Submission to the Joint Standing Committee on the National Disability Insurance Scheme inquiry into NDIS Planning

(September 2019)

TABLE OF CONTENTS

PAGE

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 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 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, 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 State-government funded disability providers report being worse off under the NDIS.

The 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 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.

Responses to the Terms of Reference

a) The experience, expertise and qualifications of planners

Please see our response to ToR (b).

b) The ability of planners to understand and address complex needs

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 said[1]:

> *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 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.

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

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 (please see our responses to Terms of Reference (f), (g), (h), (i) and (m) for more on this issue).

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

c) The ongoing training and professional development of planners

It is our observation that many Planners seem to lack specific knowledge in relation to the work of health specialists such as Physiotherapists and Occupational Therapists. Their expert recommendations, on many occasions, have been ignored 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 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 heath industry peak bodies. This would be beneficial for all involved.

d) The overall number of planners relative to the demand for plans

Our experience 'on the ground' would indicate to us that there may be a lack of planners, relative to the demand for plans.

This perception is borne from our experience of working with people with disability who have had their eligibility to join the NDIS determined, but then cannot get in to see a planner.

Maurice Blackburn encourages the JSC to give significant attention to the evidence of disability advocacy services that can provide more comprehensive data in this area.

e) 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 suggests that the JSC should consider auspicing research to determine the degree to which participation in a draft planning process reduces the likelihood of needing to access the review process.

Maurice Blackburn also believes that the suggestion by Senator Jordan Steele-John[2] and others, that participants should be able to view their plan before it is locked in, has merit.

f) The incidence, severity and impact of plan gaps

No response to this Term of Reference.

g) The reassessment process, including the incidence and impact of funding changes

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 predicable consequence of the legislated review and appeal mechanisms, which both run directly counter to the NDIS being held accountable for poor decisions. This will be covered in more detail, below.

In our experience, when the NDIA is contacted in relation to deficiencies in a client's plan, the NDIA's first response, by default, is to assert the original plan, or at most agree to minor adjustments to the original plan. We have experienced 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.

For more commentary in relation to the review process, including the timeliness of decisions, please see our responses to ToR (h) and (i) below.

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

h) The review process and means to streamline it

As detailed in our response to ToR (g), 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 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; and

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

(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.

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 reviews of the NDIS care plan have shown it to be deeply inadequate to satisfy the reasonable and necessary support requirements for each participant. The difference between what the NDIA originally determined to be reasonable and necessary, compared to what allied health professionals (and eventually in each case conceded by the NDIA) for those clients, 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.[3]

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 (see our response to ToR (m)). 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.

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.[4]

While participants must file a request for a review within three months of receiving notice of the decision, there is no timeframe imposed on the Agency to actually complete the review. Many participants report waiting months for any response,[5] 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*[6] 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 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,[7] requests for a review triggering a new plan, which restarts the whole process,[8] and the Agency providing incorrect advice about review rights.[9]

[3] Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013'*, May 2018, 2.3.
[4] Commonwealth Ombudsman, 'Administration of reviews under the *National Disability Insurance Scheme Act 2013'*, May 2018.

[5] Ibid.
[6] [2018] AATA 1326 (22 May 2018).
[7] Ibid. 4.34
[8] Ibid, 4.30
[9] Ibid. 4.16

We note the government's recent commitment to a NDIS Participant Service Guarantee[10], 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 do not agree, however, that seeking to 'streamline' the internal review process, as indicated by the wording of this ToR, is the best way to ensure shorter time frames.

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

- The adoption of a philosophy whereby the focus of a reassessment process is on 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;
- 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 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, below.

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.

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

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

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

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 often left with little option but to seek assistance in relation to the reviews process from agencies that are not best placed to provide such advice – such as from service providers, or even local members of Parliament. Senator Steele-John described the experience as follows[11]:

> *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.

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

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.

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 percent of the Federal Court scale for successful applicants, would result in 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.

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

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.

j) The circumstances in which plans could be automatically rolled-over

If the circumstances and needs of the participant have not substantially changed, such that the plan in place continues to provide the participant's reasonable and necessary supports and satisfy their stated goals, it seems to us that rolling the plan over automatically for a set period, would derive the following benefits:

- Certainty for the participant and their family;
- Less stress by avoiding another planning process which would likely produce an almost identical plan to the existing plan; and
- Cost efficiencies for the NDIS through not having to allocate staff to those plans, thus allowing a more targeted approach to optimising plans for those who need better plans.

k) The circumstances in which longer plans could be introduced

Please refer to our response to ToR (j).

We submit that an evidence base for each plan would need to be established in order for longer plans to be capable of being approved.

Typically that evidence should include a thorough Allied Health report, within which opinions are expressed that the participant's needs are not expected to change significantly within the legislatively defined rollover period.

Any change to those arrangements ought also to permit of a rollover plan being capable of being reviewed upon emergence of any significant change in circumstances necessitating changes to the participant's reasonable and necessary supports.

l) The adequacy of the planning process for rural and regional participants

Maurice Blackburn has long advocated that the shifting structure of the market plus the existing thin markets in remote, regional and rural communities will require strong and specific intervention by the NDIA. This will involve those involved in planning processes for participants in these areas.

The almost complete absence of workforce infrastructure planning in the original Productivity Commission report was a glaring and inexcusable omission.

Moreover, Maurice Blackburn notes that as far back as 2015, the NDIA was aware of the potential impact of thin markets in regional and remote areas, and that this would have a particular impact on planners. In formal advice provided by the Independent Advisory Council (IAC) to the NDIA[12] at that time, they recognised that service provision would need to be propped up by interventions including:

- flexibility in planning,

[12] Ref: *https://www.ndis.gov.au/about-us/governance/IAC/iac-reasonable-necessary-lifespan.html*

- resourcing adequate transport,
- ensuring access to technology,
- empowering individuals and
- a strong LAC presence.

The need for flexibility in planning remains just as important today. Some policy areas where planners may require specific skills or expertise include the following:

- Maurice Blackburn has been made aware that there are a number of regional and remote 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.

- Service providers that we work with report that transport support offered through the NDIS is seriously deficient for the regions. Planners need to be aware of the issues related to:

    - Enabling clients to travel to access services, and
    - Enabling service providers to send their staff to remote areas. In many cases, the cost they pay their staff per hour is currently greater than what is provided to the participant for that support through the NDIS.

- Maurice Blackburn believes that the pricing of services in regional and remote communities should be aligned with the true cost of providing those services. This is especially pertinent in the areas of:

    - Staffing,
    - Transport, and
    - Access to technology

The recent changes to the NDIS price guide, which finally recognises that market differences exist with respect to the delivery of services, is a welcome step. But there is still a huge amount work to be done on workforce infrastructure planning.

The development of plans for participants in remote, regional and rural communities requires additional skills, an appreciation of the issues facing participants in these areas, and (as the IAC pointed out), flexibility.

m) Any other related matters

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

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

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

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

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

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

We note that these sentiments were also expressed by Senator Steele-John[13]:

> *…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 which we believe the JSC should be aware of.

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

Appendix A – Case Studies

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

Case study #1 -v- NDIA

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

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

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

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

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

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

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

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

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

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

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

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

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

Case study #2 -v- NDIA

Background

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

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

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

Internal Review

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

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

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

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

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

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

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

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

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

Case study #3 -v- NDIA

Background

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

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

G had a medical negligence case settled in April 2017.

Internal Review

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

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

Tribunal Application

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

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

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

Lawyers serve second witness statement (mother).

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

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

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