <https://www.lawyersalliance.com.au/documents/item/803>.

workforce planning, inadequate transparency and failures in catering for the needs of those who fall outside of the parameters of the Scheme. Each of these concerns has the potential to have significant and unpredictable costs implications.

NIIS

6. The ALA supports a minimalist model for the NIIS, as noted in previous submissions.³ It is appropriate that the NIIS apply only in relation to motor vehicle and workplace accidents. Existing frameworks were in place at the state/territory level which were readily adapted to the NIIS model in these areas. The same cannot be said for general and medical accidents.
7. In some jurisdictions, no-fault and hybrid schemes for motor vehicle and workplace accidents can limit support available to injured individuals to a number of years after the injury takes place. The inevitable outcome of these schemes is that individuals whose ability to work has been compromised by the injury, but who do not meet a specified injury threshold, are cut off from support after the coverage period expires and left to be supported by Centrelink and Medicare. Where fault is provable, this is an unreasonable burden on the public purse and leads to worse outcomes for injured people. To expand such schemes to the much more complex areas of general and medical injuries would give rise to a significant increase in the cost burden to be carried by the NDIS and other social supports in the medium to long term. It would also have negative repercussions for people injured in these accidents as the freedom to manage their injury in the way that best suits them without government

³ Australian Lawyers Alliance, *Review of National Disability Insurance Scheme (NDIS) Costs: Submission to the Productivity Commission*, (March 2017), <https://www.lawyersalliance.com.au/documents/item/803>.

or bureaucratic interference, as common law compensation enables, would be removed.

8. The common law is the fairest way to compensate someone for injuries that they have suffered due to the fault of another. The process of determining quantum of damages involves a rigorous assessment of the injury and its impact on the individual concerned. Damages awarded are specifically designed to meet the costs arising from the injury, such as lost earnings and necessary care or modifications (while being discounted according to established practice), with the cost appropriately borne by the person or entity that gave rise to those costs by causing the injury. As well as being the fairest way to compensate injured parties, common law damages also play an important normative function, by encouraging people and entities to conduct their business with minimal risk. As such, retaining full access to common law damages where they are available will ensure the fairest outcome for people injured in general or medical accidents, and accordingly minimise the costs to the state.
9. Where individuals are not able to prove fault, the NDIS should be the default Scheme for those not catered for by existing motor or workplace accident schemes. This will allow for greater costs predictability.

Participant planning failures

10. Catering for the needs of participants is key to the Scheme's success. It is, of course, its reason for being. As noted in the Position Paper, however, some participants are experiencing poor outcomes due to their unmet need for assistance in advocating

for what they require.⁴ There have been serious problems in plan development, both by failing to provide participants with sufficient notice of the appointment in which their plan would be developed and by developing plans over the telephone.

11. Telephone prepared plans appear to be a consequence of the haste with which the Scheme is being rolled out. While plans might be able to be developed more quickly by telephone, those plans are less likely to meet participants' needs: their living conditions cannot be assessed and some disabilities make telephone conversations difficult, as acknowledged in the Position Paper. This is a clear example of haste leading to worse outcomes for participants.
12. Lack of training on the part of individuals preparing plans with participants has also caused problems and likely resulted in sub-optimal plans in some cases. This lack of training could mean that plans take longer to prepare and might miss some helpful elements as the National Disability Insurance Agency (NDIA) staff member is less aware of the needs of participants and how they might best be met.
13. If plans do not meet the needs of participants, costs could increase as those needs go unmet and conditions deteriorate. Funding will also be expended on sub-optimal services, and rehabilitative services will be less effective. Ultimately, the promise of the NDIS will go unrealised as person-centred care fails to adequately meet participant requirements.
14. It is therefore essential that participants are adequately notified of their appointment to make a plan, and if necessary are able to be accompanied by an advocate to assist in the planning process. Making plans via telephone should only

⁴ Productivity Commission, National Disability Insurance Scheme (NDIS) Costs: Position Paper Overview and Recommendations (Position Paper), <http://www.pc.gov.au/inquiries/current/ndis-costs/position>, 19.

be possible if this is suitable to the participant, and should be preceded by adequate pre-planning, as recommended in the Position Paper.⁵

15. Planners must also be sufficiently familiar with the nature of the participant's disability/ies to be able to prepare optimal plans. This will ensure that the planning process is quicker and better meets the participants' needs. The ALA supports the Productivity Commission's position that planners should have "a general understanding about different types of disability" and recommendation that "specialised planning teams for some types of disability, such as psychosocial disability" be established.⁶ All of these elements will assist in minimising costs.

Workforce planning failures

16. Inadequate workforce planning has the potential to have significant costs ramifications for the NDIS. The NDIS dramatically expands demand for disability services, as well as changing the nature of work in the sector. If these changes are not managed effectively, they could give rise to unmet needs for participants, compensation becoming payable by providers (or their insurers) and even additional injuries that might require NDIS support.
17. While disability support work can be highly fulfilling, it can also be both physically and mentally demanding. It can involve heavy lifting and challenging behaviours. As the sector moves toward a more person-centred approach, the environment that the work takes place in will move increasingly away from traditional workplaces towards peoples' homes. This carries risks as those working environments will not always meet the same workplace safety standards.

⁵ Position Paper, 27.

⁶ Position Paper, 29.

18. Coupled with this move toward higher-risk workplaces is the significant increase in demand for workers. There is a risk that expanding the workforce rapidly will not be accompanied by adequate training for new workers, putting new staff at greater risk of injury, or leaving the sector due to feeling insufficiently supported.
19. As the workplace deregulates, some workers are also being employed under less favourable conditions. There is a risk of moving toward a pay-per-service, casualised disability workforce. Employment in these circumstances is often not accompanied by adequate insurance or safety standards. As such, any injuries incurred doing this high-risk work are less likely to be adequately insured, meaning rehabilitation and compensation will be less available to workers. It will also contribute to a high staff turnover in the profession, as workers seek more favourable conditions in other industries.
20. All of this combines to give rise to an unacceptable risk to disability workers as they work toward fulfilling the promise of the NDIS. It will also have cost ramifications. If the workforce turnover is higher than necessary as a result of injuries or insecure employment contracts, more funds will be required to train new workers. Workers who are injured at work will either require insurance to pay for treatment and compensation, in which case premiums will rise, or else will be inadequately compensated and may not recover sufficiently to continue to work in the sector. Either way, there will be cost ramifications for the NDIS and the community more broadly.
21. As such, it is essential that workforce planning be prioritised in the NDIS rollout. Providers should be required to ensure minimum safety standards for their workers. Pay-per-service models of employment should be discouraged in this sector, given the high risk nature of the work and the cost ramifications of a high-turnover workforce. The NDIA can achieve this by making particular employment standards a requirement for any providers under the Scheme. Training must meet minimum

standards to ensure that workers are safe carrying out their duties both in traditional workplaces and in participants' homes or other locations.

22. Ultimately, without a safe, stable and skilled workforce, costs for the NDIS will be unnecessarily high, while the services that participants receive will be of a lower quality.

Transparency and rigour required regarding costs

Access to advocacy and legal support

23. As the Position Paper makes clear, there is a lack of clarity regarding what "reasonable and necessary supports" will actually provide for. Refraining from defining this phrase further allows greater flexibility to meet the needs of the individual participant. However, as noted in the Position Paper, the phrase will ultimately become more clearly defined as participants dispute decisions made by the NDIA and those disputes end up in tribunals or courts.
24. Compensation Reduction Amounts (CRA) are equally unclear. The NDIA has clarified that where compensation has been received, the amount of support available from the NDIS may be reduced. The ALA is not aware, however, of how this amount is calculated and how a participant might dispute that calculation if they believe that an error has been made.
25. The lack of clarity means that more disputes will end up being determined through appeals to external arbiters than might otherwise be the case. The ALA believes that both the Scheme and participants would benefit from greater clarity both in relation to the supports that are available and CRAs. We also believe that it is incumbent on the NDIA to support participants and potential participants in the appeals process, including by providing for legal costs and other advocacy support. It will be essential

that the advocacy support is external to the NDIA, to avoid the appearance or reality of a conflict of interest.

26. This support will be particularly important for participants and potential participants in the NDIS. Many (although by no means all) of these people will be at a disadvantage in advocating for themselves as a result of the disability the NDIS envisages supporting them for. As such, legal costs should be available for participants where disputes are resolved in a tribunal or a court. Funding independent advocates to assist participants to dispute decisions prior to external arbitration could be a positive development in this regard, as it would allow more participants to effectively state their case during internal review processes, obviating the need for external arbitration.
27. The lack of clarity means that these cases will play an important role in setting standards and ensuring that participants are heard. Adequate costs should accordingly be available both when (potential) participants are successful and unsuccessful. Both outcomes, after all, are equally instructive to the NDIA.

Thin markets: participants in rural and remote locations

28. Situation of thin markets, particularly in rural and remote locations, can distort costs and mean that participants are left unable to access the supports that they need. It is unclear how the NDIA envisages resolving this challenge, but it is clear that the means of resolution will have costs ramifications.
29. The NDIA needs to clarify how this problem will be resolved and ensure that no participant is unable to receive the supports that they need as a result of thin markets.

Non-NDIS disability sector

30. There are many people living with disability who do not qualify for the NDIS. Others who do qualify might not currently be participating, for example due to rollout delays.
31. Maintaining funding for existing services at a level appropriate to meet these peoples' needs is essential. Failing to fund services outside of the NDIS adequately would ultimately put excessive costs pressure on the NDIS and social supports more broadly. It would create greater demand for the NDIS, if people living with disability saw it as their only avenue to get the support that they need, and would also mean that others lose essential services.

Recommendations

The ALA makes the following recommendations:

- The NIIS should be restricted to existing motor vehicle and workplace injuries. Expanding the NIIS to general and medical injuries is too uncertain and will put costs pressures on the NDIS and other social security safeguards.
- Participants must be adequately notified of their appointment to make a plan sufficiently in advance, including the nature of the appointment. The format of the appointment must meet with the needs of the participant. There should be clear guidelines in place as to when telephone appointments are suitable and when the meeting should take place face-to-face.
- NDIA workers making plans should have an adequate level of understanding of the participants' conditions. Teams with expertise in certain types of disability would be beneficial. This will ensure participants feel better understood and will likely result in plans that better meet the needs of participants.

- The changes within the disability sector workforce as a result of the NDIS need to be managed to ensure that workers' rights are protected. Secure contracts and stringent health and safety requirements will minimise staff turnover and associated costs, and should be mandated by government regulation.
- Participants should have access to advocates as needed and payment of their legal costs when disputing NDIA decisions. These costs have been incurred due to the lack of clarity in definitions that currently exists, and the decisions made will assist the NDIA planning for the future. Supporting participants to dispute decisions will ensure that the NDIS is able to fulfil its promise and have long-term cost benefits to the Scheme as questions are clarified.
- Terms and the CRA must be transparent to enhance predictability related to costs.
- Services for people living with disability who will not qualify for the NDIS or otherwise are not engaged in the Scheme must remain available. To defund these services while they are still needed will put costs pressures on the NDIS and other services.
- The continued rollout of the NDIS should be delayed until concerns regarding participant planning, workforce planning, review protocol and access to advocacy and legal support are resolved in line with the above recommendations, to ensure costs are not expended on sub-optimal systems or wasted on procedures that will need replacement.