

30 March 2021

Joint Standing Committee on the National Disability Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ndis.sen@aph.gov.au

Dear Committee Secretary

Inquiry into Independent Assessments

Thank you for the opportunity to provide feedback on the Inquiry into Independent Assessments under the National Disability Insurance Scheme (the **NDIS**). The Queensland Law Society (**QLS**) appreciates being consulted on this important inquiry.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Executive Summary

- QLS does not support the introduction of independent assessments and has concerns that the proposal does not comply with the object and principles of the *National Disability Insurance Scheme Act 2013* (the **NDIS Act**).
- The proposed process of independent assessments is flawed. It will not achieve its objective, and risks operating to exclude people from social and economic participation, contrary to the objectives of the NDIS Act.

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This response has been compiled with the assistance of the QLS Diverse Abilities Network, whose members have both professional expertise and ongoing lived experience with the operation of the NDIS, and the QLS Health and Disability Law Committee, whose members have substantial expertise in this area.

QLS does not support the introduction of mandatory independent assessments as proposed. We enclose for your reference our previous submissions dated 16 October 2020 and 5 March 2021 which outline our concerns, including that the proposed concept is inconsistent with the object and principals of the NDIS set out in the NDIS Act.

We reiterate this position with respect to the recent consideration of the independent assessment process by the Administrative Appeals Tribunal, in the matter of *Ray*.¹ The Tribunal found that the use of an assessor and the assessor's findings were inappropriate in the circumstances. Consistent with concerns raised by our members, the decision demonstrates that the process may operate to exclude people who meet the legislative requirements for assistance through the NDIS.

Need for appropriately qualified NDIA staff

QLS considers that some of the objectives of the proposal would be better met by improving the robustness and efficacy of training programs provided to National Insurance Disability Agency (NDIA) staff. Without appropriately trained delegates and agency support staff, equitable decision-making and outcomes for participants cannot be assured. The scheme should ensure staff are comprehensively trained and upskilled to deal with particular injury cohorts, to ensure decisions are consistent and equitable.²

The implementation of targeted services and funding to manage 'starting inequity' between persons applying for the scheme would better assist in the provision of equitable support for all eligible persons. Independent assessments alone will *not* improve the disparity that can arise from differing levels of capability of applicants.

There will still be financial barriers regarding access to the scheme as participants need diagnostic reports and evidence of permanency, which will not be provided by independent assessors.

Compatibility with the NDIS Act and human rights implications

The imposition of independent assessors as proposed is contrary to the intention of the NDIS Act – depriving individuals of the choice, autonomy and control that the legislation purports to promote. For applicants who are already connected with allied health professionals, the imposition of an additional step in the process which requires a person to undergo a separate assessment by a person unknown to them from a limited pool of assessors has not been adequately justified by the NDIA's governing body, or by the Department of Social Services.

¹ *Ray and National Disability Insurance Agency* [2020] AATA 3452 (8 September 2020).

² Greg Spinda, *Equitable Rationing: The Survival Kit for the National Disability Insurance Scheme*, LWN164 Health Care Law and Ethics, Queensland University of Technology, 2016, 2, 19.

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It is also contrary to the recommendation made by the Tune Review that “the NDIA should not implement a closed or deliberately limited panel of providers.”³ The tendering process for organisations to deliver independent assessment services and the selection of only eight tender-winners has been widely criticised. A better approach would be to accredit a wider group to provide this service. An applicant could then choose from that group, which would help to preserve an applicant’s autonomy, choice and control.

Further, and of significant concern, is that these assessments, conducted over a limited time by an assessor unknown to an applicant maybe considered to carry more weight than an assessment of the applicant by an allied health professional known to the applicant.

Forcing a person to be examined unnecessarily is an affront to a person’s dignity; the process of retelling their story to a stranger can be triggering, particularly for people with psychosocial disability. This method does not properly consider if any assessor will be socially or culturally appropriate for an individual and their circumstances and no guarantees have been made by the NDIA in this regard. The agency has advised that ‘where possible’ people can choose the gender of their assessor. This uncertainty is unacceptable for individuals who have a history of trauma or abuse.

Whilst reducing functional assessments to a brief or singular assessment may be intended to simplify and bring consistency to assessing NDIS applications, our members have concerns that this approach represents a ‘one size fits all’ attitude towards people with disability, which is inappropriate given the diversity among this cohort of people. It is also at odds with the values of the NDIS Act as described under Part 2.

Compounding the specific concern relating to independent assessments are the widely held concerns associated with the use of delegates. These concerns have been known for some time. Reliance on delegates in relation to implementation and operationalisation of scheme functions is problematic, as decisions made in individual cases rely on a degree of discretion – and with this the risk of bias, inconsistency and lack of accountability.⁴ Whilst the Operational Guidelines are intended to set criteria to guide delegates in decision-making, we note that much of these merely repeat the NDIS Act and the Rules, and have been criticised as not providing tangible guidance in relation to assessing participant needs.⁵ We recommend that the Operational Guidelines are urgently reviewed to make amendments which are geared at providing tangible assistance to delegates who will rely upon them.

Review process must consider the substance of an assessor’s decision

The proposal to limit access and scope of any review initiated in response to the outcome of an independent assessment is unacceptable, and runs contrary to the principle of the NDIS.

If the assessment process is to be introduced at all, it must be fully reviewable. Procedural fairness and the right to natural justice owing to an applicant cannot be achieved unless an applicant is provided with the right to review the substance of an assessment with which they do not agree.

³ Sara Gingold, *Facts M.I.A At the NDIA?*, < https://teamdsc.com.au/resources/facts-mia-at-the-ndia?_ke=eyJrbF9jb21wYW55X2lkIjogIlg4ZVJzSilslCJrbF9lbWFpbCI6ICJhbmRyZWFKc0BxYWkub3JnLmF1In0%3D>.

⁴ Above n 2, in reference to Volker Schmidt, ‘Models of healthcare rationing’ (2004) 52(6) *Current Sociology*, 969, 970.

⁵ *Ibid*, 14.

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As mentioned above and illustrated in *Ray*, QLS has significant concerns about the ability of an assessor to be able to carry out an assessment and come to a reasonable conclusion that demonstrably and adequately captures the complexity of a person's background, needs and day to day experience. This process also appears to allow an assessor to ignore the advice of specialist clinical and allied health professionals who are familiar with the individual and their circumstances, and who have made recommendations regarding their support needs.

Attachment A provides direct accounts, from QLS members that illustrate some of the challenges, concerns and indignity associated with requiring a person to engage with an assessment process such as that proposed.

We are also concerned that the proposed assessment process, which is not reviewable, is inconsistent with Australia's international human rights obligations pursuant to the Optional Protocol to the Convention on the Rights of Persons with Disabilities (the **CRPD**).

Australia has already attracted criticism under the CRPD. The body which assesses Australia's performance, the CRPD Committee, issued a Concluding Observation in 2019 which specifically addressed the existing criteria to access services:

5. The Committee is concerned about:

(f) The inaccessibility of the National Disability Insurance Scheme due to complex procedures, limited publically available and accessible information and the lack of services in remote areas;

6. The Committee recommends that the State party:

(e) Review disability assessment criteria for support schemes under the National Disability Insurance Scheme and align them with the human rights model of disability, ensuring adequate support for older persons with disabilities, persons with disabilities from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander persons with disabilities and persons with intellectual or psychosocial disabilities;

(f) Simplify, clarify and make National Disability Insurance Scheme procedures more transparent, including by making information publically available and accessible, and ensure that the Scheme meets the diverse and intersecting requirements of persons with disabilities in all areas;⁶

Comprehensive consultation must occur before the process is introduced

We repeat the position set out in our previous correspondence, that substantial additional consultation is required. This must include engagement with current NDIS participants, as well as persons with disability who have not been able to access the scheme, disability advocates and other key stakeholders.

⁶ Concluding observations (2019) CRPD/C/AUS/CO/2-3

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdcBNJQCwIRF9xTca9TaCwjm50InhspoVv2oxnsujKTRetaVWFxhEZM%2f0OdVJz1UEVZZ66wu3f%2bt9rr%2f1nhrm%2b>

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The introduction of any mandatory assessment program should integrate timely and efficient internal review mechanisms for participants seeking to review a decision made by an independent assessor, including the substance of that decision (and not merely the process followed). This is a critical step in seeking to assure participant accessibility to justice and due process, and to build community confidence in the scheme.

Thank you again for the opportunity to comment. We would be pleased to discuss these issues with the Joint Standing Committee.

Yours faithfully

Elizabeth Shearer
President

QLS submission

Person A

- I have been completely blind all my life, and I have developed a severe hearing impairment from my childhood years due to a rare genetic condition called Norrie disease. I live alone, and although I am close with my family (who live interstate), I receive assistance from the NDIS to remain productive, and achieve the goals that I set myself to the best of my abilities.
- I agree with the common experience of NDIS participants finding reviews stressful. To be successful at my fulltime job and in life, I have cultivated a sense of independence, as many others with disabilities do, to the extent that they can. To undertake an NDIS assessment is to flip the switch, and engage with a very confronting process of listing what I can't do, or what tasks and activities I require assistance with doing. It goes against my natural inclinations to play to my strengths and frame those limitations and things that I can't do positively so as to emphasise that the same goals can be met or be it through a different way to achieve them. In summary, disability or no disability, no one likes to confront their weaknesses, and particularly in a formal, clinical setting.
- The best example of where I have found it challenging to confront my limitations is the process of shopping. Can I shop independently? Why yes, I can, and do so on a regular basis as a matter of necessity. I can shop infinitely more efficient with the assistance of a support worker. This in turn, allows me to put my limited resources and capacity into doing other things, like my work. The point I am making is that a basic functional question that is central to the NDIS assessment can be answered in different ways. The answer I give will depend on my knowledge of the system, the purpose of the question, and my own willingness to be vulnerable, and provide the assessor with what I believe to be an accurate reflection of my functional capacity.
- If I find it hard to provide an assessor with an accurate indication of my actual capacity as a white privileged male with English as a first language, it is absolutely inevitable that those in more vulnerable circumstances and or from linguistically diverse backgrounds will find it more so. It is therefore essential that independent assessments are reviewable, because mistakes will be made by both assessors and participants – in the conclusions assessors draw from what a participant is willing to tell them, and from a participant's answers themselves. This is particularly the case where the participant doesn't adequately understand the question, the context in which the question is asked, and the overarching purpose of the assessment as a whole.
- As above, I am in the fortunate position of having access to the knowledge I need to understand the purpose of the review process, which in turn gives me the confidence I need to be vulnerable when it comes to the answers I provide to the assessor. The fact that assessments are reviewable in the event an error is made reduces my stress, and gives me confidence in the process as a whole.
- To take another personal example to illustrate this point of varying outcomes between people with the same or similar functional capacity, it was not until I walked the assessor through the impact of my complete lack of vision and severe hearing impairment that I was able to articulate the functional limitations of my circumstances as a whole. Hearing aids are not just a 'nice to have' in my case. They are essential, and can literally mean the difference between life and death. Someone with exactly the same functional limitations as myself may well achieve a suboptimal outcome if either the assessor doesn't adequately understand or

take account of the unique challenges someone who is Deafblind faces, or if the individual in question isn't able to articulate these challenges to the extent that I was able to do so.

- I am of the strong belief that reducing opportunities to have assessments reviewed will widen the gap between those fortunate souls such as myself who can advocate for themselves or have strong support networks to advocate on their behalf, and those who, through no fault of their own, do not provide the kinds of information to the assessor that would be required to achieve a more optimal outcome had this information been provided or had they had another opportunity to articulate their needs with the right supports in place.
- Limiting access to reviews of independent assessments has nothing to do with efficiency, and everything to do with requiring participants to get it right on the first try, or not it all. It will increase stress across the board, and it will also favour participants who are functionally able to engage with assessment processes on their own, or who have the formal or informal supports to engage. In short, limitations will do precisely the opposite of what the NDIS was designed to do in disadvantaging the most vulnerable of an already vulnerable group. It will entrench both privilege and an underclass of people with disability based purely on one's ability to engage with a standardised assessment, and a large dose of luck, in one's personal circumstances. I am therefore strongly opposed to the proposal to impose independent assessment on existing and prospective NDIS participants as the final and non-reviewable outcome of one's application and continued eligibility for support as a participant in the scheme.
- I do not doubt that the scheme must receive continued scrutiny in terms of how best to administer it. Such considerations must be given to procedural fairness however, as a fundamental principle.

Person B

- I was born with hEDS (Hypermobile Ehlers-Danlos Syndrome), and in 2013 I was diagnosed with Postural Orthostatic Tachycardia Syndrome (POTS). Later that year, I was also diagnosed with Myalgic Encephalomyelitis /Chronic Fatigue Syndrome (ME/CFS). Unfortunately, there has been no silver bullet or magical treatment that has cured me of my impairments and disabilities. What is clear however, is that my disabilities are complex. Without previous knowledge of my conditions and the lengthy list of associated impairments, these conditions are not easy to explain. Due to my impairments from these disabilities, as well as the kinds of supports I need to have in place in order to function, it is essential that treating medical and allied health professionals are experienced, and understand that any treatments, no matter how simple can cause detrimental effects to me which I may never recovered from.
- I am unable to work or care for myself. I am unable to safely complete activities of daily living such as personal hygiene, showering independently, getting dressed, meal preparation, shopping, house cleaning, house and garden maintenance. I am mostly housebound and I have very few useable hours in the day. I am unable to participate in and enjoy many of the activities that I previously did.
- Since becoming an NDIS participant, I am now getting the supports I need to live life independently and now have choice and control of my supports.
- I am telling my story in this submission to make the point that independent assessments with standardised tools and with an allied health professional with no prior contact with a person with complex diagnoses and rarer conditions should not be given more weight than the opinions and experience of a treating GP or specialists. It is my view that decisions based

on independent assessments alone may well lead to adverse outcomes for a person with a complex medical history – being locked out of the NDIS scheme altogether, or lead to ill-informed or inaccurate recommendations as to appropriate supports for that participant. Such decisions should take treating GP and medical professional specialist opinions and advice into account as these are based on continued progress in our understanding of diagnosed conditions such as mine.

- The six allied health professionals that are currently being recommended for use in independent assessments are occupational therapists, physiotherapists, speech pathologists, psychologists, rehabilitation counsellors and social workers. Which of these allied health professionals are going to have the requisite experience and background knowledge to assess me? I don't have a mental health condition or a speech issue, so psychologists and speech pathologists aren't going to be the best allied health professional for my assessment. To gain access to the NDIS, I need to satisfy the legislation that my impairments and disabilities are permanent, as there are no known, available and appropriate evidence-based treatments that would be likely to remedy any or all of my impairments and disabilities. Therefore, my impairments and disabilities are not going to improve, so a rehabilitation counsellor and or social workers will not have the knowledge or skills to assess me in a practically and fair way. That leaves physiotherapists and occupational therapists. A very well educated and well-read physiotherapist should know about the effects of hEDS. However, are there any guarantees that they are going to have the medical knowledge to best assess me concerning the major and debilitating impairments from POTS and ME/CFS, such as PEM (Post exertional malaise)? Occupational therapists will be available to physically see what I am capable of achieving. However, am I going to be required to educate a different occupational therapist each and every time I have a review? Will I be required to use what little stamina I have to explain, in detail, that my impairments and disabilities affect more than what is visible to the naked eye? How is an OT with no knowledge or understanding about PEM, cognitive dysfunction, temperature dysregulation, autonomic dysfunction, insomnia, let alone the impacts from hEDS, be expected to accurately assess all my impairments and disabilities in a holistic manner without any previous knowledge about my conditions? How can a generalist be expected to determine what supports are adequate and reasonable and necessary in my circumstances, and that will allow me to live an independent life?
- I am also very concerned that decisions based on the outcomes of independent assessments will be non-reviewable, because I think it will lead to the practical outcome of the NDIS favouring disabilities that are straight forward and "tick boxes", so to speak. Understanding one's full background and personal history is often essential in gaining an insight into that person's functional capacity, especially when dealing with complex cases. It would be a dark and sad irony indeed if the NDIS Scheme were administered in such a way as to discriminate against individuals based on their diagnosis and disabilities. This has a very real potential of occurring if the decisions made on the basis of an inaccurate or incomplete assessment are not able to be challenged or be better informed by supporting evidence and facts from a treating GP or medical or allied health specialists with more specific and relevant knowledge than the assessor can be expected to have in their possession based on a single contact with a participant.
- Finally, I am highly uncomfortable with the idea of having to explain my complex and relatively uncommon conditions and justify my need for supports continually at the review process to someone I have never met. When I do, they are very likely to have little to no familiarity with these conditions and how they impact upon my day-to-day life. My conditions are exacerbated by exertion to a point where I am unable to function, and the prospect of going through this process every time I have my review concerns me greatly. I understand the need for a review to check in on how a participant's needs are being met

and what may have changed in the previous year. What scares me however, is the prospect of continually having to rely upon a decision informed by a single assessment and conducted by a single person whom I have never met, where the decision is deemed final. The proposed assessment process gives the assessor a great deal of power, and it gives me none. Although my initial NDIS application was really challenging to complete, it allowed me to gather the supporting documentation, it also put the ball in my court when it came to articulating how my day-to-day life is impacted by my disabilities. It provided a pathway through which I am now making use of supports to meet my NDIS goals and have a far better quality of life than I enjoyed prior to being a participant. I am really worried that the proposed that a non-reviewable independent assessment will limit my ability to explain in my own words what is working for me, and what has not worked in the past.