



**Maurice
Blackburn**
Lawyers
Since 1919

**Submission in Response
to the Queensland
Productivity Commission
(QPC)'s Inquiry into the
National Disability
Insurance Scheme (NDIS)
Market in Queensland.**

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	2
OUR SUBMISSION.....	2
RESPONSES TO SELECTED CONSULTATION QUESTIONS	4
Questions Relating to Planning	4
Questions Relating to Providers.....	14
Questions Related to Thin Markets	17
Questions Related to Workforce Development.....	20
Questions Related to Pricing	27
APPENDIX A – CASE STUDIES	28

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 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.

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

Our Submission

From our work with NDIS clients in Queensland, 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.

The Issues Paper outlines myriad topics which are areas of concern for the NDIS, the Queensland Government, disability support agencies, NDIS participants, their families and communities.

There seems to be increasing numbers of complaints from participants and their families/carers about their interactions with the NDIS. This includes delays in receiving an NDIS plan, the lack of experience and expertise of NDIS planners, the lack of communication about the proposed plan, and also the contents of the plans themselves.

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 Queensland-government funded disability providers report being worse off under the NDIS.

Poor skills and processes at the planning stage inevitably lead to a request for internal review. A rushed, inattentive and adversarial approach to the reviews process inevitably leads to the engagement of legal representation, both for the client and the NDIA. This means that the whole process frequently becomes more expensive and time consuming than it needs to be.

Further, Maurice Blackburn argues that 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 inequitable for participants.

Once an acceptable plan is in place, it is vital that services are available and affordable to fulfil the participants' plan, and ultimately, their goals.

Maurice Blackburn believes that the most important factor in ensuring that the disability support workforce is fit for purpose lies in the sector's ability to provide secure, long term employment.

We remain particularly concerned about the potential for increased casualisation of the service provider workforce, and a growth in precarious employment in the absence of sufficient workforce planning.

In this submission, we highlight that:

- The disability workforce is made up of some of the most vulnerable worker cohorts in Australia,
- These vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- Sham contracting has been a persistent issue, 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,
- Technology based employment matching services that actually employ their staff, rather than merely connect contractors to clients, need to be promoted,
- 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, and
- That the involvement of the union movement is vital.

Ensuring that NDIS pricing is competitive will assist in the retention and attraction of workers. The Commonwealth Government has almost complete control of this particular lever and must ensure that NDIS fees for services encourage and promote long term service provision in the disability sector.

It is not an exaggeration to say that the obvious deficiencies in the disability workforce represent an existential threat to the efficiency and sustainability of the NDIS. Without immediate and extensive action, the NDIS workforce will quickly become under supplied and under skilled, with predictable tragic consequences for participants to quickly follow.

The economic and social consequences of poor decision making are, in this context, dire.

Responses to Selected Consultation Questions

Questions Relating to Planning

Issues Paper Questions:

How well are the access, planning and review processes working in Queensland for people with disabilities and their carers?

How could they be improved?

From our work with NDIS clients in Queensland, 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 seems to be increasing numbers of complaints from participants and their families/carers about delays in receiving an NDIS plan, the lack of experience and expertise of NDIS planners, the lack of communication about the proposed plan, and also the contents of the plans themselves.

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 Queensland government funded disability providers report being worse off under the NDIS.

The Queensland NDIS clients we work with are telling us that the planning process is frustrating, that the plans do not reflect their needs, and that it is difficult to get an unsuitable plan changed. In this sense, there is a real risk that the NDIS will simply exacerbate many of the frustrations and problems of the system it was designed to replace.

Poor skills and processes at the planning stage inevitably lead to a request for internal review. A rushed, inattentive and adversarial approach to the reviews process inevitably leads to the engagement of legal representation, both for the client and the NDIA. This means that the whole process frequently becomes more expensive and time consuming than it needs to be.

In our experience, many of the plans simply do not provide adequate support for the participant's needs and are not consistent with the legislation and rules. This problem is particularly acute for participants with complex care needs. Such participants require a bespoke planning process which produces a unique plan, with their true needs covered holistically.

Further, 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 inequitable for participants.

The most common feedback we receive from NDIS clients in relation to supports provided in their plans is that they have to fight for everything.

We argue for the adoption of a philosophy whereby the focus of a plan reassessment process is on:

- ensuring the decision maker has access to sufficient and thorough evidence from which to make an informed decision;
- the adoption of legislated time limits for the completion of an internal review; and
- the adoption of a philosophy in relation to planning of 'do it right the first time'.

If initial planning is robust, comprehensive and responsive, then the reliance on the review system would be greatly reduced.

The Experience, Qualifications and Skill Set of NDIS Planners

The experience, qualifications and skill set of 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.

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. The planners, in our experience, often lack the skills and experience required to assess a participant's care needs, particularly for those with complex care needs.

The importance of this cannot be understated.

Immediately following the Federal election outcome, the Prime Minister said¹:

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.

There also seems to be a lack of understanding amongst planners of the NDIS's own rules and criteria.

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 by planners.

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

¹ <https://www.pm.gov.au/media/press-conference-canberra-3>

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 NDIA should consider sourcing professional development for planners from the relevant health industry peak bodies. This would be beneficial for all involved.

It is the experience of Maurice Blackburn staff that, in 100 per cent of cases, if a plan ends up in the internal and external review processes, the problems have started with the planner.

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 good, people with disability will likely have a good experience with the NDIS. If a planner lacks skills or experience, it's a different 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.

Poor performance at the planning level, however, inevitably leads to requests for internal review. It is the experience of many clients that the appeals process is frequently slow and unresponsive.

In addition to being slow and unresponsive, the internal and external review processes are also expensive. The economic impact to the scheme of the NDIA investing considerable staff time and engaging lawyers to back up poor decision making by planners is significant. It is also inefficient and unnecessary.

Many 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.

Participant involvement in planning processes and the efficacy of introducing draft plans

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

We applaud the phasing out of the dreadful process of conducting planning interviews via telephone. This process should never have been allowed to commence.

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 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 also believes that the suggestion by Senator Jordan Steele-John² and others, that participants should be able to view their plan before it is locked in, has merit. This idea has been incorporated into the recommendations contained in the interim report of the

² <https://www.everyaustraliancounts.com.au/your-questions-answered-a-chat-with-the-greens-spokesperson-on-disability-services-senator-jordan-steele-john/>

Joint Standing Committee on the NDIS (the JSC)'s inquiry into NDIS Planning³. We commend those recommendations to the QPC.

The plan reassessment 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.

We submit that the absence of such proper reassessments is a direct and predictable 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 very few cases in which suggestions for making the draft plan fair or aligned to expert opinion are given appropriate, individual consideration by the NDIA.

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.

The delay in response after a participant has asked for their plan to be reviewed (sometimes up to 12 months) means that often, 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 review process

The internal review process is not effective in changing plans. 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 decisions, including failures to make decisions, on a plan; must 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;
- (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 (for more information on issues with the AAT, please see the next section);
- (c) Most seriously in our submission, there is no entitlement to have even part of the successful Applicants' legal costs paid by the NDIS. 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, then face the AAT. 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.

³https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDIS_Planning/Interim_Report/section?id=committees%2freportjnt%2f024350%2f72475

This review and appeals framework is anathema to the NDIS being truly held accountable for producing and defending plans which fall far short of the “reasonable and necessary” supports required by the legislation.

That the legislation adopted such a framework is not surprising: the deeply flawed Productivity Commission report which was 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 examples we provide plainly illustrate the reality is very different.

In Appendix A, we have documented three examples of cases where an independent merits review of the client's care plan has shown it to be entirely inadequate to satisfy the living requirements of the client. The difference between what NDIA determined to be ‘reasonable and necessary’, compared to what healthcare professionals and the Courts determine for the same client, is astonishing.

Ensuring accountability through a robust and transparent system of internal and external review is essential for any insurance scheme, as it promotes trust and confidence in the scheme and its decision-making processes. It also ensures fairness and consistency across participants.

Unfortunately, in our experience, the NDIS' review process provides only a nominal level of accountability and creates a number of barriers to participants seeking independent and thorough review of NDIA decision-making.

The NDIA's handling of internal reviews has been particularly problematic. The Commonwealth Ombudsman received 400 complaints about the Agency's handling of reviews in an 18-month period to January 2018, which represented 32.5 per cent of all complaints about the NDIS.⁴

Reports from participants and other anecdotal evidence to date suggest that internal reviews have been of limited use, particularly when the plan under review relates to complex and/or high care needs. In our view, a number of factors may be contributing to this.

- i. 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 simply replicated. In our experience, this is particularly problematic in cases of catastrophic disability and complex care needs.
- ii. The ability of participants to obtain additional expert evidence about their needs (for example, from an occupational therapist) is extremely limited in most cases. It is therefore uncommon for the person conducting the internal review to have access to any new evidence that might better inform their decision.
- iii. Finally, there seems to be significant confusion over the correct interpretation of the legislation and associated instruments across the NDIA. This leads to inconsistent application of the rules and different outcomes depending on who is making the decision at any point in time.

⁴ Commonwealth Ombudsman, ‘Administration of reviews under the *National Disability Insurance Scheme Act 2013*’, May 2018, 2.3.

There have also been significant problems with delays during the internal review process, something that was highlighted by the Commonwealth Ombudsman in a 2018 report.⁵

While participants must file a request for a review within three months of receiving notice of the decision, there is no timeframe currently imposed on the Agency to actually complete the review. Many participants report waiting months for any response,⁶ by which time their current plan may have expired, whereupon the process has to start again.

The AAT appeal in *Simpson v National Disability Insurance Agency*⁷ 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.

The JSC recognised this as an issue, and made a number of recommendations relating to the imposition of time caps on the NDIS in its Interim Report⁸.

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,⁹ requests for a review triggering a new plan, which restarts the whole process,¹⁰ and the Agency providing incorrect advice about review rights.¹¹

We note the government's recent commitment to a NDIS Participant Service Guarantee¹², 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 believe that the best ways to achieve a quicker, more efficient internal review system are:

- The adoption of a process for ensuring that the decision maker is properly experienced and qualified, and has access to sufficient and thorough evidence from which to make an informed decision;
- The adoption of legislated time limits for the completion of an internal review, as per the JSC's recommendations;
- The adoption of a philosophy in relation to planning of 'do it right the first time'; and
- The adoption of a process whereby applicants who have successful outcomes in the AAT (outcomes which result in plans being revised upwards in the ways

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

⁶ Ibid.

⁷ [2018] AATA 1326 (22 May 2018).

⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDIS_Planning/Interim_Report/section?id=committees%2freportjnt%2f024350%2f72475; see recs 4 & 5

⁹ Ibid. 4.34

¹⁰ Ibid. 4.30.

¹¹ Ibid. 4.16

¹² <https://www.liberal.org.au/our-plan-support-people-disability>

demonstrated by our case studies in Appendix 1) have a legislated entitlement to payment of their legal costs at 100 percent of the Federal Court scale.

It is only through these changes that the assurances of NDIS accountability will be matched by behaviours. At present, there are powerful structural disincentives to accountability. If internal reviewers are cognisant that there will be cost consequences in the AAT of not making quality review decisions, the number of substandard internal review decisions will reduce. We address the issues associated with the AAT in more detail in the next section.

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 system would be greatly reduced.

In our experience, most NDIA clients are at pains to ensure that they are not 'double dipping'. They understand the need to ensure that they are receiving what they are entitled to – that is, supports that are reasonable and necessary in order to live an ordinary life.

It is of concern that the internal review process has proven to be so problematic to date. It is inappropriate for participants to be forced to seek external review before receiving a proper response to their concerns. The external review process is stressful for participants and incurs unnecessary legal costs for the NDIS.

Maurice Blackburn sincerely believes that getting the internal review process right will increase public trust in the scheme.

The incidence of appeals to the AAT and possible measures to reduce the number

As the QPC will be aware, the NDIS legislation provides for both an internal and an external review process.

If, in the internal review process, the NDIA affirms the original decision, or if a participant is not content with the extent of any variation, a participant has 28 days to file an application in the Administrative Appeals Tribunal (AAT). This can only happen once an internal review has been conducted.

There is no application fee. The AAT is also a no-cost jurisdiction and is designed to be a conciliatory process.

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.

The playing field is grossly skewed to the NDIS and against the participant.

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 and 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 forced to seek assistance in relation to the reviews process from agencies that are ill equipped to provide such advice – such as from service providers, or local members of Parliament. Senator Steele-John described his personal experience as follows¹³:

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

Simply put, the current situation results in the most uneven of playing fields, is grossly unfair, and does little to promote trust and accountability.

¹³ <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.

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 said, the benefit of the 'no-costs' jurisdiction is that participants can appeal to the AAT without fear of an adverse costs order being made against them. For many, particularly those with smaller disputes, this is likely to promote greater access to justice, even if the balance is tipped against them once their appeal is heard.

Maurice Blackburn submits that there are ways to manage this issue without denying the vast majority of participants appropriate legal representation. As submitted in the previous section, a legislative entitlement to costs at 100 per cent of the Federal Court scale for successful applicants, would give better decision-making and accountability.

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.

Once again, Maurice Blackburn 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.

Other matters related to the Planning and Review systems:

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-John¹⁴:

...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 review process. 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. With economic and social consequences, which we believe the QPC should be aware of.

¹⁴ <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'.

Questions Relating to Providers

Issues Paper Questions:

How are service providers adjusting to changed methods of funding?

What are the key barriers to providers increasing their capacity?

Do providers face stronger incentives to operate in the NDIS rather than in other sectors, or vice versa?

We have heard clear messages from Queensland NDIS clients and service providers that a range of supports must be provided for organisations to make the transition from block funding to the market based system. This must include support to ensure that service providers are able to maintain sufficient cash flow during the transition period to remain viable and continue to employ staff.

Maurice Blackburn believes that failing to provide these supports will lead to organisations of all sizes actively seeking mergers, closure, or alternative business models to NDIS service provision. Actual or intending scheme participants will suffer as a consequence of such closures.

Maurice Blackburn believes that the pricing model must reflect the true market cost of service provision – everywhere, but particularly in regional and remote communities. We believe that the main focus of pricing policy must shift from scheme sustainability to target market development.

Maurice Blackburn submits that the majority of challenges in attracting and retaining staff to provide NDIS services stem from issues that potential employers are facing due to the architecture of the scheme.

Maurice Blackburn is hearing consistent messages from our networks in relation to issues in the transition to a market based system for service providers. These messages can be divided into three clear streams – problems related to the constancy of funding; problems related to staff availability; and problems relating to service providers' relationship with the NDIA.

Problems related to the constancy of funding:

Service providers report facing enormous issues moving from block funding to a fee for service based model. Organisations are having difficulty maintaining funding while the transition occurs, but also in making the fee for service model profitable.

This uncertainty is leading to an unwillingness or inability to make commitments to staff about tenure. An agency cannot retain staff under these circumstances.

We are aware of organisations of all sizes which are seriously considering their short and medium term viability, and actively pursuing closure or merger options. These include small community operations, as well as large scale organisations which have received multi-million

dollar / multi-year contracts in the past. With little in the way of retained savings, they simply cannot see how they can survive the funding shortfalls during the transition period.

In our experience, service providers are not finding it easier to (a) find enough work to make money on a fee for service basis; or (b) find enough qualified staff willing to work for a rate that allows the business to make a profit.

The appearance of cost shifting from States to the NDIS (States removing funding for certain activities on the basis that it should be covered under NDIS funding) is acutely perceived by service providers.

Regardless of the accuracy of the perception, it has become a reality in the eyes of service providers which are transitioning from block funding to an open marketplace.

Under previous funding regimes, larger providers were able to 'juggle' their cash flow according to the staffing needs of the organisation and the needs of their clients. With the more prescriptive nature of NDIS funding, this flexibility has been removed.

Maurice Blackburn remains concerned that the shift to a market based approach is favouring the big companies over smaller community service providers. This is at odds with the goal of providing more flexible and tailored services.

Funding certainty must be maintained in order for service providers to feel confident in offering attractive, permanent jobs.

Problems relating to staff availability:

Maurice Blackburn is aware that small, individual contractors – especially personal carers - are struggling with the transition to a market based approach. Direct engagement, in particular, is something that a lot of smaller providers are expressing concern about.

Individual service providers are expressing concerns about the necessity of setting themselves up as a business, and the precarious nature of the consistency of work.

Maurice Blackburn is concerned that the transition to a market based system for service provision will not assist in the reduction of casualisation in the sector's workforce – if anything, we believe it will exacerbate it. In our experience, most participants will only need between two and six hours of assistance per day, meaning carers will still have to pick up various bits of work in a piecemeal fashion.

We are aware of the proposed use of apps to find carers, but a risk remains that there is a large portion of the workforce that will not be comfortable in using such technologies. This 'Uberisation' of the disability workforce, and other employment related structural issues, are discussed more in our response to questions related to workforce development issues.

We also believe that the emphasis on fee for service creates an optics problem. We are concerned that the appearance of a highly casualised, piecemeal approach to work will deter potential new entrants into the disability sector workforce, particularly with respect to carers.

Problems relating to service providers' relationship with the NDIA:

For a service provider to employ staff in order to provide NDIS services, they first must be registered with the NDIA.

Maurice Blackburn has found that many service providers, formerly ambassadors for the scheme, have become deeply frustrated and angry about their interactions with the NDIA.

Many providers that we work with find the registration process a matter of great complexity. Additionally, one of Maurice Blackburn's offices in regional Queensland has noted that there has been no adequate information or guidance from the NDIA to advise local service providers on how best to structure their business in order to comply with the registration requirements.

The IT dysfunction within the NDIA, which has plagued the NDIS since the outset, is regarded by most service providers as inexcusable. We have heard many reports of difficulties experienced in using the provider portal.

Several service providers have found that responses to questions put to the NDIS differ from person to person. This is being interpreted in the field as the NDIA staff receiving inadequate training, or not having a strong understanding of the scheme.

One CEO of a community disability service provider in regional Queensland likened his interactions with the NDIA to "trying to do a puzzle without having all the pieces".

In relation to regional and remote communities:

Maurice Blackburn has long advocated that the shifting structure of the market plus the existing thin markets in regional and rural communities will require strong and specific intervention by the NDIA.

We believe that options including the retention of block funding where appropriate, leveraging established community organisations, using hub and spoke models and relying on other mainstream providers are all worthwhile considerations. But it needs to be done on the basis that staff are paid appropriately, engaged appropriately and that market rates can vary significantly between communities.

Maurice Blackburn has been made aware that there are a number of communities where plans have been created for participants but there are no service providers to provide the services. In one case, a participant in a remote Queensland town has had a plan developed for \$100,000 of care needs, including respite care. The closest appropriate respite care provider is 800 kilometres away.

Ensuring that staff are available to provide services in regional and remote communities involves acknowledging that pricing will be different in those areas.

Service providers that we work with report that transport support offered through the NDIS is seriously deficient for the regions. This takes two forms:

- Enabling clients to travel to access services, and
- Enabling service providers to send their staff to remote areas.

In many cases, what these agencies pay their staff per hour is currently greater than what is provided to the participant for that support through the NDIS.

Questions Related to Thin Markets

Issues Paper Questions:

How common are thin markets in Queensland, what is causing them and how significant are their impacts? Where are they and for which services?

Did the gaps in service provision predate the NDIS, or have they emerged since 2016?

What are the consequences of thin markets for the achievement of NDIS outcomes?

Are there any other factors affecting specific markets or market segments, including in rural and remote areas?

Maurice Blackburn has heard a number of clear messages both from our own NDIS clients as well as from service providers about the significant challenges posed by the issue of thin markets for participants within the scheme. With 13 offices located in Queensland, Australia's most decentralised state, we believe we are well placed to comment on the experiences of our past and former clients in thin markets.

These concerns regularly touch on a number of common points, including that in many cases the issue of thin markets creates substantial impediments for participants, particularly those whose plans are considered to be manifestly inadequate from the outset and who are seeking review of these plans.

This includes:

- Inadequate and unrealistic pricing with respect to the key services a person with catastrophic, long-term injuries may require;
- Significant difficulties for clients in rural, regional and remote areas in securing reliable access to appropriate care services;
- Equally significant challenges with respect to accommodation and the availability of appropriate supported/assisted accommodation, particularly in rural, regional and remote areas;
- Pricing policies that serve only to limit services and in many instances lead to the withdrawal of key service providers from the NDIS market; and
- A shortage of legal or advocacy support for NDIS clients who must navigate a complex system while also assessing whether their care plans are adequate and should be reviewed.

Maurice Blackburn presents here a case study detailing thin market challenges experienced by a client through a merits review process in relation to their NDIS plans.

Case Study

12 year old Mia was born with autism and suffers epilepsy. She lives with her parents on their working farm about 15 kilometres from a thriving agricultural and mining regional centre in Queensland.

Mia has complex psychological needs, hypersensitive sensory processing disorder and is non-verbal. Mia cannot identify who she is or where she lives and requires care and supervision for 24 hours per day due to wandering, self-harm and anxiety symptoms. She also requires physical help to complete all basic activities of daily living, domestic duties, including meal preparation, laundry, cleaning, community access and participation in meaningful activity. Mia also requires care from a speech therapist, occupational therapist, psychologist, dietician and physiotherapist.

Mia's parents are juggling providing continuous care and supervision of their daughter while managing their farming business and their own health and aging issues. The parents report feeling burnt out and constantly in fear of not being able to care for their daughter. This isolation and anxiety increased when a long-term carer who had assisted the family could no longer work for them and left the area because the NDIA required all funded carers to have particular qualifications.

After a deeply deficient NDIS planning process that left Mia with a NDIS plan which fell far short of her reasonable and necessary supports, Mia's parents obtained independent evidence and launched an appeal with the help of our firm. The NDIS conceded the appeal and Mia's plan was adjusted to include an increase of over 400% in funding on the first NDIS plan.

This new plan includes funding to employ carers to help Mia. However, Mia's parents now struggle to find suitably qualified and experienced staff to care for their daughter's complex needs. Over the past 9 months, Mia's mother has interviewed more than 20 people to fill a carer position without success. The applicants are either untrained or uninterested in work which cannot pay the same wages as the nearby mines. Some applicants also refused to work for the family because it would require self-transport to the farm which is located about 15 kilometres from the nearest regional centre (Mia's plan does not include funding for transport for carers).

Mia's parents have subsequently turned to a local service provider to help them find staff and while they now have two potential part-time carers with the required certificates of training, these people have no experience working in the disability sector and are requiring weeks of training. The consequent disruption and sensory overload is proving particularly distressing for Mia. The family is also paying transport costs for the two workers out of their private savings and say that the service provider reports that it is also experiencing great difficulty in competing with the high wages of the local area mines.

Mia's parents are now extremely concerned that if they are unable to find enough suitable carers and use the funding they have been allocated within the designated time frame that these funds will be removed from Mia's plan. This is a common issue experienced by clients in thin markets, but particularly for those in rural, regional and remote areas who have high care needs which they should be funded for, but risk losing that funding because the services are not available to them locally to utilise this.

Over many years, our firm consistently advocated that the pace of roll-out should have been modulated to prioritise market readiness, including ameliorating the longer term issues associated with thin markets.

We argued that failure to do so would create a vacuum of specialist services due to the lack of availability of services, providers leaving the scheme due to unrealistic pricing models eroding sustainable profit margins and a critical lack of accommodation appropriate for people with disabilities.

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.

With respect to the many issues identified around funding and pricing models, we believe that block funding should be seriously considered as part of a range of approaches to alleviate short-term issues in transitional funding arrangements, and responding to thin markets.

The NDIA needs to ensure that an appropriate balance of large providers is in place, but also that small, more niche providers are also available and viable. In our view, larger providers are more likely to adopt, or abide the cookie-cutter, inflexible approach to participants' plan formulation that, as discussed earlier, besets the NDIS at present.

The NDIA is trying to achieve a balance between providing cost-effective services, scheme sustainability and ensuring market supply. However, we also believe that the NDIA's objective is to be, and to remain, the price setter for disability services throughout the nation.

We have long argued that that objective creates an irreconcilable tension with the practicalities of the availability and cost of services being vastly different region to region. We believe that the pricing policy must reflect the goal of becoming genuinely market-based. If the NDIS does not fully respect actual market dynamics, market development will not occur and participants will not be able to access the services they require.

In summary, Maurice Blackburn believes that, in response to thin markets, the pricing of services in regional and remote communities should be aligned with the true market cost of providing those services. This is especially pertinent in the areas of:

- Staffing;
- Transport (and travel); and
- Access to technology.

Questions Related to Workforce Development

Issues Paper Questions:

Are there impediments to workforce development within the NDIS? What are the roles of providers and governments in reducing these impediments?

In what ways may COVID-19 affect workforce development and exacerbate problems associated with thin markets?

What changes have occurred in employment practices as a result of the NDIS? What has been the impacts on workers?

Are adequate policies and programs in place to support the development of the workforce to provide disability services in Queensland? How could they be improved?

Should the Australian or Queensland governments or both be responsible for workforce development policies and programs?

Maurice Blackburn believes that the most important factor in ensuring that the disability support workforce is fit for purpose lies in the sector's ability to provide secure, long term employment.

We remain particularly concerned about the potential for increased casualisation of the service provider workforce, and a growth in precarious employment in the absence of sufficient workforce planning.

It is not an exaggeration to say that the obvious deficiencies in the disability workforce represent an existential threat to the efficiency and sustainability of the NDIS. Without immediate and extensive action, the NDIS workforce will quickly become under supplied and under skilled, with predictable tragic consequences for participants to quickly follow.

Before addressing the questions on workforce development, we draw QPC's attention to an issue raised by the Australian Lawyers Alliance in its submission to the JSC's current inquiry into the Quality & Safeguards Commission¹⁵. Their submission reads, in part:

The ALA draws the Committee's attention to an issue which we believe has the potential to become an imminent crisis for the NDIS, and thereby, the Commission.

It has been identified that aged care workers, working across multiple aged care facilities, has been a major contributor to the spread of COVID-19 in that industry.

The Federal Government, in partnership with their Victorian counterparts have identified a specific plan to address this issue. According to government announcements¹⁶, this plan includes funding to:

- *Ensure aged care employers can cover any additional entitlements to enable employees to work at a single site;*

¹⁵https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/QS_Commission; Submissions have not been published on the JSC website at the time of writing.

¹⁶ See for example: <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/support-for-aged-care-residents-and-aged-care-workers-across-victoria>

- *Engage and train additional staff where existing employees are unable to work due to self-isolation requirements and/or where a more intensive workforce mix is required;*
- *Support aged care workers who are unable to work due to symptoms, self-isolation or travel restrictions, regardless of whether they would usually receive paid leave.*
- *Provide alternative accommodation so workers who live or work in hotspots can continue to work.*

This plan operates in conjunction with Victorian Government initiatives designed to discourage employees from working when they feel unwell¹⁷.

At the core of this problem within aged care is the sector's reliance on insecure work – casual employment arrangements, subcontracting arrangements and the like.

The ALA is concerned that the exact same issue is likely to come to the fore in the disability support sector¹⁸.

The preconditions of the COVID-19 crisis in aged care also exist in the disability sector:

- ***Highly susceptible service recipients***
- ***A highly mobile workforce***
- ***A workforce based on insecure work arrangements, mostly without sick pay, who are forced to choose between working when sick, and not being able to financially support their families.***

The ALA urges the Committee to consider an immediate response to this inevitable and impending crisis, and consider its expectations of the Federal Government, the NDIA and the Commission in ensuring participant safety.

The death toll in the aged care sector due to this issue is unnecessarily high. The Committee needs to act quickly to ensure that this is not replicated in the disability community.

Maurice Blackburn shares the ALA's concerns.

Composition of the NDIS workforce

The Government's 2019 report Growing the NDIS Market and Workforce Strategy¹⁹ tells us that:

To assist providers to deliver these services, the NDIS is expected to be one of the largest job creation opportunities in Australian history, with up to an additional 90,000 full time equivalent employees (FTE) needed over the next five years. This will include a mix of highly skilled positions and a large number of roles that do not require formal qualifications. The NDIS will thus become the main supplier of funds for the employment of disability care professionals.

¹⁷ <https://www.dhhs.vic.gov.au/covid-19-worker-support-payment>

¹⁸ Our emphasis

¹⁹ <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/growing-the-ndis-market-and-workforce-strategy>; p.1

Maurice Blackburn submits that this headline focus on the size of the workforce is unhelpful. The focus for workforce development has to be on quality of service rather than the overall quantity.

Maurice Blackburn believes that the best outcomes for people with disability will be achieved when service providers offer secure, long-term employment, with attractive pay, conditions and professional development opportunities.

A focus on the scale of the workforce will only lead to a focus on finding ways to fill positions, with whoever is available at the time. There is a real risk that attempts to address the shortage of workers will lead to a reduction in quality standards, worker exploitation, and/or increasing costs.

Any focus on workforce development must start with the primary focus being on service quality.

We note that the Government's strategy document mentioned above prioritises fostering a capable workforce, through:

- Developing workforce capability, and
- Improving formal qualifications in the sector²⁰

We agree that this is an appropriate starting point.

We also note, however, that there is no mention in the strategy of focusing on the creation of secure, long-term employment opportunities. There is no mention of working with unions to ensure appropriate work conditions are fundamental. The focus seems to be on workforce flexibility. While ever this is the underlying ethos, Maurice Blackburn believes the sector will never fulfil its responsibilities to people with disability.

There must not be a 'lowest common denominator' approach to the provision of services to people with disability.

Remuneration, conditions, working environment, career mobility and training needs of the NDIS workforce

At the risk of stating the obvious, ensuring that NDIS pricing is competitive will assist in the retention and attraction of workers. The Commonwealth Government has almost complete control of this particular lever and must ensure that NDIS fees for services encourage and promote employment in the disability sector.

Further, Maurice Blackburn believes that workforce infrastructure planning is a fundamental issue for the NDIS in terms of quality outcomes and sustainability.

The Productivity Commission report which was the foundation for the scheme was woefully deficient in providing any workforce solutions. A high-quality, better skilled workforce is needed if the quality of support to individuals with complex needs is to improve.

Maurice Blackburn has long advocated that measures should be put in place to enhance skills training and capacity of the disability workforce.

²⁰ Ibid; p.9 & 10

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 workers will be recruited to work with people with complex multifaceted needs;
- Those workers will be highly vulnerable to exploitative conduct by their employing entity;
- Participants will suffer detriment as a consequence; and
- The intended benefits in increased workforce participation will be illusory.

As mentioned earlier, we remain particularly concerned about the potential for increased casualisation of the service provider workforce, and a growth in precarious employment in the absence of sufficient workforce planning.

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 has been a persistent issue, 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. (This is discussed more broadly below).
- The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants.

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.

The role of the Queensland and Commonwealth Governments in providing and implementing a coordinated strategic workforce development plan for the NDIS workforce

The legislation underpinning the NDIS enshrines a very important role for states and territories within its provisions. On the majority of substantive issues, states and territories have a powerful voice in the directions chosen by the federal government and the NDIA.

These powers should not be taken for granted.

It should be remembered that, until recently, states and territories had the majority say in how the needs of people with disability were serviced in their jurisdiction. This institutional memory should not be discarded.

People with disability, and service providers, are reliant on state and territory governments to remain analytical and critical of decisions happening at the federal level.

State and territories need to remain alert to changes that erode this power of veto and oversight. Nowhere is this more important than on issues pertaining to the entitlements offered under the scheme, and the workforce which provides those services.

The interaction of NDIS workforce needs with employment in adjacent sectors including health and aged care

Adjacent sectors are currently operating in tsunami-like circumstances:

- The aged care sector is dealing with the influx of baby boomer generation clients, and will shortly be having to respond to the outcomes of the Royal Commission. It is also under enormous pressure from the COVID crisis – especially given the experiences in NSW and Victoria.
- The health sector is also under immense strain from the current COVID-19 crisis. Many workers in the health sector will take a significant amount of time to recover from the stress and anxiety created by this pandemic. There is a real risk that fed up workers will leave the sector.

The disability sector will be competing with those desperate adjacent sectors for skilled workers. The heightened need for workforce planning cannot be underestimated.

The Growing the NDIS Market and Workforce report tells us that²¹:

*To help grow a capable workforce that delivers supports and services that maximise the health and wellbeing of NDIS participants, the Government, through the NDIS Commission, will be developing an NDIS Capability Framework. The Capability Framework, **which will be developed over a three-year period** coinciding with full scheme, will set out the behaviours and core capabilities to be demonstrated by providers and workers when delivering services, depending on their role.*

The report goes on to say:

During the development phase, the Government will work closely with state and territory governments as well as NDIS providers, participants, workers, and technical experts to create a framework that complements workforce capability frameworks that might exist in other jurisdictions or sectors. The Capability Framework will be an important resource for NDIS providers in workforce planning and development.

Maurice Blackburn encourages QPC to consider whether this cascading series of frameworks is the best response, when equipping the sector to compete with adjacent sectors currently in crisis mode in relation to capacity.

If the disability sector were to focus on the creation of secure, long-term employment opportunities, including access to excellent professional development opportunities, this would make them more than competitive in the jobs marketplace.

Workforce issues related to the delivery of NDIS services to Aboriginal and Torres Strait Islander peoples.

We have read the Australian Lawyers' Association submission to the JSC's inquiry into the NDIS Workforce²², and commend their findings on this topic to the QPC:

- 45% of Aboriginal and Torres Strait Islander people report living with disability or long-term health conditions.
- 7.7% of Aboriginal and Torres Strait Islander people reported having severe and profound disability.
- This is 2.1 times the rate for non-Aboriginal and Torres Strait Islander people.
- The prevalence of disability is higher among Aboriginal and Torres Strait Islander women (47% reported living with disability or long-term health conditions, with 8.4% experiencing severe and profound disability, compared to men: 42.9% and 7.1%).

²¹ Ibid; p.9 & 10. (Our emphasis)

²² <https://www.aph.gov.au/DocumentStore.ashx?id=a16f0a83-75ec-4153-ae3e-1150ff731447&subId=680103>

- The majority of Aboriginal and Torres Strait Islander people with disability live in poverty, lack access to disability-appropriate housing, and young Aboriginal and Torres Strait Islander people with disability often cannot attend school or can only participate in a limited way because the local school cannot accommodate their disability.²³
- That Aboriginal and Torres Strait Islander people with disability often fail to get NDIS plans or are given seriously under-resourced plans. One major reason for this is the absence of meaningful advocacy support for Aboriginal and Torres Strait Islander people with disability to access the NDIS.²⁴
- The difficulties of accessing appropriate NDIS plans is particularly serious in remote communities, where 44% of Aboriginal and Torres Strait Islander people report living with disability or long-term health conditions and 7.5% report having severe and profound disability.
- The lack of services in remote Aboriginal and Torres Strait Islander communities means that either the community itself must bear the cost of providing necessary support services to Aboriginal and Torres Strait Islander people with disability, or that those people must leave the community and their Country in order to access the necessary services. The latter option presents a difficult dilemma for Aboriginal and Torres Strait Islander people with disability.
- The NDIS needs to be prepared and equipped to provide necessary support services in remote communities so that Aboriginal and Torres Strait Islander people with disability can continue to participate in community, cultural and ceremonial activities.
- The lack of access to disability support services in remote communities has a significant discriminatory effect on Aboriginal and Torres Strait Islander women. This produces a gender inequity in which the burden for compensating for lack of services in remote communities falls predominantly on Aboriginal and Torres Strait Islander women, either through the provision of informal care, or in being forced to leave communities and Country in order to access necessary support services.²⁵

²³ Griffis, Damian (2019). *In traditional language, there is no word for disability*. The Guardian, 21 November 2019.

²⁴ Griffis, n 4 above.

²⁵ Ibid.

Questions Related to Pricing

Is the NDIA's transitional pricing strategy working effectively in Queensland?

How is price regulation affecting market development in Queensland, particularly in thin markets?

In what ways could price regulation be improved?

As mentioned earlier, Maurice Blackburn believes that the pricing model must reflect the true market cost of service provision – everywhere, but particularly in regional and remote communities.

We believe that the main focus of pricing policy must shift from scheme sustainability to target market development.

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:	Original Plan	New Plan	Variance from Original to New Plan
Support Area			
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:	Original Plan	Agency Offer (post conciliation)	Legal Counter Offer	Agency Counter
Support Area:				
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