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31 October 2019

Mr David Tune AO PSM
NDIS Consultations
Department of Social Services
GPO Box 9820
Canberra ACT 2601

By email: NDISConsultations@dss.gov.au

Dear Mr Tune,

We welcome the opportunity to provide feedback in relation to the review of the NDIS Act and the new NDIS Participant Service Guarantee.

We would be grateful for the opportunity to discuss our observations directly with you and your team.

Please do not hesitate to contact me and my colleagues on 07 3016 0311 or at RHodgson@mauriceblackburn.com.au if we can further assist with this important project.

Yours faithfully,

Rod Hodgson
Principal Lawyer
MAURICE BLACKBURN
Accredited Specialist Personal Injury Law

Submission in response to the review of the NDIS Act and the new NDIS Participant Service Guarantee.

October 2019

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

For 100 years, Maurice Blackburn has worked with Australians who have suffered severe and catastrophic injuries, assisting them to access justice, compensation and support as they attempt to rebuild their lives. We assist them in navigating the law, social insurance schemes and private sector insurance. We engage with their families, friends and carers – as well as service providers – as they rally to assist our clients.

We have been regular contributors to the various inquiries relating to the development of the NDIS since its inception, dating back to the original Productivity Commission inquiry. We have also been advising clients and other stakeholders since the commencement of the Trial sites. All of our submissions are based on the lived experience of our clients, and the observations of Maurice Blackburn staff who work with them.

Many of Maurice Blackburn's clients are also NDIS participants and we have acted in a number of internal review and AAT appeals.

Our Submission

Maurice Blackburn is grateful for the opportunity to participate in this Review, as we have done with many of the reviews into the NDIS since its inception.

We note that the Minister's media releases in relation to this Review indicate that it 'will focus on streamlining NDIS processes'[1].

Maurice Blackburn's view is that an inappropriate emphasis on 'streamlining' and the removal of 'red tape' risks the Panel overlooking the true drivers of inefficiency in the scheme. These are not the answers to scheme efficiency – in fact they are the things that are most likely to exacerbate the current problems.

We are particularly concerned that streamlining and red tape removal are generally euphemisms for the removal of the checks and balances which help ensure that things are done right the first time.

We also believe that 'streamlining' is often code for 'centralisation of power'. We are keen to ensure that States and Territories retain their important function in monitoring the decisions of the scheme's management and governance structures, and that this oversight is not held to blame for the NDIA's inefficiencies. Equally, it is crucial that the external checks and balances, primarily the Administrative Appeals Tribunal (AAT) and Federal Court, are not only retained but substantially reinforced.

[1] https://ministers.dss.gov.au/media-releases/5041

The current review and appeals regime is designed to minimise the NDIA's accountability for decisions which negatively affect participants and their families.

We further contend that 'red tape removal' is commonly the purported rationale for stripping away checks and balances that are there to prevent inefficiencies and inequities, and to ensure organisational accountability. Without appropriate internal and external accountability and transparency, the scheme will be exposed to greater inefficiency, and the dream of genuine choice and control for people with disability will be lost.

We urge the Review panel to be alert to these potentially detrimental courses of action and ensure that its focus is directed at areas where improvements can be made without undermining protections and benefits.

In our experience, and from the lived experience of those we represent, the things most likely to increase scheme efficiency are:

- The proper recruitment and training of appropriately skilled planners,
- The insistence on an individualised approach to plan creation,
- The introduction of an accessible, efficient, fair and transparent plan review and appeals process, one that has the objective of ensuring plans cover what is truly reasonable and necessary for the participant, and
- A genuine focus on ensuring that workforce issues are corrected – especially ensuring the continuity of funding for service providers, and having legislated requirements for accredited services to provide real jobs.

Maurice Blackburn agrees that an NDIS Participant Service Guarantee is probably a good idea. It would need, however, to guarantee more than just a quick turnaround. It needs to be predicated on 'do it right the first time', and needs to ensure that:

- Plans are properly assessed and tested by qualified medical and allied health experts,
- The voice of participants and their support networks is properly heard during the planning process,
- There are legislated timeframes by which internal reviews must be completed,
- There are processes in place to support participants while a review is in process, and
- External bodies are appropriately resourced to cope with the number of cases that come before them.

Each of these themes is explored in more detail in our responses to the Terms of Reference, over the following pages.

Response to Terms of Reference

1. Opportunities to amend the NDIS Act

a. to remove process impediments and increase the efficiency of the Scheme's administration; and

b. to implement a new NDIS Participant Service Guarantee.

The experiences of people with disability, their families and carers with the Scheme's administration and decision-making, including: access, planning, review and appeal processes

From our work with NDIS clients, we know that for many participants the reality of the scheme has not lived up to its initial promise. The scheme has fundamental design flaws, and its implementation problems have been misrepresented as mere teething issues.

There is increasing numbers of complaints from participants and their families / carers about delays in receiving an NDIS plan, confusion over the planning process, the lack of experience and expertise of NDIS planners, the lack of communication about the proposed plan, as well as the contents of the plans themselves. These issues are reflected in the growing number and rate of appeals to the Commonwealth AAT. In our view, the matters filed in the AAT are a small fraction of those actually receiving outcomes inconsistent with the legislation, from the planning process.

In addition to this, the NDIS clients we work with are telling us that it is extremely difficult to get an unsuitable plan reassessed and changed.

This comes against the backdrop of participants and their families having struggled for decades to access appropriate services, therapy, equipment and care. Many participants who had been clients of State-government funded disability providers report being worse off, both as to levels of support; and the fractious, slow and cumbersome planning process under the NDIS.

Our clients consider that the NDIS is exacerbating many of the frustrations and problems of the system it was designed to replace.

It is not appropriate for the NDIA to rely on the internal review and external appeal process as a 'safeguard' for poor decision making by planners. The process is complex, difficult and deeply inequitable, by design, for participants.

We believe that this presents myriad opportunities to enhance the Act and the Rules. To this end, we address this Term of Reference in three sections. They are:

- Problems with the Planning Process;
- Problems with the Reassessment Process; and
- Problems with the Review and Appeal Process

i. Problems with the Planning Process

The lack of appropriate experience, qualifications and skills amongst NDIA planners are resulting in considerable problems for NDIS clients, including inappropriate communication with clients, delays in assessing care plans, development of inappropriate care plans, and failures to advise of rights to review.
There is, in our experience, a real issue with the consistency of messaging that comes from NDIS staff (both planners and Local Area Coordinators). There needs to be focused attention paid to how this inconsistency, and the confusion it creates, can be removed. There is also confusion about what constitutes a planning 'meeting', with many participants surprised to be given a plan after a brief introductory telephone conversation. On that note, we applaud the phasing out of the dreadful process of conducting planning interviews via telephone. This process should never have been allowed to commence. We sound a note of caution: our call for improved consistency should not be construed as advocacy for a cookie-cutter approach to plan development. Plans should never be off the rack. Rather, the needs of every participant are unique, and skilled planners need to prepare bespoke plans reflecting the unique needs of the participant, and in accordance with law.

While acknowledging the challenges associated with the rapid roll out of the scheme, in our experience many of the planners engaged by NDIA appear to be underprepared for the role. This may be a reflection of poor recruitment processes, inadequate or inappropriate training, or both.

It is a commonly held view amongst clients and consumer advocacy groups that NDIA planners often do not appear to listen adequately during planning meetings, and that the contents of the final plan often do not reflect the discussions that occurred during the planning meetings.

Put simply, in our experience the planners often lack the skills and experience required to assess a participant's care needs. The problem is particularly for those with complex care needs and who represent the most vulnerable cohort of NDIS participants. It takes years of training and experience to properly assess the support needs of such a participant and there are few planners who satisfy this.

Maurice Blackburn urges the Review to consider, as a matter of urgency, how planners can be assisted in making decisions based on the best available information about the individual and his/her disability. There are several options which the Review may consider:

- Establishing a comprehensive training regime for NDIA planners, with appropriate guidelines and support.

- The involvement of appropriately qualified and independent health and allied health professionals in planning meetings could help ameliorate the lack of relevant qualifications in planners.

    - If the participant has an existing relationship with an allied health professional, finding ways for that professional to be directly engaged in the planning process
    - If the participant does not have an existing relationship with an appropriate allied health professional, requiring the NDIA to facilitate the supply of one.

- If it is not deemed appropriate for direct involvement in planning meetings by allied health professionals, NDIA should be required to ensure that evidence from such professionals is available during the planning process. There is a current inequity whereby those with the means to pay for, for example, a thorough OT report prior to the planning meeting are more likely to achieve a better outcome. Those without that capacity are left without that expert input in the planning session. (This inequity is discussed more in response to ToR 2)

Allied health professionals are also well equipped to provide expert opinion to the planner in the areas of:

- Current equipment needs
- Projected future equipment needs, both short term and long term
- The ancillary services required maximise the benefits of the equipment

Coupled with the current lack of empirical evidence available to planners, the technology used by planners is very restrictive in what responses can be added to the NDIA's information system.

In addition, there appears to be a desperate need for system updates to support individualised plans. For example, some of the NDIA's technology systems do not appear to allow for variations, and inputted data that cannot be manually adjusted makes the process very confusing for participants.

Maurice Blackburn believes that this is particularly evident in the area of equipment provision. If, for example, an equipment item is not listed on a participant's plan, then an application is submitted for an item not listed on the original plan, a whole new plan needs to be created. This lack of flexibility in the system is the antithesis of the bespoke, personalised approach espoused by the Prime Minister. It is also deeply inefficient: new plans being developed when a minor cost adjustment to an existing plan would meet the particular needs at that time. There must be a way through which a participant's plan can allow for ad hoc/incidental equipment requirements without having to start the process again.

Immediately following the Federal election outcome, the Prime Minister said[2]:

> *Every single Australian with a disability needs a bespoke approach, their challenges are different and they must be recognised as different. You can't take a cookie-cutter approach to this….and we need to have a system that can address that.*

Our experience, over more than 100 years working with people with disabilities, endorses the need for bespoke planning and eschewing any legislative or regulatory frameworks which could produce cookie-cutter outcomes.

At present, we see too little evidence of a planning process which is respectful of the unique needs of each individual. The use of standardised assessment processes may be contributing to this lack of personalisation. We urge the Review to explore the degree to which standardised assessment forms are used, the number of different assessment forms that are available for use, and whether these forms have an appropriate focus on function.

[2] https://www.pm.gov.au/media/press-conference-canberra-3

It is the experience of Maurice Blackburn staff that if a plan ends up in the internal and external review processes, the problems have started with the planner.

The obvious flaws in the planning process represent the biggest challenge faced by the NDIS. They infect all aspects of the scheme, undermining outcomes and destroying trust. It has been described to our staff as a fork in the road, in the very early stages of a person's journey with the NDIA. If the planner is skilled and has appropriate flexibility and discretion, good, people with disability will likely have a good experience with the NDIS. If a planner lacks skills or experience, it's a fraught path.

Therefore, a prime determinant of people's experience of the NDIS, at the moment, is luck. If a client lucky enough to be assigned a good planner, there is a good chance he/she will be content with their relationship with the NDIA.

Some planners are appropriately experienced and competent in their role. However, clients have described it as 'a total lottery' as to whether they receive services from such a planner.

Possible ways forward in relation to the role of Planners:

Maurice Blackburn agrees that participant involvement throughout the planning process is crucial.

As mentioned earlier, the involvement of appropriately qualified and independent health and allied health professionals in planning meetings could help make up for any lack of relevant qualifications in planners. It is our observation that many Planners seem to lack specific knowledge in relation to the work of health specialists such as Physiotherapists and Occupational Therapists. Their expert recommendations, on many occasions, have been ignored or dismissed by planners. Such recommendations are only heeded when the heat and scrutiny of the review and appeals process is applied to the deficient plan.

In our view there is a clear deficit of skills and experience with some planners and urgent action is required to remedy this through comprehensive training. This is particularly critical for planners working with participants with complex care needs, whose plans must only be prepared by planners with appropriate experience and training.

Maurice Blackburn submits that the Review should consider recommending that the NDIA source professional development for planners from the relevant heath industry peak bodies. This would be beneficial for all involved.

We submit that this Review should also seek assurances that the NDIA's technological systems offer sufficient flexibility to appropriately capture a client's needs.

Maurice Blackburn's experience would suggest that engaging in draft planning has proven positive for NDIS clients. It enables the collection of data and evidence that enables the formal planning process to be conducted more smoothly, and with less surprises. It also allows participants to seek input and feedback from medical and allied health professionals.

It is important that those agencies who are providing draft planning or pre-planning services – in many cases community and advocacy groups – are adequately resourced to continue to provide this beneficial function. The increased efficiency it provides to the formal planning process would make it a justifiable use of public funds.

Maurice Blackburn suggests that this Review could consider requesting research to determine the degree to which participation in a draft planning process reduces the likelihood of needing to access the review process.

Maurice Blackburn also believes that the suggestion by Senator Jordan Steele-John[3] and others, that participants should be able to view their plan before it is locked in, has merit.

ii. Problems with the Reassessment / Internal Review Process

In cases where we have been engaged to assist a client achieve a fairer and more reasonable plan, our observation is that an objective and reasoned reassessment rarely occurs at that stage.

We submit that the absence of such proper reassessments is a direct and predicable consequence of the legislated review and appeal mechanisms, which both run directly counter to the NDIS being held accountable for poor decisions. This will be covered in more detail, below.

In our experience, when the NDIA is contacted in relation to deficiencies in a client's plan, the NDIA's first response, by default, is to assert the original plan, or at most agree to minor adjustments to the original plan. We have experienced few cases in which suggestions for making the draft plan fair or aligned to expert opinion are given appropriate, individual consideration by the NDIA. This in our view represents a systemic form of pushback: the mindset at the NDIA is surmised to be "we need to back the first plan, let's see if this participant is serious and if they take it to the AAT, we'll have another look at it."

It is generally unclear whether the person undertaking the review has any additional expertise or experience in disability supports and care needs. If that is not the case, then the problems created by the original planner's lack of expertise are repeated. In our experience, this is particularly problematic in cases of catastrophic disability and complex care needs.

Whatever the reasons, the NDIA's default mechanism and approach to the reassessment of plans, according to the experience and perceptions of our staff and clients, is to engage in stonewalling. This does nothing to promote internal accountability and transparency and undermines trust in the scheme.

The delays in responding to requests for review compound the frustration of participants and undermine the efficacy of the process. Delays of up to 12 months in responding to a request for internal review or reassessment are common and by the time the NDIA has made a decision about whether to affirm or amend a plan, a new plan has already been issued. The process must then start again.

The AAT appeal in *Simpson v National Disability Insurance Agency*[4] highlighted this problem. The appeal involved a request for internal review of an unsuccessful eligibility application and a delay of over nine months in the Agency completing the review. The AAT found that the delay was unreasonable as there was nothing complex or unusual about the request, and that the applicant was therefore entitled to lodge an appeal in the AAT despite the internal review not being completed. The AAT also specifically noted that this situation was not unusual and it had identified other people in the applicant's position.

[3] https://www.everyaustraliancounts.com.au/your-questions-answered-a-chat-with-the-greens-spokesperson-on-disability-services-senator-jordon-steele-john/

[4] [2018] AATA 1326 (22 May 2018).

The Commonwealth Ombudsman also highlighted a number of other problems with the internal review process, including participants being encouraged or warned not to request a review[5], requests for a review triggering a new plan, which restarts the whole process[6], and the Agency providing incorrect advice about review rights[7].

Possible ways forward in relation to the internal review / reassessment process:

We note the government's recent commitment to a NDIS Participant Service Guarantee[8], a commitment to:

> *Introduce a new NDIS Participant Service Guarantee – setting new standards for shorter timeframes for people with disability to get an NDIS plan and to have their plan reviewed, with a particular focus on children, and participants requiring specialist disability accommodation (SDA) and assistive technology.*

We see this as a positive step. We also note that a major function of this review is to explore what this new guarantee could or should cover.

We do not agree, however, that seeking to 'streamline' the internal review process, is the best way to ensure shorter time frames.

We believe that the best ways to achieve a quicker, more efficient internal review system are:

- That NDIA staff consider, as part of their reassessment process, the ramifications and consequences if the internal review outcomes are changed by the AAT and are held accountable when this occurs,
- Ensuring that the focus of a reassessment process is on ensuring that the decision maker is properly experienced and qualified, free of conflict of interest, and has access to sufficient and thorough evidence from which to make an informed decision;
- Removing the barriers that prevent participants accessing independent expert evidence and advice,
- The adoption of legislated time limits for the completion of an internal review;
- The adoption of a requirement that a thorough explanation / justification of the outcome be provided;
- Adverse costs consequences for the NDIA in respect of plans which are modified to the benefit of applicant participants after AAT appeals are filed; and
- The adoption of a philosophy in relation to planning of 'do it right the first time'.

The most important change to the internal review system should be a move toward independence and external scrutiny. The current regime, whereby NDIA staff reassess the work of other NDIA staff as part of a formal review process, is untenable. Funding should be made available for independent reassessments, and support for the participants undergoing that process.

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[5] Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013'*, May 2018; s.4.34

[6] Ibid, s.4.30

[7] Ibid, s.4.16

[8] https://www.liberal.org.au/our-plan-support-people-disability

iii. Problems with the External Review and Appeal Process

As detailed above, the internal review process is not effective in ensuring that plans are right and just. Almost invariably, it is only once a dispute moves past the internal review system to external review processes do we see real change.

It is important to re-state and clearly understand the appeal framework:

(a) All disputed decisions, including failures to make decisions on plans; must first be the subject of internal review. This is one person within the NDIA purporting to judge the actions (or inaction) of another person employed by the same entity. It is transparently lacking in independence; then

(b) Review decisions can then be advanced to the AAT. Within the AAT, there are long delays, commonly more than 12 months before a hearing date is allocated;

(c) Finally, the participant can appeal to the Federal Court but only on a question of law.

The AAT is a no-cost jurisdiction for NDIS matters. Broadly analogous disputes, such as under our Comcare scheme, stand in contrast: there is a right top payment of some legal costs for successful applicants.

The NDIA is required to provide Tribunal documents – a set of all documents within its possession which are relevant to the application and the decision in dispute. Supplementary Tribunal documents can be requested by the participant or the AAT if any documents have been omitted.

The AAT appeals are case-managed by the Tribunal and can involve a number of preliminary case conferences and alternative dispute resolution (ADR) via a conciliation conference. It is open to a participant to put new evidence to the NDIA through this process, which may take the form of new expert evidence or more evidence from the participant themselves and/or their support network.

If the matter does not resolve at a conciliation conference, it will be listed for hearing by the Tribunal. Typically, the NDIS is legally represented by large and skilled legal firms. However, for applicant NDIS participants, legal representation is usually difficult to obtain due to the 'no costs' nature of the jurisdiction.

There is no entitlement to have even part of the successful Applicants' legal costs paid by the NDIS at the AAT stage. Put simply, the NDIS can produce a deplorably deficient plan, defend that deficient plan through an internal review which affirms the plan or makes minor modifications, and then face the AAT (and have the plan changed to the betterment of the participant) without any cost consequences.

Irrespective of how substantially different the new plan is as a result of the scrutiny of the AAT, the Applicant has no entitlement to reimbursement of their legal costs. The NDIA engages private legal representation, yet few participants can afford to do so. The playing field is grossly skewed to the NDIS and against the participant. This is a fundamental design defect in the scheme. It is anathema to true accountability.

The AAT process has proven difficult for NDIA clients for a number of reasons:

i. The 'no costs' nature of the AAT restricts law firms from offering a 'no win, no fee' service in which the costs are recovered from the unsuccessful party. This precludes most participants from accessing legal representation because of the prohibitive cost of paying themselves.

   Legal Aid has received some funding for these appeals but resources are notoriously scarce. A number of disability advocacy groups have also been funded to provide support but most are only able to provide advice rather than formal legal representation.

   This means that most participants will have to rely on pro bono representation or be self-represented. However, as shown in the case studies in Appendix A, the value of supports under dispute can amount to tens or hundreds of thousands of dollars *per year*. Many involve complex disabilities, high-care needs and require sophisticated expert evidence, which most participants will not be able to afford or arrange;

ii. The legislation and rules are also unclear, difficult to interpret and subjective; and

iii. Some disputes involve complex questions of statutory interpretation, or the interaction between the NDIS and other sources of support (for example, Medicare and the health system).

The issue of legal representation requires particular consideration. The NDIA engages private firms to represent them in every AAT appeal at great cost. Because of the barriers to engaging legal representation, the participants themselves are rarely represented. This too, runs completely counter to the 'choice and control' mantra which permeates the NDIS's stakeholder communications.

This problem is compounded by the difficult and complex legal issues that arise during the appeals. It is entirely unreasonable to expect a self-represented participant to be able to navigate and respond to arguments put to them by sophisticated lawyers and barristers representing the NDIA. The case studies featured in Appendix A demonstrate the complexity of the legal process. This is not something a participant should be required to engage in unassisted.

Under the current situation, participants are often left with little option but to seek assistance in relation to the reviews process from agencies that are not best placed to provide such advice – such as from service providers, or even local members of Parliament. Senator Steele-John described the experience as follows[9]:

> *You can't pick up the phone and speak to a human being, you can't get your plan reviewed properly because there aren't enough people around to do it and we get these farcical decisions made that I and other MPs have to deal with daily, we act almost as a kind of second tier of the AAT to be honest, you know, taking constituent enquiries every single day, and resolving issues……. Now that can't be a dynamic that continues*

Furthermore, many of the agencies which provide advocacy services, including with regard to plan inadequacy, are NDIS funded. Anecdotally, some of those agencies report a reluctance to advocate vigorously against an NDIA decision for fear that the NDIA will react negatively when the next round of funding approvals are due.

[9] https://www.abc.net.au/radionational/programs/breakfast/ndis-minister-a-spasm-in-a-positive-direction/11155308

Importantly, an external review process with a pronounced power imbalance does nothing to improve decision-making within the NDIA. Instead of encouraging good decision-making at first instance or in the internal review phase (and thereby minimising legal disputes), the restrictions against accessing legal representation simply shield the NDIA from taking responsibility for poor decision-making.

If participants could access appropriate legal representation and the NDIA was also liable for legal costs in unsuccessful matters, it seems likely that more attention would be paid to getting the plan right in the first place, and minimising the number of disputes.

The lack of effective legal representation in AAT appeals also means that jurisprudence will be slow to develop and the scope and nature of disputes will not be incrementally limited or narrowed by previous decisions. This will lead to unnecessary administrative and legal costs for the Agency and ongoing uncertainty and hardship for participants.

That the legislation adopted such a framework is not surprising: the deeply flawed Productivity Commission report which laid the foundational architecture for the NDIS Act was permeated with the naïve notion that plan adequacy and integrity would be assured by a well-functioning bureaucracy. Legal representation was to be discouraged.

The cases and stories of the clients we work with every day plainly illustrate that the reality is very different. Simply put, the current situation results in the most uneven of playing fields, is grossly unfair, and does little to promote trust and accountability. This cannot be overstated – without an appropriate accessible, robust and fair external review process, there will be no change to the inefficiencies and grossly unfair outcomes that continue to plague the scheme and cause terrible dissatisfaction amongst participants and their families.

Possible ways forward in relation to the external review and appeals processes:

Maurice Blackburn submits that there are ways to manage this issue without denying the vast majority of participants' appropriate legal representation. A legislative entitlement to costs at 100 percent of the Federal Court scale for successful applicants, would encourage better decision-making and accountability so as to minimise disputes.

Maurice Blackburn is also on record as expressing concern that the AAT does not appear to be resourced for the quantum of reviews that are expected to be bought to it over the course of the full scheme roll out. We submit that this review could seek reassurances on this issue.

Once again, Maurice Blackburn also reiterates our belief that the numbers of external reviews would fall if the planning process was more thorough, if the reassessment process was taken seriously by the NDIA, and internal review process was effective and efficient.

Significant change is requires to ensure that promises of NDIS accountability will be matched by behaviours because, at present, there are powerful structural disincentives to accountability.

If initial planning is robust, comprehensive and responsive, and decision makers know that costs accountability is the consequence of poor decisions, then the reliance on the review and appeal system would be greatly reduced.

The roles and responsibilities of the Commonwealth and state and territory governments to support people with disability in their interaction with the NDIS, including advocacy, information and referral services.

Maurice Blackburn has had a long and consistent commitment to contributing to discussions around the scheme's design and roll-out. The magnitude of the challenges facing the NDIS is difficult to overstate. The problems are borne of:

- Poor design – underpinned by a deeply flawed Productivity Commission report prior to the legislation;
- Ineffectual governance and leadership;
- Misdirected funding priorities;
- Unrealistic implementation timelines; and
- Inept implementation methodologies.

With the roll-out now almost complete, it is vital that attention shifts from speed to accuracy, and ameliorating the longer term issues associated with thin markets and labour force development.

This includes a vacuum of specialist services due to the lack of availability of such services in many areas, providers leaving the scheme due to unrealistic pricing models eroding sustainable profit margins and a critical lack of accommodation appropriate for people with disabilities. We are aware, through interactions between our regional offices and their clients, that this is especially acute in rural and remote communities.

In Maurice Blackburn's experience, there are a number of barriers affecting the availability of services, and in turn, the ability of participants to access services. Specifically, these include the following issues:

i. Pricing models, the removal of bloc funding and cost shifting between states and the NDIS

Service providers report facing enormous problems moving from bloc funding to a fee for service, market-based model. Organisations are having difficulty maintaining funding while the transition occurs, and critically, also in identifying strategies to make the fee for service model profitable.

We are aware of organisations of all sizes which are seriously considering their short and medium term viability and are actively pursuing closure or merger options. These include small community operations, as well as large scale businesses which have received multi-million dollar / multi-year contracts in the past. With little in the way of retained savings, many agencies are reporting uncertainty as to how they will survive the funding shortfalls during the transition period.

Under the transition to the market based system, service providers are not finding it easy to:

(a) implement a business case which enables sustainability on a fee for service basis; or

(b) find enough qualified staff willing to work for a rate that allows the business to achieve financial sustainability.

Service providers are also concerned about the apparent cost-shifting from states and territories to the NDIS. The perception that states and territories are removing funding for certain activities on the basis that it should be covered under NDIS funding is pervasive amongst service providers who are transitioning from block funding to an open marketplace.

There is also a concern that the shift to a market-based approach will favour the big companies over smaller community service providers. Such a contraction would particularly affect regional and remote areas of Australia because the smaller outfits are often located outside the major metropolitan centres and are therefore able to be more responsive to individual client needs in country areas.

One of the many major errors made in the Productivity Commission report, which was the genesis of the NDIS, was the assertion that state-based (and funded) providers were ineffectively delivering services. The reality was that most of those providers had long and deep experience in the provision of disability services, and did so compassionately and economically. The centralist, one-size-fits-all ethos which is at the core of the NDIS scheme design, is disrespectful of the skills and experience of many such state-based providers.

Possible ways forward in relation to pricing models, the removal of block funding and cost shifting between states and the NDIS

Maurice Blackburn submits that this Review should give serious consideration as to whether there is anything in the legislation that would prevent the pace of the roll out to full scheme being slowed to enable a focus on the development of the market and labour force.

Maurice Blackburn also submits that this Review should give serious consideration as to whether there is anything in the legislation that would prevent the maintenance of appropriate bloc funding arrangements, to ensure service continuation.

ii. Issues relating to workforce development

Small, individual contractors – particularly personal carers – are struggling with the transition to a market-based regime.

Transition to a market-based system for personal care provision will not assist in the reduction of casualisation in the sector’s workforce – if anything we believe it will exacerbate it.

Strategies to address the growing shortage of workers risk either reducing quality standards or increasing costs, or both. It is absolutely crucial that appropriate levels of funding are committed to this issue. It should not be permitted to bring a ‘lowest common denominator’ approach to the provision of services to eligible individuals.

There must be sufficient and properly qualified staff available Australia-wide. The risks in not adopting that approach are plain:

- Unscrupulous entities and individuals will enter the market, seeking to exploit the funds available;
- Unskilled and untrained people will be recruited to work with people with complex multifaceted needs. If a carer’s skills and experience are not properly matched with the needs of the participants, participants will suffer, with catastrophic consequences; and
- Workers will be highly vulnerable to exploitative conduct by their employing entity.

Maurice Blackburn draws the Review’s attention to the current trend toward the ‘Uberisation’ of the disability workforce. It is important that the legislative and regulatory frameworks underpinning the NDIA’s work recognise that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- That these vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- Sham contracting is rife, with workers told they must be independent contractors rather than traditional employees. These employees are then missing out on superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect,
- That technology based employment matching services that actually employ their staff, rather than merely connect contractors to clients, need to be rewarded,
- That in order to compete with other care sectors (health, aged care), the employment conditions within organisations registered to provide NDIS services must be first rate.

The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants.

Possible ways forward in relation to staffing issues:

In our experience, the most precarious employment markets are also much less likely to be unionised. It is crucial that the NDIA liaise with the union movement on any structural enhancements that can be put in place to ameliorate exploitative working arrangements.

Maurice Blackburn would like to see NDIA's procurement processes for service provision have far higher expectations on the credentials of the applicant firm as an employer of choice. If a firm cannot provide details of their employment model and processes, they should not be registered as an NDIA provider.

2. Any other matter relevant to the general operation of the NDIS Act in supporting positive participant and provider experiences.

Maurice Blackburn is concerned that the scheme, as it is currently administered, is creating different classes of beneficiaries, and this in turn is creating an access to justice issue.

Consumer protection agencies are vocal in their view that NDIS clients do not have adequate access to advocacy or support for negotiating an appropriate care plan that is suitable to their needs.

Often, clients are not well placed to know if what's in their plan is adequate or realistic. This is especially true for clients requiring supports for psychosocial illnesses.

We believe that current processes are creating classes of recipients – a divide between those who have the wherewithal and financial resources to access expertise that will enable them to judge whether or not their plan is fair, and those who lack those resources.

Participants with sufficient resources to gain their own access to professional support, and arrange for supporting reports from experts such as Occupational Therapists (OTs), are better able to secure the funding that their needs warrant. Industry professionals can be engaged to provide advice in pre-planning, using the NDIS terminology that leads to a good result for their client – but these services require an upfront investment which few clients are able to produce.

Those without the benefit of such resources are very much on their own. As mentioned earlier, access to publicly available supports such as Community Legal Centres and Legal Aid is limited, and their resources are stretched.

We note that these sentiments were also expressed by Senator Steele-John[10]:

> *…if you're a disabled person born into a, you know, rich, white family maybe with a lawyer or two in your family tree you're maybe not gonna have a bad time with the NDIS because you can cite the relevant clauses of the Act and get what you need.*
>
> *If you're from where I'm from in WA, in Rockingham you know, and you've not had that experience in your family you've never engaged with disability services before odds are you're gonna get a worse deal. And that is not OK.*

This 'have and have nots' distinction is also becoming more apparent in the internal and external review processes. Those better equipped to engage support are more likely to have a successful review process than those who are forced to navigate it alone. Once again, we perceive this as an access to justice issue which we believe the Review should be aware of.

[10] https://www.everyaustraliancounts.com.au/your-questions-answered-a-chat-with-the-greens-spokesperson-on-disability-services-senator-jordon-steele-john/, in the section entitled 'Transcript'.

Appendix A – Case Studies

Maurice Blackburn presents three case studies, detailing the results of merits review processes in relation to the value of clients' plans.

Case study #1 -v- NDIA

Background
In 2001, aged 18, K suffered a cardiac arrest and secondary hypoxic brain injury. Since his injury he has required 24 hour care. K had also run a medical negligence claim.

In October 2016, K became an NDIS participant. His first plan included a budget of $215,906.08. Core supports was the largest support area, at $196k. As part of the plan review process, K further submitted a care plan report from a rehabilitation specialist, which outlined K's requirement for 24 hour care and that his core supports budget should be $352k.

Internal Review – December 2016 to May 2017
In December 2016 K's lawyers wrote to the NDIA CEO requesting an internal review pursuant to section 100 of the NDIS Act. The lawyers asserted that the plan was wrong at law and against the weight of evidence and requested increased budgets in a number of support areas, for a total budget of $409k.

In May 2017 (after considerable follow ups), the lawyers received a decision from the NDIA affirming the original plan. Importantly, the internal reviewer rejected the rehabilitation specialist's recommendation for overnight care including 1.5 hourly turning. The decision asserted that the rehabilitation specialist did not have the relevant expertise to comment on K's care needs.

AAT Review – May to October 2017
In May 2017, on receiving the internal review decision, K's lawyers immediately applied for AAT review. In June 2017, Tribunal Documents (T Docs) were received. Most importantly, there was clear inconsistency between the planner's recognition that K required 24 hour care and her Team Leader's insistence that overnight care was not required.

In August 2017, we obtained and filed a report from a rehabilitation physician, commenting on K's care needs (amongst other issues). The physician assessed K to require 36.5 hours of care per day. Based on the physician's evidence, lawyers calculated K's plan budget to be $830k.

Coincidentally and without notice, on the same day as lawyers served the report, the solicitor for the Agency sent a draft revised plan for K. She said that "*while investigating the plan in the course of these proceedings the Agency has formed the view that the amount of core supports originally included in the plan was insufficient given his level of disability.*"

The draft revised plan was prepared by a new planner, not involved in the original or internal review decisions. The draft revised plan allowed for 24 hour care, with a core supports budget of $465k and total budget of $488k.

K's lawyers wrote the Agency, accepting the draft revised plan in principle, and making requests for minor amendments. K's lawyers also requested that the higher budget be applied retrospectively so that K would be reimbursed for out of pocket expenses. This reimbursement request was accepted.

Because of delays in processing the reimbursement, K's lawyers did not receive the new plan (a finalised version of the draft revised plan) until October 2017, days before the scheduled Conciliation Conference in the AAT. They proposed Terms of Settlement with which the Agency agreed, and K's lawyers withdrew the proceedings.

The below table compares the original plan, the plan with budget increases K's lawyers requested on internal review, the plan based on the rehabilitation physician's report, and the new plan finally agreed to.

K's lawyers achieved an improvement on the original plan of more than $280,000 per year. K has a life expectancy of several decades.

Support Area	Original Plan	Internal Review Plan	Rehabilitation Physician Plan	New Plan	New v Original
Assistive Tech	$3,050.00	$3,050.00	$3,050.00	$19,092.70	$16,042.70
Improved Life Choices	$1,369.12	$1,369.12	$1,369.12	$1,369.12	$0.00
Improved Daily Living / Support Coordination	$14,626.96	$25,915.00	$23,416.00	$17,005.46	$2,378.50
Core supports	$196,860.00	$352,595.50	$774,257.05	$465,187.16	$268,327.16
Home modifications	$0.00	$26,500.00	$26,500.00	$0.00	$0.00
TOTAL	**$215,906.08**	**$409,429.62**	**$830,453.12**	**$502,654.44**	**$286,748.36**

Case study #2 -v- NDIA

Background
S received damages through a motor vehicle accident claim in 2012. Since then, his affairs been managed by a trustee company.

S's care is managed by a specialist rehabilitation company. The specialist rehabilitation company considered the NDIS plan budget of $61,435.15 was deficient considering the evidence provided. In particular, the specialist rehabilitation company had submitted evidence in relation to the costs of S's care through supported accommodation in a group home.

The specialist rehabilitation company wrote to the planner indicating that they considered the plan had significant errors. The planner replied that the share accommodation costs were "over the benchmark" and that this issue had been referred to the "Technical Advisory Team" for advice. However the planner did not make further contact with the specialist rehabilitation company. In September 2017, the Trustee contacted lawyers for assistance.

Internal Review
Lawyers wrote to the Agency CEO requesting an internal review of S's plan. The lawyers submitted that the plan budget should be increased to $443k, giving particulars within each support area based on information provided by the specialist rehabilitation company.

On 1 November 2017, lawyers wrote to the Agency CEO again, enclosing evidence in support of the earlier request (reports, quotes etc as provided by the specialist rehabilitation company).

In November and December 2017, the lawyers made various attempts to receive confirmation that the request had been received and was being treated as a valid request for internal review. By calling the Agency's general enquiries line the lawyers discovered their correspondence had been forwarded a specific office of the NDIA. However no direct contact details were provided and emails to the office received no response.

In January 2018, an Agency planner advised the specialist rehabilitation company that they were conducting a scheduled review of S's plan (i.e. annual review). The specialist rehabilitation company prepared a Needs Assessment Report to assist with this process.

The lawyers contacted the planner directly by email to provide the internal review letters and evidence. However the planner advised that he did not know who the internal review was allocated to, and that he would only perform the scheduled review. The planner advised he had extended S's old plan for three months and would prepare a new one in the interim.

On 22 March 2018, the planner met with S, with one of the specialist rehabilitation company's OTs attending by phone. The planner had been provided with an updated report by the specialist rehabilitation company which supported a plan budget of $301k.

On 23 April 2018, the planner sent the new plan to the specialist rehabilitation company. It had a total budget of $266k.

By strategic pursuit of the NDIA, and obtaining best quality evidence, the new plan is more than four times larger than the original plan.

Summary of budget changes: Support Area	Original Plan	New Plan	Variance from Original to New Plan
Assistive technology	$350.00	$2,553.00	**$2,203.00**
Improved life choices	$2,524.12	$1,395.71	**-$1,128.41**
Improved Daily Living	$5,028.55	$13,740.29	**$8,711.74**
Improved relationship	$2,911.96	N/A	**-$2,911.96**
Support Coordination	$6,320.52	$7,136.00	**$815.48**
Transport	$1,750.00	$1,606.00	**-$144.00**
Core supports	$42,550.00	$239,880.10	**$197,330.10**
TOTAL	**$61,435.15**	**$266,311.10**	**$204,875.95**

Case study #3 -v- NDIA

Background

G was born in 1991 and sustained Hypoxic-ischemic encephalopathy (HIE) during labour. G was diagnosed with Cerebral Palsy, spastic quadriplegia, severe developmental delay, and severe intellectual impairment.

G permanently requires 24 hour supervision with some two-person care for behavioural issues. G is living with his mother on a family farm in rural Australia.

G had a medical negligence case settled in April 2017.

Internal Review

Lawyers wrote requesting an internal review of G's plan on 1 December 2017. This was based on medical reports, including 24-hour care needed.

A decision was made by the NDIS on 12 January 2018, with the original decision upheld. In relation to core supports, the internal reviewer said that G had developmental delay which is not recognised as a disability for a person over the age 6.

Tribunal Application

An application was lodged in this matter in the AAT on 17 January 2018. A case conference was held on 2 March 2018, with orders for evidence from an Occupational Therapist and G's mother, and a conciliation date set.

Lawyers made a without prejudice offer on 13 April to the Agency based on a rehab provider's report – this was an offer of $565,000. The Agency requested particulars for this on 8 May 2018, and lawyers responded with a supplementary report from rehab provider and doctor.

Conciliation was held 26 July, and the Agency conceded that G requires 24-hour care. The Agency made a without prejudice offer on 30 July of $415,000. This included core supports: 13 hours per day, 1 overnight inactive shift per week, plus 4 weeks of 24 hr care. Care funded at standard rate.

Lawyers serve second witness statement (mother).

Lawyers then made a further counter offer on 21 August of $491,000. Core supports: 15 hrs per day, 2 overnight per week, 4 weeks 24 hr care funded at complex/high intensity rate.

Agency made a counter offer in mid-September 2018 that was accepted and will yield a plan with a budget approximately $465,376.84 – a total increase on the original plan offered of $408,000.

Summary of budget changes: Support Area:	**Original Plan**	**Agency Offer (post conciliation)**	**Legal Counter Offer**	**Agency Counter**
Core Supports	44,740	371,102	447,813	420,733
Improved Life Choices	7,500	1,710	1,710	1,710
Support Coordination	1,805	11,524	11,524	11,524
Improved relationships		14,013	14,013	14,013
Improved Daily Living		15,272	15,272	15,272
Transport	1,606	2,123	2,123	2,123
Assistive Tech	1,021	TBA	TBA	TBA
TOTAL	**56,672**	**415,745**	**492,456**	**465,376**