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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 further to the Productivity Commission's inquiry into National Disability Insurance Scheme (**NDIS**) costs.

Summary of submission

We refer to our previous submission dated 14 July 2017 and confirm that we were invited to provide a supplementary submission following the determination of *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132 (**Full Court McGarrigle Appeal**) on 21 August 2017. This submission responds to matters raised by the National Disability Insurance Agency's (**NDIA**) in the Full Court McGarrigle Appeal and in its submission to the Productivity Commission.[1]

Our contribution 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 NDIS participants and people in receipt of forensic disability services in the mental health system.

The NDIA argues that in order to ensure the financial sustainability of the scheme it should have greater flexibility in administering the scheme by:

1. Applying a financial sustainability discretion which overrides the express criteria in the NDIS Act and enables the NDIA to refuse to fund reasonable and necessary supports.[2]
2. Enabling the NDIA to change the Rules for reasonable and necessary supports without following the process in s 209 of the NDIS Act.

VLA cautions against these approaches which are contrary to the objectives and guiding principles of the NDIS Act and reduce certainty for people with disability, their families and carers.

[1] Productivity Commission submission number 327
[2] NDIA Submissions in the Full Court McGarrigle Appeal, particularly paragraphs 32 to 36.

Financial sustainability discretion

The NDIA sought to argue in the Full Court McGarrigle Appeal that the purpose of sections 3(3)(b) and 4(17)(b) of the Act is to ensure that all powers and functions under the Act must be exercised with regard to the financial sustainability of the NDIS. In other words, the NDIA sought to argue that even if a support is reasonable and necessary and meets the criteria expressly outlined in section 34 the CEO should have a discretion to refuse to fund it because it would imperil the financial sustainability of the NDIS. The Full Court did not consider this argument as it was a new argument and the Full Court refused leave to amend the grounds of appeal to hear it. We note that we haven't seen this approach applied in NDIA decision making.

VLA accepts that it is necessary that the NDIS be capable of modification in response to service pressures that threaten its financial sustainability. In *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (**McGarrigle**) the Federal Court found that it is the rules under section 35 that provide the ability to modify the operation of the sections regarding approval of supports (sections 33 and 34) by excluding certain kinds of supports from inclusion in participant plans.[3] Her Honour said "It is through the Rules that the executive is able to implement … some policy decision-making about the nature and extent of supports to be provided or funded under the NDIS".[4]

The NDIA sought to argue in the Full Court McGarrigle Appeal that it is not only though the Rules that the extent of supports to be funded under the NDIS can be modified. The NDIA put the position that it is also through a purported discretion the CEO has under sections 33(2)(b) and 34(1) to refuse to fund a participant plan if it would threaten the financial sustainability of the NDIS.

VLA considers that the need to ensure financial sustainability is not, and should not, be a separate, independent and additional criterion for deciding whether a reasonable and necessary support should be granted. Sections 3(3)(b) and 4(17)(b) of the Act and rule 2.5 of the Rules do not themselves support the existence of the postulated residual discretion of the CEO not to fund a reasonable and necessary support for a particular participant. Such a construction would undermine the objects of the Act to 'provide reasonable and necessary supports … for participants'.[5]

From an NDIS participant's perspective there seems little point in detailed statutory criteria and rules to determine the reasonable and necessary supports that will be funded, only for the CEO to revisit the question whether such supports should be funded by reference to an unstructured residual discretion which could potentially duplicate, outflank or nullify the detailed statutory criteria.

Neither the Act nor the Rules contain any guidance as to how decision makers would undertake the complex task of assessing as a criterion the impact of financial sustainability of the NDIS as a whole when making a particular decision in relation to an individual participant's plan. This would add considerable uncertainty and inconsistency to the preparation and approval of statements of participant supports in individual cases and will likely lead to an increase in reviews. It would also be contrary to the guiding principle under the Act is that

[3] *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at [42]-[43]
[4] Ibid at [43]
[5] NDIS Act, section 3(d)

people with a disability and their families and carers should have certainty that people with a disability will receive the care and support they need over their lifetime.[6]

In our view this is not what the legislature intended. The scheme cannot function predictably, transparently or fairly if financial sustainability looms large over every decision and can be used as an arbitrary override on aspects of participant's plans. That is not consistent with an insurance based approach where decisions are made in accordance with policies.

Recommendation 1: There should be no changes to the requirement that reasonable and necessary supports must be funded having regard to the considerations outlined in sections 33 and 34 of the Act. The financial sustainability of the NDIS scheme should not be an additional discretionary criterion upon which funding can be refused.

Changes to the Rules

Rules regarding the approval of reasonable and necessary supports, made under section 35 of the NDIS Act, are category A rules under section 209 of the NDIS Act. This means that they require approval of the Commonwealth and host jurisdictions before being implemented.[7] The revised explanatory memorandum for the NDIS Bill states that category A rules require this level of approval because they relate to significant policy matters with financial implications for the Commonwealth and host jurisdictions or which interact closely with relevant state or territory laws.[8]

Draft Recommendation 9.1 of the Productivity Commission Position Paper recommends that the requirement that changes to the NDIS rules have unanimous agreement from the Australian Government and all host jurisdiction be relaxed. In its July 2017 submission to the Productivity Commission, the NDIA supports this recommendation and proposes that the NDIA CEO be given a limited delegation to change the rules in certain circumstances.[9]

VLA considers that it was the clear intention of the legislature to ensure that certain types of rules that bind decision makers under the scheme would be made via the section 209 process. This is because of the complex interaction between Commonwealth and State governments in determining how to provide and fund supports. In the instance of transport funding, the NDIA sought to apply an internal policy to limit the access to funding for reasonable and necessary supports. The approach was found to be not supported under the Rules and legislation.[10]

We urge caution in giving the NDIA CEO, or any other person, the power to alter or bypass the process for amending Rules made under section 209 of the NDIS Act. The Rules are the key tool for decision making under the scheme and the process for their amendments reflect the significant impact any changes will have for participants, State Governments and service providers. One of the key rationales put forward by the NDIA for the proposal to make Rules outside the s209 process is the need to act quickly. [11] In our view it is a key priority to ensure

[6] NDIS Act, section 4(3)
[7] NDIS Act, section 209(4)
[8] Revised Explanatory Memorandum, NDIS Bill 2013, Page 83
[9] Productivity Commission submission number 327, page 58
[10] *McGarrigle v National Disability Insurance Agency* [2017] FCA 308
[11] Productivity Commission submission number 327, page 58

consultation and proper consideration of the impact of changes with potentially wide ramifications for participants of the scheme before they are implemented.

Recommendation 2: The NDIA CEO should not be given the power to amend category A rules under the NDIS Act without the approval of Australian and host jurisdictions.

If the Productivity Commission requires any further information please do not hesitate to contact our Senior Policy and Projects Officer Aimee Cooper

Yours faithfully

DAN NICHOLSON
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