

16 October 2020

Our ref: VK-HD/DAN

Committee Secretariat
Joint Standing Committee on the National Disability Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600

By email: [REDACTED]

Dear Committee Secretariat

General issues around the implementation and performance of the National Disability Insurance Scheme

Thank you for the opportunity to provide feedback on the inquiry into general issues related to the implementation and performance of the NDIS (the **Inquiry**). The Queensland Law Society (**QLS**) appreciates the opportunity to assist the Joint Standing Committee on the National Disability Insurance Scheme (the **Committee**) as it undertakes this important review.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Diverse Abilities Network, whose members have substantial expertise and ongoing lived experience with the National Disability Insurance Scheme (the **NDIS**), and the QLS Health & Disability Law Committee, whose members have significant experience in navigating the legal framework underpinning the NDIS as well as advocating on behalf of key stakeholders.

The NDIS is a critical tool in the funding and delivery of disability services. Ensuring that the governing legislation is appropriate and that the scheme is appropriately funded, managed and administered is essential to achieving its intended aims – to provide Australians with disability with choice and control, and in turn, to live with equal opportunity to participate in the community as afforded others.

Impediments to access

Our members reported a number of scenarios encountered in the operation of the scheme which have resulted in limiting access, some significantly.

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Communication and eligibility criteria

Several examples indicate significant inconsistency in decision-making by NDIS administrators when assessing an applicant's eligibility criteria. Clearer communication and publication of appropriately detailed factors which may impact access criteria (including any likely inclusion or exclusion markers) is urgently required – not only for the benefit of applicants and carers, but for assessment staff in conjunction with provision of increased training and support resources.

QLS acknowledges the difficulty in ensuring that scheme eligibility criteria and the application process is effectively communicated to applicants and potential applicants. The NDIS website provides accessibility options to navigate visitors around the site, including web chat, availability of other languages, calling options, font size enlargement, internet relay, speak and listen, and email services.

Providing several options for engagement is essential to facilitating scheme access for applicants. Flexible communication pathways must run continuously through the scheme as applicants navigate the application process. QLS is advised this is not the case.

In one example, a QLS member completed the NDIS application form to apply for hearing aid funding, noting therein that due to moderate-severe hearing loss, email was the best method of communication. The member was subsequently contacted by telephone, and despite explaining that fully participating in the conversation was impossible due to being deaf and reiterating the previous request that they communicate by email, the member was advised this was not possible. The member was forced to enlist a colleague to speak with the NDIA caller, in effect acting as a translator during the call. When a conversation was eventually able to be had between the member and the NDIA representative, the member was advised that the reported hearing proficiency *in one ear* needed to be between 1-2% worse in order to qualify for assistance. This disqualification was concluded even though that the member's overall status of being legally deaf and requiring hearing aids, was never in dispute.

Upon reviewing published submissions made to date to this Inquiry, and after consulting with our members who rely on and/or are engaged by clients in relation to the NDIS, it is clear that this is not an isolated occurrence. The Ernst & Young independent review in 2015 (the **2015 Review**) of the *National Disability Insurance Scheme Act 2013* (the **NDIS Act**) undertaken in accordance with section 208 of the NDIS Act and submitted to the Hon. Christian Porter (as then Minister for Social Services). found inconsistency in application, and sometimes inflexibility in practice as demonstrated by the experience described above. The 2015 Review reported that whilst the legislative framework was suitably formed to enable government to further the object and principles of the NDIS Act, changes were required in order to improve its administration:

*"There is a need to amend elements of the NDIS Act and NDIS Rules to provide greater clarity on the policy intent of governments and how the Scheme should be administered in practice. There is also scope to amend the NDIS Act to enhance the efficiency and effectiveness of the NDIS administration."*¹

¹ A. Metcalf AO, *Independent review of the NDIS Act* <https://www.dss.gov.au/sites/default/files/documents/04_2016/independent_review_of_the_ndis_act.pdf>.

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We have reviewed the COAG report² published in response to the 2015 Review, and note with concern that the vast majority of recommendations and required amendments to the NDIS Act and associated legislative framework are yet to be made. This is despite COAG's agreement with all but two of the 33 recommendations made for legislative amendments.

The prolonged inaction in implementing the agreed recommendations is a significant issue which should not be overlooked in seeking to understand why significant gaps in the scheme's functionality persist.

Recommendations 1 to 5 of the 2015 Review suggested legislative changes to sections 4, 5 and 17A of the NDIS Act, to ensure that the principles of the legislation reflect the inclusive and accessible intentions of the scheme. The suggested amendments include:

1. Amend principles that directly reference carers so that they align with the 'recognise' and 'respect' terminology of the *Carers Recognition Act 2010* (Cth).
2. Amend section 5(d) to reference lesbian, gay, bisexual, transgender and intersex (LGBTI) status.
3. Amend relevant principles to remove moderating language (e.g. 'to the extent of their ability' and 'to the full extent of their capacity').
4. Add a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design.
5. Add a new principle to section 4, reflecting the importance of a diverse and sustainable market that provides choice and control and high quality supports to people with disability.

The suggested principles must be inserted into the NDIS Act, in support of the Act's intention to ensure broad and appropriate access to the scheme, underpinned by values of individual autonomy and respect for persons with disability. Frequent issues encountered with the scheme relating to inconsistency in applying the eligibility criteria will continue to arise if the guiding principles of the NDIS Act are not reflective of its accessibility and operative intentions. This is a threshold issue, and must be urgently addressed by way of legislative change.

Improvements to bureaucratic nature and processes

QLS acknowledges the complexity associated with administration of a multi-faceted scheme, and reiterates the point made above regarding legislative change to amend the guiding principles. Operational aspects of the scheme, including subordinate legislative instruments, guidelines and policies, are developed in alignment with the principles and objectives of the primary act. The subsequent operation of the scheme and effect on those attempting to access it will be impacted accordingly.

A lack of nuance in decision-making related to the eligibility and assessment of some medical conditions is a common problem reported by QLS members. This is demonstrated in the example above, relating to a member's application for hearing aids – the threshold issue being that the hearing aids were ultimately required, was overlooked. In another example, a member

² Australian Government Department of Social Services, COAG Response to the independent Review of the National Disability Insurance Scheme Act 2013, <<https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/national-disability-insurance-scheme/coag-response-to-the-independent-review-of-the-national-disability-insurance-scheme-act-2013>>.

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reported cases where persons with multiple sclerosis were being refused reasonable NDIS service costs on the basis that their condition at the time of approval was relatively stable. However, this did not consider the fluctuating nature of the condition, and as such, the likelihood that support would be necessary when relapsing-remitting episodes occur. A willingness to engage in reasonable and evidentially supported future planning and provision for persons with fluctuating conditions must be adopted by the scheme if it is to operate in accordance with the NDIS Act, which states:

“People who are participants in the NDIS will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.”

This statement is repeated in the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.³

In response to the repeated service refusals, Multiple Sclerosis Queensland created a policy which required treatment providers to write a report on envisaged relapsing episodes, based on a patient's history, and set out predicted increased costs to be borne in association with the progression of the autoimmune condition. This has had a positive impact on the number of successful applicants and appeals undertaken to seek assistance for persons with multiple sclerosis in Queensland.

In another example a member reported that after having received funding for a new bed, they discovered a less expensive bed with voice activation technology which was more appropriate for their circumstances. Despite the preferred option being within the allocated funding amount, and against all common sense the NDIA representative insisted that the member purchase the more expensive, and less functional, option – an outcome clearly to the detriment of the scheme and the participant. The member was forced to raise an argument pursuant to section 34 of the NDIS Act, eventually convincing the representative and receiving approval to purchase the voice activated, cheaper option.

These examples identify a significant challenge which the scheme must overcome – that scheme operation and accessibility itself should not be reliant on an individual's capacity to advocate. This failure results in a complete misdirection of limited resources, and significant delays, all of which can be easily avoided. Participation and access must be encouraged and matched with equal participation and flexibility on the part of scheme administrators.

Decision-making, consistency and delay reduction

The scheme would benefit from changes to increase transparency in decision-making, which will lead to greater consistency and a reduction in delayed outcomes resulting from the decisions.

Acting to implement the recommendations of the 2015 Review is a critical first step. Following this, a review of the suite of NDIS Rules must be urgently carried out to identify if additional amendments are required to the supporting legislation. This is in addition to the changes to

³ *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.

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the various NDIS Rules which were recognised in previous inquiries, such as the 2015 Review.

Independent assessments

QLS is aware of concerns raised by some stakeholders regarding the introduction of mandatory independent assessments. We understand that the intent of the process is to provide a consistent approach to assessments of functional capacity of eligible participants.

Appropriately detailed information for the reasons necessitating the new process must be provided by the Government to ensure transparency and to assess if the new protocol can be justified, and if it poses a risk to individual rights.

The issue was recently considered by the Administrative Appeals Tribunal, which found that the NDIA's use of an assessor and their findings to be inappropriate in the circumstances.⁴ This raises questions about its suitability as a uniform process.

We recommend that the Government urgently commence a thorough consultation process with key stakeholders, including NDIS recipients and client advocacy groups, to ensure that the resulting process aligns with the principles of the NDIS Act.

NDIS participants seeking to engage family members as paid supports

Engaging family members in paid support roles is anticipated by the scheme, and provided for in particular circumstances. This is set out in the operational guideline, 'Including Specific Types of Supports in Plans Operational Guideline – Sustaining informal supports',⁵ which states that the NDIA will fund family members to provide supports in exceptional circumstances, including for example:

- There is a risk of harm or neglect to the participant;
- There are religious or cultural reasons for funding a family member to provide supports; or
- The participant has strong personal views, for example in relation to their privacy.

QLS is concerned by reports from members with clients who have sought paid support for family members in accordance with the operational guideline, and who were advised by their plan manager or support coordinator that it is 'not permitted'.

The guidelines do not have the authority or operation of primary legislation. It is concerning that NDIA administrators are relying upon the guidelines to assert decision-making authority on an issue which is not captured by the NDIS Act.

QLS recommends that consultation with key stakeholders be urgently commenced to consider the issue and determine whether legislative amendment is required.

⁴ Ray and National Disability Insurance Agency [2020] AATA 3452 (8 September 2020).

⁵ NDIS Operational Guideline, Sustaining informal supports [11.1] <[>.](https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-sustaining-informal-supports#:~:text=Generally%2C%20the%20NDIA%20will%20only,member%20to%20provide%20supports%3B%20or>)

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NDIS price guide, auditing of service providers and appropriate accountability and complaints mechanisms

Multiple concerns have been expressed by members about the NDIS price guide. QLS considers an urgent review of the price guide and its development is required, for transparency, improvement and accountability purposes. The review must include appropriate consultation with key stakeholders, including patient advocacy groups and individual recipients. The review should include markers for financial and social appraisal of the price guide in comparison to the Medicare price guide (including its formulation and auditing processes).

Auditing of service providers, complaints and accountability issues are not isolated to the price guide, and significant improvement is urgently required to ensure that these processes are functional and effective. Ensuring efficacy and accessibility of these functions is a critical component of the scheme, and necessary to satisfy the principles of the NDIS Act.

QLS would be pleased to consult with the Joint Standing Committee to develop improved legislative and operational guidelines on these processes.

Integration with education and learning institutions

Strategies should be implemented in schools and government departments to improve the relationship between the NDIS and the state school system. QLS understands that parents are sometimes forced to apply for funding through the NDIS to fill gaps in education services. This practice has increased during COVID-19 (see **below**: 'Impacts of COVID-19').

QLS believes that clearer pathways and guidelines should be developed to assist schools and NDIS providers in supporting students with disabilities. We believe that the process of communication between schools, NDIS providers and parents should be streamlined. The onus of developing this process and ensuring these relationships develop should be with the schools as they bear the responsibility of supporting and educating the children. The NDIS must ensure it is appropriately accessible to work with schools, and NDIA administrators trained to manage and assist in this integration. The aim of this process should be to allow schools and NDIS providers to collaborate whenever students should require their NDIS providers to assist them during school hours on school grounds.⁶

By primarily operating in separate environments, NDIS and school-generated support services are unable to collaborate, to the disadvantage of the affected student. QLS recommends that in Queensland, a review of the *Education (General Provisions) Act 2006* (the **Education Act**) be urgently undertaken with a view to making amendments to:

⁶ NDIS Provider Access to Queensland Schools, Department of Education, <<https://ppr.qed.qld.gov.au/education/management/Procedure%20Attachments/NDIS-provider-access-to-state-schools/Provider-fact-sheet.pdf>>.

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- recognise that schools have a key role in supporting the positive development of children with disability and to work collaboratively with the student, family, caregivers and other appropriately qualified specialists and allied health professionals to facilitate optimal learning opportunities for the child;
- mandate that schools implement adjustments that are recommended by a student's NDIS-funded specialist, or by an appropriately qualified privately engaged paediatric specialist; and
- ensure that the Education Act, Regulations and associated policies operate in compliance with the *Human Rights Act 2019* (Qld).

Impacts of COVID-19

In the midst of the COVID-19 pandemic, people with disability are at increased risk. In some cases this is because their disability or health condition increases vulnerability to illness. In all cases, accessing required support services was difficult even before the onset of the pandemic. With rapid changes to community, government, service availability and movement associated with limiting the virus spread, accessibility issues for persons reliant on the NDIS have become even more acute. It is reported that nearly 50% of people with disability were living below the poverty line before the pandemic began.⁷ New costs emerged as required to maintain personal safety, such as protective equipment (for example masks and gloves), and additional support services such as online shopping and delivery. Delivery of essential services, such as education, was difficult for all learning providers and families – but much more so for students with disability. Professor Helen Dickinson, Director of the Public Service Research Group at the University of New South Wales reported that reliance on the NDIS increased notably during this time, as families were forced to access the scheme to seek accessible remote learning pathways for children.⁸ Reliance on the NDIS to facilitate access to education should not be required.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Senior Policy Solicitor Vanessa Krulin via [REDACTED].

Yours faithfully

[REDACTED]

Luke Murphy
President

⁷ Kirsten Deane, *Pandemic experience shows the NDIS is still not working like it should*, 22 August 2020 <<https://everyaustraliancounts.com.au/opinion/pandemic-experience-shows-the-ndis-is-still-not-working-like-it-should/>>.

⁸ Helen Dickinson, Catherine Smith, Sophie Yates, *The Conversation, Only one fifth of school students with disability had enough support during the remote learning period*, 24 July 2020 <<https://theconversation.com/only-one-fifth-of-school-students-with-disability-had-enough-support-during-the-remote-learning-period-143195>>.