

## The NDIS: Six priority issues and models that are working well

### Submission to the Joint Standing Committee on the National Disability Insurance Scheme: Inquiry into general issues around the implementation and performance of the NDIS

March 2019

#### Overview

Victoria Legal Aid (**VLA**) welcomes the opportunity to contribute to the Joint Standing Committee on the National Disability Insurance Scheme's *Inquiry into general issues around the implementation and performance of the NDIS*.

Informed by our work with clients with disability across Victoria, we identify six priority issues with the implementation and operation of the NDIS:

1. 'Market failure', 'thin markets' and the 'maintaining critical supports' project or 'provider of last resort'.
2. Plans and supports that do not adequately meet people's needs.
3. Interface issues and lack of service coordination.
4. Delay in updating the Operational Guideline on Transport in response to the Federal Court decision in *McGarrigle*.
5. Discharge and release planning.
6. Conduct of the NDIA as a model litigant in the Administrative Appeals Tribunal (**AAT**).

In addition, we have highlighted models that are working well in the hope that these models can be invested in, maintained and replicated.

Ultimately, VLA hopes to work with other agencies and organisations toward these five outcomes:

1. Victorians have access to tailored, appropriate NDIS plans that improve their lives and wellbeing.
2. There are reliable, engaged and expert services to provide supports funded under the NDIS, and clear responsibility for making sure people get the services they are funded to receive.
3. Legal and social support sectors are equipped to understand the NDIS and make it work for the people we work with.
4. The NDIS supports people to live independently in the community, avoid interaction with the justice system and build pathways out of restrictive environments, including mental health services and prisons.
5. The NDIS works effectively with mainstream health, justice, housing and transport services.

We look forward to continuing to work with the National Disability Insurance Agency (**NDIA**), the Victorian and Federal Governments and our partners in the community and legal assistance sectors to make the NDIS – and related systems – work as well as possible for our clients and consumers.

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## Victoria Legal Aid, our clients and the NDIS

VLA is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession and community legal centres, we help people with legal problems such as criminal matters, family separation, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We also deliver specialist non-legal services, including our Family Dispute Resolution Service and our Independent Mental Health Advocacy, as well as providing community legal education, and contributing to policy and law reform.

### VLA and our work with people with disability

VLA is the largest provider of legal services to people with disability in Victoria. During 2017–18, VLA helped 94,485 unique clients: 26% disclosed having a disability or mental health issue and 11% were in custody, detention or psychiatric care.<sup>1</sup>

We offer a specialist legal service which provides advice and representation at courts, tribunals and psychiatric hospitals for people with disabilities and mental health conditions.

We receive funding from the Department of Social Services to provide legal representation in NDIS matters on review at the AAT. Since 2013, we have provided legal representation to over 100 people with NDIS AAT appeals in ‘novel or complex’ matters.

In addition, through our work across criminal law, child protection, tenancy and family law, we see the flow-on effects when our disability services systems, including the NDIS, are not working at their best.

### VLA and the NDIS

We consider the NDIS holds great promise for our clients and we will continue to work closely with the NDIA and the Victorian and Federal Governments to help make the NDIS work at its best.<sup>2</sup>

We also see through our work that when the NDIS is not working as intended, the consequences for individuals and for the State and Federal Governments can be serious, including extended detention in mental health services, prolonged custody without conviction, inability to obtain bail or parole, homelessness, deterioration in health, increased risk of re-offending and family breakdown (including through the child protection system).

We continue to see the need for a framework of NDIS service provision and accountability that makes sure people receive the supports and services they need, and that provides an established process for when supports fail.

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<sup>1</sup> See Victoria Legal Aid, *Annual Report 2017–18* (available at: <https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report-2017-18>). This includes clients seen by a private practitioner duty lawyer. Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters, or participated in community legal education—we do not create an individual client record for these people. Neither does this client count include people assisted by our Independent Mental Health Advocacy service. We note that, because this figure relies on clients disclosing their disability or mental health issue at the time of receiving legal assistance, the actual number of clients experiencing disability or mental health issues is likely to be significantly higher.

<sup>2</sup> See, eg, Victoria Legal Aid submissions to: this Committee's *Inquiry into market readiness of the National Disability Insurance Scheme* (March 2018) and *Inquiry into transitional arrangements for the NDIS and into general issues around the implementation and performance of the NDIS* (November 2017); Productivity Commission's *Inquiry into the National Disability Insurance Scheme Costs* (July 2017) (available at: <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability>).

## Six priority issues

This short submission sets out six key issues with the operation and implementation of the NDIS that we continue to see through our work.

A theme that arises in each of issues 1, 3 and 5 below is the lack of systemic coordination i.e. no-one holding the matter and navigating the system, particularly for people who face additional barriers to doing that themselves. Similarly, with the points we raise about what is working well, in both cases it relates to skilled coordination by someone with a strong knowledge of the system.

### 1. 'Market failure', 'thin markets' and the 'maintaining critical supports' project or 'provider of last resort'

We continue to see the consequences of 'market failure' or 'thin markets' for our clients – particularly people with complex needs and people in regional areas – where service providers are not ready, willing or able to provide the services and supports a person needs to live well and safely in the community.

We have heard repeatedly that the 'maintaining critical supports' project and/or 'provider of last resort' (PLR) framework will be released shortly, but we have not yet seen this. The absence of this framework means 'market failure' and 'thin markets' continue to contribute to our clients falling through gaps, including offending, imprisonment, inability to get bail or parole, housing insecurity, inability to be discharged from secure mental health facilities and child removal.

This Committee's 'Market Readiness Report' recommended that 'the NDIA publicly release the outcomes of the Maintaining Critical Supports project and its policy on provider of last resort (PLR) arrangements as a matter of urgency' (recommendation 24) in September 2018. This is the third time that this Committee has highlighted that the publication and implementation of a PLR arrangement (or similar framework) is necessary.<sup>3</sup> These remarks have been echoed by the Productivity Commission, the Australian National Audit Office and in the McKinsey & Company Independent Pricing Review.<sup>4</sup>

Despite this, there is still no enforceable obligation on any government body to ensure that an NDIS participant receives their funded supports.

The damage being caused through this deficiency is difficult to overstate. By way of example, in our client Francis's case, in granting him bail after he had spent 180 days in jail because his NDIS accommodation and supports failed, Justice Lasry said:

***'He's in 23-hour lockdown at Melbourne Assessment Prison. I can't imagine a worse place for him. The longer he is there the more he will be damaged. Who knows what damage has been done already?'***<sup>5</sup>

We reiterate the urgent need for a planned, reliable and engaged framework of expert assistance, with accountability and real safeguards built in.<sup>6</sup>

<sup>3</sup> Joint Standing Committee on the NDIS, *Report on Transition Arrangements for the NDIS* (2018) and *Report on Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017).

<sup>4</sup> See, Productivity Commission, *National Disability Insurance Scheme – Costs* (2017) 36; Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market* (2016–2017) 27; McKinsey & Company, *Independent Pricing Review*, Final Report (2018) (see especially 59 onwards).

<sup>5</sup> Emma Younger, 'Man with intellectual disability released from Melbourne prison after judge 'horrified' by conditions' (24 November 2017) (available at: <https://www.abc.net.au/news/2017-11-24/judge-releases-man-with-autism-from-melbourne-jail/9186352>); 'Emergency intervention removes disabled young man from prison' 7.30 (9 November 2017) (available at: <https://www.abc.net.au/7.30/emergency-intervention-removes-disabled-young-man/9135942>).

<sup>6</sup> For more information on VLA's recommendations regarding market failure see Victoria Legal Aid, *Explainer – the NDIS and the need for a provider of last resort* (November 2017) (available at: <https://www.legalaid.vic.gov.au/about-us/news/explainer-ndis-and-need-for-provider-of-last-resort>).

## 2. Plans and supports that do not adequately meet people's needs

Where people with disability do not have skilled assistance to apply for the NDIS and assess supports, the funded services they receive may not adequately respond to the person's needs.

By way of example, we have worked with a number of clients with complex support needs, including as a result of intellectual disability, autism spectrum disorder or psychosocial disability, combined with experiences of homelessness and offending, who have received plans that cover only activities such as weekly bowling or cooking, rather than more intensive core supports.

In John's case,<sup>7</sup> his plan initially included nine hours of core supports, which were largely consumed with taking John to multiple weekly appointments. With these more limited supports, he committed further offences and was taken into custody.

After his plan was reviewed by a worker with greater experience and skill in relation to John's disability, his NDIS funding was increased to cover more intensive services, including 24/7 support.

### **John: Inadequate supports contributed to offending**

John has an ABI and schizophrenia, and his disabilities have contributed to past substance abuse, lack of employment, and limited community engagement. He has a history of offending, most commonly at the lower level. His disabilities have a significant impact on John's everyday functioning. His housing has been unstable, and his behaviours of concern make his housing options limited. John has been most successful in retaining accommodation and reducing recidivism when he has received consistent supports both at his accommodation and during outreach.

In John's case, however, his NDIS plan initially included only nine hours per week of core supports for him, which were absorbed by taking John to and from multiple weekly appointments. This necessary use of his support funding meant that his support provider did not provide support for John to engage in daily activities of his choice or interest, or provide opportunities for him to be active and safe in the community.

With these more limited supports, he committed further offences and was taken into custody. John's existing plan was ultimately considered by a specialist support coordinator with established expertise working with people with complex needs. In addition, John's case was escalated to the Intensive Support Team, which is a Victorian Government team that intervenes to respond to crises on a referral-in model (see below). Ultimately, John's support coordinator and DHHS liaised with the NDIA regarding a necessary plan review given the acknowledged insufficiency of John's plan.

After a series of significant delays, resulting in John's continued remand in custody, his plan was reviewed and his supports increased to provide 24/7 support for him in his home. These supports made an innovative shared accommodation option feasible for John in circumstances where previously his disability had made shared accommodation options impossible to maintain.

Recognising the potential benefits of effective planning for participants with complex support needs, we welcome the commencement of the Complex Support Needs Pathway and look forward to working with the specialised planners and skilled support coordinators in the Brimbank-Melton and Western Melbourne areas (although we note that these remedial factors currently have limited scope).<sup>8</sup>

The capacity to equip and resource skilled planning that facilitates supports that are appropriate to the particular person and their needs is critical to the effectiveness of the NDIS.

<sup>7</sup> Not his real name.

<sup>8</sup> NDIS, 'Improved NDIS planning for people with complex support needs' (16 November 2018) (available at: <https://www.ndis.gov.au/news/1002-improved-ndis-planning-people-complex-support-needs>).

### 3. Interface issues and lack of service coordination

The uncertainty regarding the NDIS/mainstream service interface is contributing to a lack of responsibility for applying for supports, and obtaining those supports and accommodation to assist people to exit prison, be discharged from inpatient units, maintain their housing and maintain care of their children with disability.

At VLA, across a range of restrictive contexts, we are seeing these issues arise for clients whose complex support needs arise at the NDIS/mainstream interface.

One client, Sam, was recently the subject of a story in *The Age*.<sup>9</sup>

#### **Sam: Young man in an acute psychiatric ward because he's at the interface of the NDIS and mainstream systems**

Sam has spent over two years in an acute psychiatric ward of a public mental health service, despite not requiring inpatient treatment. Sam has Huntington's disease – a neurodegenerative disease which is terminal and can lead to complex support needs and behaviours of concern.

His successful discharge from the health service relies on a delicate balance of housing and supports, which span across NDIS and mainstream services. There are questions, for example, about whether Sam is eligible for Specialist Disability Accommodation (SDA) funding, and what packages of State-based and Federal funding could be combined to build durable housing and support options for him.

For over two years Sam has been confined to the restrictive environment which is not designed for his care because he does not have housing, is not funded to receive SDA (meaning that neither State nor Federal options are realistically available), and has not been the subject of any overarching consideration of what supports could be provided across the NDIS/mainstream interface to create a pathway out of the psychiatric ward.

Recently, VLA escalated Sam's case to the Intensive Support Team. *The Age* reported that the Victorian Minister has 'directed the department to prioritise finding suitable accommodation options' for Sam. It was also reported that the NDIA reiterated that state and territory governments remain responsible for providing affordable and accessible housing to the community, including people with disability.

VLA is also witnessing intractable issues at the justice interface in the prison context. In John's case (above), interface issues compounded a range of other systemic issues, including chronic delay, and jeopardised his exit from custody.

The NDIA should adopt a measured approach to interface issues, based on past decisions and clear lines of responsibility between State and Federal agencies.

While we appreciate that novel issues may arise at the State/Federal interface, at present we see that NDIS participants are themselves left to navigate this tension, rather than government agencies working together to join up the multiple, applicable regimes.

We know that Sam and John's cases are not unique and that a system-wide approach needs to be adopted.

<sup>9</sup> Miki Perkins, 'We are drowning': Sam doesn't have mental illness, yet he's living in a psych ward' *The Age* (7 March 2019) (available at: <https://www.theage.com.au/national/victoria/we-are-drowning-sam-doesn-t-have-mental-illness-yet-he-s-living-in-a-psych-ward-20190306-p5128a.html>).

#### 4. Delay in updating the Operational Guideline on Transport in response to the Federal Court decision in *McGarrigle*

It has been approximately two years since the Federal Court decision in *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (**McGarrigle**). However, VLA continues to assist clients in the AAT where the funding amount for transport supports has been determined through application of a fixed cap at the primary and internal review phases by the NDIA.

The Operational Guideline on Transport which informs NDIA decision-makers (as well as participants and their advocates) continues in the same form as before the McGarrigle decisions and refers directly to and applies the erroneous elements of the AAT decision. This practice continues to burden NDIS participants with the (now, technically, resolved) legal uncertainty in relation to the funding of reasonable and necessary supports.

We recommend quickly and accurately embedding the reasoning of Federal Court and AAT decisions regarding transport (as well as other interface issues) in NDIA decision-making. This includes:

- Updating the NDIA Operational Guideline on Transport so that it conforms with the existing law.
- Building clear communication channels and ways of making sure decision-makers and advocates on the ground are aware of these decisions quickly so that the reasoning in AAT and Federal Court decisions starts to simplify the complexity of the NDIS.
- Refraining from relitigating these issues on review in the AAT once they have been authoritatively determined.

#### 5. Discharge and release planning

Discharge and release planning (whether it is from custody, a secure extended care unit (**SECU**) or another restrictive environment) requires earlier engagement and an awareness of the multiple ways that exit from a SECU, custody and remand can happen.

Last year, the Victorian Ombudsman tabled her *Investigation into the imprisonment of a woman found unfit to stand trial* in the Victorian Parliament. She described the imprisonment of a VLA client, a 39-year-old woman with a significant developmental disorder, as ‘the saddest case I have investigated in my time as Ombudsman’.<sup>10</sup> The judge in Rebecca’s case said she might have been sentenced to a month in prison if she had pleaded guilty and been sentenced for the charges. Instead, she was in prison for 18 months. Rebecca would have been released if she had housing and supports in the community. As the Ombudsman said, ‘[s]he remained in prison simply because there was nowhere else for her to go’.<sup>11</sup> The NDIS is a potential source of optimism and may be able to help fill some of the gaps in disability accommodation and services. In its current form, however, it has added another layer to an already complex system, and in some cases is exacerbating rather than resolving problems.

We reiterate the importance of planning for a person’s release before their sentence is complete or discharge is imminent so that supports are in place to facilitate successful discharge or release and reduce risk of reoffending or readmission. This may require the funding of supports for transition prior to release.

<sup>10</sup> See, eg, Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018) (available at: <https://www.ombudsman.vic.gov.au/News/Media-Releases/imprisonment-of-woman-found-unfit-to-stand-trial>).

<sup>11</sup> *Ibid.*

## 6. Conduct of the NDIA as a model litigant in the AAT

As a model litigant, the NDIA is required to deal with claims promptly and not cause unnecessary delay. It is required to limit the scope of legal proceedings wherever possible, including by considering alternative dispute resolution and offers of settlement, and making early assessments of prospects of success.<sup>12</sup>

As we outlined in a submission to the statutory review of the AAT last year, we have observed a difference between the obligations set out in the model litigant guidelines, and the conduct of litigation.<sup>13</sup>

Our submission detailed the case of our client Todd.<sup>14</sup>

### **Todd: Unnecessarily protracted proceedings in the AAT for a young boy**

Todd was nearly four years old, with autism spectrum disorder, ADHD, a generalised anxiety disorder and a developmental delay. Soon after diagnosis, Todd received NDIS supports. When Todd's plan was renewed 12 months later, his supports were reduced. Todd applied to the NDIA for an internal review of this decision. The NDIA confirmed its original decision. As a result, he applied for a review to the AAT.

Todd had submitted detailed medical evidence at the time of his plan review, at internal review, and at the AAT proceedings. Despite having this material, the NDIA did not make any settlement offer. As a result, VLA prepared and filed Todd's statement of facts, obtained witness statements, funded further expert reports to support Todd's application and arranged for witnesses to attend the hearing.

The day before the scheduled hearing, we received a settlement offer.

A settlement was agreed after business hours that day, under which the NDIA agreed to fund nearly all the supports originally sought by Todd.

The NDIA had failed to make an early assessment of the matter and to keep the costs of litigation to a minimum.

During Todd's litigation, we also saw the NDIA miss deadlines for filing. This led to additional hearings and the use of substantial extra resources, both on VLA's part and for the Tribunal.

We encourage the NDIA to acknowledge the burden created by this conduct both for individuals and for the legal system. We understand these concerns have been brought to the NDIA's attention and that improved processes will be introduced. We recommend that attention should be paid to the essential role of the model litigant guidelines in promoting the good faith, efficient resolution of matters and the benefits this has for all involved.

<sup>12</sup> Appendix B to the Legal Services Directions 2017, made under s 55ZF of the *Judiciary Act* 1903 (Cth) (**Model Litigant Guidelines**).

<sup>13</sup> Victoria Legal Aid, *On the Merits: Getting important and complex decisions right* (August 2018) (available at: <https://www.legalaid.vic.gov.au/about-us/news/our-submission-to-statutory-review-of-administrative-appeals-tribunal>).

<sup>14</sup> Not his real name.

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## Models that are working well

Models we see that are working well, which should be continued, invested in and replicated are set out below.

### 1. Victorian State-based Intensive Support Team – an expert escalation service

This model has been largely successful when VLA has escalated clients in acute crisis to the Intensive Support Team. As John's case (above) highlighted, this model reinserts an accountability and whole-of-government (State and NDIA) coordination piece into the puzzle and enhances the skills of the multiple bodies engaging with the person.

It is not clear whether this service will continue post-transition and, in our view, it should (whether resourced and coordinated at the State or Federal level).

We also note that this mechanism continues to be ad hoc, based on case-by-case escalation. We reiterate that a systematised and efficient approach for people with complex needs at the interface NDIS and mainstream systems needs to be put in place and promoted.

### 2. Small number of innovative, specialist support coordinators emerging

In our view, for clients with complex needs and behaviours of concern, innovative, specialist support coordinators are an essential part of the NDIS regime. VLA clients have been directly assisted by the capacity of skilled and experienced case managers to problem-solve complex cases and think creatively about supports. Such specialised services are essential to ensure that those who have complex needs and can't advocate for themselves do not become subject to a second tier NDIS that entrenches disadvantage. For this reason, we would suggest that support coordination should not be seen as merely an initial or introductory requirement for those with complex needs, but is recognised as the foundation that keeps other supports in place, either until they are clearly established, or ongoing.

In this context, we are concerned to learn of cases where support coordination is being reduced or removed for clients at plan reviews, including those with complex needs.

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We are pleased to have been able to contribute evidence from our casework to the Committee's inquiry, including the stories of five of our clients. We look forward to continuing to work with the NDIA, the Victorian and Federal Governments and our partners in the community and legal assistance sectors to resolve these priority issues and maximise the potential of the NDIS for our clients and the community.