

NATIONAL DISABILITY INSURANCE SCHEME PLAN DECISION-MAKING: OR WHEN TAILOR-MADE CASEPLANNING 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 caseplanning, an insurance logic, or principles of equity and efficiency of decision-making; and then assess 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.

Keywords: NDIS, caseplanning, insurance logic, legal remedies, ethic of justice vs ethic of care.

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.¹

The National Disability Insurance Scheme ('NDIS') is a major new program now 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).² Sixty to seventy per cent of scheme participants are anticipated to be people with an intellectual impairment or autism.³ When fully implemented, the NDIS will at \$22 billion annually be the second largest Federal Government program (behind only Medicare but outstripping aged care⁴). It provides eligible participants with significant resources (valued at an average of \$54,000 annually in 2017⁵) under a personal plan geared to the

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¹ Explanatory Memorandum, *National Disability Insurance Scheme Bill 2012*.

² An increase from the original expectation of 460,000: Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs' (Canberra: Productivity Commission, June 2017) <<http://www.pc.gov.au/inquiries/current/ndis-costs/position/ndis-costs-position.pdf>>, 4, 70, 88.

³ 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 at 272. Currently 66% of participants have ID (37%) or autism (29%) with 6% having psychosocial impairments: Productivity Commission, *ibid*, 108.

⁴ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above 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: *ibid*.

⁵ *Ibid*, 113. The value of packages varies significantly by disability, jurisdiction and other factors: *ibid*, 111-117.

needs of their particular disability, where possible a plan administered to maximise participant control⁶ (though only a minority elect to do so⁷).

As reflected in the extract from the Explanatory Memorandum to the establishing legislation, the philosophy of the scheme is that of a personal budget or package of resources developed 'jointly' between the Agency and the person with disability.⁸ This 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 the social caseworker rather than of an administrator, and on first blush seems unreceptive to administrative routinisation ('Taylorism') or digitisation and automation. Unsurprisingly, potential NDIS participants and their families or supporters think likewise.⁹ 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

⁶ 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, declining to an anticipated one tenth by full-roll out: *ibid*, 281. For reasons of efficient transition from the old to the new scheme, inclusion of such services 'where provided and available' is privileged: *ibid*, 282; *National Disability Insurance Scheme (Plan Management) Rules 2013* rr 6.8-6.9.

⁷ Kostas Mavromaras et al, 'Evaluation of the NDIS: Final Report' (Adelaide: Flinders University National Institute for Labour Studies, 2018) <https://www.dss.gov.au/sites/default/files/documents/04_2018/ndis_evaluation_consolidated_report_april_2018.pdf> xvii, 92, 120-121, 125. Just under half (46%) of participants in the trial sites managed at least portion of a package, with one in ten participants doing so directly, and the remainder managed by families (31%) or someone else (5%): *ibid*, 120. The proportion self-managing was higher for the aged, at one in five: *ibid* 242.

⁸ For a review of international developments of personalisation, see Andrew Power, Janet Lord and Allison deFranco, *Active Citizenship and Disability: Implementing the personalisation of support*, Cambridge Disability Law and Policy Series (Cambridge University Press, 2013).

⁹ Joint Standing C'tee on NDIS, 'Progress Report' (Canberra: Joint Standing Committee on the National Disability Insurance Scheme, Joint Standing Committee on the National Disability Insurance Scheme,, 7 September 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/General_NDIS/Progress_report>, 46-63; Kirsten Deane, 'People With Disability Demand Action to Fund and Fix NDIS' on *Probono Australia* (2 May) <https://probonoaustralia.com.au/news/2018/05/people-disability-demand-action-fund-fix-ndis/?utm_source=Pro+Bono+Australia+-+email+updates&utm_campaign=96375ef227-EMAIL_CAMPAIGN_2017_08_18&utm_medium=email&utm_term=0_5ee68172fb-96375ef227-146900557&mc_cid=96375ef227&mc_eid=ab8c827001>.¹⁰ *Ibid*, 71, para [3,102].

in the National Disability Insurance Agency ('NDIA') that is not placing the participant, and those who support them, at the centre of the Scheme'.¹⁰

So how does the actual process square with legislative and other obligations, and how adequate and effective are the avenues of review? Does the planning process adequately meet standards of good administration, and is it equitable if more articulate or better supported individuals or more worldly and experienced families are more likely to achieve an optimal level of plan resourcing while the less experienced go short-changed? Is adequate attention paid to providing support during the planning process and beyond, and why are nominee appointments so rare? Are Administrative Appeals Tribunal ('AAT') review rights broad enough and accessible enough? These are some of the issues explored in this paper.

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 formal 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 digital twist on the tension between two types of ethics, an ethics of justice that 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.¹¹ And, although merits review of issues – such as what

¹⁰ Ibid, 71, para [3,102].

¹¹ Virginia Held, 'Care and Justice in the Global Context' (2004) 17(2) *Ratio Juris* 141, 144. More generally, Virginia Held *The Ethics of Care: Personal, Political, and Global* (OUP, 2006). For discussion of the origins of an ethic of care in the work of 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, Sonya Stanford (eds) *Critical Ethics of Care in Social Work: Transforming the Politics and Practices of Caring* (Routledge, 2018), Ch 5. 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),

constitutes ‘reasonable and necessary’ supports or whether it is a NDIA or general service responsibility – does provide crucial individualised response for some individuals, it is argued that it is rather unsuited to delivering the normative guidance about system boundaries and other aggregate policy settings various inquiries have hoped it is capable of providing.

II THE NDIS AND THE PLANNING FRAMEWORK

A CONTEMPORARY HUMAN SERVICE DELIVERY MODELS AND THE NDIS

Human service delivery is anything but immune from technological change, including data management and machine learning initiatives. It was one of the first sectors to embrace such management in the USA,¹² accelerated by pressures of fiscal austerity, privatisation and neoliberalism.¹³

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. Adoption of scientific management or neo-Taylorist approaches to operationalising the scheme when recruiting participants and settling plans, was driven by the 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.¹⁴ Quoting references to a ‘tsunami’ of applications and ‘break-neck speed’ of roll out, the

especially Ch 2. For discussions on care and justice in disability studies, see Anita Silvers, 'Reconciling Equality to Difference: Caring F(or) Justice for People with Disabilities' (1995) 10(1) *Hypatia* 30; Susan Wendell and Anette Junemann, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge, 1996); and, Eva Feder Kittay, 'The Ethics of Care, Dependence and Disability' (2011) 24(1) *Ratio Juris* 49.

¹² Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martins Press, 2017).

¹³ Mimi Abramovitz and Jennifer Zelnick, 'Privatization in the Human Services' in Martha Albertson Fineman, Titte Mattsson and Ulrika Andersson (eds), *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective* (Routledge, 2017) 182.

¹⁴ Each State has its own ‘instrument’ to set this priority and determine the sequence of processing between different regions within the jurisdiction: eg *National Disability Insurance Scheme (Facilitating the Preparation of Participants’ Plans – New South Wales) Rules* 2016.

Productivity Commission noted in its October 2017 report that from a June quarter 2017 average of approving 165 plans a day the NDIA would need to average 500 (and review ‘hundreds’ more) each day in the optimistically targeted final year of transition (2018-2019),¹⁵ concluding that the existing short-fall of performance would push completion out by at least another year.¹⁶

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.¹⁷ Originally collected for other purposes, using different definitions and quality checks from place to place, it is unsurprising that legacy data deficiencies¹⁸ and broad spectrum questionnaire or other intake information¹⁹ resulted in intake decision errors²⁰ and draft plans at odds with the needs of participants. This risk of inappropriate plans was compounded by the scale of the task and lack of suitable personnel to serve as the human liaison or facilitator in the planning process, along with undue reliance on remote access telephone or video conferencing due to cost-pressures. One consequence of this was that instead of ironing out mismatch issues during the initial planning process, they went unaddressed (especially in the case of more

¹⁵ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 90.

¹⁶ Ibid, 92.

¹⁷ For an outline of NDIA computer-aided decision-making, see: ANAO, 'Decision-making Controls for Sustainability – National Disability Insurance Scheme Access' (Canberra: Auditor-General, 2017) <https://www.anao.gov.au/sites/g/files/net4181/f/ANAO_Report_2017-2018_13.pdf> 42, paras [3.51]-[3.54].

¹⁸ Ibid 9, para [18], 33, para [3.18], 35-37, paras [3.28]-[3.34] (defined program transitions), 43, para [3.59] (data integrity deficiencies).

¹⁹ The out-sourcing of intake processing to Department of Human Services ‘Smart’ centres, is summarised at: ANAO Report, *ibid*, 19 paras [1.18]-[1.19].

²⁰ A 2017 quality assurance methodology commissioned by the NDIA from KPMG found substantive errors in 6.3 per cent of general access decisions (ones not fast-tracked based on having a listed condition or being a legacy cohort transfer): *ibid*, 63 para [5.43].

vulnerable clients²¹) or were deferred until participants exercised their right to challenge a plan once made.

As we touch on again in the conclusion, there may also be a much deeper NDIS design reason why Taylorist administration has gained so much purchase. This we suggest lies in the downgrading of 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.²² As Ife summarised this somewhat problematic typology, there are 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.*²³

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'.²⁴ 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. Under-

²¹ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 136-138, 158, 177.

²² Jonathan Bradshaw's paper was originally published as 'The Taxonomy of Social Need' in Gordon McLachlan (ed), *Problems and Progress in Medical Care* (OUP, 1972); it has been published in other forms but the original is republished in Richard Cookson, Roy Sainsbury and Caroline Glendinning (eds), *Jonathan Bradshaw on Social Policy: Selected Writings 1972-2011* (University of York, 2013) [available at <https://www.york.ac.uk/inst/spru/pubs/pdf/JRB.pdf>] 1-11.

²³ 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.

²⁴ 'Convention on the Rights of Persons with Disabilities 2007 A/RES/61/106 Annex I (CRPD).', Article 1.

investment in this capacity cannot be rectified by advocacy and support (absolutely crucial though this is for other reasons) and 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 very limited ability to do so.²⁵

B THE LEGISLATIVE FRAMEWORK FOR NDIS PARTICIPATION AND PLANNING

In assessing how the NDIS roll-out is travelling it is first necessary to understand how planning is structured in the legislation (Part B1). This is followed by a discussion of recent experience of the planning process in practice (Part B2).

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.

a. Qualification as a participant

Eligibility to participate in the NDIS is initiated by making an 'access request' to the Agency (NDIA),²⁶ in an approved form and including any required information.²⁷ No further information is required for an adult on a list of 30 conditions or for a child under

²⁵ This was a key finding of the independent evaluation of NDIS trial site roll-out: Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, xv, xvii, xx, 34-35, 55, 126-127, 139-140, 185, 191, 197-200, 202, 217-218.

²⁶ *National Disability Insurance Scheme Act 2013* (Cth), s 18.

²⁷ S 19(1). The Productivity Commission observed, 'This can be lodged through a form, but is increasingly being completed by telephone': Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 168.

7 experiencing one of 130 listed conditions,²⁸ a boon for applicants but a source of angst when the NDIA changes diagnostic criteria and assessment processes to correct for perceived over-representation of disabilities such as autism.²⁹ If access is denied (or is deemed denied) a later request can be made, but not while a previous request is being reviewed.³⁰

To be eligible a person must meet age, 'residence' and geographic location conditions, and either disability or early intervention requirements (the 'access criteria'),³¹ but someone already receiving support services which would cease on acceptance into the NDIS qualifies on that basis alone.³² The NDIA has wide powers to require applicants to provide information or undergo an assessment and those information collection powers extend to 'other persons'.³³ The application process is complex, especially for people with psychosocial disability, literacy or cognitive issues, or people from culturally and linguistically diverse, and those from indigenous

²⁸ Productivity Commission, *ibid*, 168-69.

²⁹ See Rick Morton, 'Autism overhaul amid NDIS cases blowout', *The Australian* Tuesday 16 October 2018. Earlier, Rick Morton, 'We Can't Guarantee Places for Autism, NDIA Boss', *The Australian* Saturday 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* Tuesday 7 July 2018 <<https://www.theaustralian.com.au/national-affairs/health/ndis-online-blackout-as-autism-diagnosis-rejected/news-story/562a4ee9a16ba9de8f24e808917150d6>>;

³⁰ *National Disability Insurance Scheme Act 2013* (Cth), s 19(2).

³¹ S 20(1). The principal age condition is being under 65 years of age at application: s 22(1)(a). Residence is the same as for social security (Australian residence), requiring citizenship or a permanent visa and that the principal connection is to Australia: s 23(1) (termed 'residence'). 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): Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 173-180 (impact on defined life domains, and be expected to require support for the lifetime of the person: s 24). Early intervention is more complicated: see s 25.

³² Ss 20(2), 23(3).

³³ S 26.

communities.³⁴ Decisions about access are reviewable by the AAT, but reviews overwhelmingly confirm NDIA decisions not to accept an applicant as a participant.³⁵

A person becomes a participant once the access criteria are satisfied (and must be advised in writing of this)³⁶ and remains a participant until death, revocation due to no longer meeting the access criteria,³⁷ 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).³⁸

b. Plan prioritisation and preparation

Once accepted as a participant the next step is that the Agency is obliged to ‘facilitate’ preparation of a plan ‘as soon as practicable’,³⁹ consistent with timelines and priorities stipulated in subordinate instruments (‘rules’).⁴⁰ The principal focus of those facilitation rules is to establish the order in which ‘classes’ of participants will have their

³⁴ Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, 184, 191-192.

³⁵ See for example: *Re Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (Member Bygrave) [osteoarthritis and morbid obesity]; *Re BBMC and National Disability Insurance Agency* [2018] AATA 386 (Member Bygrave) [anxiety disorder, irritable bowel syndrome, sicca syndrome and cluster migraine]; *Re Holmes and National Disability Insurance Agency* [2017] AATA 2750 (Member McCallum) [post-traumatic stress disorder, emphysema, neck and throat condition]; *Re Kilgallin and National Disability Insurance Agency* [2017] AATA 186 (Deputy President Humphries & Senior Member Toohey) [disability did not ‘substantially reduce’ function]; *Re Mulligan and National Disability Insurance Agency* [2015] AATA 974 (Senior Member Toomey, Member McCallum) [ischaemic heart disease, cardiomyopathy, Conn’s syndrome, lumbar disc injury and sciatica]; *Re Mulligan and National Disability Insurance Agency* [2014] AATA 374; *Re Furminger and National Disability Insurance Agency* [2018] AATA 1872 (Deputy President McDermott) [neither disability nor early access conditions met]; *Re Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (Member Bygrave) [back condition did not meet s 24 permanence requirement].

³⁶ *National Disability Insurance Scheme Act 2013* (Cth), s 28.

³⁷ S 30.

³⁸ 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: Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 256; Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, xxi, 227-230, 243, 246-247.

Continuity of service arrangements guaranteeing existing levels of support for recipients of state and territory services who are aged 65 at the date of potential transitioning into the full NDIS scheme, add another layer of complexity in terms of their uncertain entitlements as their needs change or intensify over time: further <<https://www.ndis.gov.au/people-disability/continuity-support>>

³⁹ S 32.

⁴⁰ S 32A.

plans developed, so that there is an orderly transition of participants into the NDIS from any other services.⁴¹

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.⁴² 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.'⁴³

c. Personalisation and the statement of needs

The plan, its administration or any revision is obliged to conform to certain principles, including 'so far as reasonably practicable' that it be 'individualised' and 'be directed by the participant'.⁴⁴

Individualisation, together with the insurance logic,⁴⁵ is what differentiates the NDIS from previous disability service models in Australia, where block funding of services was common.⁴⁶ 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

⁴¹ See for example *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans – Victoria) Rules 2016*.

⁴² Joint Standing C'ttee on NDIS, 'Progress Report', above n 9, paras [3.23], [3.103].

⁴³ Ibid, para [3.43].

⁴⁴ *National Disability Insurance Scheme Act 2013* (Cth), s 31(a),(b). The circumstances where self-management is not permitted or is contra-indicated due to undue risk are detailed in *National Disability Insurance Scheme (Plan Management) Rules 2013*, Part 3.

⁴⁵ 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?' on *The Mandarin* (1 August) <<https://www.themandarin.com.au/96536-what-are-ndis-scheme-actuaries-measuring-and-what-are-they-missing/>>; further, Gemma Carey et al, 'Pricing and Actuarial Approaches within the Australian National Disability Insurance Scheme' in Karen Baehler (ed), *The Oxford International Handbook of Public Administration for Social Policy* (Oxford University Press, forthcoming) available at https://www.academia.edu/36839943/Australia_s_National_Disability_Insurance_Scheme_the_role_of_actuaries

⁴⁶ 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.

of their 'statement of goals and aspirations' is the first legislative planning step directed towards realisation of this objective.⁴⁷ 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.⁴⁸ 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.⁴⁹

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' supports⁵⁰). At that point the Act stipulates that the plan 'cannot be varied after it comes into effect, but can be replaced ...'.⁵¹ The plan normally lasts for the agreed planning cycle (usually 12 months),⁵² 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).⁵³

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

⁴⁷ National Disability Insurance Scheme Act 2013 (Cth), s 33(1)(a).

⁴⁸ S 33(1)(b)(i)-(iii).

⁴⁹ Ss 33(2),(3).

⁵⁰ Ss 33(5), 34.

⁵¹ S 37(2).

⁵² Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 197.

⁵³ *SSBV by his Litigation Guardian v National Disability Insurance Agency* [2018] FCA 1021 at para [3] (Reeves J).

adjustments currently call for a full plan review.⁵⁴ Modification of the participant statement does not change the participant supports,⁵⁵ but a review of it may be requested by the participant or initiated by the NDIA.⁵⁶ A decision about holding a plan review must be made within 14 days (otherwise it is taken to be refused).⁵⁷

Merits review by the AAT may be sought in respect of decisions not to review an existing plan,⁵⁸ or the contents of the original or any replacement plan.⁵⁹ 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.⁶⁰ However a plan review (more accurately to be amended and named as a 'reassessment') is an entirely distinct process to external merits review of a decision (including decisions about plan reviews).⁶¹ Unless a reassessment is formally subject to an internal review, the AAT has no jurisdiction to consider it. Understandable confusion due to *both* being described as a 'plan review', when only 'internal reviews' are reviewable, led to failure of AAT review applications because no

⁵⁴ Ibid.. Participants in the trial sites expressed dissatisfaction at the unnecessary paperwork and confusion this generated: Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, 194.

⁵⁵ *National Disability Insurance Scheme Act 2013* (Cth), s 47(2).

⁵⁶ Ss 48(1), (4) respectively.

⁵⁷ S 48(2).

⁵⁸ *National Disability Insurance Scheme Act 2013* (Cth), s 99(f).

⁵⁹ S 99(d). As explained in the second note to s 49, any replacement plan is made in accord with s 33(2) so is reviewable by the AAT.

⁶⁰ Ss 100(5), (6). The Auditor-General found deficiencies in the since revised administrative systems for recording and monitoring formal reviews: ANAO, 'Decision-making Controls for Sustainability – National Disability Insurance Scheme Access', above n 17, 47-49 paras [4.6]-[4.14].

⁶¹ To avoid confusion between the two (which precluded AAT review in *Re Bridgland and National Disability Insurance Agency* [2017] AATA 69 (Senior Member Toohey & Member Connolly), paras [17]-[21]), the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* proposed renaming the former 'reassessments' instead of 'reviews': Sched 2, items 18, 22-43 [amending ss 31, 33, 36-37, 41, 47-50 NDIS]. Schedule 2 was removed from the Act as enacted by the Senate in December 2017 and included in Sched 1 of an exposure draft of a proposed *National Disability Insurance Scheme Amendment (Enhancements) Bill 2018* (<https://engage.dss.gov.au/wp-content/uploads/2018/09/Draft-NDIS-Amendments-Enhancements-Bill-2018.pdf>).

request for plan review properly so called had been made;⁶² though in a few instances the AAT found jurisdiction because the plan was *deemed* to have been reviewed.⁶³

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.⁶⁴

2. *Planning in practice*

Until mid-2017 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.⁶⁵ Assessment tools were provided for from the outset,⁶⁶ 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),⁶⁷ which however it failed to make

⁶² *Re DXBG and National Disability Insurance Agency* [2017] AATA 1752 (Senior Member Kelly); *Re Rodrigues and National Disability Insurance Agency* [2016] AATA 1095 (Senior Member Toohey); *Re QQNH and National Disability Insurance Agency* [2016] AATA 220 (Deputy President Bean); *Re Burston and National Disability Insurance Agency* [2014] AATA 456 (Senior Member Toohey).

⁶³ *Re Hassett and National Disability Insurance Agency* [2018] AATA 4 (Deputy President McDermott) [reviewable because did alter plan]; *Re Eccles and National Disability Insurance Agency* [2017] AATA 1457 (Member Taglieri) [deemed reviewable decision]; *Re ZKTN and National Disability Insurance Agency* [2017] AATA 744 (Deputy President McDermott); *Re Nairn and National Disability Insurance Scheme Agency* [2017] AATA 242 (Deputy President Forgie) [partially reviewable]; *Re BSLR and National Disability Insurance Agency* [2018] AATA 1282 (Senior Member Cameron) [reviewed in substance]; *Re FJKH and National Disability Insurance Agency* [2018] AATA 1294 (Deputy President Bean) [deemed review due to delay]; *Re Simpson and National Disability Insurance Agency* [2018] AATA 1326 (Deputy President Humphries) [deemed review due to delay].

⁶⁴ *Re FFVQ and National Disability Insurance Agency* [2018] AATA 1968 paras [30]-[31].

⁶⁵ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 3 191.

⁶⁶ *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, Part 4.

⁶⁷ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 3, 192.

public as required.⁶⁸ From mid-2017 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.⁶⁹

Understandably, participants and families express concern that the reference plan acquires undue presumptive weight, undermining the individualisation intended.⁷⁰ 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 omissions⁷¹), leading the Parliamentary Committee to recommend reinstatement of the process of consulting on a draft plan.⁷² Another source of dissatisfaction arises when subsequent plans reduce the level of resourcing on apparently arbitrary bases, as in *Re PNFK* where 'core' funds (monies able to expended at the discretion of the person) in the second plan were lowered pro rata for unspent allocations in the previous plan, despite the profound disability and acute needs of the recipient.⁷³

The other serious concern for many applicants and their families is that achievement of quantitative planning targets is prioritised over the quality and

⁶⁸ Ibid, 193. The only reference is to a 'planning conversation tool' (the details of which are not accessible) though in 2014 reference was also made to a (non-disclosed) 'assessment tool': NDIA, *Operational Guidelines--Planning* National Disability Insurance Agency <<https://www.ndis.gov.au/operational-guideline/planning/performing-needs-assessment#8.1>>.

⁶⁹ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 193-194.

⁷⁰ Ibid, 195-196.

⁷¹ Damian Palmer, 'Let's be honest, there's more wrong with the NDIS than just 'teething problems'' on *The Conversation* (25 October 2017) <<https://theconversation.com/lets-be-honest-theres-more-wrong-with-the-ndis-than-just-teething-problems-86225>>; Joint Standing C'tee on NDIS, 'Progress Report', above n 9, para [3.47].

⁷² Joint Standing C'tee on NDIS, 'Progress Report', above n 9, para [3.105]. Although from July 2016 packages comprise three segments (core, capacity-building, and capital) which allow participants flexibility *within* each segment (avoiding the need for a plan revision), few participants understood this, generating unnecessary modification requests: *ibid*, paras [3.66], [3.70].

⁷³ *Re PNFK and National Disability Insurance Agency* [2018] AATA 692 (Member McCallum). The two day AAT hearing ultimately resolved around a package of \$221,000 annually sought for the applicant and the NDIA's revised package totalling \$160,840: paras [94], [100] respectively.

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 [NDIA] to finalise plans quickly, and the quality of plans has been compromised.⁷⁴

As the Commission elaborated, 'the planning process ... is one of the main sources of complaint to the [Ombudsman]'.⁷⁵ 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 Commission.⁷⁶ Concerns it attributed to measures designed to speed sign-up, keep faith with the States and contain costs; but which risked becoming entrenched in NDIA practice and culture to the detriment of the scheme.⁷⁷ This was echoed by the Joint Parliamentary Committee which wrote that

Participants, 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.⁷⁸

So to what extent are these and other concerns amenable to legal resolution?

III WHAT ROLE FOR THE LAW?

Issues of lack of transparency of process, inadequate communication with planners, being surprised by plans which bear little relationship with individual needs, are just some of the reasons that 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 A), as a judicial challenge on a point of law (Part B), or as a possible basis for remediation through merits review of decisions in the AAT (Part C).

⁷⁴ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 181.

⁷⁵ Ibid, 200.

⁷⁶ Ibid, generally 200-220.

⁷⁷ Ibid, 202.

⁷⁸ Joint Standing C'ttee on NDIS, 'Progress Report', above n 9, 46 para [3.25]. See also the evaluation of trial sites: Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, 45, 128.

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 Act adopts less imperative language, reading:

Matters that must be included in a participant’s plan

33(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]...

It is evident from the underlined phrase above that section 33 uses weaker language than the ‘joint preparation’ referred to in the Explanatory Memorandum (‘EM’) quoted at the beginning of the 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, that plain meaning governs, and there is no scope for referring to the EM; that is permissible only if the phrase is found to be ambiguous.⁷⁹ Only then might the EM 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 these ‘manner of decision-making’ requirements of subsection 33(2) would engage section 6 of the *Administrative Decisions (Judicial Review) Act 1977*, most likely by seeking the remedy of declaration.⁸⁰

⁷⁹ *Acts Interpretation Act 1901* (Cth) ss 15AB(1)(b), (3).

⁸⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(a).

Subsection 6(1) of that 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),⁸¹ 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.’⁸² Once a decision to issue a plan is made a challenge on the same bases lies under section 5.⁸³

Among the technical legal hurdles to bringing such a challenge would be whether an application was premature until administrative merits review avenues had been exhausted,⁸⁴ and whether a decision to issue the plan supercedes review of procedural issues about ‘conduct’ in reaching it.⁸⁵ 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.⁸⁶ 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

⁸¹ S 6(1)(a).

⁸² S 6(1)(b).

⁸³ S 5(1)(a),(b). Issue of the plan is clearly a decision within *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. Section 39B of the *Judiciary Act 1903* (Cth) s 39B(1)(c) also provides the Federal Court with jurisdiction.

⁸⁴ See the discretionary power conferred in s 10(2)(b)(ii) *Administrative Decisions (Judicial Review) Act 1977* (Cth) 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 a court... or by another tribunal ...of that 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 (Hely J), para [49].

⁸⁵ *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322, 337-341 (Sackville J), 348-349 (Kiefel J).

⁸⁶ Productivity Commission, ‘National Disability Insurance Scheme (NDIS) Costs’, above n 2, 26: ‘Scheme participants are often not aware of their rights and options, such as their entitlement to request a face-to-face meeting or have an advocate present during the planning meeting.’

judicial review be entertained (on the basis that, unlike other legislation,⁸⁷ the NDIS Act does not have a provision validating a decision *made* by 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 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).

The first boundary is set through amendments to the formerly all-embracing *National Disability Agreement*⁸⁸ and ‘continuity of services’ clauses in the *Bilateral Agreements with States and Territories*,⁸⁹ with all the associated centripetal forces and

⁸⁷ See for example *Aged Care Act 1997* (Cth), s 23B.4.

⁸⁸ See *National Disability Agreement 2012* <http://www.federalfinancialrelations.gov.au/content/npa/national_agreements/national-disability-agreement.pdf>. Implementation of the Agreement is overseen by the Disability Reform Council of the Council of Australian Government (COAG); *National Disability Strategy 2010-2020* <http://www.federalfinancialrelations.gov.au/content/npa/national_agreements/national-disability-agreement.pdf>.

⁸⁹ See for example *Bilateral Agreement between Commonwealth and NSW* (16 September 2015) <<http://webarchive.nla.gov.au/gov/20151020011806/http://www.coag.gov.au/node/525>>, cl. 27, 28, Sched D (Continuity of Support Arrangements in New South Wales); previously *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch 2012* cl 62, Annex E ‘Continuity of Support’. <https://www.coag.gov.au/sites/default/files/agreements/IGA%20on%20NDIS%20Launch%20-%20Annex%20E%20Continuity%20of%20Support_pdf.pdf>

complexity of federal agreements.⁹⁰ 'Signs of brinkmanship' by governments regarding delaying renegotiation around continuity of service for transitioning clients,⁹¹ and evidence of 'cost-shifting, scope creep and service gaps'⁹² 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 ('COAG') and its oversight bodies such as the Disability Reform Council.⁹³

The second boundary is set by the NDIS Act criterion as elaborated in the Rules as to whether a support is more appropriately funded by the NDIS or by mainstream services,⁹⁴ and is policed in part by AAT decisions.⁹⁵ While statistics are less than sufficiently detailed, the AAT had received a total of 268 applications as at June 2017,⁹⁶ 130 of which had been resolved (58% affirming the NDIS decision).⁹⁷ Of these, just 31 were published decisions⁹⁸ with the remainder presumably resolved through conciliation or other processes which do not result in published reasons (as also is common across other parts of the AAT caseload).

⁹⁰ Arrangements suggested as more about politics than law, given the effective unenforceability of Agreements: Johanne Poirier, 'Intergovernmental Agreements in Canada: At the crossroads between law and politics' in Peter J Meekison et al (eds), *Reconsidering the Institutions of Canadian Federalism: Canada the State of the Federation 2001-2002* (McGill-Queen's University Press, 2002) 425; James Maxeiner, 'United States Federalism: Harmony without unity' in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 491.

⁹¹ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 239.

⁹² Ibid, 247.

⁹³ Ibid, 30-31, 236-254, 398, 450.

⁹⁴ *National Disability Insurance Scheme Act 2013* (Cth), s 34(1)(f); *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.

⁹⁵ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 252. *Re Young and National Disability Insurance Agency* [2017] AATA 407 (Senior Member Toohey, Member Connolly); *Re McCutcheon and National Disability Insurance Agency* [2015] AATA 624 (Senior Member Toohey); *Re Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706 (Senior Member Toohey & Member Pertton).

⁹⁶ Representing 0.19% of all access decisions: Joint Standing C'tee on NDIS, 'Progress Report', above n 9, 17 para [2.52].

⁹⁷ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 420.

⁹⁸ Austlii search 4 March 2018.

The publicly reported AAT boundary decisions continue what the Productivity Commission termed a 'narrow focus' on a particular support item.⁹⁹ Thus in *Re ZCPY*,¹⁰⁰ 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 primary school level).¹⁰¹ Separate funding of agencies specifically for coordination of other services has also been accepted.¹⁰² Likewise it was found appropriate to fund activity-based exercise sessions and physiotherapy respectively in two other cases,¹⁰³ or transport to community access in one case and six months of fulltime home care in another.¹⁰⁴ So too the cost of four times daily home visits by a registered nurse to monitor insulin levels and injections for a participant with unstable diabetes for whom generalist health services would be inappropriate.¹⁰⁵ However a portable oxygen concentrator and insulin pump were found to appropriately be funded by the general health system,¹⁰⁶ as was the case for a

⁹⁹ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 251-252.

¹⁰⁰ The literacy program in *Re ZCPY and National Disability Insurance Agency* [2017] AATA 3052 (Member Parker); the NeuroMoves physiotherapy sessions in *Re Hudson and National Disability Insurance Agency* [2017] AATA 2176 (Members McCallum & Bygrave), paras [49]-[50].

¹⁰¹ Similarly in *Re McCutcheon and National Disability Insurance Agency* [2015] AATA 624 (Senior Member Toohey) where chiropractic treatment was found to be fundable, or the prism lens for vision in *Re KLMN and National Disability Insurance Agency* [2017] AATA 1815 (Member Pertton).

¹⁰² *Re LNMT and National Disability Insurance Agency* [2018] AATA 431 (Deputy President Bean), paras [33]-[38].

¹⁰³ *Re Hudson and National Disability Insurance Agency* [2017] AATA 2176 (Members McCallum & Bygrave) [two-hour activity-based exercise session once per week]; *Re King and National Disability Insurance Agency* [2017] AATA 643 (Member Parker) [annual gym fees and physiotherapy sessions].

¹⁰⁴ *Re JQJT and National Disability Insurance Agency* [2016] AATA 478 (Senior Member Toohey, Members McCallum & Bygrave) [one return trip of up to 36 kilometres each weekend by a support worker]; *Re PNMJ and National Disability Insurance Agency* [2015] AATA 866 (Senior Member Toohey & Member Pertton) [168 hours of care per week for six months].

¹⁰⁵ *Re Mazy and National Disability Insurance Agency* [2018] AATA 3099 (Deputy President Constance). Similarly, *Re QZHH and National Disability Insurance Agency* [2018] AATA 1465 (Member Parker).

¹⁰⁶ *Re Young and National Disability Insurance Agency* [2014] AATA 401 (Senior Members Toohey & Handley).

pulse oximeter and oral suction pump,¹⁰⁷ early intervention diabetes treatment,¹⁰⁸ or the non-approval of a home occupational therapy room and equipment.¹⁰⁹ Similarly a swivel car seat and particular listening therapy for autism failed to gain NDIS funding approval in two other cases.¹¹⁰

While well-reasoned on their facts, it is difficult to discern a strong normative direction about aggregate management or policy based on these cases. However 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,¹¹¹ so the jury remains out on AAT handling of these reviews.

C Merits review

1 What role merits review?

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.'¹¹² Individual merits review or other legal accountability is rarely provided outside income transfer payments due to the greater complexity and

¹⁰⁷ *Re Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706 (Senior Member Toohey & Member Perton).

¹⁰⁸ *Re YPRM and National Disability Insurance Agency* [2016] AATA 1023 (Deputy President Humphries & Senior Member Toohey).

¹⁰⁹ *Re ZNDV and National Disability Insurance Agency* [2014] AATA 921 (Deputy President Bean).

¹¹⁰ *Re Young and National Disability Insurance Agency* [2017] AATA 407 (Senior Member Toohey & Member Connolly) [car swivel seat]; *Re TKCW and National Disability Insurance Agency* [2014] AATA 501 (Senior Member Toohey & Member Thompson) [listening therapy program].

¹¹¹ 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.

¹¹² ANAO, 'Decision-making Controls for Sustainability – National Disability Insurance Scheme Access', above n 17, 46 para [4.1].

discretionary character of planning decisions about service issues, along with government concerns that such process cannot accommodate broader social equity and distributional justice aspects.¹¹³ So AAT review of certain NDIS decisions is an exception,¹¹⁴ even if able to be construed as an entitlement program.

This last is an important point, 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.¹¹⁵

Placement of the NDIS within the Department of Social Services (despite responsibility of an assistant Minister for Social Services Housing 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 Commission.¹¹⁶

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 social context and the external environment) is not sustainable, context does play an important role that is currently entirely excluded from disability pension ('DSP') entitlement claims.¹¹⁷ Just as

¹¹³ 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* ss 140A, 143, 147 (item 6 of modification table).

¹¹⁴ Another but since repealed exception was Victoria's Intellectual Disability Review Panel, which had only recommendatory powers: *Intellectually Disabled Persons' Services Act 1986* (Vic), s 27; IDR, 'A Right to Be Heard: 20 years of the intellectual disability review panel' (Melbourne: Intellectual Disability Review Panel, 2007). Its work was studied in Terry Carney and Keith Akers, 'A Coffee Table Chat or a Formal Hearing' (1991) 2(3) *Australian Dispute Resolution Journal* 141 and Christine Bigby and Sue Tait, 'Evaluation of the Independent Review of a Major Life Decision Affecting People Who Have an Intellectual Disability' (2004) 11(2) *Psychiatry, Psychology and Law* 202.

¹¹⁵ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 78.

¹¹⁶ *Ibid*, 401. The Assistant Minister is currently Sarah Henderson MP.

¹¹⁷ Terry Carney, 'Vulnerability: False hope for vulnerable social security clients?' (2018) 41(3) *University of New South Wales Law Journal* 783.

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 the 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 family friends.

2. Policing ‘reasonable and necessary’ supports

The rules detail the way reasonable and necessary supports are to be expressed within a plan,¹¹⁸ as well as elaborating the meaning of the phrase.¹¹⁹ Deciding what are the ‘reasonable and necessary supports’, self-evidently is a matter of discretionary judgement rather than of 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 formal equity considerations (treating like cases alike). It also engages human rights principles. Thus in *Re PNFK* involving a profoundly disabled child, it was held that the phrase should be interpreted in the light of both the CRPD and the *Convention on the Rights of the Child* given that both were referenced in the statutory objectives of the NDIS.¹²⁰

¹¹⁸ *National Disability Insurance Scheme (Plan Management) Rules 2013*, Part 6.

¹¹⁹ *National Disability Insurance Scheme (Supports for Participants) Rules 2013*. The NDIA has also adopted *Operational Guidelines*, which, for consistency, both NDIA decision-makers and the AAT are expected to apply 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) AATA 179; (1979) 2 ALD 634.

¹²⁰ *Re PNFK and National Disability Insurance Agency* [2018] AATA 692 (Member McCallum), paras [21]-[22]. Though this can cut both ways, and in *Re Rain and National Disability Insurance Agency* [2018] AATA 2597 neither a folding wheelchair nor a carer/pusher were 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.

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.¹²¹ 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'.¹²² 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 NDIA policy had sought to impose.¹²³ That is consistent with the fundamental principle that application of policy guidelines cannot alter the legal meaning of terms or the statutory architecture established.¹²⁴ In this instance it does not mean that other practically available sources of the support should not be considered, merely that once discarded as an acceptable alternative, the necessary support must be fully funded.¹²⁵ Slippage however 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

¹²¹ *Re McGarrigle and National Disability Insurance Agency* [2016] AATA 498 (Senior Member Toohey); *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (Mortimer J), para [41]

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.

¹²² *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132 (Kenny, Robertson and Kerr JJ), para [8].

¹²³ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (Mortimer J), para [95]

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.

¹²⁴ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420-421.

¹²⁵ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, paras [97]-[98]. 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).

‘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).¹²⁶

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,¹²⁷ 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;¹²⁸ but prism lens for double vision were found reasonable and necessary.¹²⁹ 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.¹³⁰

More recently, the purchase of a wheelchair with ‘off-road’ capacity (a zoom atv) was found to be reasonable and necessary, despite NDIA objections that a similarly

¹²⁶ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 188-189; *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, paras [39], [91] (with (a), (b) and (d) speaking to necessity, and (c), (e), (f) to reasonableness).

¹²⁷ *Re ZCPY and National Disability Insurance Agency* [2017] AATA 3052 (Member Parker), paras [123]-[139]; the NeuroMoves exercise program in *Re Hudson and National Disability Insurance Agency* [2017] AATA 2176 (Members McCallum & Bygrave), paras [49]-[50]; the Bobath exercise therapy and gym membership in *Re King and National Disability Insurance Agency* [2017] AATA 643 (Member Parker), para [26]; the once a week support worker return trip in *Re JQJT and National Disability Insurance Agency* [2016] AATA 478 (Senior Member Toohey, Members McCallum & Bygrave), paras [43]-[47]; the 168 hours a week of care for a child over a six month period in *Re PNMJ and National Disability Insurance Agency* [2015] AATA 866 (Senior Member Toohey & Member Perton), para [107]; the period of chiropractic treatment in *Re McCutcheon and National Disability Insurance Agency* [2015] AATA 624 (Senior Member Toohey), para [91]; the taxi fares to TAFE sessions and a weekly gym session in *Re Perosh and National Disability Insurance Agency* [2018] AATA 980 (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).

¹²⁸ *Re KLMN and National Disability Insurance Agency* [2017] AATA 1814 (Member Perton), paras [55]-[82]; see also *Re Rain and National Disability Insurance Agency* [2018] AATA 2597 (Member Parker).

¹²⁹ *Re KLMN and National Disability Insurance Agency* [2017] AATA 1815 (Member Perton), paras [36]-[43].

¹³⁰ *Re Young and National Disability Insurance Agency* [2017] AATA 407 (Senior Member Toohey & Member Connolly), para [45]-[59].

priced 'standard' wheelchair would be appropriate due to lower risk and flexibility to adjust to the participant's deteriorating condition (hereditary spasticity paraplegia). The recreational lifestyle opportunities provided by the off-road wheelchair over the (comparatively short) expected life of a wheelchair, led the AAT to find this to be the appropriate purchase.¹³¹ 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.¹³² Likewise three 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.¹³³

For its part the Productivity Commission rejected the option of further legislative definition of the phrase, instead concluding that 'additional guidance, where required, should be contained in rules, operational guidelines or other policy documents'.¹³⁴ While wise advice to a point, the Commission may not have fully appreciated that ultimately the legislation does set the boundaries, only within which may rules or policy provide further calibration.

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 for public confidence. NDIS case planning is torn between the need to fulfil on the one hand one version of an ethics of justice, treating like cases alike; and an ethics of care, acknowledging the unique circumstances of each participant, and the

¹³¹ *Re Munday and National Disability Insurance Agency* [2018] AATA 355 (Member McCallum), paras [95]-[96].

¹³² *Re Way and National Disability Insurance Agency* [2018] AATA 983 (Member McCallum), paras [50]-[56].

¹³³ *Re LJY and National Disability Insurance Agency* [2018] AATA 3506 (Deputy President Constance) para [36]). In similar vein, two days of in-home care was not found to be reasonable and necessary for a child with a severe congenital heart condition: *Re BIJD and National Disability Insurance Agency* [2018] AATA 2971 (Deputy President Humphries).

¹³⁴ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 187.

importance of the dialogue between participants, their families and other informal and formal supporters.¹³⁵ In practice, the NDIA and other stakeholders recognise both the lack of consistency in planning outcomes, and often poor quality in casework engagement.¹³⁶ 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 the NDIA has sought to provide greater consistency of planning outcomes,¹³⁷ 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 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 cultural needs,'¹³⁸ an apparent neglect by NDIA of participant's support needs during the process is surprising. Support needs potentially arise in either or both of the planning process and package administration;

¹³⁵ 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), especially Chs, 1, 5, 6, 7. The salience of these issue 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. 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.

¹³⁶ Joint Standing C'tee on NDIS, 'Progress Report', above n 9, 24, para [2.84] (NDIA recognition of sources of cost pressure), 50-51 paras [3.39]-[3.41] (stakeholder evidence), 60 para [3.68] (NDIA quality assurance measures).

¹³⁷ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 193, 195, 201.

¹³⁸ *National Disability Insurance Scheme Act 2013* (Cth), s 4(9). See also s 4(2) ['[p]eople with disability should be supported to participate in and contribute to social and economic life to the extent of their ability'] and the 'equality' value captured by ss 4(1), (6), (7), (8).

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 percent of participants received some form of support in the processes. Support was mainly drawn from their interpersonal network, with three quarters of 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%). Statutory 'nominees' were mentioned in only one in ten (9%) of cases.¹³⁹

In fairness to the NDIA, the current nominee provisions are poorly drawn, which may account for such limited exercise of that power. A plan nominee is a substitute decision-maker (what the ALRC would rename a 'representative'¹⁴⁰). Except to the extent excluded in the appointing instrument, a NDIS plan nominee exercises proxy powers of a participant to make, review or administer a plan.¹⁴¹ 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',¹⁴² and appointments are a last resort, for those otherwise unable adequately to participate in the planning and lacking an informal supporter able to undertake the role (or be strengthened to do so).¹⁴³ 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,¹⁴⁴ though this principally involves acting as a channel of communication

¹³⁹ Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, 93. 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).

¹⁴⁰ ALRC, 'Equality, Capacity and Disability in Commonwealth Laws: Final Report' (Sydney: Australian Law Reform Commission, 2014), para [5.33].

¹⁴¹ *National Disability Insurance Scheme Act 2013* (Cth), s 78(1); *National Disability Insurance Scheme (Nominees) Rules 2013*.

¹⁴² S 78(5); rr 5.5, 5.6.

¹⁴³ *National Disability Insurance Scheme (Nominees) Rules 2013* r 3.14(b)(i),(ii), (iv).

¹⁴⁴ *National Disability Insurance Scheme Act 2013* (Cth), s 79(1), (2).

with the NDIA.¹⁴⁵ The main problem with the plan nominee provision is that the protections around exercise of such proxy decision-making powers are inadequate,¹⁴⁶ 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.¹⁴⁷ Public trustees also assume management roles in this way, though according to the NDIA not as an official plan nominee.¹⁴⁸

To its credit, NDIA operational guidelines from the outset have encouraged recognition of informal support for decision-making,¹⁴⁹ but arguably investment in capacity-building in this area has been inadequate,¹⁵⁰ an under-investment compounded by reductions in State funding of disability advocacy programs.¹⁵¹ The

¹⁴⁵ National Disability Insurance Scheme (Nominees) Rules 2013 r 3.9.

¹⁴⁶ Terry Carney, 'Australian Guardianship Tribunals: An adequate response to CRPD disability rights recognition and protection of the vulnerable over the lifecourse?' (2017) 10(Sp) *Journal of Ethics in Mental Health* <http://www.jemh.ca/issues/v9/theme3.html>

¹⁴⁷ Christine Fougere, 'Guardianship, Financial Management and the NDIS: NCAT's experience' (Paper presented at the Australian Guardianship and Administration Council Heads of Tribunal meeting, Hobart, 23 March 2017) <http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf>; Office of the Public Advocate, *Guardianship and the National Disability Insurance Scheme* (September 2014) Office of the Public Advocate <<http://www.publicadvocate.vic.gov.au/advocacy-research/ndis>>.

¹⁴⁸ Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 364. The Commission notes that it may not be 'fit for purpose' in any event, due to conflicts of interest and other concerns identified by the ALRC: *ibid*, n 84.

¹⁴⁹ NDIA, 'Operational Guideline – General Conduct – Supporting Participants' Decision-Making' (Canberra: National Disability Insurance Agency, 2013) <https://www.ndis.gov.au/html/sites/default/files/documents/operational_guideline%20_general_conduct_supporting_participants_decision_making.pdf>.

¹⁵⁰ OPA, *Submission to the National Disability Insurance Scheme Code of Conduct discussion paper* Office of Public Advocate <<https://engage.dss.gov.au/wp-content/uploads/2017/07/OPA-Submission-to-NDIS-Code-of-Conduct-June-2017.pdf>>, 9.

¹⁵¹ 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 generalist disability service: Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs', above n 2, 39-40, 60, 213-214, 357, 363-369, 377, esp. 380-388. In NSW half of all advocacy services faced loss of funding from July 2018 (losing

resultant proliferation of reliance on informal support may be problematic, not least because there is little evidence that NDIA planners scrutinise the approach taken by supporters, much less have access to some principles to guide a judgement about whether the way they are enacting the support is in tune with 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 even when it is accorded priority.¹⁵² Given the high proportion of participants with intellectual disability where family carers may have more entrenched paternalist values,¹⁵³ the case for long term decision making support and or advocacy both in plan formulation and in its administration is surely heightened.¹⁵⁴

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 is most effective and value for money.¹⁵⁵

\$13m pa): James Robertson, 'NSW disability groups face wipeout, new figures show' *Sydney Morning Herald* Wednesday, 11 October 2017 <<https://www.smh.com.au/national/nsw/nsw-disability-groups-face-wipeout-new-figures-show-20171011-gyystp.html>>. On 6 April 2018 NSW funding was guaranteed for another two years, joining Qld in providing transition funding: Alexandra Smith, 'Berejiklian to reverse funding cuts to disability groups' *Canberra Times* Friday 6 April 2018 <<http://www.canberratimes.com.au/nsw/berejiklian-to-reverse-funding-cuts-to-disability-groups-20180405-p4z802.html>>.

¹⁵² Terry Carney, 'Supported Decision-making in Australia: Meeting the challenge of moving from capacity to capacity-building?' (2017) 35(2) *Law in Context* 44; 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' (2017) *Journal of Intellectual and Developmental Disabilities* ahead of print DOI <http://www.tandfonline.com/doi/full/10.3109/13668250.2017.1378873>.

¹⁵³ 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 ('[d]espite the aspiration for choice and control espoused within the UNCRPD and Australian disability policies, the reality for many adults with intellectual disability is different.' at 395 [emphasis added]).

¹⁵⁴ For a similar conclusion reached by the independent evaluation: Mavromaras et al, 'Evaluation of the NDIS: Final Report', above n 7, 185, 197-198, 202.

¹⁵⁵ 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 2010-2015' (2017) 52 *Australian Journal of Social Issues* 222; Jacinta Douglas and Christine Bigby, 'Development of an Evidence-

IV CONCLUSION

This article has explored some of the issues which have arisen due to challenges of the roll-out of the NDIS scheme. Contrary to perceptions that the scheme is exclusively designed around personalisation values, it is shown that the scheme has multiple other objectives, including formal 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, has 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 it might inject.¹⁵⁶ Instead other external accountability mechanisms must be relied on to resolve such questions. Individual advocacy and support, for its part, is undoubtedly a most valuable resource, and one heavily promoted by the CRPD, but its operationalisation remains a work in progress.

As foreshadowed earlier, the insurance logic enshrined in the 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

based Practice Framework to guide Decision Making Support for People with Cognitive Impairment' *Disability & Rehabilitation* forthcoming.

¹⁵⁶ See also Rick Morton, 'Test Cases Risk NDIS Budget Blowout', *The Australian* Saturday 6 October 2018 <<https://www.theaustralian.com.au/national-affairs/health/test-cases-risk-ndis-budget-blowout/news-story/b96603b0bc172e72f70d162ee083611c>>

and preferences of the person. It has also led to imposition of bright line distinctions between disability-specific costs (fundable) and any associated complex needs (not funded), as most contentiously the 'multiple, compounding and inextricably connected complex support needs' of some people with intellectual disability such as those manifesting as acting out and other social and criminal behavioural issues.¹⁵⁷ 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 personal agency and equality. Those debates raise conceptual and substantive questions going to the heart of contemporary understandings of disability and state responsibilities to vulnerable citizens with very limited ability to self-advocate, but their resolution lies beyond the scope of the present article, which has concentrated on some of what might be termed the 'law questions' raised by the NDIS.

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¹⁵⁷ 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' (Sydney: The Community Restorative Centre, 2017) <https://www.researchgate.net/profile/Simone_Rowe/publication/319135689_Access_to_the_NDIS_for_people_with_cognitive_disability_and_complex_needs_who_are_in_contact_with_the_criminal_justice_system_Key_challenges/links/5993d3e1aca272ec9084e6f3/Access-to-the-NDIS-for-people-with-cognitive-disability-and-complex-needs-who-are-in-contact-with-the-criminal-justice-system-Key-challenges.pdf>; VCOSS, 'Young man stuck in prison by NDIS transition mess' 10 November 2017 <<http://vcoss.org.au/blog/young-man-stuck-in-prison-by-ndis-transition-mess/>>. Approximately 10-15% of people with disabilities may be affected to an extent to warrant consideration of restrictive practices: ALRC, 'Equality, Capacity and Disability in Commonwealth Laws: Final Report', above n 140 para [8.7].

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