**From:**
**To:** Community Affairs, Committee (SEN)
**Subject:** Further comments from QAI
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Dear Committee

During our time with the Committee at the Brisbane hearing on the NDIS draft Bill, the Committee indicated it would be open to additional comments on the Bill if we had anything further we would like to add. I have wrestled with the propriety of providing such comments so long after the invitation was made, but I judge the profundity of the change the Bill will produce once enacted warrants all comment so long as the Committee is prepared to receive it. I will understand if the Committee judges the following comments too late for it to consider, but I do hope you may find time to quickly glance through them as I feel they have something real to add to a deliberation that will affect the lives of hundreds-of-thousands of vulnerable people in Australia.

Kind Regards

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Director Queensland Advocacy Incorporated.

## Human Rights

The Productivity Commission's report on the state of disability support in Australia did more than identify that system's failings and recommend a method for its functional renovation. It aligned the overhaul it envisaged with the advancement of human rights which, in terms of people with disability, find their most complete and articulate expression in the Convention on the Rights of Persons with Disabilities (CRPD). What I do not recall, and please correct me if I am wrong, is the full acknowledgment by the Productivity Commission in its report of just how fragile those rights are, given the lack, of a body both to adjudicate on and provide remedies for, violations of the rights described in the CRPD and other relevant instruments.
One such instrument is the Disability Services Act 2006 (Qld) (DSA). Section 19 of that Act outlines the human rights of the people whose lives it encompasses. These rights are described in terms of full correspondence with the human rights enjoyed by other people. Yet the language of the DSA ensures that these rights are hardly more than aspirational given that their application is only 'encouraged' and not mandated. The CRPD is hardly more helpful. It is a bona fide international instrument ratified by the Commonwealth that binds all levels of government. Even so it is considered to represent little more than a developmental guide for governments seeking to improve the status of people with disability. It suffers this humiliation because its boldly drafted Articles are reduced to little more than plaintive entreaties by the lack of any domestic mechanism to enforce the principles they express. If Government is serious about self-directed support and about better quality lives for people with disability, it will make human rights enforceable at domestic law by enacting the relevant instruments into applicable legislation, and by empowering a tribunal to adjudicate allegations of their breach.
To its great credit the NDIS draft bill goes some way to incorporating elements of the CRPD into its objects in section 3. It states that part of its objects are to give effect to certain obligations under the CRPD. Just what those obligations are, however, it does not specify. It leaves room therefore for either an extremely narrow or Liberal interpretation of just what those obligations may be.
The productivity commission made it plain in its final report on the NDIS that the NDIS could not be a catchall that would provide every kind of support to people with

disability. It identified certain areas of life where other entities should take primary responsibility for providing the supports people with disability require. These included areas such as transport, health, employment, and education. Yet QAI is aware of instances where reluctance has marked the attitude of the relevant entities and agencies to provide the necessary support for people with disability to obtain the full expression of the rights in these areas as described in the CRPD. For example, QAI is aware of a young man with high support needs who was admitted to hospital. Nurses were reluctant to provide the regular turning and lifting he required and suggested support workers should come in to provide that service. The service provider was reluctant to provide support workers to fulfil a role it believed should be provided by the hospital. Equally QAI is aware of instances in education where the education system has proved disinclined to provide high-level support services to students in mainstream schools, believing those supports should be provided by the government agencies directly tasked to provide to people with disability the supports and services they require to enjoy the healthy quality of life people without disability take for granted.

If a narrow view is taken to the interpretation of the obligations under the CRPD to which the Bill intends to give effect, these sorts of problems may continue. We will see the continuation of this petty and selfish bickering over jurisdiction and responsibility that has served to make the lives of people with disability less warm, less inclusive, and less bearable than they otherwise should be. A broad interpretation of those obligations would allow the NDIS to step in on such occasions, or perhaps more unequivocally, require it to intervene with a full-service response where cross jurisdictional spats threaten the welfare and development of people with disability.

**Objects of the Act**

Section 3(3) provides the matters to which regard must be had when giving effect to the objects of the Act. There are only two. A third should be added. This should read, '(c) the support needs of people with disability and the importance of ensuring that an overzealous attachment to preserving Scheme capital does not jeopardise the service of those needs.' To bookkeepers and actuaries this may seem an absurd or outrageous inclusion. They would argue that if the NDIS collapses because of overgenerous or reckless disbursement of funds, then no one will benefit because the weight of opinion required to launch the NDIS in the first place will never be rallied again, Consequently people with disability could find themselves worse off than they were before the NDIS started. This argument holds validity. It cannot be used, however, to justify excessive parsimony. Prudence is one thing; tightfistedness is another. Insurance companies, or organisations run along similar prudential lines, are not famous for their generosity. A loose parallel may be drawn with the way the Office of the Public Trustee administers the assets of people judged to lack the capacity to manage them on their own. A common complaint against the Public Trustee is the jealous attachment the office shows towards the assets they administer and their reluctance to release funds for anything but subsistence living. These complaints may be exaggerated, but if they contain any substance at all they constitute a warning that cannot be ignored about the potential for fiscal prudence to transform into something hardly removed from avarice. This constitutes a risk to the integrity of the NDIS as great as unbridled largesse. If the NDIS continues, but fails to properly perform its primary function, then it becomes bankrupt of effect other than the maintenance of its own existence. .

General Principles Guiding Actions Under the Bill

Section 4 (1) provides that "People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development." It must be made plain in an Act as seminal as this that the Act itself is, within the limits of its objects and purpose, a font from which this right springs. One way of demonstrating this would be to make some modest changes to the language of section 4 that would add an imperative quality to its principles.
In subsections 2, 3, 4, 5, 9, 10 and 13, for example, removing or replacing the single word 'should" and replacing it with "will" or "must" could propel the possibilities these subsections hold from aspirational dreams to ironclad entitlements. It is worrying to note the use of the word 'should' in these subsections to indicate a situation which ought to be but which in fact is not. If the legislation admits only that people with disability 'should' have the same rights as other people rather than issuing an unmistakeable declarative that they do have those rights, then enactment of the legislation will not change the position of people with disability with regard to those rights.
In this vein, for example section 4(3) would be recast to read - People with disability and their families and carers '*will' or "must'* have certainty that people with disability will receive the care and support they need over their lifetime. Section 4(2) would read - People with disability *'will or 'must'* have their privacy and dignity respected.

Section 4(14) should be redrafted to read 'Innovation, quality, continuous improvement and effectiveness in the provision of supports to people with disability *will be expected and failure to demonstrate continuous improvement could lead to suspension of eligibility to deliver services.'*

**Permanent Disability**

The draft legislation sets out eligibility criteria which must be met if entry into the NDIS will be approved. One of these criteria is the possession of a 'permanent' disability. This should be changed to 'long-term' disability. This would bring the draft legislation into conformity with the CRPD, which describes disability in terms of 'long-term' impairments that prevent full and equal participation in society because of their interaction with various barriers. This is the standard that should be adopted for the NDIS. It may be true that legislation from other jurisdictions refers to the 'permanence' of disability, but that is not the standard we must follow. The CRPD binds all levels of Government and trumps all legislation that contradicts its articles. Consistency with inappropriate standards cannot be used as an excuse for perpetuating the impropriety.

Participants Plans

Section 31 describes the principles that should be taken into account when preparing, reviewing, and replacing participants plans, and managing the funding that is related to those plans. These principles promised much. They promise that plans should be individualised and directed by the participant. They promise that plans and funding will be underpinned by the right of the participant to exercise maximum control over their own life, and that plans will maximise the choice and independence of the participant, and advance the inclusion and participation of the participant in the community with the aim of achieving his or her individual aspirations. They promise all of these things, but only in so far as they 'are reasonably practicable' to deliver. Who decides whether it is reasonably practicable for a plan to be individualised?

Who decides whether it is reasonably practicable for a person to exercise control over their own plan and the administration of their own funding? Who decides how far a person's right to exercise control over their own life will be extended, and what are the criteria that will be applied to reach this determination? These things are not explained. It can only be imagined that it will be the NDIA that will make these decisions and that the decisions will be based largely on their financial affordability. Who decides whether the amount and the supports required to achieve the maximum levels of all these fine principles are reasonable or unreasonable and therefore unsustainable? Again it can only be imagined that it will be the NDIA.
Given the profound effect these decisions will have on the lives of hundreds of thousands of people, there must be a review mechanism participants can engage to secure a re-evaluation of the determination made by the NDIA about the reasonable practicability of granting the participants the choice, the development, the control the quality of life the principles described in section 31 promise. Such a mechanism exists under section 99. All decisions made under section 31 must become reviewable under this section.
Section 48 permits a participant to request a review of their plan at any time. It is at the CEO's discretion to decide whether or not a review will be provided, though if the CEO decides not to grant the review that decision is reviewable. The CEO also has the discretion to conduct a review of the participant's plan at any time. This decision is not reviewable. It should be. A participant may be dissatisfied with their plan and find the prospect of an unsolicited review welcome. On the other hand, they may be perfectly happy with their plan and the package of supports it provides and find the prospect of a review alarming. It is difficult to imagine why the CEO would embark upon the review of a plan if some sort of interference with that plan was not intended. It is entirely possible that planned interference would be motivated by the exhortations to economy regularly repeated throughout the bill to the CEO. Admonitions of this type are difficult to ignore when they are delivered by an employer. When they are built into the legislation that regulates your conduct, assigning to them a position of even shared eminence becomes almost impossible. They become and remain the dominant theme of daily operation. It is vital therefore, to protect the interests of the participants, that a decision by the CEO to review a participant's plan be a reviewable one under section 99. The participants quality of life must not be put at risk because of an overenthusiastic attachment to the bottom line. If the CEO intends to embark upon a review of the participant's plan the participant must be notified of that intention and the clear purposes underlying that intention must be made plain. The participant must be given all the information they need to understand why a review is being planned . They must be able to seek review of that decision and the CEO must be required to present all of the information the participant requires to support that review. If the CEO plans the review because some form of impropriety on the part of the participant is suspected then the evidential burden must lie on the CEO to demonstrate this impropriety both in the notice provided of the planned review and in any subsequent review of the CEO's decision.

Plans and Capacity

Care must be taken to ensure that in a matter of plans and funds management the rights of people with decision-making difficulties are protected. They must be fully included in all of the ways that someone without such a difficulty would be engaged. This would encompass all aspects of plan development and management, particularly where management of the plan was to be exercised by a plan management service. There are presumptions both in the CRPD and the

Guardianship and Administration Act 2000 (Qld) that adults have the capacity to make their own decisions. Yet, the decision-making model regularly followed in Queensland in the event of questions about capacity involves wholesale substitution by another of an individual's rights to make their own decisions. We fear that sometimes this substitution is made in circumstances where a participant could with the appropriate support networks around them make either some or all of the decisions involved in these processes. Capacity is a flexible concept and malleable condition. Incapacity to make decisions in one area, particularly about extremely complex issues, does not mean that the capacity to make all of the decisions is lost. Before the NDIA decides that a person lacks the capacity to make decisions about their plans and to manage their funds all the efforts that can reasonably be made must be made firstly to allow the participant to make all of the decisions that they can about their plans and the management of their funds and secondly where it is incontrovertibly the case that someone lacks the capacity to make those decisions that they are included in every possible way as a contributor to those decisions that are made on their behalf.

Education

Where education and other supports are identified as prerequisites necessary to maximise the level of participation in the planning and management of supports funded by the NDIS, these must be provided. They cannot be left to individuals or their support networks to identify and secure alone. What is more, the cost of educating people to manage their own supports must not be taken from a participant's support package. It should come from an entirely independent source. Billing such cost to a participant would reduce and potentially debase the delivery of essential supports. Likewise, the costs to a service provider in the form of brokerage, planning, management and administration should not be stripped out of a service-users support package. Given the vital role these supports play in ensuring the participant's quality of life they must not be diminished in order to satisfy the pernicious and ever-growing appetite of these incidental costs.

**Assessment of reasonable and necessary supports**

It will be most important to applicants to understand how and by who the assessment of reasonable and necessary supports are made. It will be equally necessary to establishing and maintaining the trust of applicants and recipients under the NDIS that in this matter their inputs are sought, considered and used in a way that encourages a belief that their input was genuinely sought and honestly considered – as valuable and influential, in fact, as the input from all other sources.

The question of what is reasonable and necessary could conceivably be the source of much rancour and dispute. An entity with the power to mediate and, where the dispute proves intractable, to adjudicate on such matters should be established. This entity must be independent from the NDIS and populated by staff who have a deep understanding of the issues germane to people with disability. It may be well to use self-assessment wherever possible in the assessment process. This would give people a greater sense of control and ownership of the process, an undeniable aim of the construct the Productivity Commission proposed. Perhaps of more importance to the actuaries who will likely dominate the management and board of the NDIA is the research that indicates people who self-assess generally underappraise their support needs compared with those assessed by third parties. In other words, it would cost the NDIS less to permit self-assessment than it would to insist on using paid NDIA personnel to do the job. At the very least a decision about what constitutes reasonable and necessary supports should be a reviewable decision for the purposes of section 99.

Contracts of Service

Another issue for consideration is the ability of the service user to walk away from an agreement with a host provider where a dispute over the quality of a service has resisted all reasonable attempts at resolution. QAI appreciates the importance of honouring contractual obligations, but it would be a grievous wrong to hold a service user to the full term of a contract where the services contracted for were unacceptable. It must be remembered that in many instances the contracted services will be for ``intimate care and support, which, if improperly provided, could make life an intolerable misery. It is essential therefore that the system envisaged incorporates both a mediation mechanism for settling disputes about these issues and, if mediation fails, an entity that can dissolve the service contracts without penalty to either party. If, however, it is the service provider that wishes to void the contract, upon such a decision being made, the service provider must continue to provide the contracted services for a reasonable time during which the service user can identify and secure another service provider.

Nominees

The Rules will set down the criteria the CEO must consider when determining whether or not a nominee will be appointed. These criteria must above all protect the participants rights to make their own decisions and must activate the nominee’s conferral only where the participant is manifestly incapable even with the appropriate supports of managing their plan and the regular business with the NDIA associated with that plan. The participant must be given the opportunity to play the maximum part possible in the identification of the nominee. Others who could play a legitimate and important part are those who know the participant best, for example, family and others in the person’s support network. There should be no innate bias against a close family member filling this role. They may have been providing most of the individual’s support prior to the NDIS and may know intimately and best the person’s needs, desires, dreams and ambitions.

For the purpose of notices issued to nominees on behalf of the participant any failure of the nominee not to comply with that notice must not in any way harm the participant or their entitlement to supports. Any punitive action resulting from the failure to comply with a notice must attach to the nominee and not the participant. One must assume that in the majority of cases a nominee will be appointed because a determination has been made that the participant lacks the capacity to manage and carry out the obligations that attach to the management of the plan and funding negotiated with the NDIA. If this is the case, and a nominee has been appointed because of a perceived lack of capacity on the part of the participant, then under no circumstances should the participant be liable for the failures or improprieties of the nominee. Further, if the CEO's decision to appoint a nominee is planted in the CEO is discretion to unilaterally make such an appointment, the CEO must provide to the participant full information about why this decision was made. A mere notice that the decision has been made is insufficient. Full reasons underlying the decision must be disclosed.

**Unreasonable Risk to Participant**

The Rules will also provide the criteria to assist in determining whether a participant managing their own Plan presents an unreasonable risk to themselves. There must

be a presumption that a person has the capacity to self-manage their plan and the risk to the participant of managing their plan is within the bounds of acceptability. The burden of overturning this presumption must lie with the agency asserting the contrary. In this case the presence of unreasonable risk is something which should be subject to some degree of explanation. There are many kinds of risk. Are all of these to constitute a basis for excluding a person from managing their own plan? An extensive history of criminal fraud may well constitute such a risk by exposing the person to the temptation of committing further fraud. An unwise investment decision or two should not. This constitutes no more than evidence of the ability to make a mistake.. People without disability are entitled to make mistakes and are not forever dammed because of those mistakes. Equally a bohemian or unusual lifestyle should not constitute evidence that a participant is likely to be frivolous or foolish in the disbursements of their funding. An intellectual or cognitive disability could be classified as an unnecessary risk. They most certainly should not be, at least in the first instance. There should be a presumption always that a person has the capacity to manage their own plans and funding. If a concern exists that they may lack the capacity necessary to do this, the evidentiary burden of establishing that must rest on the NDIA. If the presence of an intellectual or cognitive disability is to be taken at first hand is posing a risk too great to be borne that a person can successfully manage their own affairs then this would undermine so thoroughly the fine precepts on which the NDIS is based that it would at least in every moral, ethical and decent sense fall under its own weight of prejudice. With the proper supports in place the presence of intellectual or cognitive disability constitutes no risk at all.

**Right to information**

It is understandable that the NDIA will require certain information to determine whether a person qualifies for assistance under the NDIS. However, a power to compel information can very easily change from a legitimate, reasonable and reasoned request for necessary information into a base intrusion that can transform a process first to establish eligibility, and second to establish support needs, into a brutalisation little short of a back street mugging. Such misfortune was endured in Queensland as part of the Growing Stronger initiative when applications for support were made under the program. A tool used to assay the carer's state of mind effectively required the carer to denounce their loved one as a ruinous burden on their lives. This psychological mauling left many carers so bruised from the encounter they barely had the heart to continue the fight for support. The tool was eventually withdrawn after vigorous lobbying for its repeal. But it serves as a salutary lesson of what a request for information can inflict if that request is clumsy, insensitive, and ill-thought out.

What is more, who decides what is necessary information. There must be recourse for individuals required to supply information to seek an opinion from an independent authorised body about whether the information sought is necessary for the stated purpose. Refusal to divulge information on the basis of a favourable finding by this body must constitute a defence for withholding the information.

There are severe consequences for an individual who refuses to comply with a request for information. What sanctions are there for the NDIA and its agents if they are found to have requested information unreasonably or to have requested information that is unnecessary for the decision process? Liability cannot attach just to the individual who is applying for support under the NDIS. Improper conduct by the NDIA or its agents must also carry penalties of a type and force that will encourage proper and reasonable conduct.

**Notices**

The proposed legislation gives the NDIA the power to issue notices about certain matters. Penalties will attach to individuals who fail to comply with these notices. If the agency is to have this power, then there must be a review process individuals can employ when they believe a notice has been issued without good cause. The issue of all notices should be reviewable under section 99.

**Confidentiality**

The draft legislation proposes penalties for improper dealing with confidential information. It also provides for mechanisms that will allow the NDIA to share information with other agencies. Participants must have full control of their information. If the NDIA needs to circulate information to other agencies, it must first be required to obtain a release from the participant involved. They must also be required to explain to the participant why it is necessary to divulge confidential information to another agency. If a participant does not want their information shared, there may be consequences for this restriction, but control of the information must always remain with the individual. The participant must of course be made aware of these consequences. If the participant resists information sharing, there must be an independent body to which the parties can submit their reasons for refusal before they become liable to any consequences or sanctions for that refusal.

**Service Providers - Registration and Qualifications**

It is important that someone can do the job they are hired to do. It is important that they can do that job well. It is also important that predators who would prey upon the people they are hired to support are discouraged from entering the disability sector. It is equally important that fears about such predators are not used to restrict entry into the sector so thoroughly that existing service organisations find their position of market dominance strengthened and potential new entrants are discouraged by that regimen even from attempting to join the sector. Such fears may be legitimately held. They may also be exploited by the unscrupulous for their own ends. The Productivity Commission in its final report about the NDIS said that the ability to empathise with a client was the most important qualification for a disability sector employee. The ability to empathise is rarely something that can be taught. It is usually innate. Past experience has shown that it is by no means common to everyone employed in the disability sector. The skills needed for most forms of personal care, for cooking and cleaning, and for many of the other duties a support worker may be required to perform are readily learned. Anecdotal evidence suggests that some parents employing workers to support their disabled children prefer to hire outside of the mainstream disability sector. They are looking for people who can empathise with their children and whose minds are still clear of the corruptions that association with the mainstream sector can produce. They look for these things and apparently find them without risking their children's security. Whatever regulation is adopted must be balanced in a way that does not further entrench the incumbents along with the operational cultures, practices and procedures that service users have long found offensive, restrictive, self-serving and inhospitable.

The Productivity Commission also recommended in its final report on the NDIS that a system of service delivery should be adopted that encouraged new entrants into the service sector. This new blood would constitute an invigorating draught that would stimulate change, innovation, and improved quality for service users. Over-regulating entry into the sector for new entrants could work to maintain the position of and dependence upon existing suppliers. This would seem likely to inhibit the flexibility

and Innovation central to the success of the NDIS. With constrained entrance for new entrants into the disability sector there will be less pressure on existing service providers to imagine beyond the tired responses they routinely deploy in the face of demands for change.
Restricting the passage of new entrants into the sector would also seem to steal from the NDIS, and from the service users hoping to benefit from it, the vital spark that gives one credibility and the other genuine hope for change, namely, real choice. For over regulating the sector, even with the noblest intent, could reduce choice to little more than an ersatz blend restricting service users, so to speak, to a selection from the hard centres left at the bottom of the box – nobody really wants them, but they are all that is available. This is hardly any choice at all.

**Review of Reviewable Decisions**

It is a sensible idea that the review of reviewable decisions should be a two part process, namely, an initial internal review followed where the results of this are not acceptable to the participant, by an external review by an independent authority. The Administrative Appeals Tribunal is proposed as that body.
Given the sensitivity of the issues for consideration, and the far-reaching nature of the decisions this body will make, a better alternative may be to establish a new forum thoroughly acquainted with and sensitive to the issues that face people with disability. Without wishing to cast aspersions on the AAT I fear they may be more swayed by arguments about capital preservation than by the needs of an individual whose eligibility may be considered borderline. I fear further that the frustrations of managing a crowded calendar may encourage the AAT to identify more closely with the NDIA because of its administrative structure, than with people with disability.

**Compensation**

The draft legislation proposes that the NDIA may require people to seek compensation where the NDIA believes there is a good chance compensation may be recovered. If the NDIA believes the chances of recovering compensation are good, then the NDIA should finance the individual's case including the payment of court costs if the action is unsuccessful. Even better, where the NDIA would require someone to commence an action for compensation, then the NDIA should stand in their shoes bearing all the costs and administrative burdens of the action.
Further the NDIA must not on any account be allowed to grow so attached to the preservation of the capital it administers on behalf of people with disability that it comes to require in every case where chance may exist, however meagre, of obtaining compensation, that NDIS applicants commence legal action to recover that compensation.
If this is a power the NDIA is to have, then it must be exercised fairly and only where a good chance of success exists. Requiring the NDIA to make and carry actions on behalf of all persons judged to have the required chance of success in an action for compensation would help to ensure the NDIA only required such actions where the proper chance of success existed.

**The Board**

It is important for the successful and effective operation of the NDIS that the people it is established to serve have faith in it and in the team that oversees its operation. People with disability are accustomed to large bureaucratic operations crushing rather than realising their hopes and dreams. The NDIS will be a large bureaucratic

organisation. Separate from Government it will still answer to Government for its performance and financial liquidity. This association will encourage people with disability to believe it is the creature of Government and so suspect of and subject to the coarse and unsympathetic villainies that populate such entities.
People with disability will be expecting the NDIS to let them down. They will expect it to engage them without sympathy and without understanding. One way to counter these expectations would be to ensure that at least a portion of the Board had disability. I can appreciate the urgency in the clamours for Board Members to possess the requisite business skills. The scheme must remain financially viable. Governments and the public must believe the Board can maintain that viability. The scheme cannot go bust. If it does it will leave hundreds of thousands of people with disability without support. It would sound a knell that would forever echo over the memory of its corpse. There would be no redemption; no second chance. Even so, it is essential for the dignity and wellbeing of almost half a million people with disability that the NDIS is administered in a way that is not only fiscally sound but responsive to the needs and aspirations of the people it is bound to support. Such responsiveness is not easy to engender. It flies in the face of long-established culture that considers people with a disability a burden, and one that should be content with whatever largesse the community cares to dispense.
A good, strong way to overcome that culture where it exists, and to prevent its germination and development where it does not, is to start at the top. It is therefore essential for the development and operation of the NDIS, and for the development of confidence in the NDIS, a vital infusion without which the scheme cannot prosper, that at least some of the Board have a disability. I am not asking that the composition of the Board be compromised. I am merely asking that where people with disability have the required expertise, they be included on the Board, so the Board will at least in part, perhaps in whole, be representative of the population whose lives it will affect either with lasting grace or lasting sorrow, depending on its early development.

**Debt Recovery**

The draft legislation makes recoverable by the NDIA amounts paid to individuals to which they were not entitled. The power to recover overpayments persists for up to six years after the overpayment was first noticed. The NDIA may take legal action to recover an overpayment if other means fail. If an overpayment is established an arrangement for its return may be negotiated. Unsurprisingly this arrangement is susceptible to unilateral variation at any time by the CEO. If the CEO is to have such a power, and I would argue they should not as the power to unilaterally vary an agreement for the repayment of a debt is inherently unjust as such variations almost always work in favour of the person seeking to recover the debt, then any decision to invoke this power must be a reviewable one under section 99. Further, the power must only be exercisable if the NDIA is able to demonstrate a significant change in the participant’s circumstances. Such a change in circumstances could only encompass a profound shift in the participant's financial status. The shift must be clearly demonstrable and must be more than adequate to allow the participant to make repayment without undue hardship and alteration to their quality of life.

Any arrangement about how an overpayment will be repaid, should not penalise the participant by, for instance, requiring the return of the monies in a lump sum or even buy instalment where that is manifestly unfair. It must be remembered that many people receiving support under the NDIS will have the disability support pension as their only form of income. This would make it extremely difficult for a participant to return an overpayment even by instalments of no more than a handful of dollars per

week. It must always be remembered that even such modest terms would have a disproportionate effect on many people with disability for whom the absence of even just a few dollars a week can have a substantial impact on their life quality. What is more participants could not be expected to repay by lump sum money to which they were not entitled even if they had a modest nest egg towards which the NDIA might turn covetous eyes and attempt to justify a raid upon by unfairly using this to inflate the participant's personal wealth. Such nest eggs are maintained against emergencies that with perfect equity threaten the situations of people with disability on the basis of perfect equality with those who do not have disability. Floodwaters for example do not exempt from damage the home of someone with disability. What is not equal is the comparatively greater injury people with disabilities sustain from those emergencies and their lesser ability to recover from that injury. Once consumed by tragedy the nest eggs of people with disability are almost impossible to replace from the proceeds of a disability support pension alone. Consequently repayment of debts to the NDIA should be made only by instalments from proven income that is sufficient to support these repayments. If the disability support pension is the only income a participant has, then any overpayment should be written off at least until the participants income reaches a base level from which instalments can be made without seriously degrading the opportunities and quality of life a participant is able to enjoy. There should be no discretion in this matter. In cases where income is low and assets are modest there should be an absolute requirement for the NDIA to write off or wave altogether a participant's debt.

Equally any arrangement for the repayment of a debt to the NDIA must not see that money taken from the paarticipant’s support package, or in an yway interfere with the delivery of that support package. Funding for support packages will be based upon a careful assessment of participants’ needs. Given the almost cruel eye the NDIA is admonished again and again in the draft legislation to bear upon the distribution of funds to participants it is impossible to believe that in any support package there would be sufficient fat available to permit the payment from the package any debt owed to the NDIA. Consequently any money stripped from that source could debase the participant’s quality of life in ways and to an extent that would be entirely contrary to the purpose of the NDIS.

The NDIA may require a participant to provide to the agency information if it believes that person owes it a debt and the agency has reasonable grounds on which it suspects that person holds information that will assist it to establish and recover that debt.
What constitutes reasonable grounds in this instance? The NDIA must have strong evidence that the participant or other person has the information that it desires and must be required to reveal this evidence to the person it is requesting the information from. Before the person the subject of the request provides the information, they must be able to apply to an independent body for confirmation that this is information the NDIA is able to request. They must be required to hand over the information only if this body determines the information sought falls within the power of the NDIA to seek.

The NDIA has the power to compel the relevant person to appear before it to provide the information sought. If such a demand is made, the travel and other associated costs of providing the information must be given to the individual. The time and place arranged for the delivery of the information must be convenient for the individual. It must at the very least be a fully accessible location and the transfer must coordinate with the time of the day that the individual is able to arrange for support workers to

accompany them to the meeting. The person should also be entitled to have a support person or an advocate present to promote and protect their interests. The requirement to appear does not apply if a person has a reasonable excuse. What constitutes a reasonable excuse? In the case of a person with disability reasonable excuse should encompass at the very least the physical difficulties of appearing before the Inquisition or a lack of those faculties necessary to plead and understand the case against them. It should also include a denial by the individual that they have the information. The onus should then lie upon the NDIA to demonstrate at least upon the balance of probabilities that the person has the information.

In certain circumstances the NDIA may write off or waive a debt resulting from an overpayment. A waiver wipes out the debt altogether. Writing it off only suspends it until such time as the NDIA chooses to resume its pursuit. There should be no difference between a decision to write off or waive a debt. Either should conclude absolutely any claim the NDIA has to the debt. What is more the circumstances in which they can be granted should be expanded.

Currently the NDIA must waive a debt where it results solely from an administrative error on the part of the agency. If the participant contributed in any way to the debt however innocently, even for example where they acted on the basis of the administrative error on the part of the agency, then there is no requirement to waive the debt. This must change. If the participant has relied in good faith on the conduct of the NDIA and that conduct is imperfect than the participant cannot be held liable for any debt that accrues as a result of this combination. Even where the NDIA has made no contribution to the accumulation of a debt, but the participants conduct has been honest and blameless, then by the same token the debt should be waived if it is clear that it cannot be repaid without causing hardship to the participant.

The NDIS Rules

The relevant minister can make rules about the NDIS. When making rules the minister must have regard to maintaining the economic viability of the insurance scheme. Surely the Minister must also have regard to the purposes of the insurance scheme which is to provide people with disability equitable supports across the nation and to provide those supports in ways that give those people true control of their own lives. An undue focus, and in this case an exclusive focus on preserving the economic viability of the scheme runs, as has already been alluded to, the risk of making the continuance of the scheme the primary purpose of the scheme. What is the purpose of its continuance if its administration is so parsimonious it fails to bring meaningful change to the lives of people with disability.

Kind Regards,
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