

28 June 2016

Ms Carolyn Wilkes
Director of Advocacy and Access
Disability and Carers Group
Department of Social Services
GPO Box 9820 CANBERRA ACT 2601

By email: disabilityadvocacy@dss.gov.au

Dear Ms Wilkes

Review of the National Disability Advocacy Program

I write in relation to the Department of Social Services' (DSS) National Disability Advocacy Program (NDAP) Discussion Paper, issued in April 2016 (the "Discussion Paper").

The Law Council welcomes the opportunity to provide comments in relation to the important issues raised in the Discussion Paper. We note that the Discussion Paper "aims to initiate discussion and generate ideas about what an updated NDAP should look like, and how it should work, in a National Disability Insurance Scheme ("NDIS") environment." The Law Council's comments will be restricted to issues relating to legal advocacy for disabled people within this context, and specifically to question 5.2 ("What barriers prevent people with disability from accessing justice?").

In summary, the Law Council believes that there are three important elements that should be considered in addressing the question of what barriers prevent people with disability from accessing justice in relation to the NDAP, namely:

- (1) The specific needs of disabled people (and especially indigenous disabled people) to access legal advocacy services;
- (2) The current uncertainties surrounding the final operation of the NDIS scheme; and
- (3) The manner in which access to publicly funded legal advocacy services is currently restricted under the NDAP.

(1) The specific needs of disabled people (and especially Indigenous disabled people) to access legal advocacy services;

The availability of legal advocacy is important for disabled people on the basis of the inherent difficulties such people may face in accessing disability services, and on the basis of the complex legal difficulties they might face. For instance, the 2012 Legal Australia-Wide ("LAW") Survey found that disabled people are significantly more likely than the general population to have a higher prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems across a broad range of legal areas.

Furthermore, the above issues are magnified for disabled individuals who come from Indigenous communities. Indigenous people with mental health disorders and cognitive disabilities are significantly over-represented in the criminal justice system.¹ Recently, the University of New South Wales's Indigenous Australians with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project found that Indigenous Australians with mental health disorders and cognitive disabilities are "significantly more likely to have experienced earlier and more frequent contact with the criminal justice system and [face] greater disadvantage than non-Indigenous people."² The report went on to state that:

Indigenous Australians with mental [health disorders] and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways. Although this also applies to non-Indigenous people with mental [health disorders] and cognitive disabilities who are highly disadvantaged, the impact on Indigenous Australians is significantly greater across all measures and experiences gathered in the studies across the project.³

(2) The current uncertainties surrounding the final operation of the NDIS scheme

In addition, the Law Council notes that the NDIS is one of the most significant administrative schemes established by the Commonwealth since Medicare. While the final operational shape of the NDIS is still being refined through its ongoing national "rollout", which it is understood will not be complete until 2018-19,⁴ it is clear that the scheme will be relatively complex and will involve a number of new referral and service pathways, as well as new service providers.

With the NDIS currently in "roll-out" phase, there remains some uncertainty around the final shape of the scheme, the availability of and need for legal advocacy services under it, and the extent to which such services will be publicly funded (for example on the guidelines mentioned above) remains uncertain. By way of illustration, the following table shows the change (increase) in the number of applications that have been made to the Administrative Appeals Tribunal (AAT) relating to the NDIS since the commencement of the NDIS on 1 July 2013.

Date	No. of applications lodged
1 July 2013 – 31 Dec 2013	1
1 Jan 2014 – 31 Dec 2014	22
1 Jan 2015 – 31 Dec 2015	25
1 Jan 2016 – 22 June 2016	37

Clearly, the number of applications to the AAT has been increasing annually, while the scheme itself is yet to be fully rolled out across the country. Given the common experience of no-fault workers compensation and motor accident schemes, the Law Council anticipates that disputation under the scheme will continue to increase, as will the scheme's cost, resulting in changes to eligibility and entitlements rules to constrain budgets. This will increase the scheme's legal complexity and the concomitant need for legal assistance for those seeking administrative review.

(3) The manner in which access to publicly funded legal advocacy services is currently restricted under the NDAP.

1 [Baldry, E., McCausland, R., Dowse, L. and McEntyre, E. 2015, A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system. \(UNSW\), October 2015, p 10](#); [McCausland, R., Johnson, S., Baldry, E. and Cohen, A., People with mental health disorders and cognitive impairment in the criminal justice system: cost-benefit analysis of early support and diversion \(UNSW and PWC\), August 2013, p3.](#)

2 Baldry, et al, *Ibid*, op cit, p10.

3 Baldry, et al, *Ibid*, op cit, p148.

4 [DisabilityCare Australia](#) Commonwealth Government (May 2013), p. 7.

Notwithstanding the clear need disabled people may have to access legal advocacy services, the NDIS Guidelines⁵ set out restrictive criteria for the awarding of funding. Not only must such cases meet specified criteria (as determined by the DSS Central Assessment Provider) in terms of raising complex or novel legal issues⁶, but the DSS delegate with responsibility for policy oversight of the External Merits Review must also approve funding of the matter against specified funding criteria.⁷

Were public funding for such AAT applications to prove overly-restrictive, it could result in an increasing number of applicants proceeding to the AAT unrepresented, which could place additional strain on the AAT's resources.

Need for adequate funding of legal assistance services within the NDIS

Given the legal needs of disabled people, the potential restriction of public funding for legal assistance in relation to reviewable NDIS decisions and uncertainties around the ongoing "rollout" of the NDIS, disabled people may face access to justice barriers when attempting to legally enforce their rights under the scheme. The Law Council believes that it will be important that the NDIA (pursuant to sections 118 and 119 of the NDIS Act) closely monitor and regularly publicly report on both the nature and extent of AAT applications made in connection with the scheme, and the manner in which public funding is made available to legal aid agencies in respect of those applications.

If there are any queries concerning this letter, please contact Robert Leader on (02) 9926 0236 or robert.leader@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Brett Young', with a large, stylized flourish at the end.

MICHAEL BRETT YOUNG
CHIEF EXECUTIVE OFFICER

⁵ ["Review of National Disability Insurance Agency decisions in the Administrative Appeals Tribunal - Central Assessment Provider Guidelines for Assessment of Complex or Novel Matters"](#) (DSS)

⁶ See Part 4 of the Guideline.

⁷ See Part 5 of the Guideline.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.