

# NATIONAL DISABILITY INSURANCE SCHEME PLAN DECISION-MAKING: OR WHEN TAILOR- MADE CASE PLANNING MET TAYLORISM & THE ALGORITHMS?

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*The National Disability Insurance Scheme ('NDIS') has been criticised for failing adequately to live up to the promise of individualised resource packages tailored to the needs of each participant, instead applying bureaucratic, standardised administrative logics. This paper analyses the legal architecture, policy assumptions and administration of the NDIS to establish the extent to which its guiding philosophy lies in professional person-centred case planning, an insurance logic, or principles of equity and efficiency of decision-making; and then assesses the contribution of legal remedies in ensuring fidelity of purpose to policy goals. It is argued that whatever the validity of criticism of NDIS Taylorist administrative standardisation and data-driven planning, it is neither an error of law nor responsive to merits review avenues. Undue weighting of equity and efficiency goals over the preferences and needs of individual participants nevertheless remains ethically problematic in unduly elevating an ethics of justice (impartial planning based on abstract principles applied consistently to all participants) over an ethics of care that views each participant as unique, as arguably the NDIS was designed to promote.*

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## I INTRODUCTION

Under the arrangements set out in this Bill, supports for participants will be provided as part of an individual goal-based plan.

... Each participant’s plan will be in two parts. The first, developed by the participant, will set out the goals, aspirations and individual circumstances, and the second part, *developed jointly by the participant and the Agency*, will set out the funded supports and assistance to be provided by the NDIS. The plan will be formally approved by the Agency, and include details on how the participant has decided to manage their plan and when it will be reviewed.<sup>1</sup>

<sup>1</sup> Explanatory Memorandum, National Disability Insurance Scheme Bill 2012 (Cth) 9 (emphasis added).

The National Disability Insurance Scheme ('NDIS' or 'Scheme') is a major new program projected to cater for 475,000 Australians with severe disability once the post-trial roll-out, which commenced in 2016, is completed (scheduled for late 2019).<sup>2</sup> Approximately 60–70% of Scheme participants are anticipated to be people with an intellectual impairment or autism.<sup>3</sup> When fully implemented, the NDIS will, at \$21.5 billion annually, be the second largest federal government program (behind only Medicare but outstripping aged care).<sup>4</sup> It provides eligible participants with significant resources (valued at an average of \$54,000 annually in 2017<sup>5</sup>) under a personal plan geared to the needs of their particular disability. Where possible, a plan is administered to maximise participant control,<sup>6</sup> though only a minority elect to do so.<sup>7</sup>

As reflected in the extract from the Explanatory Memorandum to the establishing legislation,<sup>8</sup> the philosophy of the scheme is that of a personal budget or package of resources developed 'jointly' between the National Disability Insurance Agency ('NDIA') and the person with a disability.<sup>9</sup> This

<sup>2</sup> Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs* (Study Report, October 2017) 4 <<https://www.pc.gov.au/inquiries/completed/ndis-costs/report/ndis-costs.pdf>>, archived at <<https://perma.cc/DK89-58MH>> ('*NDIS Costs*').

<sup>3</sup> Susan Collings, Angela Dew and Leanne Dowse, 'Support Planning with People with Intellectual Disability and Complex Support Needs in the Australian National Disability Insurance Scheme' (2016) 41(3) *Journal of Intellectual and Developmental Disability* 272, 272. Currently, 66% of participants have an intellectual disability (37%) or autism (29%), with 6% having psychosocial impairments: *ibid* 104.

<sup>4</sup> *NDIS Costs* (n 2) 73. NDIS costs are shared between the federal and the state and territory governments, but the combined annual cost will be roughly double that of the Pharmaceutical Benefits Scheme.

<sup>5</sup> *Ibid* 113. The value of packages varies significantly by disability, jurisdiction and other factors: at 111–17.

<sup>6</sup> Though in-kind government or block-funded government contracted services remain part of the service mix, contributing nearly one-fifth (19%) of package costs at transition, this will decline to an anticipated one-tenth by full roll-out: *ibid* 281.

<sup>7</sup> Kostas Mavromaras et al, 'Evaluation of the NDIS' (Final Report, National Institute for Labour Studies, Flinders University, February 2018) xvii, 92, 120–1, 125. Just under half (46%) of participants in the trial sites managed at least a portion of a package, with one in 10 participants doing so directly and the remainder managed by families (31%) or someone else (5%): at 120. The proportion who were self-managing was higher for the aged, at one in five: at 242.

<sup>8</sup> Explanatory Memorandum (n 1) 9.

<sup>9</sup> For a review of international developments of personalisation, see Andrew Power, Janet E Lord and Allison S deFranco, *Active Citizenship and Disability: Implementing the Personalisation of Support* (Cambridge University Press, 2013).

implies caseworker facilitation, which tailors entitlements to the specific needs, living circumstances and preferences of the person, through a process of personal consultation, specialist input and refinement over time. It connotes the skills of a social caseworker, rather than of an administrator, and on first blush seems unreceptive to administrative routinisation ('Taylorism')<sup>10</sup> or digitisation and automation. Unsurprisingly, potential NDIS participants and their families or supporters concur.<sup>11</sup> However, as the first progress report by the Joint Parliamentary Committee concluded, 'evidence received during ... recent public hearings seems to be indicative of a culture developing in the NDIA that is not placing the participant, and those who support them, at the centre of the Scheme.'<sup>12</sup> So how does the actual process square with legislative and other obligations, and how adequate and effective are the avenues of review? One question is whether the planning process adequately meets standards of good administration. Another consideration is whether it is equitable if more articulate or better supported individuals, or more worldly and experienced families, prove to be more likely to achieve an optimal level of plan resourcing, while the less experienced go short-changed.

An important issue is whether adequate attention is paid to providing support during the planning process and beyond (given that nominee appointments are so rare). Questions also arise as to whether Administrative Appeals Tribunal ('AAT') review rights are broad enough and accessible enough. These are some of the issues explored in this article. It will be argued that, however contrary to the spirit of the Scheme it may be for the NDIA to adopt Taylorist standardisation techniques or data-driven planning, to do so does not constitute an error of law, even if it leads to undue weighting of equity and efficiency goals over greater responsiveness to the preferences and needs of individual participants. Or, to put it differently, this can also be interpreted as a tension between two types of ethics: an ethics of justice that

<sup>10</sup> The application of Taylorist scientific management principles to social casework is not new: Michael Fabricant, 'The Industrialization of Social Work Practice' (1985) 30 *Social Work* 389, 393: 'Clearly, the craft elements of social work are being shattered by the increasingly rigid and mechanistic practices of large public-sector service agencies'.

<sup>11</sup> Joint Standing Committee on the National Disability Insurance Scheme, *Progress Report* (7 September 2017) 46–63; Wendy Williams, 'People with Disability Demand Action to Fund and Fix NDIS', *Pro Bono Australia* (Web Page, 2 May 2018) <<https://probonoaustralia.com.au/news/2018/05/people-disability-demand-action-fund-fix-ndis/>>, archived at <<https://perma.cc/93VE-XCSM>> .

<sup>12</sup> *Progress Report* (n 11) 71 [3.102].

seeks impartial planning, based on abstract principles applied consistently to all participants; and an ethics of care, that views each participant as unique and seeks a more relational approach to planning, that places at its centre the dialogue between the caseworker (or planner), the participant and their formal and informal supporters rather than abstract standardised principles.<sup>13</sup> Although merits review of issues — such as what constitutes ‘reasonable and necessary’ supports,<sup>14</sup> or whether ‘supports’ is an NDIA or general service responsibility — does provide a crucial individualised response for some individuals, it is rather unsuited to delivering the normative guidance about system boundaries and other aggregate policy settings that various inquiries hoped it would.

## II THE NDIS AND THE PLANNING FRAMEWORK

### A *Contemporary Human Services Delivery Models and the NDIS*

Human service delivery is anything but immune from technological change, including data management and machine learning initiatives. These initiatives are being integrated into the human service sector at a breathtaking pace,<sup>15</sup> accelerated by pressures of fiscal austerity, privatisation and neoliberalism.<sup>16</sup>

Even if Australia had not already been an early user and ideological convert to data and machine learning solutions, pure pragmatics would have been the mother of this invention in the NDIS roll-out phase. The adoption of scientific management or neo-Taylorist approaches to operationalising the

<sup>13</sup> Virginia Held, ‘Care and Justice in the Global Context’ (2004) 17(2) *Ratio Juris* 141, 143–4. See generally Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2005). For a discussion of ethics of care originating from Carol Gilligan, the synergies (or not) between justice and care, and the risk of paternalism, see Jenny Hay, ‘Care and Justice: Two Sides of the Same Coin in a Critical Care Ethics in Social Work’ in Bob Pease, Anthea Vreugdenhil and Sonya Stanford (eds), *Critical Ethics of Care in Social Work: Transforming the Politics and Practices of Caring* (Routledge, 2018) 49. For an analysis of care law through the lens of a concept of vulnerability, which likewise draws on the relational insights of feminist scholarship, see Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016).

<sup>14</sup> See below n 87.

<sup>15</sup> Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin’s Press, 2017) 11–12.

<sup>16</sup> See Mimi Abramovitz and Jennifer Zelnick, ‘Privatization in the Human Services’ in Martha Albertson Fineman, Ulrika Andersson and Titti Mattsson (eds), *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective* (Routledge, 2017) 182.

Scheme when recruiting participants and settling plans was driven by hugely ambitious completion targets and pressures to accommodate the large legacy cohorts receiving various services in each of the Australian states and territories, the transitioning of whom was the first priority.<sup>17</sup> Quoting references to a ‘tsunami’ of applications and the ‘break-neck speed’ of the roll-out, the Productivity Commission noted in its October 2017 report that from the 2017 second quarter’s average of approving 165 plans a day, the NDIA would need to average 500 plans a day (and review ‘hundreds’ more) each day in the optimistically-targeted final year of transition (2018–19),<sup>18</sup> concluding that the existing shortfall of performance would push completion out by at least another year.<sup>19</sup>

Information provided to the NDIA by states and territories about their legacy clients not only identified priority applicants for transitioning into the NDIS, but, together with an intake questionnaire, became one of the sources of the individual metrics used to generate access decisions and preliminary plan profiles for participants.<sup>20</sup> Originally collected for other purposes using different definitions and quality checks from place to place, it is unsurprising that legacy data deficiencies<sup>21</sup> and broad spectrum questionnaires or other intake information<sup>22</sup> resulted in intake decision errors,<sup>23</sup> and draft plans at odds with the needs of participants. This risk of inappropriate plans was compounded by the scale of the task and the lack of suitable personnel to

<sup>17</sup> Each state has its own ‘instrument’ to set this priority and determine the sequence of processing between different regions within the jurisdiction: see, eg, *National Disability Insurance Scheme (Facilitating the Preparation of Participants’ Plans — New South Wales) Rules 2016* (NSW).

<sup>18</sup> *NDIS Costs* (n 2) 90.

<sup>19</sup> *Ibid* 92.

<sup>20</sup> For an outline of NDIA computer-aided decision-making, see Australian National Audit Office, *Decision-Making Controls for Sustainability: National Disability Insurance Scheme Access* (ANAO Report No 13 2017–18, 19 October 2017) 42 [3.51]–[3.54] (*‘ANAO Report’*).

<sup>21</sup> *Ibid* 9 [18], 33 [3.18], 35–7 [3.28]–[3.34], 43 [3.59].

<sup>22</sup> The out-sourcing of intake processing to Department of Human Services ‘Smart’ Centres is summarised at *ibid* 19 [1.18]–[1.19].

<sup>23</sup> A 2017 quality assurance methodology commissioned by the NDIA from KPMG found substantive errors in 6.3% of general access decisions (ones not fast-tracked based on having a listed condition or being a legacy cohort transfer): *ibid* 63 [5.43].

serve as the human liaison or facilitator in the planning process,<sup>24</sup> along with undue reliance on remote access telephone or videoconferencing due to cost-pressures.<sup>25</sup> One consequence was that instead of ironing out mismatch issues during the initial planning process, they went unaddressed (especially in the case of more vulnerable clients)<sup>26</sup> or were delayed until participants elected to challenge the plan once made.<sup>27</sup>

As we note in the conclusion, there may also be a deeper, NDIS-design reason why Taylorist administration has gained so much purchase. This, we suggest, lies in the downgrading of a professional casework ('normative' expert) assessment of need, in favour of greater emphasis on client-defined ('felt') need, to reprise Jonathan Bradshaw's preliminary work on a typology of need.<sup>28</sup> As Ife summarised, this somewhat problematic typology includes four basic types of need:

[N]ormative need, or need as defined by authorities, experts and opinion leaders; *felt need*, or need as experienced by the population concerned and measured by social surveys; *expressed need*, or felt need turned into action in the form of demand for service; and *comparative need* inferred from an analysis of demographic characteristics and levels of service provision.<sup>29</sup>

<sup>24</sup> These widely criticised deficiencies were recognised and addressed on 16 November 2018 with the announcement of new pathways for complex need cases: Department of Human Services, *Improved NDIS Planning for People with Complex Support Needs* (Web Page, 9 April 2019) <<https://www.ndis.gov.au/news/1002-improved-ndis-planning-people-complex-support-needs>>, archived at <<https://perma.cc/9JCM-9SUE>>. See also *NDIS Costs* (n 2) 214–15.

<sup>25</sup> *NDIS Costs* (n 2) 200–7.

<sup>26</sup> *Ibid* 136–8, 176–7.

<sup>27</sup> Office of the Public Advocate, *The Illusion of 'Choice and Control'* (Report, September 2018) 16–17; Morrie O'Connor, 'The National Disability Insurance Scheme and People with Mild Intellectual Disability: Potential Pitfalls for Consideration' (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 17.

<sup>28</sup> See below n 29.

<sup>29</sup> Jim Ife, 'The Determination of Social Need: A Model of Need Statements in Social Administration' (1980) 15(2) *Australian Journal of Social Issues* 92, 95 (emphasis added). Jonathan Bradshaw's paper was originally published as 'A Taxonomy of Social Need' in Gordon McLachlan (ed), *Problems and Progress in Medical Care: Essays on Current Research* (Oxford University Press, 7<sup>th</sup> Series, 1972) 71. It has been published in other forms, but the original has been republished: Jonathan Bradshaw, 'A Taxonomy of Social Need' in Richard Cookson, Roy Sainsbury and Caroline Glendinning (eds), *Jonathan Bradshaw on Social Policy: Selected Writings 1972–2011* (University of York, 2013) 1.

Elevation in the NDIS of the weight attached to felt or expressed need through a statement of goals, aspirations and personal circumstances of the person reflects the central objective of the *Convention on the Rights of Persons with Disabilities* ('CRPD') 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.<sup>30</sup> However, some needs are complicated to understand and express. Eliciting and documenting the full gamut of social contextual data and knowledge about the person can turn on access to the skill and time of professional case planning expertise, which is alert to the risk of paternalism by families or the imposition of professional values, in place of the authentic goals and aspirations of the person. Underinvestment in this capacity cannot be rectified by advocacy and support (despite how absolutely crucial these are for other reasons), nor can it be left in the hands of conflicted service providers. Striking the balance between past excesses of professional planning of needs and promotion of CRPD-compliant, person-centred planning was a key challenge for the design of the NDIS, one, which we suggest, is yet to be fully realised or understood, in terms of the risk of placing undue reliance on self-expression by individuals with limited ability to do so.<sup>31</sup>

### B *The Legislative Framework for NDIS Participation and Planning*

In assessing the NDIS roll-out, it is first necessary to understand how planning is structured in the legislation (Part II(B)(1)). This is followed by a discussion of recent experience of the planning process in practice (Part II(B)(2)).

#### 1 *The Five Steps*

The legislative framework for participation in the NDIS involves five main steps: (i) qualification for participation; (ii) prioritisation for planning purposes; (iii) preparation of a participant statement of needs; (iv) formulation of the NDIS plan; and (v) any review of that plan.

<sup>30</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('CRPD').

<sup>31</sup> This was a key finding of the independent evaluation of the NDIS trial site roll-out: Mavromaras et al (n 7) xv, xvii, xx, 34–5, 55, 126–7, 139–40, 185, 191, 197–200, 202, 217–18.



(a) *Qualification as a Participant*

Eligibility to participate in the NDIS is initiated by making an ‘access request’ to the NDIA,<sup>32</sup> in an approved form and including any required information.<sup>33</sup> No further information is required for an adult on a list of 30 conditions or for a child under seven experiencing one of 130 listed conditions.<sup>34</sup> Access through the list avenue is a boon for applicants but a source of angst when the NDIA contemplates narrowing of diagnostic criteria, or use of specialised categories of medical assessors to correct for perceived over-representation of disabilities such as autism.<sup>35</sup> If access is denied (or is deemed denied), a later request can be made, but not while a previous request is being reviewed.<sup>36</sup>

To be eligible, a person must meet age, residence and geographic location conditions, and either disability or early intervention requirements (the ‘access criteria’),<sup>37</sup> but someone already receiving support services which

<sup>32</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 18 (‘*NDIS Act*’).

<sup>33</sup> *Ibid* s 19(1). The Productivity Commission observed that ‘[t]his can be lodged through a form, but is increasingly being completed by telephone’: *NDIS Costs* (n 2) 168.

<sup>34</sup> *NDIS Costs* (n 2) 168–9.

<sup>35</sup> Rick Morton, ‘We Can’t Guarantee Places for Autism, NDIA Boss’, *The Australian* (online, 2 June 2018) <<https://www.theaustralian.com.au/national-affairs/health/we-cant-guarantee-places-for-autism-says-ndia-boss/news-story/6cf57ba7d113c9374bfade9af061a4a2>>; Rick Morton, ‘NDIS Online Blackout as Autism Diagnosis Rejected’, *The Australian* (online, 7 July 2018) <<https://www.theaustralian.com.au/national-affairs/health/ndis-online-blackout-as-autism-diagnosis-rejected/news-story/562a4ee9a16ba9de8f24e808917150d6>>. On 16 October 2018, the Cooperative Research Centre for Living with Autism, in conjunction with the NDIA, issued new tighter guidelines for assessment of autism: see ‘A National Guideline for the Assessment and Diagnosis of Autism Spectrum Disorder in Australia’, *Autism CRC* (Web Page) <<https://www.autismcrc.com.au/knowledge-centre/resource/national-guideline>>, archived at <<https://perma.cc/T5RQ-T8P9>>. See Andrew Whitehouse, ‘New Autism Guidelines Aim to Improve Diagnostics and Access to Services’, *The Conversation* (online, 16 October 2018) <<https://theconversation.com/new-autism-guidelines-aim-to-improve-diagnostics-and-access-to-services-104929>>, archived at <<https://perma.cc/C2EL-NM2Y>>.

<sup>36</sup> *NDIS Act* (n 32) s 19(2).

<sup>37</sup> *Ibid* s 20(a). The principal age condition is being under 65 years of age at application: at s 22(1)(a). The residence requirement is met if the person resides in Australia and is either an Australian citizen, a holder of a permanent visa or a special category visa holder who is a protected Special Category Visa (‘SVC’) holder: at s 23(1). The definition of disability is broad (similar to coverage of an ‘impairment’ for disability support pension purposes), but it must be shown to be ‘permanent’ (fluctuating conditions such as psychosocial disability can qualify, but it is more problematic in practice and may warrant a separate ‘gateway’ process): *NDIS Costs* (n 2) 173–80. Disability requirements include impact on defined life domains

would cease on acceptance into the NDIS qualifies on that basis alone.<sup>38</sup> The NDIA has wide powers that includes both the power to require applicants and others to provide information to the NDIA and the power to require those applicants to undergo an assessment.<sup>39</sup> The application process is complex, especially for people with psychosocial disability, literacy or cognitive issues, or people from culturally and linguistically diverse, and indigenous, communities.<sup>40</sup> Decisions about access are reviewable by the AAT, but reviews overwhelmingly confirm NDIA decisions not to accept an applicant as a participant.<sup>41</sup>

A person becomes a participant once the access criteria are satisfied (and must be advised in writing of this)<sup>42</sup> and remains a participant until death, revocation due to no longer meeting the access criteria,<sup>43</sup> or electing for first time receipt of residential aged care or home care *after* turning 65 (the situation is different and uncertain for continuity of support transferees).<sup>44</sup>

and expectation that support will be required for the lifetime of the person: *NDIS Act* (n 32) s 24. Early intervention is more complicated: at s 25.

<sup>38</sup> *NDIS Act* (n 32) s 20(2). It should be noted that the person must also meet certain residence requirements: at ss 21(2)(a), 23(3).

<sup>39</sup> *Ibid* s 26.

<sup>40</sup> Mavromaras et al (n 7) 184, 191–2.

<sup>41</sup> See, eg, *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (osteoarthritis and morbid obesity); *BBMC and National Disability Insurance Agency* [2018] AATA 386 (anxiety disorder, irritable bowel syndrome, sicca syndrome and cluster migraine); *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (post-traumatic stress disorder, emphysema, neck and throat condition); *Kilgallin and National Disability Insurance Agency* [2017] AATA 186 (disability did not ‘substantially reduce’ function); *Re Mulligan and National Disability Insurance Agency* (2015) 149 ALD 408 (ischaemic heart disease, cardiomyopathy, Conn’s syndrome, lumbar disc injury and sciatica); *Re Mulligan and National Disability Insurance Agency* (2014) 140 ALD 685. Access reviews are however not confined to conditions listed at the point of application: *Re FSQQ and National Disability Insurance Agency* [2019] AATA 186.

<sup>42</sup> *NDIS Act* (n 32) s 28.

<sup>43</sup> *Ibid* s 30.

<sup>44</sup> *Ibid* s 29(1). Because aged care is a capped program with co-contribution features, there is a strong disincentive for people to elect to transfer from the NDIS to residential aged care or a community care package: *NDIS Costs* (n 2) 256; Mavromaras et al (n 7) xxi, 227–30, 243, 246–7. Continuity of service arrangements guaranteeing existing levels of support for recipients of state and territory services who are aged 65 at the date of a potential transition into the full NDIS scheme adds another layer of complexity in terms of their uncertain entitlements as their needs change or intensify over time: see generally Department of Human Services, ‘Continuity of Support’, *National Disability Insurance Scheme* (Web Page,

(b) *Plan Prioritisation and Preparation*

Once a person is accepted as a participant, the NDIA is obliged to ‘commence facilitating’ the preparation of a plan ‘as soon as reasonably practicable’,<sup>45</sup> consistent with timelines and priorities stipulated in subordinate instruments (*Facilitation Rules*).<sup>46</sup> The principal focus of those *Facilitation Rules* is to establish the order in which ‘classes’ of participants will have their plans developed, so that there is an orderly transition of participants into the NDIS from other services.<sup>47</sup>

Due to the volume of applications and staffing difficulties, substantial time can elapse between becoming a participant and scheduling the first planning consultation; four months in one case.<sup>48</sup> Delay reportedly became endemic, with the Joint Parliamentary Committee, in its September 2017 report, noting that ‘[i]n addition to the delay between access and service provision ... participants consistently reported lengthy delays in receiving plans, plan reviews, and other information from the NDIA’.<sup>49</sup>

(c) *Personalisation and the Statement of Needs*

The preparation, administration and any revision of the plan is obliged to conform to certain principles, including that ‘so far as reasonably practicable’ they be ‘individualised’ and ‘be directed by the participant’.<sup>50</sup>

Individualisation, together with the insurance logic,<sup>51</sup> is what differentiates the NDIS from previous disability service models in Australia, where block

22 November 2018) <<https://www.ndis.gov.au/applying-access-ndis/people-receiving-supports-other-governments/continuity-support>>, archived at <<https://perma.cc/ZUJ5-BP2M>>.

<sup>45</sup> *NDIS Act* (n 32) s 32.

<sup>46</sup> *Ibid* s 32A.

<sup>47</sup> See, eg, *National Disability Insurance Scheme (Facilitating the Preparation of Participants’ Plans — Victoria) Rules 2016* (Vic) r 1.2.

<sup>48</sup> *Progress Report* (n 11) 45 [3.23], 71 [3.103].

<sup>49</sup> *Ibid* 52 [3.43] (citations omitted).

<sup>50</sup> *NDIS Act* (n 32) ss 31(a)–(b). There are, however, circumstances where self-management is not permitted or is contraindicated due to ‘unreasonable risk’: *National Disability Insurance Scheme (Plan Management) Rules 2013* (Cth) pt 3 (*NDIS (Plan Management) Rules*).

<sup>51</sup> For an introduction to the role of actuarial principles (and room for improvement), see Gemma Carey et al, ‘What Are NDIS Scheme Actuaries Measuring and What Are They Missing?’ *The Mandarin* (online, 1 August 2018) <<https://www.themandarin.com.au/96536-what-are-ndis-scheme-actuaries-measuring-and-what-are-they-missing/>>, archived at <<https://perma.cc/M4MJ-KXUP>>; Gemma Carey et al, ‘Pricing and Actuarial Approaches

funding of services was common.<sup>52</sup> It is also the lightning rod for much of the public and policy concern about the way the NDIS roll-out is being handled. Preparation by participants of their ‘statement of goals and aspirations’ is the first legislative planning step directed towards realisation of this objective.<sup>53</sup> The statement covers both goals and aspirations as well as the ‘environmental and personal context’ of their lives: living arrangements, family and community supports and social and economic participation.<sup>54</sup> The plan itself must include both the participant statement together with a ‘statement of participant supports’, indicating what the NDIA funds or provides, as well as issues such as plan administration and review.<sup>55</sup>

(d) *Bringing a Plan into Effect*

Whatever the deficiencies of a plan due to inadequate consultation, the next stage is giving effect to it. This happens once the participant’s statement has been received and the delegate of the CEO of the NDIA ‘approves’ the statement of participant supports (those determined to be ‘reasonable and necessary’ supports).<sup>56</sup> At that point, the *National Disability Insurance Scheme Act 2013* (Cth) (‘*NDIS Act*’) stipulates that the plan ‘cannot be varied after it comes into effect, but can be replaced’.<sup>57</sup> The plan normally lasts for the agreed planning cycle (usually 12 months),<sup>58</sup> unless a review is brought forward, but the Federal Court has ruled that it remains valid until replaced by another plan (or the person ceasing to be a participant).<sup>59</sup>

within the Australian National Disability Insurance Scheme’ in Karen Baehler (ed), *The Oxford Handbook of Public Administration* (Oxford University Press, 2018).

<sup>52</sup> See generally Gemma Carey et al, ‘The Personalisation Agenda: The Case of the Australian National Disability Insurance Scheme’ (2018) 28(1) *International Review of Sociology* 1; Christiane Purcal, Karen R Fisher and Carmel Laragy, ‘Analysing Choice in Australian Individual Funding Disability Policies’ (2014) 73(1) *Australian Journal of Public Administration* 88.

<sup>53</sup> *NDIS Act* (n 32) s 33(1)(a).

<sup>54</sup> *Ibid* s 33(1).

<sup>55</sup> *Ibid* ss 33(2)–(3).

<sup>56</sup> *Ibid* ss 33(5), 34.

<sup>57</sup> *Ibid* s 37(2).

<sup>58</sup> *NDIS Costs* (n 2) 197.

<sup>59</sup> *SSBV by his Litigation Guardian v National Disability Insurance Agency* [2018] FCA 1021, [3] (Reeves J).

*(e) Reassessments and Plan Reviews*

A request for earlier plan review may be made at any time (or the participant statement modified). However, no process for making minor adjustments is available; instead, all adjustments currently call for a full plan review.<sup>60</sup> Modification of the participant statement does not change the participant supports,<sup>61</sup> but a review of it may be requested by the participant<sup>62</sup> or initiated by the NDIA.<sup>63</sup> A decision about holding a plan review must be made within 14 days (otherwise it is taken to be refused).<sup>64</sup>

Merits review by the AAT may be sought in respect of decisions not to review an existing plan,<sup>65</sup> or the contents of the original or any replacement plan.<sup>66</sup> Prior to AAT consideration, the NDIA undertakes an internal reconsideration by someone not associated with the original decision, who must affirm, vary, or set aside and substitute the original decision.<sup>67</sup> However, a plan review (to be amended and renamed a 'reassessment') is an entirely distinct process to external merits review of a decision (including decisions about plan reviews).<sup>68</sup> Unless a reassessment is formally subject to an internal

<sup>60</sup> Ibid. Participants in the trial sites expressed dissatisfaction at the unnecessary paperwork and confusion this generated: Mavromaras et al (n 7) 194.

<sup>61</sup> *NDIS Act* (n 32) s 47(2)(b).

<sup>62</sup> Ibid s 48(1).

<sup>63</sup> Ibid s 48(4).

<sup>64</sup> Ibid s 48(2).

<sup>65</sup> Ibid s 99(1) item 6.

<sup>66</sup> Ibid s 99(1) item 4. As explained in the second note to s 49, any replacement plan is made in accordance with s 33(2), so is reviewable by the AAT.

<sup>67</sup> Ibid ss 100(5)–(6). The Auditor-General found deficiencies in the since revised administrative systems for recording and monitoring formal reviews: *ANAO Report* (n 20) 47–9 [4.6]–[4.14].

<sup>68</sup> To avoid confusion between the two (which precluded AAT review in *Bridgland and National Disability Insurance Agency* [2017] AATA 69, [17]–[21] (Senior Member Toohey and Member Connolly)), the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Cth) proposed renaming the former 'reassessments' instead of 'reviews': at sch 2, items 18, 22–31, 41–3. Schedule 2 was removed from the Act as enacted by the Senate in December 2017 and included in sch 1 of an exposure draft of a proposed National Disability Insurance Scheme Amendment (Enhancements) Bill 2018 (Cth).

review, the AAT has no jurisdiction to consider it.<sup>69</sup> Understandable confusion due to both being described as a ‘plan review’, when only ‘internal reviews’ are reviewable, led to a failure of AAT review applications, because no request for plan review properly so-called had been made;<sup>70</sup> though in a few instances, the AAT found jurisdiction because the plans were deemed to have been reviewed.<sup>71</sup>

NDIA administration of planning and review has been strongly criticised for its lack of process, documentation and fidelity to legislative requirement, adding to the burden of applicants and their supporters in negotiating the planning process. As Deputy President Humphries of the AAT wrote in *Re FFVQ*:

*Put bluntly, decision-making by the Agency has been slow and difficult to interpret.*

... It seems to the Tribunal entirely inappropriate that a participant, working with finite resources and coping with the added burden of a disability, should need to be left in doubt as to the status of decisions made affecting his or her entitlement to the benefits conferred by the legislation, yet this is precisely the situation many applicants to the Tribunal have found themselves in recently.<sup>72</sup>

<sup>69</sup> *NDIS Act* (n 32) s 103; ‘Can We Help?’, *Administrative Appeals Tribunal* (Web Page, 11 January 2019) <<https://www.aat.gov.au/apply-for-a-review/national-disability-insurance-scheme-ndis/can-we-help>>, archived at <<https://perma.cc/7ZZA-6TK4>>.

<sup>70</sup> *DXBG and National Disability Insurance Agency* [2017] AATA 1752; *Rodrigues and National Disability Insurance Agency* [2016] AATA 1095; *Re QQNH and National Disability Insurance Agency* (2016) 69 AAR 1; *Re Burston and National Disability Insurance Agency* (2014) 64 AAR 84.

<sup>71</sup> See, eg, *Hassett and National Disability Insurance Agency* [2018] AATA 4 (reviewable decision because it did alter plan); *Eccles and National Disability Insurance Agency* (2017) 72 AAR 565 (it was deemed a reviewable decision); *Re ZKTN and National Disability Insurance Agency* (2017) 72 AAR 234; *Re Nairn and National Disability Insurance Scheme Agency* (2017) 71 AAR 439 (partially reviewable decision); *Re BSLR and National Disability Insurance Agency* [2018] AATA 1282 (Senior Member Cameron) (the decision was reviewed in substance); *Re FJKH and National Disability Insurance Agency* [2018] AATA 1294 (Deputy President Bean) (the decision was deemed reviewable due to delay); *Re Simpson and National Disability Insurance Agency* [2018] AATA 1326 (Deputy President Humphries) (the decision was deemed reviewable due to delay).

<sup>72</sup> *Re FFVQ and National Disability Insurance Agency* [2018] AATA 1968, [30]–[31] (emphasis added).

## 2 Planning in Practice

Until mid-2017, most initial plans were formulated on the basis of telephone conversations, rather than personal contact with planners at face-to-face meetings, as is now the practice.<sup>73</sup> Assessment tools were provided for from the outset,<sup>74</sup> but the NDIA went through four options before, in mid-2016, settling on a suite of measures covering 11 disability types (but not psychosocial disability),<sup>75</sup> which it failed to make public as required.<sup>76</sup> From mid-2016, existing data (such as legacy supports under previous state schemes) and other information has been used to generate a typical ‘reference package’ as a starting point or ‘first plan process’ which, at least in theory, is then able to be adjusted, resources and process permitting.<sup>77</sup>

Understandably, participants and families express concern that the reference plan acquires undue presumptive weight, undermining the individualisation intended.<sup>78</sup> Concerns also arose about the abandonment from July 2016 of sharing of the draft plan prior to it coming into effect (often with glaring errors of inappropriate inclusions and omissions),<sup>79</sup> leading the Joint Parliamentary Committee to recommend reinstatement of the process of consulting on a draft plan.<sup>80</sup> Another source of dissatisfaction arises when subsequent plans reduce the level of resourcing on apparently arbitrary bases, as in the case of *PNFK and National Disability Insurance Agency* (‘PNFK’) where ‘core’ funds (monies able to be expended at the discretion of the person) in the second plan were lowered pro rata for unspent allocations

<sup>73</sup> *NDIS Costs* (n 2) 191.

<sup>74</sup> *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) pt 4 (‘*NDIS (Supports for Participants) Rules*’).

<sup>75</sup> *NDIS Costs* (n 2) 192.

<sup>76</sup> *Ibid* 192–3.

<sup>77</sup> *Ibid* 193–4.

<sup>78</sup> *Ibid* 195–6.

<sup>79</sup> Damian Palmer, ‘Let’s Be Honest, There’s More Wrong with the NDIS than Just “Teething Problems”’, *The Conversation* (online, 25 October 2017) <<https://theconversation.com/lets-be-honest-theres-more-wrong-with-the-ndis-than-just-teething-problems-86225>>, archived at <<https://perma.cc/W2FT-HKZY>>; *Progress Report* (n 11) 53 [3.47].

<sup>80</sup> *Progress Report* (n 11) 72 [3.105]. From July 2016, although packages comprised three segments (core, capacity-building and capital), allowing participants flexibility *within* each segment (avoiding the need for a plan revision), few participants understood this, generating unnecessary modification requests: at 59 [3.66], 60–1 [3.70].

in the previous plan, despite the profound disability and acute needs of the recipient.<sup>81</sup>

The other serious concern for many applicants and their families is that achievement of quantitative planning targets is prioritised over the quality and professional casework engagement of the planning. As the Productivity Commission concluded:

Planning processes are currently not operating well. The speed of transition and performance indicators that focus on participant numbers have placed pressure on the National Disability Insurance Agency to finalise plans quickly, and the quality of plans has been compromised.<sup>82</sup>

As the Productivity Commission elaborated, ‘the planning process is one of the main sources of complaint to the [Ombudsman]’.<sup>83</sup> Lack of consultation and engagement, lack of accessibility and transparency of process, and lack of sufficiently skilled planners were the three principal concerns noted by the Productivity Commission.<sup>84</sup> The Productivity Commission attributed these issues to measures designed to speed up sign-up, retain faith with the states and maintain costs, but which risked becoming entrenched in NDIA practice and culture to the detriment of the Scheme.<sup>85</sup> This was echoed by the Joint Parliamentary Committee, which wrote that

[p]articipants, their families, carers, and service providers expressed dissatisfaction with plans being developed over the phone; the skills and competence of planners; inconsistency of planning decisions; delays to plans and plan reviews; and the Agency’s lack of transparency.<sup>86</sup>

The next Part will explore to what extent these and other concerns are amenable to legal resolution.

<sup>81</sup> [2018] AATA 692. The two day AAT hearing ultimately revolved around a package of \$221,094.42 annually sought for the applicant and the NDIA’s revised package totalling \$160,843.86: at [94], [100] (Member McCallum).

<sup>82</sup> *NDIS Costs* (n 2) 181.

<sup>83</sup> *Ibid* 200.

<sup>84</sup> *Ibid*; see also at 200–20.

<sup>85</sup> *Ibid* 202.

<sup>86</sup> *Progress Report* (n 11) 46 [3.25]. See also the evaluation of trial sites: Mavromaras et al (n 7) 45, 128.



### III WHAT ROLE FOR THE LAW?

Issues of lack of transparency of process, inadequate communication with planners and being surprised by plans which bear little relationship with individual needs are just some of the reasons why participants and their families ask the ‘law’ or the ‘entitlement’ question. That question can arise in a number of ways: as a normative question about ‘conformity’ to the intent of the architects of the Scheme (Part III(A)), as a judicial challenge on a point of law (Part III(B)), or as a possible basis for remediation through merits review of decisions in the AAT (Part III(C)).

#### A *The Normative Question*

##### 1 *How Collaborative Should or Must the Planning Be?*

Crucially, so far as participant and community expectations about collaborative planning of the character envisioned in the ‘joint development’ of plans (as mentioned in the Explanatory Memorandum), the key provision of the *NDIS Act* adopts less imperative language, reading:

33 Matters that must be included in a participant’s plan

- (1) A participant’s plan must include a statement (the *participant’s statement of goals and aspirations*) prepared by the participant that specifies:
  - (a) the goals, objectives and aspirations of the participant; and
  - (b) the environmental and personal context of the participant’s living ...
- (2) A participant’s plan must include a statement (the *statement of participant supports*), prepared with the participant and approved by the CEO, that specifies:
  - (a) the general supports (if any) that will be provided to, or in relation to, the participant; and
  - (b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and [review, funding etc] ...<sup>87</sup>

<sup>87</sup> *NDIS Act* (n 32) ss 33(1)–(2) (emphasis added).

It is evident the phrase ‘prepared with’ in s 33(2) uses weaker language than the ‘joint preparation’ referred to in the Explanatory Memorandum in Part I of this article. Of course, the legal meaning of the phrase ‘prepared with’ may be literally consistent with the kind of ‘articulated’ or sequentially-staged planning process currently adopted by the NDIA. If so, the plain meaning of the provision governs, and there is no scope for referring to the Explanatory Memorandum; that is permissible only if the phrase is found to be ambiguous.<sup>88</sup> Only then might the Explanatory Memorandum be drawn on to support a requirement for a wider, more fully ‘collaborative’ planning process.

## 2 What Remedies Would Lie for Enforcement?

Any challenge to NDIA processes based on breach of the ‘manner of decision-making’ requirements of s 33(2) of the *NDIS Act* would engage s 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘ADJR Act’), most likely by seeking the remedy of declaration.<sup>89</sup> Section 6(1) of the *ADJR Act* enables judicial review to be sought by a person aggrieved by conduct of an officer who ‘has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies’ (as is the case for a planning decision). Relevant grounds for any such review include breach of the principle of procedural fairness (formerly termed natural justice),<sup>90</sup> or ‘that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed.’<sup>91</sup> Once a decision to issue a plan is made, a challenge on the same basis lies under s 5.<sup>92</sup>

The technical legal hurdles to bringing a challenge include whether an application is premature until administrative merits review avenues have been exhausted,<sup>93</sup> and whether a decision to issue the plan supersedes review of

<sup>88</sup> *Acts Interpretation Act 1901* (Cth) ss 15AB(1)(b), (3).

<sup>89</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(a) (‘ADJR Act’).

<sup>90</sup> *Ibid* s 6(1)(a).

<sup>91</sup> *Ibid* s 6(1)(b).

<sup>92</sup> *Ibid* ss 5(1)(a)–(b). The issue of a plan would clearly fall within a ‘decision’: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) also provides the Federal Court with jurisdiction.

<sup>93</sup> See the discretionary power conferred in *ADJR Act* (n 89) s 10(2)(b)(ii) to refuse to grant an application where ‘adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court ... or by another tribunal ... of that

procedural issues about ‘conduct’ in reaching it.<sup>94</sup> However, in practical terms, surely an almost insuperable barrier is that a conduct challenge about lack of a face-to-face meeting would undoubtedly be rectified once a challenge was in the wind, by way of the NDIA planner offering what the Productivity Commission described as the little known ‘entitlement’ to request such an in-person meeting.<sup>95</sup> Only in the extraordinarily unlikely factual matrix of a plan issued on the basis of a data-generated ‘reference package’ being applied *without any* human endorsement at all (however cursory), might judicial review be entertained (on the basis that, unlike other legislation,<sup>96</sup> the *NDIS Act* does not have a provision validating a decision *made* by a computer).

For all practical purposes, then, face-to-face planning is a normative expectation, the realisation of which depends on acceptance of recommendations of external inquiries or lobbying, rather than one able to be secured through the courts.

### B *Judicial and AAT Policing of the ‘Resource Allocation’ Boundaries*

Because the NDIS replaces arrangements for only a portion of the groups previously eligible for state and territory disability services (risking cost-shifting erosion of those arrangements over time), and then only covers specific, rather than mainstream, services (a boundary demarcation between services for those individuals), law in theory serves a ‘sectoral boundary rider’ role in setting and monitoring adherence to the terms of those resource allocation arrangements. Fidelity to those principles affects not only the financial viability of the NDIS, but also the quality of individual lives of both those not covered (reliant on state/territory services) and NDIS participants (in retention of their supplementary general supports).

decision, conduct or failure’. A similar common law principle applies to judicial review: *NAUV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1319, [49] (Hely J).

<sup>94</sup> *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FLR 1, 18–23 (Sackville J), 30 (Kiefel J).

<sup>95</sup> *NDIS Costs* (n 2) 26.

<sup>96</sup> See, eg, *Aged Care Act 1997* (Cth) s 23B-4.

The first boundary is set through amendments to the formerly all-embracing *National Disability Agreement*<sup>97</sup> and ‘continuity of services’ clauses in the bilateral agreements with states and territories,<sup>98</sup> with all the associated centripetal forces and complexity of federal agreements.<sup>99</sup> ‘[S]igns of brinkmanship’ by governments regarding delaying renegotiation around continuity of service for transitioning clients,<sup>100</sup> and evidence of ‘cost-shifting, scope creep and service gaps’<sup>101</sup> are among the problems identified. These are endemic to federal systems of government and are reliant on political rather than legal redress, principally through the Council of Australian Governments and its oversight bodies, such as the Disability Reform Council.<sup>102</sup>

The second boundary is set by the *NDIS Act* criterion, as elaborated in the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) (*‘NDIS (Supports for Participants) Rules’*), of whether a support is more appropriately funded by the NDIS or by mainstream services,<sup>103</sup> and is policed in part by AAT decisions.<sup>104</sup> While statistics are less than sufficiently

<sup>97</sup> See *National Disability Agreement between the Commonwealth of Australia and the States and Territories*, 2009 (Agreement) <[http://www.federalfinancialrelations.gov.au/content/npa/national\\_agreements/national-disability-agreement.pdf](http://www.federalfinancialrelations.gov.au/content/npa/national_agreements/national-disability-agreement.pdf)>, archived at <<https://perma.cc/FD3J-L3TN>>. Implementation of the Agreement is overseen by the Council of Australian Governments (‘COAG’) Disability Reform Council: at 5.

<sup>98</sup> See, eg, *Bilateral Agreement between the Commonwealth and NSW*, 16 September 2015 (Agreement) cls 27–8, sch D <<http://webarchive.nla.gov.au/gov/20151020011806/http://www.coag.gov.au/node/525>>, archived at <<https://perma.cc/2X9D-NQ5W>>, previously *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch 2012*, 7 December 2012, (Agreement) cl 62, annex E <<https://www.coag.gov.au/content/intergovernmental-agreement-national-disability-insurance-scheme-launch>>, archived at <<https://perma.cc/Y38V-6Y9Z>>.

<sup>99</sup> These arrangements were described as more about politics than law, given the general unenforceability of agreements: Cheryl Saunders, ‘Intergovernmental Agreements and the Executive Power’ (2005) 16(4) *Public Law Review* 294, 296–9.

<sup>100</sup> *NDIS Costs* (n 2) 239.

<sup>101</sup> *Ibid* 247.

<sup>102</sup> *Ibid* 30–1, 236–54, 398, 450.

<sup>103</sup> *NDIS Act* (n 32) s 34(f); *NDIS (Supports for Participants) Rules* (n 74) rr 3.5–3.7, sch 1.

<sup>104</sup> *NDIS Costs* (n 2) 252; *Young and National Disability Insurance Agency* [2017] AATA 407 (‘*Young*’); *Re McCutcheon and National Disability Insurance Agency* (2015) 147 ALD 449 (‘*McCutcheon*’); *Re Fear and National Disability Insurance Agency* (2015) 148 ALD 385 (‘*Fear*’).

detailed, the AAT had received a total of 268 applications as at June 2017,<sup>105</sup> 130 of which had been resolved (58% affirming the NDIS decision).<sup>106</sup> Of these, just 20 were published decisions,<sup>107</sup> with the remainder presumably resolved through conciliation or other processes which do not result in published reasons (as is common across other parts of the AAT caseload).

The reported AAT boundary decisions continue what the Productivity Commission termed a ‘narrow focus’ on a particular support item.<sup>108</sup> Thus, in *ZCPY and National Disability Insurance Agency* (‘ZCPY’),<sup>109</sup> a literacy program was found to be appropriately funded by the NDIS rather than general educational services, because the young person was moving into years 10 and 11 and literacy restrictions were a significant barrier to educational participation at that level (unlike a similar request at the primary school level);<sup>110</sup> and separate funding of agencies specifically for coordination of other services has also been accepted.<sup>111</sup> Likewise, it was found appropriate to fund activity-based exercise sessions and physiotherapy, respectively, in two other cases,<sup>112</sup> or to provide transport to community access in one instance and six months of full-time home care in another.<sup>113</sup> It was also found appropriate to fund the cost of four daily home visits by a registered nurse to monitor insulin levels and injections for a participant with unstable diabetes,

<sup>105</sup> *NDIS Costs* (n 2) 420. This number represented 0.19% of all access decisions: *Progress Report* (n 11) 17 [2.52].

<sup>106</sup> *NDIS Costs* (n 2) 420.

<sup>107</sup> *AustLII* (Web Page) <[http://www8.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;meta=%2Fau;query=title%28%22national%20disability%20insurance%20agency%22%29;results=100;rank=on;callback=on;mask\\_path=au%2Fcases%2Fcth%2FAATA;view=date;submit=Search;sfield=full](http://www8.austlii.edu.au/cgi-bin/sinosrch.cgi?method=auto;meta=%2Fau;query=title%28%22national%20disability%20insurance%20agency%22%29;results=100;rank=on;callback=on;mask_path=au%2Fcases%2Fcth%2FAATA;view=date;submit=Search;sfield=full)>.

<sup>108</sup> *NDIS Costs* (n 2) 251–2.

<sup>109</sup> [2017] AATA 3052 (‘ZCPY’).

<sup>110</sup> These situations were found to be similar to those in *McCutcheon* (n 104), where chiropractic treatment was found to be fundable, or the prism lenses for vision in *Re KLMN and National Disability Insurance Agency* (2017) 158 ALD 362 (‘*Re KLMN*’).

<sup>111</sup> *LNMT and National Disability Insurance Agency* [2018] AATA 431, [33]–[38] (Deputy President Bean).

<sup>112</sup> *Hudson and National Disability Insurance Agency* [2017] AATA 2176 (two-hour activity-based exercise session once per week); *King and National Disability Insurance Agency* [2017] AATA 643 (‘*King*’) (annual gym fees and physiotherapy sessions).

<sup>113</sup> *JQJT and National Disability Insurance Agency* [2016] AATA 478 (‘*JQJT*’) (one return trip of up to 36 kilometres each weekend by a support worker); *Re PNMJ and National Disability Insurance Agency* (2015) 68 AAR 8 (‘*Re PNMJ*’) (168 hours of care per week for six months).

for whom generalist health services would be inappropriate.<sup>114</sup> However, a portable oxygen concentrator and insulin pump were found to appropriately be funded by the general health system,<sup>115</sup> as was the case for a pulse oximeter and oral suction pump,<sup>116</sup> early intervention diabetes treatment,<sup>117</sup> and a home occupational therapy room and equipment.<sup>118</sup> Similarly, a swivel car seat and particular listening therapy for autism failed to gain funding approval in two other cases.<sup>119</sup>

While well-reasoned on their facts, it is difficult to discern a strong normative direction about aggregate management or policy based on these cases, but this may not be the long suit of merits review in any event, meaning that other avenues will have to be relied on. Merits review is thought to struggle to deal with the complexity and polycentric character of reviews of such services,<sup>120</sup> so the jury is still out on AAT handling of these reviews.

### C Merits Review

#### 1 What Role Can Merits Review Play?

As the National Audit Office observed: ‘Individuals seeking to access the NDIS may have limited ability to self-advocate. As such, it is important that NDIS applicants who are found ineligible have access to effective, transparent and timely internal and external review processes.’<sup>121</sup> Individual merits review

<sup>114</sup> *Re Mazy and National Disability Insurance Agency* [2018] AATA 3099 (Deputy President Constance). See also *Re QZHH and National Disability Insurance Agency* [2018] AATA 1465 (Member Parker).

<sup>115</sup> *Re Young and National Disability Insurance Agency* (2014) 140 ALD 694.

<sup>116</sup> *Fear* (n 104).

<sup>117</sup> *YPRM and National Disability Insurance Agency* [2016] AATA 1023.

<sup>118</sup> *ZNDV and National Disability Insurance Agency* [2014] 144 ALD 652.

<sup>119</sup> *Young* (n 104) (car swivel seat); *Re TKCW and National Disability Insurance Agency* (2014) 141 ALD 689 (listening therapy program).

<sup>120</sup> Jill Toohey, ‘New Challenges in Merits Review Decision-Making’ (2015) 80 *AIAL Forum* 20, 23:

The decision to give the Tribunal jurisdiction to review decisions of the NDIA was not universally welcomed. Some thought the Tribunal too inaccessible, its procedures too formal and legalistic, and some questioned the ability of its members to determine complex disability matters and thought a specialist tribunal or an interim level of review, similar to the Social Security Appeals Tribunal, more appropriate.

<sup>121</sup> *ANAO Report* (n 20) 46 [4.1].

or other legal accountability is rarely provided outside income transfer payments, due to the greater complexity and discretionary character of planning decisions about service issues, along with government concerns that such a process cannot accommodate broader social equity and distributional justice aspects.<sup>122</sup> Therefore, AAT review of certain NDIS decisions is an exception,<sup>123</sup> even if construed as an entitlement program.

This last point is important since, at least in the eyes of its chief architects, an entitlement program it is not. As the Productivity Commission put it:

Moving away from the welfare culture of current disability systems to one of seeking reasonable and necessary supports and managing down the total cost of disability over a participant's lifetime (in line with an insurance approach) will be critical for the financial sustainability of the scheme.<sup>124</sup>

Placement of the NDIS within the Department of Social Services (despite responsibility of an assistant Minister for Social Services and Disability Services), together with a lack of NDIA independence to pursue an insurance rather than entitlement logic, also came in for criticism from the Productivity Commission.<sup>125</sup>

An insurance logic arguably does favour such capacity-building social facilitation of optimal participation in the life of the community, which is the essence of realisation of a social, rather than medical or 'deficit', model of disability. While purist adherence to the social model (that disability results solely from the person's social context and the external environment) is not sustainable, context does play an important role that is currently entirely

<sup>122</sup> For example, the AAT can only set aside, but not exercise, its usual powers to remake a decision about a social security participation (employment pathway) plan and after a specific request to do so: *Social Security (Administration) Act 1999* (Cth) ss 140A, 143, 147 item 6.

<sup>123</sup> Another (but since repealed) exception was Victoria's Intellectual Disability Review Panel, which had only recommendatory powers: *Intellectually Disabled Persons' Services Act 1986* (Vic) ss 27–8; Intellectual Disability Review Panel, *A Right to Be Heard: 20 Years of the Intellectual Disability Review Panel* (2007). Its work was studied in Terry Carney and Keith Akers, 'A Coffee Table Chat or a Formal Hearing?: The Relative Merits of Conciliation Conferences and Full Adjudicative Hearings at the Victoria Intellectual Disability Review Panel' (1991) 2 (August) *Australian Dispute Resolution Journal* 141.

<sup>124</sup> *NDIS Costs* (n 2) 78.

<sup>125</sup> *Ibid* 401. The Assistant Minister was then the Hon Sarah Henderson MP: 'Ministers', *Department of Social Services* (Web Page, 28 August 2018) <<https://www.dss.gov.au/ministers>>, archived at <<https://perma.cc/LW4A-SYL7>>.

excluded from disability support pension ('DSP') entitlement claims.<sup>126</sup> Just as for DSP purposes, there is a world of difference to judging need for lower limb mobility supports to know whether a person walks on urban paved surfaces or on the sands of the gibber desert; or that a one-armed labourer has different employment participation support needs to a one-armed academic, so too for the NDIS. There is a world of difference for NDIS planning between meeting the needs of older persons with intellectual disability (including the high numbers of former residents of institutions) with no family and no one who knows them well, compared to the person in a well-resourced professional family with siblings and an engaged and supportive network of friends.

## 2 Policing 'Reasonable and Necessary' Supports

The subordinate instruments that accompany the *NDIS Act* detail the way in which reasonable and necessary supports are to be expressed within a plan,<sup>127</sup> as well as elaborating the meaning of the phrase.<sup>128</sup> Deciding what the 'reasonable and necessary supports' are, self-evidently, is a matter of discretionary judgement, rather than an application of a bright line rule or definition. This has resource and staffing implications for the planning process (more time and higher skilled staff), as well as raising equity considerations (treating like cases alike). It also engages human rights principles. Thus, in *PNFK*, a case involving a profoundly disabled child, it was held that the phrase should be interpreted in light of both the *CRPD* and the

<sup>126</sup> Terry Carney, 'Vulnerability: False Hope for the Vulnerable Social Security Clients?' (2018) 41(3) *University of New South Wales Law Journal* 783.

<sup>127</sup> *NDIS (Plan Management) Rules* (n 50) pt 6.

<sup>128</sup> *NDIS (Supports for Participants) Rules* (n 74). The NDIA has also adopted operational guidelines: NDIA, 'Planning OG', *NDIS* (Web Page, 7 December 2018) <<https://www.ndis.gov.au/about-us/operational-guidelines/planning-operational-guideline>>, archived at <<https://perma.cc/6SHW-T6DF>>. For consistency, both NDIA decision-makers and the AAT are expected to apply these guidelines, unless there is a sound reason for departure, in accordance with the 'Drake principle': *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) [2] ALD 634.



*Convention on the Rights of the Child*,<sup>129</sup> given that both were referenced in the statutory objectives of the NDIS.<sup>130</sup>

The NDIA took one case as far as the Full Court of the Federal Court in the hope of gaining clarity about the meaning of the phrase beyond Mortimer J's brief remarks in the lower court.<sup>131</sup> However, this proved fruitless, apart from the Full Court's observation about the already remitted case that '[g]iven the potential systemic importance of the issues sought to be raised before the Tribunal, the President of the Tribunal may wish to consider constituting a three-person Tribunal, including a Presidential Member'.<sup>132</sup> Crucially, however, Mortimer J had found that the phrase 'reasonable and necessary supports' serves as a 'gateway' into *fully* funded support, without any overlay of reduction based on family contribution of the type the NDIA policy had sought to impose.<sup>133</sup> This is consistent with the fundamental principle that application of policy guidelines cannot alter the legal meaning

<sup>129</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3 (entered into force 2 September 1990).

<sup>130</sup> *PNFK* (n 81) [21]–[25] (Member McCallum). The impact of human rights principles is, however, more diluted than it first appears: *Re Pavilupillai and National Disability Insurance Agency* [2018] AATA 4641, [65]–[70] (Deputy President Forgie). Human rights can cut both ways: in *Re Rain and National Disability Insurance Agency* [2018] AATA 2597, neither a folding wheelchair nor a carer/pusher was found to be reasonable and necessary supports, in part because Member Parker concluded it risked the person becoming dependent on it for participating in photography excursions.

<sup>131</sup> *McGarrigle and National Disability Insurance Agency* [2016] AATA 498; *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [41] (Mortimer J) ('*McGarrigle (Federal Court)*')

Its meaning can be derived from the context in which it is used, especially in my opinion s 4(11), which sets out what reasonable and necessary supports should enable and empower people with a disability to do, read with s 14 which sets out the purposes for which funding for reasonable and necessary supports is provided.

<sup>132</sup> *National Disability Insurance Agency v McGarrigle* (2017) 157 ALD 458, 459 [8] (Kenny, Robertson and Kerr JJ).

<sup>133</sup> *McGarrigle (Federal Court)* (n 131) [95] (Mortimer J):

The subject matter of the CEO's approval in s 33(2)(b) is the reasonable and necessary supports that 'will' be funded. The language is imperative, and in my opinion this is consistent with the applicant's contention that the relevant gateway established by the legislative scheme is whether the support is 'reasonable and necessary', and once through that gateway, the scheme intends the support will be fully funded. There are no references in these provisions to 'contributions' from the participant, the participants' family or carers.

of terms or the statutory architecture established.<sup>134</sup> In this instance, it does not mean that other practically available sources of the support should not be considered, merely that once discarded as acceptable alternatives, the necessary support must be fully funded.<sup>135</sup> Slippage arises in a number of ways: because the requirement applies to general as well as to specific supports in a plan; because ‘reasonable’ is read disjunctively from ‘necessary’; and because the phrase is not tightly tied to the non-exhaustive list of six characteristics of qualifying supports (with different items relating to reasonableness and necessity).<sup>136</sup>

Reported AAT decisions so far have concentrated on whether the support in question satisfies the criteria of degree of benefit and effectiveness, and that of being value for money. While many applications result in favourable determinations,<sup>137</sup> the value for money requirement is viewed seriously. Thus, in one instance, additional taxi transport, such as to go bushwalking and facilitate event hosting, and air-conditioning and security for a rental property, were found not to be reasonably necessary in the circumstances,<sup>138</sup> but prism lenses for double vision were found reasonable and necessary.<sup>139</sup>

<sup>134</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420–1 (Bowen CJ and Deane J).

<sup>135</sup> *McGarrigle (Federal Court)* (n 131) 143, [97]–[98] (Mortimer J). Most recently, this precedent was relied on in supporting funding of taxi fares and two interstate flights by a carer to facilitate sporting involvement by an NDIA participant: *Re David and National Disability Insurance Agency* [2018] AATA 2709 (Senior Member Cameron).

<sup>136</sup> *NDIS Costs* (n 2) 187–9. *NDIS Act* ss 34(1)(a)–(b), (d) speak to necessity, while ss 34(1)(c), (e)–(f) speak to reasonableness: *ibid* 130 [39], 141 [91] (Mortimer J).

<sup>137</sup> *ZCPY* (n 109) [123]–[139] (Member Parker); the NeuroMoves exercise program in *Hudson* (n 112) [49]–[50] (Members McCallum and Bygrave); the Bobath exercise therapy and gym membership in *King* (n 112) [26] (Member Parker); the once a week support worker return trip in *JQJT* (n 113) [43]–[47] (Senior Member Toohey, Members McCallum and Bygrave); the 168 hours a week of care for a child over a six-month period in *PNMJ* (n 113) [107] (Senior Member Toohey and Member Pertton); the period of chiropractic treatment in *McCutcheon* (n 104) [91] (Senior Member Toohey); the taxi fares to TAFE sessions and to a weekly gym session in *Re Perosh and National Disability Insurance Agency* (2018) 159 ALD 385, 397 [83], [85] (Member McCallum); or the increased hours, frequency and duration of overnight care, day assistance in personal care and community access in *Re DGJJ and National Disability Insurance Agency* [2018] AATA 1263 (Senior Member Kelly).

<sup>138</sup> *KLMN and National Disability Insurance Agency* [2017] AATA 1814, [55]–[82] (Member Pertton). See also *Re Rain and National Disability Insurance Agency* [2018] AATA 2597 (Member Parker).

<sup>139</sup> *Re KLMN* (n 110) 379–80 [36]–[43] (Member Pertton).

Similarly, a \$12,000 swivel car seat according independent mobility to a Land Cruiser failed this test when compared to portable access steps requiring placement by another person.<sup>140</sup> More recently, the purchase of a wheelchair with 'off-road' capacity (a Zoom ATV) was found to be reasonable and necessary, despite the NDIA's objections that a similarly priced 'standard' wheelchair would be appropriate due to lower risk and flexibility to adjust to the participant's deteriorating condition (hereditary spasticity paraplegia).<sup>141</sup> The recreational lifestyle opportunities provided by the off-road wheelchair over the (comparatively short) expected life of that wheelchair led the AAT to find this to be the appropriate purchase.<sup>142</sup> However, an additional six hours a week to enable social outings was found not to be value for money in another case, because it could be funded from the underspent core support budget or capacity-building funds not used to date to address episodes of problematic behaviours, which gave rise to the need for such support.<sup>143</sup> Likewise, two hour blocks of homecare for an autistic child failed the test given that it was principally child care, and alternative avenues for such support had not been canvassed.<sup>144</sup>

For its part, the Productivity Commission rejected the option of further legislative definition, instead concluding that 'additional guidance, where required, should be contained in rules, operational guidelines or other policy documents'.<sup>145</sup> While wise advice to a point, the Productivity Commission may not have fully appreciated that ultimately the legislation sets the boundaries, only within which may rules or policy provide further calibration.

<sup>140</sup> *Young* (n 104) [45]–[59] (Senior Member Toohey and Member Connolly).

<sup>141</sup> *Munday and National Disability Insurance Agency* [2018] AATA 355, [95]–[96] (Member McCallum).

<sup>142</sup> *Ibid.*

<sup>143</sup> *Way and National Disability Insurance Agency* [2018] AATA 983, [50]–[56] (Member McCallum).

<sup>144</sup> *Re LJY and National Disability Insurance Agency* [2018] AATA 3506, [36] (Deputy President Constance). Similarly, two days of in-home care was not found to be reasonable and necessary for a child with a severe congenital heart condition: *Re BJJD and National Disability Insurance Agency* [2018] AATA 2971 (Deputy President Humphries).

<sup>145</sup> *NDIS Costs* (n 2) 187.

### 3 Equity: The Need for Support and Advocacy?

Equity of case planning outcomes is both an important ethical value (treating like cases alike), as well as being important to building and maintaining public confidence. NDIS case planning is torn between, on the one hand, the need to fulfil one version of an ethics of justice (treating like cases alike) and, on the other hand, an ethics of care (acknowledging the unique circumstances of each participant, and the importance of the dialogue between participants, their families and other informal and formal supporters).<sup>146</sup> In practice, the NDIA and other stakeholders recognise both the lack of consistency in planning outcomes, and often poor quality in casework engagement.<sup>147</sup> Eligibility rules can deliver distributional equity in income transfer programs, but equity in case planning relies on other measures. Reference packages are one of the ways in which the NDIA has sought to provide greater consistency of planning outcomes,<sup>148</sup> but even if the data is reliable, they only set a minimum floor. A common refrain in conversation around the NDIS is that families high in the human capital qualities of experience and persistence enjoy greater success in negotiating the correct package above that baseline, while participants lacking confident family members or other advocacy support tend to lose out.

Given its infusion with *CRPD* values and an express principle that '[p]eople with disability should be supported in all their dealings and communications with the [NDIA] so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and

<sup>146</sup> Anna Yeatman eloquently analysed this as the realisation of the wider conception of the intersubjectivity of the 'self', in contradistinction to the narrow focus on the 'will' of the person (ie the notion of self-governance), observing that recent trends in welfare have favoured the latter (as to some extent does the NDIS): Anna Yeatman et al, *Individualization and the Delivery of Welfare Services: Contestation and Complexity* (Palgrave Macmillan, 2009) chs 1, 5–7. The salience of these issues to the NDIS was anticipated in Michele Foster et al, 'The Politics of Entitlement and Personalisation: Perspectives on a Proposed National Disability Long-Term Care and Support Scheme in Australia' (2012) 11(3) *Social Policy and Society* 331. See also Paul Henman and Michele Foster, 'Models of Disability Support Governance: A Framework for Assessing and Reforming Social Policy' (2015) 50(3) *Australian Journal of Social Issues* 233.

<sup>147</sup> *Progress Report* (n 11) 24 [2.84], 50–1 [3.39]–[3.41], 60 [3.68].

<sup>148</sup> *NDIS Costs* (n 2) 193, 195, 201.

cultural needs,<sup>149</sup> an apparent neglect by the NDIA of participants' support needs is surprising. Support needs potentially arise in either or both of the planning process and package administration; needs which might be realised either on an informal or funded basis (ie as a component of a package), or perhaps through the rarely utilised appointment of a plan or a correspondence 'nominee'. The evaluation report found that, aside from assistance from NDIA planners themselves, between 90% and 95% of participants received some form of support.<sup>150</sup> Support was mainly drawn from their interpersonal network, with three-quarters mentioning assistance from family (73%) or friends (3%), and one in five (19%) from guardians; civil society sources accounted for similar levels (support workers 17%) and other advocates (16%).<sup>151</sup> Statutory 'nominees' were mentioned in only one in 10 (9%) of cases.<sup>152</sup>

In fairness to the NDIA, the current nominee provisions are poorly drafted, which may account for such limited exercise of the power. A plan nominee is a substitute decision-maker (what the Australian Law Reform Commission would rename a 'representative').<sup>153</sup> Except to the extent excluded in the appointing instrument, an NDIS plan nominee exercises proxy powers of a participant to make, review or administer a plan.<sup>154</sup> If appointed at the initiative of the NDIA, the nominee is restricted to areas where 'the nominee considers that the participant is not capable of doing, or being supported to do, the act',<sup>155</sup> and appointments are a last resort, for those otherwise unable to adequately participate in the planning and lacking an informal supporter who is able to undertake the role (or be strengthened to

<sup>149</sup> *NDIS Act* (n 32) s 4(9). The legislation also captures an 'equality' value: at ss 4(1), (6)–(8); see also s 4(2): 'People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.'

<sup>150</sup> Mavromaras et al (n 7) 93.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.* These proportions should be treated with caution, given data and methodological limitations (including incomplete coverage of people with severe and profound disabilities transitioned into the scheme).

<sup>153</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report, August 2014) 135 [5.33].

<sup>154</sup> *NDIS Act* (n 32) s 78(1); *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) r 3.7 ('*NDIS (Nominees) Rules*').

<sup>155</sup> *NDIS Act* (n 32) s 78(5); *NDIS (Nominees) Rules* (n 154) rr 5.5–5.6.

do so).<sup>156</sup> A correspondence nominee, despite the name, is empowered to perform all other acts open to a participant other than the making and administration of the plan,<sup>157</sup> though this principally involves acting as a channel of communication with the NDIA.<sup>158</sup> The problem with the plan nominee provision is that the protections around exercise of such proxy decision-making powers are inadequate,<sup>159</sup> making it essentially a form of ‘guardianship light’. In practice, few nominee appointments are made. Instead, driven in significant part by risk-averse policies of overly cautious providers and others, numbers of applications are made under state and territory laws for adult guardianship or financial management orders, sometimes to enable an access application or facilitate negotiation, but mainly to provide management of a plan.<sup>160</sup> Public trustees also assume management roles in this way.<sup>161</sup>

To its credit, NDIA operational guidelines from the outset have encouraged recognition of informal support for decision-making,<sup>162</sup> but in our assessment, investment in capacity-building in this area has been inadequate,<sup>163</sup> an under-investment compounded by reductions in state funding of disability advocacy programs.<sup>164</sup> The resultant proliferation of reliance on

<sup>156</sup> *NDIS (Nominees) Rules* (n 154) rr 3.14(b)(i)–(ii), (iv).

<sup>157</sup> *NDIS Act* (n 32) ss 79(1)–(2).

<sup>158</sup> *NDIS (Nominees) Rules* (n 154) r 3.9.

<sup>159</sup> Terry Carney, ‘Australian Guardianship Tribunals: An Adequate Response to CRPD Disability Rights Recognition and Protection of the Vulnerable over the Lifecourse?’ (2017) 10(3) *Journal of Ethics in Mental Health* 1.

<sup>160</sup> Christine Fougere, ‘Guardianship, Financial Management and the NDIS: NCAT’s Experience’ (Presentation, Australian Guardianship and Administration Council Heads of Tribunal Meeting, 23 March 2017); Tess McCarthy, ‘Guardianship and National Disability Insurance Scheme’ (Discussion Paper, Office of the Public Advocate, 1 September 2014).

<sup>161</sup> *NDIS Costs* (n 2) 364. The Productivity Commission notes that it may not be ‘fit for purpose’ in any event, due to conflicts of interest and other concerns: at 84, citing *Equality, Capacity and Disability in Commonwealth Laws* (n 153) 151–2 [5.106]–[5.112].

<sup>162</sup> National Disability Insurance Agency, *Operational Guideline* (at 19 December 2013) 22.

<sup>163</sup> See also Office of the Public Advocate, Submission to the National Disability Insurance Scheme, *Code of Conduct Discussion Paper* (June 2017) 9.

<sup>164</sup> Victoria was the first state temporarily to guarantee to continue its previous funding, with the others initially seeing this to be a specific, rather than a generalist, disability service: *NDIS Costs* (n 2) 39–40, 60, 213–14, 357, 363–9, 377; see especially at 380–8. In NSW, half of all advocacy services faced loss of funding from July 2018 (losing \$13 million per annum): James Robertson, ‘NSW Disability Groups Face Wipeout, New Figures Show’, *The Sydney*

informal support may be problematic, not least because there is little evidence that NDIA planners scrutinise the approach taken by supporters, much less that they have some principles to guide a judgement about whether the way they are enacting the support is in tune with the intention of rights and principles in the legislation. Informal supports, while in theory closest to the person and thus most capable of knowing or ‘reading’ the will and preferences of the person being supported, may be unduly protective and risk-averse, and accountability can be difficult to ensure.<sup>165</sup> Given the high proportion of participants with intellectual disability, where family carers may have more entrenched paternalist values,<sup>166</sup> the case for long-term decision-making support and/or advocacy, both in plan formulation and in its administration, is surely heightened.<sup>167</sup> Again, the resolution of these deficiencies lies in the public policy arena, rather than being amenable to legal redress. However, when doing so, it is critical to take an evidence-based approach to determining what kinds of capacity-building support or advocacy are most effective and have the best value for money.<sup>168</sup>

*Morning Herald* (online, 11 October 2017) <<https://www.smh.com.au/national/nsw/nsw-disability-groups-face-wipeout-new-figures-show-20171011-gyystp.html>>, archived at <<https://perma.cc/DTD2-7459>>. See also the Council for Intellectual Disability website campaign hub: Council for Intellectual Disability, *Don't Silence* (Website) <<https://donsilence.org.au/>>, archived at <<https://perma.cc/AW45-S6FP>>. On 6 April 2018, NSW funding was guaranteed for another two years, joining Queensland in providing transition funding: Alexandra Smith, ‘Berejiklian to Reverse Funding Cuts to Disability Groups’, *The Canberra Times* (online, 6 April 2018) <<http://www.canberratimes.com.au/nsw/berejiklian-to-reverse-funding-cuts-to-disability-groups-20180405-p4z802.html>>, archived at <<https://perma.cc/4D6N-HUCX>>.

<sup>165</sup> Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44, 47; Christine Bigby, Mary Whiteside and Jacinta Douglas, ‘Providing Support for Decision Making to Adults with Intellectual Disability: Perspectives of Family Members and Workers in Disability Support Services’ (2019) 44(4) *Journal of Intellectual and Developmental Disability* 396, 397.

<sup>166</sup> Bernadette Curryer, Roger J Stancliffe and Angela Dew, ‘Self-Determination: Adults with Intellectual Disability and Their Family’ (2015) 40(4) *Journal of Intellectual and Developmental Disability* 394, 395 (emphasis added): ‘Despite the aspiration for choice and control espoused within the UNCRPD and Australian disability policies, *the reality for many adults with intellectual disability is different.*’

<sup>167</sup> For a similar conclusion reached by the independent evaluation, see Mavromaras et al (n 7) 185, 197–8, 202.

<sup>168</sup> *Ibid.* See also Christine Bigby et al, ‘Delivering Decision-Making Support to People with Cognitive Disability: What Has Been Learned from Pilot Programs in Australia from 2010 to 2015’ (2017) 52(3) *Australian Journal of Social Issues* 222, 236; Jacinta Douglas and Christine

## IV CONCLUSION

This paper has explored some of the issues which have arisen due to challenges with the roll-out of NDIS. Contrary to perceptions that the Scheme is exclusively designed around personalisation values, this paper has shown that the Scheme has multiple other objectives, including equity and efficiency. Reconciling this tension was always going to be difficult, but the scale, speed and complexity of the roll-out have seen numbers of administrative practices adopted by the NDIA which are inimical to the form of personalised planning at the heart of the insurance logic of the Scheme, generating a culture which threatens both individual justice to participants and public confidence in its administration.

These Taylorist routinisation and data-driven planning initiatives are understandable but highly problematic practices. However, their adoption is shown not to constitute an error of law, despite the way individual justice to NDIS participants is sacrificed to equity, efficiency and roll-out target goals. For its part, merits review of issues, such as what constitutes ‘reasonable and necessary’ supports, or whether a support is an NDIS or generalist service responsibility, proved more effective in securing social justice for participants. However, it appears unlikely that these legal avenues will deliver the normative guidance about system boundaries and other macro policy issues recent inquiries anticipate they might inject.<sup>169</sup> Instead, other external accountability mechanisms must be relied on to resolve such questions. Individual advocacy and support, for their part, are undoubtedly valuable resources, and are heavily promoted by the *CRPD*, but their operationalisation remains a work in progress.

As foreshadowed earlier, the insurance logic enshrined in the *NDIS Act* has crafted a very *particular* (and thus contestable) form of personalisation, with lesser weight on expert case planning and more reliance on participant or familial expressions of the will and preferences of the person. It has also led to the imposition of bright line distinctions between disability-specific costs (fundable) and any associated complex needs (not funded).

Bigby, ‘Development of an Evidence-Based Practice Framework to Guide Decision Making Support for People with Cognitive Impairment Due to Acquired Brain Injury or Intellectual Disability’ (2018) *Disability and Rehabilitation* 1–8.

<sup>169</sup> See also Rick Morton, ‘Test Cases Risk NDIS Budget Blowout’ *The Australian* (online, 6 October 2018) <<https://www.theaustralian.com.au/national-affairs/health/test-cases-risk-ndis-budget-blowout/news-story/b96603b0bc172e72f70d162ee083611c>>.



Most contentiously, the ‘multiple, compounding and inextricably connected complex support needs’ of some people with intellectual disability that, when unmanaged, can manifest as acting out and other social and criminal behavioural issues.<sup>170</sup> Such departures from traditionally more holistic and professional forms of welfare planning delivery by government and civil society agencies pose many unanswered, but fundamental, questions about the appropriateness or otherwise of the insurance logic and the associated closer embrace in NDIS planning of *CRPD* principles, such as those of agency and equality.<sup>171</sup> Those debates raise conceptual and substantive questions going to the heart of contemporary understandings of disability and state responsibilities to vulnerable citizens with limited ability to self-advocate, but their resolution lies beyond the scope of the present paper, which has concentrated on some of what might be termed the ‘legal questions’ raised by the NDIS.

<sup>170</sup> Alison Churchill, Mindy Sotiri and Simone Rowe, ‘Access to the NDIS for People with Cognitive Disability and Complex Needs Who Are in Contact with the Criminal Justice System: Key Challenges’ (Research Paper, The Community Restorative Centre, January 2017) 4. See, eg, Victorian Council of Social Service, ‘Young Man Stuck in Prison by NDIS Transition Mess’ (Media Release, Victorian Council of Social Service, 10 November 2017) <<https://vcoss.org.au/analysis/young-man-stuck-in-prison-by-ndis-transition-mess/>>, archived at <<https://perma.cc/3QJN-JP5Q>>. Approximately 10–15% of people with disabilities may be affected to an extent that warrants consideration of restrictive practices: *Equality, Capacity and Disability in Commonwealth Laws* (n 153) 244 [8.6]–[8.7].

<sup>171</sup> For a recent contribution, see Emily Cukalevski, ‘Supporting Choice and Control: An Analysis of the Approach Taken to Legal Capacity in Australia’s National Disability Insurance Scheme’ [2019] 8(2) *Laws* 8.