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Disability and Carers Group
Department of Social Services
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disabilityadvocacy@dss.gov.au

Dear Sir/Madam,

RE: Review of the National Disability Advocacy Program

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Improving access to justice for people with disability

Research conducted by the Law and Justice Foundation found that people with disability, regardless of the severity of their condition, were significantly more likely to experience legal problems than people without a disability.¹ The research demonstrated that disability was a significant predictor of every major category of legal problem studied, including those related to discrimination, relationship breakdown, rented housing, government payments, debt and education.² As identified by the discussion paper, legal advocacy can lead to

¹ Christine Coumarelos, Pascoe Pleasence and Zhigang Wei, 'Law and disorders: illness/disability and the experience of everyday problems involving the law' 17 *Justice Issues* (September 2013) 8.

² Cited in Christine Coumarelos, Pascoe Pleasence and Zhigang Wei, 'Law and disorders: illness/disability and the experience of everyday problems involving the law' 17 *Justice Issues* (September 2013) 2, 3, 11.

better and faster outcomes for people with disability experiencing legal problems. NLA supports proper funding of a range of independent, disability advocacy organisations including legal assistance.

We note that the Department of Social Services has invited LACs to respond to a questionnaire in the context of a review of legal advocacy services for people with a disability to assist in identifying issues, gaps and best practice for people with disability accessing justice. Each of the LACs will be responding to that survey to reflect our extensive practice experience assisting people with disability. This submission is made in addition to these survey responses. This submission focuses specifically on the importance of providing legal assistance to National Disability Insurance Scheme (NDIS) applicants at the Administrative Appeals Tribunal (AAT). The External Merits Review – Support Component (EMR-SC) was established to ensure that people affected by ‘reviewable decisions’ of the National Disability Insurance Agency (NDIA) have access to support when seeking review of those decisions at the AAT. Assistance available under the EMR-SC includes access to non-legal support and access to legal services where a case raises complex or novel legal issues. Legal assistance in complex or novel cases at the AAT is provided by the LACs.

The EMR-SC scheme was initially funded to run until the end of the current financial year and has since been extended for a further 12 months. At this stage there is no guarantee that the funding will continue beyond this period. In our experience, the provision of legal assistance at the AAT has led to better and more sustainable outcomes for people with disability.

Legal assistance for NDIS applicants at the AAT – making rights real

Legal assistance to help people realise their rights and entitlements under the NDIS is a crucial component of the scheme, ensuring that it operates effectively in practice. Without legal representation assisting NDIS applicants at the AAT, the scheme runs the risk of falling short of its intended objectives to “support a better life for hundreds of thousands of Australians with a significant and permanent disability and their families and carers” and “to ensure that people with disability continue to get the support they need”.³ In our experience, targeted legal assistance and representation ensures better outcomes for applicants at the AAT, which in turn provides clarity on new and complex questions of law and interpretation and improves the overall efficiency and effectiveness of primary decision-making.

Erroneous administrative decision-making under the NDIS affects not only some of the most disadvantaged and marginalised people in Australia, but also runs the risk of undermining the integrity and promise of the scheme itself. Based on our casework experience we know that government agencies can make mistakes. Access to legal assistance for review of these

³ <http://www.ndis.gov.au/about-us>.

decisions ensures that primary decision makers and internal review processes are sound and comply with the legal and administrative frameworks for decision-making, leading to better outcomes for people with disabilities. The role of legal advocacy for NDIS applicants at the AAT is highlighted in the following example from our casework.

Navigating the NDIS: Kylie's story

With the advent of the NDIS trial in her home town, Kylie was optimistic that her support needs would continue to be met or even enhanced. She was stunned when she was informed that her plan would not include physical therapies that had previously been funded and which she viewed as essential in keeping her mobile and independent.

Kylie, a single mother who was born with spina bifida and scoliosis, is also in renal failure and has a degenerating bone disease in her hip. After the NDIS refused to provide the same level of care that she had been receiving through a Victorian government package, many aspects of her life began to unravel. While she initially used some savings to pay directly for her therapy, when this money ran out, her health deteriorated. She had to leave her job and withdraw from studies.

'I went from being able to walk with a limp, to being confined to a couch, barely able to walk the length of the hallway, and needing to use a wheelchair,' Kylie says. 'I was in pain and taking ever stronger painkillers. I couldn't do the things I needed to do, take care of my child the way I wanted to. The house looked like a bomb had gone off in it.'

At this distressing time, working out how to challenge the decision, after an initial appeal was rejected, seemed overwhelming.

'I had a feeling of dread about trying to tackle the system on my own when I was at such a low point,' Kylie says.

Kylie got in touch with the Rights Information Advocacy Centre who provided her with invaluable support in what she describes as a 'long, stressful, scary journey'. There, an advocate successfully applied for funding for legal representation under the Department's 'novel or complex' funding and put her in touch with a lawyer from Victoria Legal Aid (the LAC in Victoria) who took on her case.

In August 2015 the Administrative Appeals Tribunal upheld Kylie's appeal. This was the first time the Tribunal considered evidence of "lived experience" in deciding what was a 'reasonable and necessary support'.

Since the decision to restore Kylie's therapy after two years, her strength and mobility are returning. Kylie says she hopes that the outcome of her case will be greater recognition that people with disabilities are experts in their own condition and knowledgeable about what will help them.

Going to the Tribunal alone can be very daunting – it is a complex, technical and adversarial process. But as Kylie's experience shows, legal assistance can make all the difference.

Continued funding for legal assistance for NDIS applicants at the AAT is necessary to assist people to realise their rights and entitlements under the scheme. Legal advocacy

supporting the rights and interests of people with disability promotes good decision-making processes and ultimately ensures the effective operation of the NDIS. Funding for novel and complex cases is a bare minimum and should be continued. To ensure the integrity of the scheme and that it achieves its intended goals, funding should be provided for all meritorious appeals to the AAT, consistent with comparable Commonwealth schemes such as veterans entitlements.

Balancing out disadvantage

Legal assistance for NDIS applicants at the AAT helps to address the disadvantages faced by applicants. The NDIA is represented before the AAT by experienced in-house solicitors with expertise in interpreting the legislation and the AAT review processes. Failure to provide adequate funding for legal representation for applicants will result in a clear and unacceptable disparity in access to legal advice and representation between the NDIA and applicants. The AAT can be intimidating for unrepresented applicants and non-legally trained advocates faced with its adversarial environment and technical requirements.

Legal aid solicitors regularly represent applicants before the AAT, including in social security and veterans matters, and so are familiar with the AAT processes and can lend their experience and expertise to NDIS participants daunted by challenging NDIA decisions. Given their specialist expertise in dealing with AAT matters, nationwide coverage and organisational experience, LAC solicitors are best placed to assist NDIS applicants in these matters.

Different support needs of people with a disability

Legal assistance addresses a different need to advocacy support assistance. Within the NDIS, EMR advocates play an important role in assisting people with a disability to seek review of decisions, supporting them to participate in the review process and promoting the interests of the person with a disability. However legal assistance is equally important in advising NDIS participants of their prospects of success and assisting them to narrow the issues they challenge through the AAT. Legal representatives work with the applicant and their advocate to obtain evidence, present their position before the AAT and in many cases help to resolve the matter without it needing to go to a hearing. Based on our experience in providing assistance to applicants before the AAT the availability of legal assistance assists to resolve disputes efficiently and early.

Legal assistance plays an important role in advising people against pursuing non-meritorious matters. This saves the individual the stress and anxiety of pursuing an appeal where there is no prospect of achieving what they desire. It also saves the AAT and NDIA appeals team valuable resources.

Case study - Resolving matters early

Sam is a young person. She was born with significant chromosomal disabilities, and suffers from epilepsy, seizures and has an intellectual disability. She is cared for by her grandmother. When Sam moved from NSW government disability funding to the NDIS, she was finishing school and moving to early adulthood. As well as requiring disability supports she also needed further surgery for one of her conditions. She was having surgery in an adult's hospital for the first time. Sam and her grandmother were stressed by all the changes going on in their lives, as well as the impending surgery.

Sam's grandmother was unhappy that the NDIA had refused to fund a couple of supports. Disability Advocacy assisted her grandmother to appeal to the AAT and successfully sought legal representation from the Department's "complex or novel" funding. A solicitor from Legal Aid NSW (the LAC in NSW) represented Sam before the AAT.

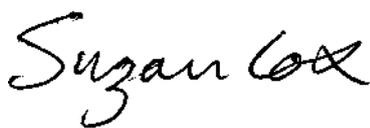
Sam's legal aid solicitor helped her grandmother to identify which supports could be funded under the NDIS as "reasonable and necessary supports" and which supports were more appropriately sought through the health system, and assisted her to obtain evidence for her AAT appeal.

Sam's matter was resolved with Sam reaching an agreement with the NDIA following the AAT conciliation conference but prior to a hearing being listed. Sam and her grandmother felt supported throughout the process and relieved that neither would need to give evidence in a formal AAT hearing.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,



Suzan Cox QC
Chair