

National Disability Insurance Scheme Consultation Paper: Planning Policy for Personalised Budgets and Plan Flexibility

Submission to National Disability Insurance Scheme

23 February 2021



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1. Executive summary

National Legal Aid (NLA) welcomes the opportunity to contribute to the consultation on proposed changes to access and eligibility in the *Consultation Paper: Planning Policy for Personalised Budgets and Plan Flexibility*.

NLA brings together the practice experience of the eight Australian state and territory legal aid commissions (LACs). In the 2019-20 financial year, LACs provided around 1.9 million legal services to people across the country.¹ We have enclosed the NLA Booklet which provides some further background to NLA and LACs.

NLA supports many of the proposed changes to planning outlined in the consultation paper, including the introduction of draft plans, which will allow participants a greater say in their plans before they are finalised, the movement towards greater flexibility in use of plan funds and adopting different terminology for plan reviews and reassessments.

However, we do not support the proposed move away from individualised, goal-based planning, where budgets are developed before a participant has a planning meeting. This process, where a participant is involved in decisions about their disability supports only after a provisional decision about the level of funding they should receive has been made, sits uncomfortably with some of the core principles of the National Disability Insurance Scheme (NDIS), including:

- That the NDIS should enable people with disability to exercise choice and control in the planning and delivery of their supports (s 3(1)(e) *National Disability Insurance Scheme Act 2013* (NDIS Act), and
- That people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity (s 4(8) NDIS Act).

Our response to the consultation paper will draw on examples from our experience in assisting clients with disability to provide recommendations about how the proposed policy could be changed to better support participants and the National Disability Insurance Agency (NDIA) to create, to use and to seek review of plans.

¹ National Legal Aid, 2019-20 data, *National Legal Aid Statistics* <https://www.nationallegalaid.org/> *National Partnership Agreement on Legal Assistance Services 2015-2020*, 2019-20 data. In 2019-20 COVID-19 impacted the number of “in person” services including at courts and tribunals (e.g. duty lawyer). However, there was a rise in the number of more intensive services delivered.

2. Our work with Australians with disability

2.1 About National Legal Aid and state and territory legal aid commissions

LACs are independent, statutory bodies established under state or territory legislation and funded by governments to provide legal assistance services to people who cannot afford a lawyer.

NLA represents the directors of the eight state and territory LACs in Australia.

NLA's purpose is to:

- Lead and encourage a national system of legal aid which allows people experiencing disadvantage to obtain access to justice.
- Provide a forum for engagement at a national level with governments, stakeholders, and the community, and for the individual LACs to engage with each other about best practice of delivering legal aid.

NLA aims to ensure that people's legal rights and interests are not prejudiced because they cannot:

- 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.

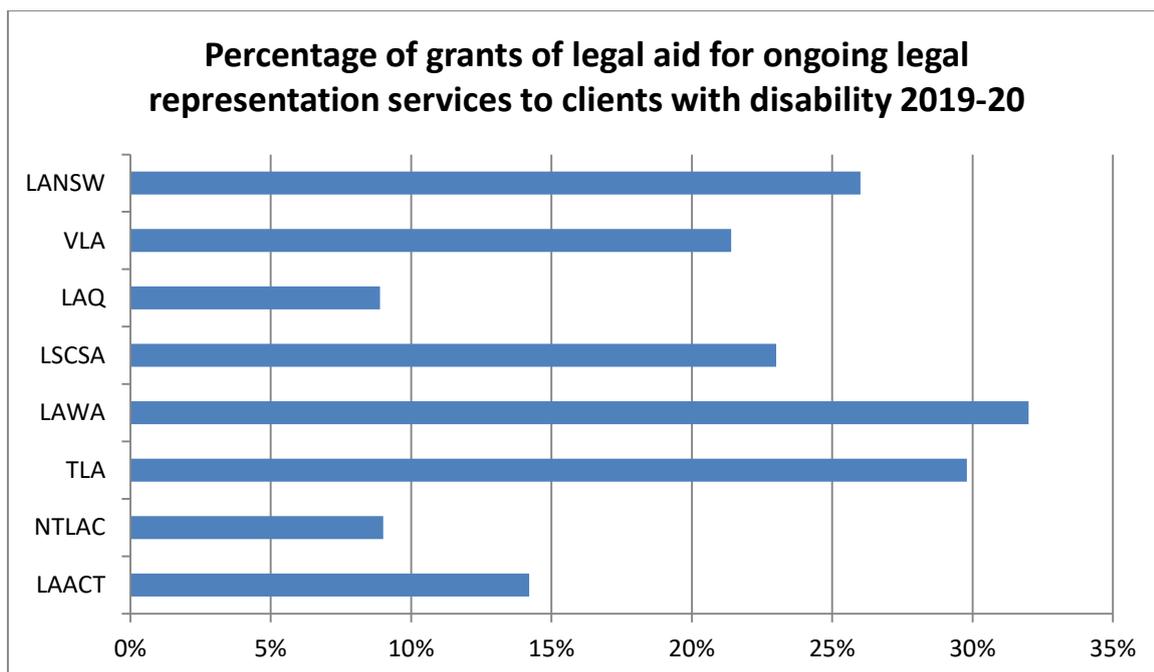
2.2 Free legal help for people with disability, their carers and families

LACs are the largest provider of legal services to people with disability across Australia. Through this work we observe firsthand how the NDIS is not yet living up to its promise.

LACs offer specialist legal advice and representation in courts, tribunals and mental health inpatient units for people with disability. In addition, LACs receive funding from the Department of Social Services to provide legal representation in NDIS matters on appeal before the Administrative Appeals Tribunal (AAT).

In the 2019-20 financial year, LACs provided large numbers of more intensive legal services to people with a disability.⁴

The following table reflects the percentage of grants of legal aid for ongoing representation services to people with disability. Data in the table will be a significant undercount as the data relies on the self-identification of the service user as a person with disability. The legal assistance sector is currently working with the Commonwealth Attorney-General's Department to support improved data collection including in relation to the delivery of services to people with a disability.



Many of our clients are eligible for receiving services under the NDIS and have overlapping legal needs. Through this work we see how the NDIS functions for the most disadvantaged members of our communities. When the NDIS works, it provides vital supports for our clients to live well and safely. When the NDIS fails, it can lead to people struggling to get through each day, losing care of their children or being deprived of their liberty.

3. Background

3.1 Previous submissions

NLA has made policy submissions in response to prior NDIS inquiries and consultations, including:

- [Putting People First: Removing barriers for people with disability to access NDIS supports - Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee](#), November 2019 (Putting People First submission).²
- Joint Standing Committee on the National Disability Insurance Scheme on [NDIS Planning](#), September 2019.

Additionally, individual LACs have made submissions to the NDIS Thin Markets Project in June 2019, to the Joint Standing Committee on the NDIS on Market Readiness for the provision of services under the NDIS and to the Productivity Commission on NDIS Costs.³

² The Legal Services Commission of South Australia made an additional submission to the Review, which sits alongside the national submission.

³ See for example: submission on the Thin Markets Project by [Legal Aid NSW](#) and [Victoria Legal Aid](#) in June 2019; Legal Aid NSW, Submission to the Joint Standing Committee on the National Disability Insurance Scheme on Market Readiness for provision of services under the NDIS, March 2018 by [Legal Aid NSW](#) and [Victoria Legal](#)

Our recommendations in this submission should be read in conjunction with previous responses, particularly the [Putting People First](#) submission, Chapters 6 (Creating a Plan), 7 (Using a plan) and 8 (Reassessing and Reviewing a Plan).

In the Putting People First submission we made 29 recommendations about how the planning process could be improved for participants, from the steps taken before a plan is made all the way through to reviews, reassessments and plan amendments.

Our key recommendations were:

- Timely planning decisions, particularly for early intervention participants.
- Draft plans with reasons given to a participant before a planning decision is made.
- Clearer processes for the inclusion of supports where the cost or level is determined after the plan has been made, such as assistive technology, Specialist Disability Accommodation (SDA) and modifications.
- More support throughout plans, including specialist support coordination.
- A greater distinction (in terminology and practice) between internal reviews and reassessments of plans, scheduled and unscheduled.

This submission should also be read alongside our submission on the Access and Eligibility consultation paper,⁴ in which we recommended that independent assessments not be made compulsory for applicants. The reasons for that recommendation – the burden on applicants, the greater usefulness of information provided by people who know the applicant well and the risk of delayed and fractured decision making – also apply to planning decisions.

3.2 The Tune Review Report

In December 2019, David Tune AO PSM published the results of that review in a report entitled *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee* (the Tune Review).

The Tune Review made a number of recommendations about the planning process, including:

- Timeframes for planning decisions, as set out in the Participant Service Guarantee.
- Greater recognition and support for families and carers providing informal support to children.
- Increasing the involvement of participants in decisions about supported independent living funding.
- Greater flexibility in the use of plan supports, with some limited exceptions.

[Aid](#); Submission to the Productivity Commission on NDIS costs by [Legal Aid NSW](#) and [Victoria Legal Aid](#), July 2017.

⁴ National Legal Aid, National Disability Insurance Scheme: Access and Eligibility Policy with independent assessments, submission to the Consultation Paper, February 2021.

- Improvement in the Rules about Support Coordination, including the avoidance of conflicts of interest.
- The NDIA support participants more in accessing the market for services, including through market intervention and intervention and resources about best practice supports.
- Changes to reviews and reassessments of plans, to make possible for them to be amended, and to better differentiate between reviews under ss 48 and 100 NDIS Act.

4. Responses to the Consultation Paper

4.1 Introduction: Plans should be made with a participant, not about them

The NDIS is a significant reform to the delivery of disability supports in Australia. Central to the NDIS are important principles about the rights of people with disabilities, including:

- That the NDIS will enable people with disabilities to exercise choice and control in the pursuit of their goals and the planning and delivery of supports (s 3(1)(e) NDIS Act).
- That people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity (s 4(8) NDIS Act).
- That people with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs (s 4(9) NDIS Act).

In relation to decision making under the NDIS Act, section 5 includes the following principles:

- That people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves (s 5(a) NDIS Act).
- The judgements and decisions that people with disability would have made for themselves should be taken into account (s 5(c) NDIS Act).

We consider that retaining individualised, goal-based planning is essential to the NDIS upholding and delivering these general principles. This means involving a person with a disability in the entirety of the decision about the supports that will be funded for them under the NDIS.

Under the current proposal, a plan would be developed according to an assessment of the person's functioning, which would include information about their environment and context. The participant would speak to a planner about their supports only after a budget had been developed.

We do not support a process where a budget or funding level for a person with disability is determined before they are involved in the conversation about what they need. We think that consideration of functioning and environment is only one part of determining the support needs of a person with a disability and that the person's goals, ambitions, choices and interests are equally important. We consider that a participant (including with assistance from their family and/or carers) is best placed to provide information to the NDIA about their needs, prior to funding decisions being made. The important participant focused principles of the NDIS set out above cannot be realised without a genuine opportunity for participants to contribute to and participate in planning decisions.

The Tune Review report said:

The general principles at section 4 of the NDIS Act reinforce that the objectives of the NDIS are to place individualisation at the heart of planning and maximise a participant's ability to exercise choice and control over the disability supports they need to achieve their goals and aspirations.⁵

In relation to functional assessments, the Tune Review report said that the pilot suggested that assessments could be implemented nationally for people who "require further evidence to support decision-making about the supports in their plan".⁶

As we outlined in our submission on access and independent assessments, assessments should not create further barriers for people who already have sufficient evidence for the decisions about their supports to be appropriate and effective. Nor should they provide a basis for the NDIA to make decisions about participants instead of with them.

4.2 Support budgets

The other most significant change outlined in the paper is the proposal to move towards a single decision about a participant's budget rather than a decision about each support and whether it meets the reasonable and necessary criteria in section 34(1) NDIS Act.

Because it is unclear the factors a decision maker would take into account to determine a budget level, and because this change would require legislative amendment, we will provide further comment about it when the details are provided.

We do not support a model in which supports are determined by reference to "a participant with a similar level of functional capacity, support need and environmental context" (Consultation Paper, page 13). In the Putting People First submission we expressed our concern about the overreliance on Typical Support Packages (TSPs),⁷ and we consider that this proposed change could also undermined the tailored and individualised decision making that is at the core of the NDIS.

The NDIS is designed to be person-centred. A person-centred approach, according to the

⁵ The Tune Review Report, page 63.

⁶ The Tune Review Report, page 65.

⁷ See page 39 of the Putting People First submission, and particularly the case study of Greg.

Productivity Commission report on Disability Care and Support, is intended “to maximise, as much as reasonably possible, the capacity for people with disabilities to take control of their lives”.⁸ The focus on individualised, tailored supports rather than a budget determined by a level of severity of disability is a key part of delivering that control to people with disabilities.

LACs around the country work with and advocate for many participants in the NDIS. For some, flexibility in funding is extremely important to help them to meet their goals. For others, certainty about what is included and what is not is most important. Some participants prefer shorter plans, so that they can plan for expected changes of circumstances, while others find the process of engaging regularly in planning meetings frustrating.

It is essential in delivering improvements to the planning process that individual circumstances and goals remain at the forefront – in decisions about support levels, individual support requests, management of funding, release of funds and plan length. This also means having clear and effective review mechanisms if a planning decision is not appropriate for a participant.

4.3 How should a participant’s plan be set out so its easier to understand? How can we make it easy for participants to understand how their funding can be spent?

A common concern among our clients is a lack of information about how support budgets have been calculated and what they include. Currently, support budgets are calculated by reference to the NDIS Price Guide and support catalogue, which means that plans often contain very precise amounts of funding, but little information about how the amount has been reached. An amount of core supports funding might have been calculated to include personal care, domestic assistance and continence support, and although a participant can use that funding flexibly, if they do not know how it has been calculated it makes it very difficult to know whether their needs can be met over the duration of the plan.

This lack of clarification leads to unnecessary requests for review (where, for example, a participant already has the funding for a support), missed timeframes for review (where it only becomes clear later than three months into the plan that supports will not be sufficient) or, most commonly, additional steps in a review, where a participant and their representative have to work out what is and isn’t included in a plan to make a case for further support.

Even if a budget is fully flexible, a plan should still include an explanation of what the decision maker considers is funded within it. This makes it easier for participants to identify any shortfalls and to seek a review if necessary. This is particularly important if plans will be for a longer period of time, where the risk of realising late that the supports in a plan are insufficient is greater.

⁸ Productivity Commission Inquiry report, *Disability Care and Support*, 31 July 2011 at 345.

If a planner has determined that a particular support should not be included in a plan, the participant should get reasons for that decision. Currently the record of a decision under s 33(2) NDIS Act is the plan itself. Any exclusions to funding should be explained in reasons accompanying the plan so the participant can make informed decisions as to whether to seek internal review and as to the use of funding under the plan.

4.4 How can we support participants to prepare for a planning meeting? What might be needed to support participant decision making?

In our experience, participants often need support prior to a planning meeting, and while some support is offered by Local Area Coordinators and Early Childhood Early Intervention partners, it can be difficult for participants, particularly participants with complex needs and/or limited informal support, to access comprehensive pre-planning.

Support should be given to participants who need it to develop their goals. The consultation paper says that goals do not determine what supports will be offered. A participant's goals are a relevant consideration in determining whether a support is "reasonable and necessary" within the meaning of section 34 of the NDIS Act. Sub-section 34(1)(a) of the NDIS Act provides that the CEO must be satisfied that a "support will assist the participant to pursue their goals, objectives and aspiration included in their statement of goals and aspirations". Tailored goals help participants get the right kind of supports and the legislation in its current form reflects this. Generalised, non-individualised goals can lead to inadequate NDIS plans.

In our experience, a lack of systematic and consistent pre-planning support is contributing to a two-tiered system where people who have access to supports (either through funded services, family members or support people) obtain more appropriate plans, while people who are unsupported and socially isolated are more likely to receive inadequate plans.

We do not consider that this will be remedied by independent assessments, which are still predicated on the person's willingness and ability to undergo an assessment, the person's ability to communicate their needs and environmental circumstances to an assessor they do not have a therapeutic relationship with. Where a person lacks informal support and is isolated, an assessment could create further barriers rather than remedying them.

Case study: Assessment of needs in custody

Carmen (*not her real name*) was an NDIS participant with a mild intellectual disability. Due for release from Silverwater Women's Correctional Centre, she was assessed by an occupational therapist without a support person present for the assessment to determine what she would need in the community.

The occupational therapist asked Carmen about her sleeping, to which she replied that she slept well. Carmen had difficulty understanding the concept of time and had spent very long periods of the day while in custody in 'lockdown'. As a result, she had very irregular sleep patterns and when she returned to the community, she frequently needed active overnight support from paid carers.

The NDIA relied on the occupational therapist's assessment of Carmen's sleeping and found

that first, she did not require Supported Independent Living (SIL) funding, and then, even when that decision was changed, that she did not need active overnight support. As a result, Carmen still has insufficient funding for overnight support, and those who care for her must provide evidence to change the decisions that have been based on her brief assessment while in custody.

In relation to assessments occurring before a plan is made, we repeat our submission that they should not be made compulsory, and instead should be offered to a participant if required to evidence their support needs. Currently, progress reports are routinely provided by practitioners who know a participant well, detailing the participant's progress towards their goals and their needs for the following plan period. This information is often very detailed, specific and based on a thorough understanding of the participant.

If assessments are to form part of every scheduled plan review, there should be broad exemptions (as outlined in our response to the access consultation paper) to reduce the burden on applicants and to recognise the circumstances in which assessment could be harmful, unhelpful or impractical.

When they do go ahead, assessors should be encouraged to consult with a wide range of sources to ensure that their understanding of the participant's needs is as accurate as possible.

Case study: Accessing reports to make accurate planning decisions

Graham (*not his real name*) was an NDIS participant with an intellectual disability and a communication impairment. Graham was in custody. Due his disabilities, he was placed in the additional supports unit (ASU) at Long Bay gaol.

He was assessed by an occupational therapist prior to his release. He told the occupational therapist that he had lived independently prior to being in custody. Corrections staff told the therapist that he was doing well in gaol.

In reality, Graham had not lived independently but had been reliant on his family for all aspects of daily life. He did not know how to get accommodation, manage his money, shop, cook or attend to his own daily needs. When his mother died, he became homeless and lived on a factory floor where he worked until his boss helped him to get accommodation.

In the ASU, the decisions he had to make were limited and he had support with all of the tasks and decisions he would find difficult on his own on release.

Graham's file had a number of reports that detailed his life outside of custody and his functional limitations. The therapist did not access any of them, and wrote a report recommending minimal support. The Mental Health Review Tribunal would not approve Graham's conditional release with the level of funding in his NDIS plan.

In our Putting People First submission we shared our concerns about the overreliance on typical support packages (TSPs), including to change decisions about reasonable and necessary supports. We are concerned that if a planning meeting happens only after an assessment and with a budget already determined, the same issues about inflexible decision making could arise.

Planning meetings work best when participants and those who support them are given direct access to the decision maker and are permitted to freely express their goals, functional limitations and needs.

4.5 Which supports should always be in a fixed budget? What principles should apply in determining when determining whether supports should be included in the fixed budget?

We recommend that the following supports might be better included in a fixed budget:

- High cost, individually prescribed assistive technology items with fixed prices;
- Specialist Disability Accommodation (SDA); and
- Modifications, including home and vehicle modifications.

It is important that the Agency consult with people with disability to determine what arrangement best reflects their preferences and the objectives of the scheme, in this respect.

This is to allow participants certainty that these specialised items, at the right specifications, are included in their plans. For these supports, if there is not clarity about whether they are provided for in a plan, it can prevent a participant from accessing them at all.

Under the assistive technology guidelines at 30 November 2020, assistive technology is split into three levels – low cost (under \$1,500), mid cost (from \$1,500-\$5,000) and high cost (over \$5,000).⁹ We recommend that only high cost items be in the fixed budget so that participants have maximum flexibility about lower cost items.

We also recommend that it be possible for a participant to use core support budget funding, or alternatively, that fixed budgets contain a buffer, to allow a participant to get an agreed support if there is a small change to their needs in relation to the fixed budget, for example:

- A recommended model of assistive technology is no longer available, and an equivalent piece of technology is available at a similar, but higher price.
- An occupational therapist recommends an additional feature to an approved piece of technology, such as an adjustable headrest for a motorised wheelchair.
- There is an increase in price between when a quote is given and when the support is purchased, or
- Minor remediation work is needed because of home modifications.

For these small changes to an otherwise agreed support it should not be necessary for a participant to engage in a review process, because the support itself has been approved.

Decisions about supports in the fixed budget

Supports like SDA, modifications and high cost assistive technologies take time to determine correctly, and currently there is no timeframe for when a decision on these supports will be

⁹ [How do we consider the cost of the assistive technology? | NDIS](#)

made if all the information is not available at a planning meeting.

Participants often wait months for the deferred decision about funding to be made, after providing the assessment and/or quote. Many participants are confused about how the funding can be provided without an internal review of the plan.

Once the quote or assessment has been provided and the NDIA approves the quote provided in the assessment and decides to fund the support, there is no clear mechanism for including the support in the plan.

We recommend, as we recommended in our submission to the Tune Review, that the NDIA should make a decision about fixed funding supports within 28 days of receiving a quote or a recommendation from the SDA panel.

We also recommend that there be a clear process for the NDIA to consider these supports, and that decisions about specific supports like SDA, home modifications and assistive technology are reviewable.

Case study: Decisions about fixed supports

Mark (*not his real name*) is a participant in the NDIS with a cognitive and a physical disability. He sought that SDA be included in his plan and the decision was referred to the SDA Panel for recommendation about his eligibility and building requirements. After three months the SDA Panel returned its recommendation and recommended that Mark not be found eligible for SDA. He was sent a letter by the NDIA informing of the decision and telling him he could seek review. When he sought review, the NDIA declined to deal with the request on the basis that the decision to approve his plan was made more than three months earlier. The SDA Panel's decision was not reviewable, which meant that Mark had limited options to challenge the decision despite raising his need for SDA at his planning meeting.

The power to vary a plan, as outlined in the Consultation Paper, may address some of the issues with decision making around individual supports where all of the required information is not available at a planning meeting. However, we are concerned that if the decision in question is whether or not to vary a plan to include a support, the review would have the same limitations as the review of a decision not to reassess a participant's plan under the current s 48 NDIS Act. Reviews of this type of decision look at whether it was correct not to reassess a plan. If successful, the ultimate result is a remittal of the decision to the NDIA to reassess the plan. This increases the steps for both the Agency and the participant in resolving an issue about a participant support.

Instead we consider that the review should be of the decision not to fund a particular support, including the decision not to fund a support at the level requested by the participant. This would allow reviews both internally and at the AAT to engage with the approval of the support itself, simplifying the process and reducing delay.

4.6 How can we assure participants that their plan budgets are at the right level?

NLA considers that the most effective way to ensure a participant's plan will meet their needs is to engage in personalised goal-based planning with them and the people who support them and in consideration of all the information that they provide.

This involves:

- supporting the person through the pre-planning phase, including through the development of tailored goals if needed;
- offering and funding an assessment if it is necessary to establish support needs;
- evaluating the effectiveness of previous plans, and not reducing funding based on a perceived underspend;¹⁰ and
- Reviewing the available material and applying the appropriate recommendations of support providers.

We support the introduction of draft plans so that participants can see the proposed supports that will be funded before a decision is made and correct any errors, however this should be a starting point for a planning discussion.

We note that the proposal to shift to a flexible amount instead of individual supports would also require a participant to have a working knowledge of the current price guide, and skills in budgeting and predicting expenditure over time in order to determine whether the plan provides a reasonable and necessary level of funding. This is a significant shift, and runs the risk of participants accepting a level of funding at an abstract level which will not ultimately meet their needs.

We echo the concerns of the Tune Review Report about the ways in which criterion s 34(1)(e) – the support takes into account what is reasonable to expect families, carers, informal networks and the community to provide – has been applied.¹¹ This requirement is designed to recognise the contributions of informal care and support to a person with disability and NDIS supports should support informal caregivers in their caring roles. Supports for a participant, whether adult or child, should not be reduced on the basis that informal support is available to the participant if it comes at the risk of the wellbeing of either the carer or participant.

Ensuring supports are at the right level also involves implementing targeted processes for people in detention. Clear processes for planning for a person's release before their sentence is complete or discharge is imminent should be systematically introduced so that supports are in place to facilitate successful discharge or release and reduce risk of reoffending or readmission. This may also require the funding of supports for transition prior to release.

¹⁰ See Putting People First submission at page 51.

¹¹ Tune Review Report, see page 99-103.

4.7 What new tools and resources should we provide to support people using their plan and new plan flexibilities?

We consider that skilled support coordinators play an important and ongoing role for people with complex needs to problem-solve issues, navigate systems and think creatively about supports. They provide crucial assistance to many participants to properly engage NDIS services and get the most out of their funding. Longer plans and more flexibility will, for many, make support coordination essential.

The NDIA should also ensure that participants and their nominated support people are provided with adequate and accessible information about how to use their NDIS plan, including guidance, detailed information about the implications of self-management, plan management and agency management of support categories in their NDIS plans.

4.8 What ideas do you have for how people can use their plans more innovatively?

The most effective way to ensure the innovative delivery of support is to allow people with disability to make the decisions about the delivery of their supports – including what, how, where and when. Although the NDIS Act contains no exhaustive definition of supports, in our experience, participants are more likely to have a support approved if it falls within a recognised category, for example, in the NDIS Support Catalogue.

Case study: Innovative use of supports

Damien (*not his real name*) is a 30-year-old NDIS participant with epilepsy, an intellectual disability and autism spectrum disorder. Damien lived in a private rental house where his housemates provided support to him for 12 hours a day and received a subsidy towards their rent. Damien liked to participate in volunteer and paid work, always with support, including developing his own business to support others with disabilities. He was surrounded by a group of friends and family who worked together to help him make decisions.

The NDIA recognised that Damien and his family and support network had created an innovative and individualised system for supporting him to achieve his goals. However they reduced his funding significantly when his plan was reviewed, declining to fund personal care support on the basis that it was not assisting him to achieve independence and was not as cost effective as living with other people with disabilities. The decision put Damien's housing and engagement in employment at risk.

The decision was reversed in the Administrative Appeals Tribunal with assistance from Legal Aid NSW and Damien was able to stay in his home.

The starting point for evaluating innovative supports should always be the individual's goals and the benefits they obtain from the support. Frequently participants are asked to demonstrate why supports they choose are more cost effective than conventional options, without proper consideration of the benefits to them of the model they have chosen.

4.9 How best to handle the timing of the release of funds and rollover of unused funds?

We recommend that the release of funds operates like current rules around management of plan funding, that is, that a participant can express a release schedule of their choice, and that the choice is only overruled if there is evidence of risk to the participant from the choice.

If the release of funds is to be within the discretion of a decision maker:

- There must be clear guidelines to guide decision making;
- The participant's preferences should be sought and considered; and
- It should be possible to apply to the NDIA for a change in the frequency if the decision affects the participant's access to supports.

A participant's use of funds within a plan period (for example more intensive support in one year than another) should not be considered an indication of a need for lower support overall. As we have previously submitted, there can be a number of reasons, including market factors, that mean that plan funding is not spent as intended.

4.10 How should check-ins be undertaken? Under what circumstances is a check-in needed and how often? Who should be involved in a check-in?

The general principle should be that participants can nominate a chosen frequency of check in, with the delegate to consider whether there is any risk from the participant's proposal.

A longer plan period will not always be the most appropriate for a participant with complex or changing needs and there should be flexibility in plan lengths if there is a known upcoming change of circumstances for a participant. If a participant will reach an important milestone, such as leaving school, it should not fall to the participant to notify the NDIA of when that occurs, rather, the flexibility of plan length should be used to ensure that a new planning conversation can be had well in advance of the change.

The NDIA may be the only agency with information about whether a person with disabilities is getting support, and we approve the proposal that the NDIA would contact a participant if there was a period of underspending or no spending on supports. This could indicate that the participant's welfare is at risk or that they need more assistance or market intervention to deliver the support they need.

It is not clear what the relationship will be between plan reassessments and check-ins, but a check-in should be capable of being initiated by participants, and the outcome should be reviewable.

4.11 Reviews

The Consultation Paper states that the NDIA does not intend that the review process in relation to planning decisions will change (page 25).

In our Putting People First submission we explained how mischaracterisation of internal review requests, confusing terminology in relation to review of decisions and plan reassessment, and issues with the AAT's jurisdiction when a plan had been replaced were unnecessarily complicating the review process for applicants, the Agency and the Tribunal itself.¹²

We understand that the proposed changes to allow for plan variations, plan reassessment and reviews of the decision to approve a plan are designed to simplify the review process and give participants clearer paths to seek review. To work effectively, policies must be developed to clearly allow decision makers to identify and differentiate between the types of reviews.

To make the review processes as effective as possible, we recommend that the following decisions are reviewable:

- **The decision not to approve a specified support**, or not to approve the support at a specific level. The decision should be made within **28 days** of receiving information or evidence for the support including a report, quote or SDA panel recommendation. The timeframe for seeking a review of the decision should be **three months** from the date the reasons for the refusal are given to the participant.
- **The decision to approve a statement of participant supports in a participant's plan**. The timeframe for seeking a review of the decision should be **at any time within the duration of the plan**.
- **The decision to reassess or not to reassess a participant's plan**. The timeframe for seeking a review should be within 3 months of the decision to reassess or not to reassess.

Currently, for all reviewable decisions in s 99 NDIS Act an affected person must seek a review within 3 months. In the case of a decision to approve a statement of participant supports, the proposed changes would see those decisions in effect for significantly longer than they are currently, for example up to 5 years. As outlined above, in our experience, it is often not apparent to a participant from the outset that a plan will not adequately meet their needs.

We consider that for appeal rights to be retained, it should be possible for a participant to seek a review of a decision to approve their plan as long as the plan is in force (and incorporating any variations that are made). Under the current legislative regime, where a participant wants to seek review of their statement of participant supports more than 3 months after the decision is made, they must first request that their plan is reviewed (reassessed) before its schedule review date.

As the Consultation Paper makes clear, plan reassessment is for a situation where there is a change in the participant's circumstances or functional capacity. It is not expressly designed for situations where it becomes apparent later than three months after a plan is approved

¹² See the Putting People First submission, pages 54 to 70.

that it will not be sufficient for a participant's needs. This currently causes confusion for participants seeking review (see pages 61-62 of our Putting People First submission) and is likely to further complicate the review process if, and when, a reassessment is tied to a further functional assessment.

We also do not support the proposal that a functional assessment would be needed before plan reassessment, unless an exception applies. We consider that assessments should be offered to participants and not made compulsory. Participants already regularly furnish detailed reports about their use of their plans completed by practitioners who know them well and are well placed to comment on their future support needs. Again, what should be included in a participant's plan should be influenced by more than just a participant's functional capacity, and should extend to their goals, aspirations, choices and interests.

We are also concerned that incorporating functional assessments into decisions about whether to conduct a plan reassessment will increase delay and complexity into the process. According to the Position Paper, a participant would have to demonstrate a significant change in circumstances or functional capacity and then the Agency would organise a functional assessment (if an exception did not apply) to help determine whether a reassessment should take place. Currently, requests for unscheduled review (reassessment) are often made because there is an urgent need for greater funding. The current process gives the NDIA 14 days to decide whether or not to review the plan before a participant can continue with a review. Functional assessments are likely to significantly extend this timeframe.

5. Conclusion

NLA supports the NDIA's efforts to improve decisions about access to the NDIS, and to better support applicants to evidence the impacts of their impairments on their functional capacity.

Based on our experience supporting, advising and advocating for people with disability, including in Tribunal reviews of NDIS access decisions, we have made recommendations about how the Eligibility and Access Policy could be amended.

Our recommendations are as follows:

Recommendations

1. That individualised, goal-based planning, in which a decision about funding is made with, and not about, a participant is maintained.
That voluntary assessments for planning purposes be offered to participants who need assistance to evidence their support needs.
2. That the Agency produce and distribute details about how a decision maker would determine the support level in a plan for general consultation.
3. That plans contain information about how the support level in the plan has been reached and that reasons are given for any supports requested that are not included

with the plan.

4. That the NDIA provides support to applicants in the pre-planning process, including, where necessary, assisting the participant to develop tailored goals.
5. That skilled and experienced support coordinators are funded for participants, including on an ongoing basis, to help problem-solve issues, navigate systems and think creatively about supports.
6. That the NDIA should develop a clear and responsive approach to considering requests for home modifications, assistive technology items and specialist disability accommodation.
7. That the NDIA should ensure that participants are provided with adequate and accessible information about how to use their NDIS plan, including detailed information about the implications of self-management, plan management and agency management of support categories in their NDIS plans.
8. That release of funds and check-ins should both be at the frequency nominated by the participant, unless the participant's choice would put them at risk.
9. That the decision not to approve a specified support, or not to approve the support at a specific level should be made within 28 days of receiving information or evidence for the support including a report, quote or SDA panel recommendation.
10. That the timeframe for seeking a review of the decision not to approve a specified support, or not to approve the support at a specific level, should be three months from the date the reasons for the refusal are given to the participant.
11. That the timeframe for seeking review of a decision to approve a statement of participant supports in a participant's plan should be at any time within the duration of the plan.
12. That the timeframe for seeking a review of a decision to reassess or not to reassess a participant's plan should be within 3 months of the decision to reassess or not to reassess.

Thank you for the opportunity to provide feedback on the Consultation Paper: Planning Policy for Personalised Budgets and Plan Flexibility.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,



Suzan Cox OAM QC
Chair



National Legal Aid

2020

National Legal Aid represents the directors of the 8 Australian State and Territory legal aid commissions.

This booklet describes the role of legal aid commissions in delivering legal assistance services.



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Providing legal assistance

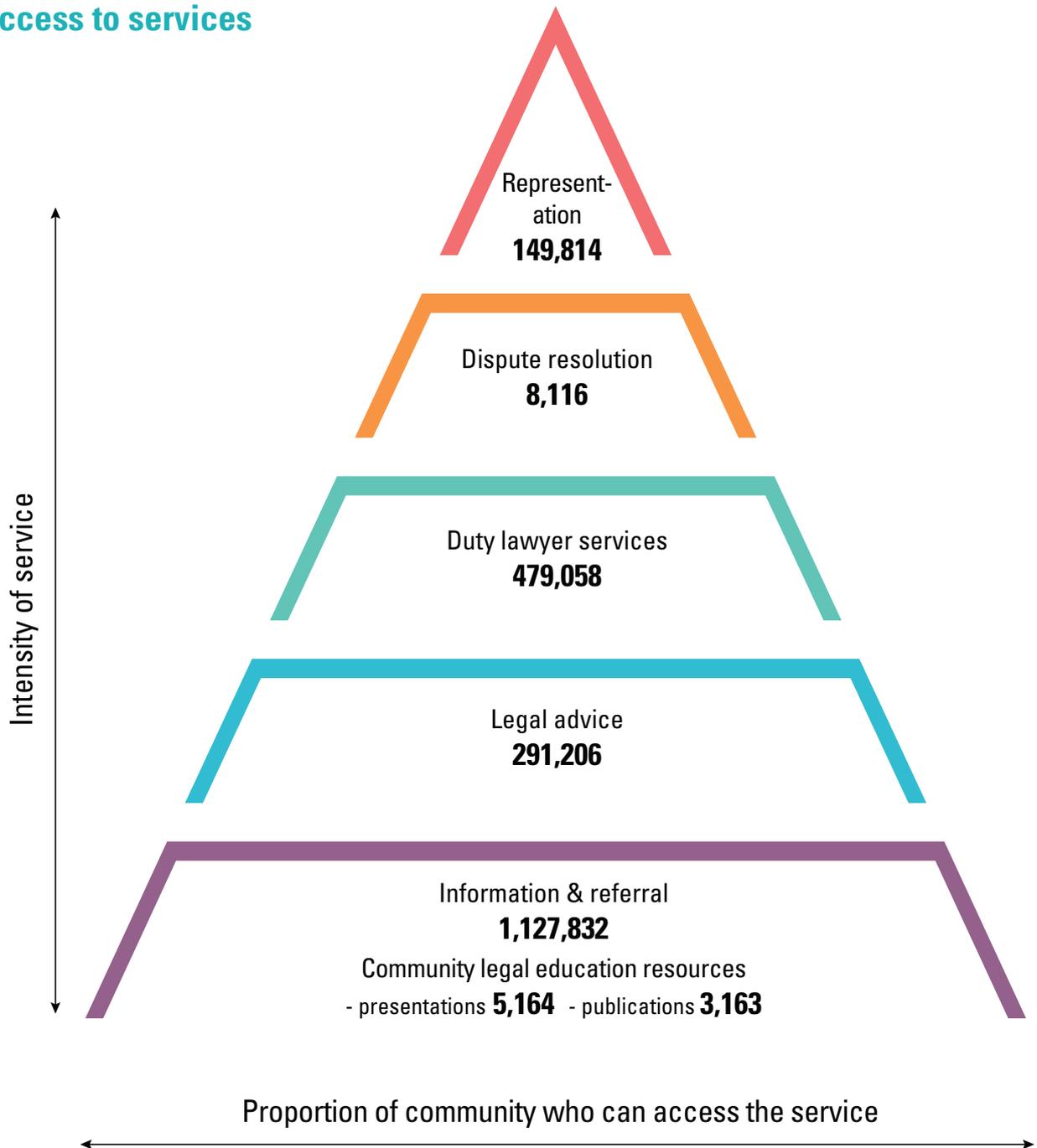
8 legal aid
commissions 

in excess of 2 million services
in 2018-19

2018-19
funding \$838.73_M

78 offices around
the country

Access to services

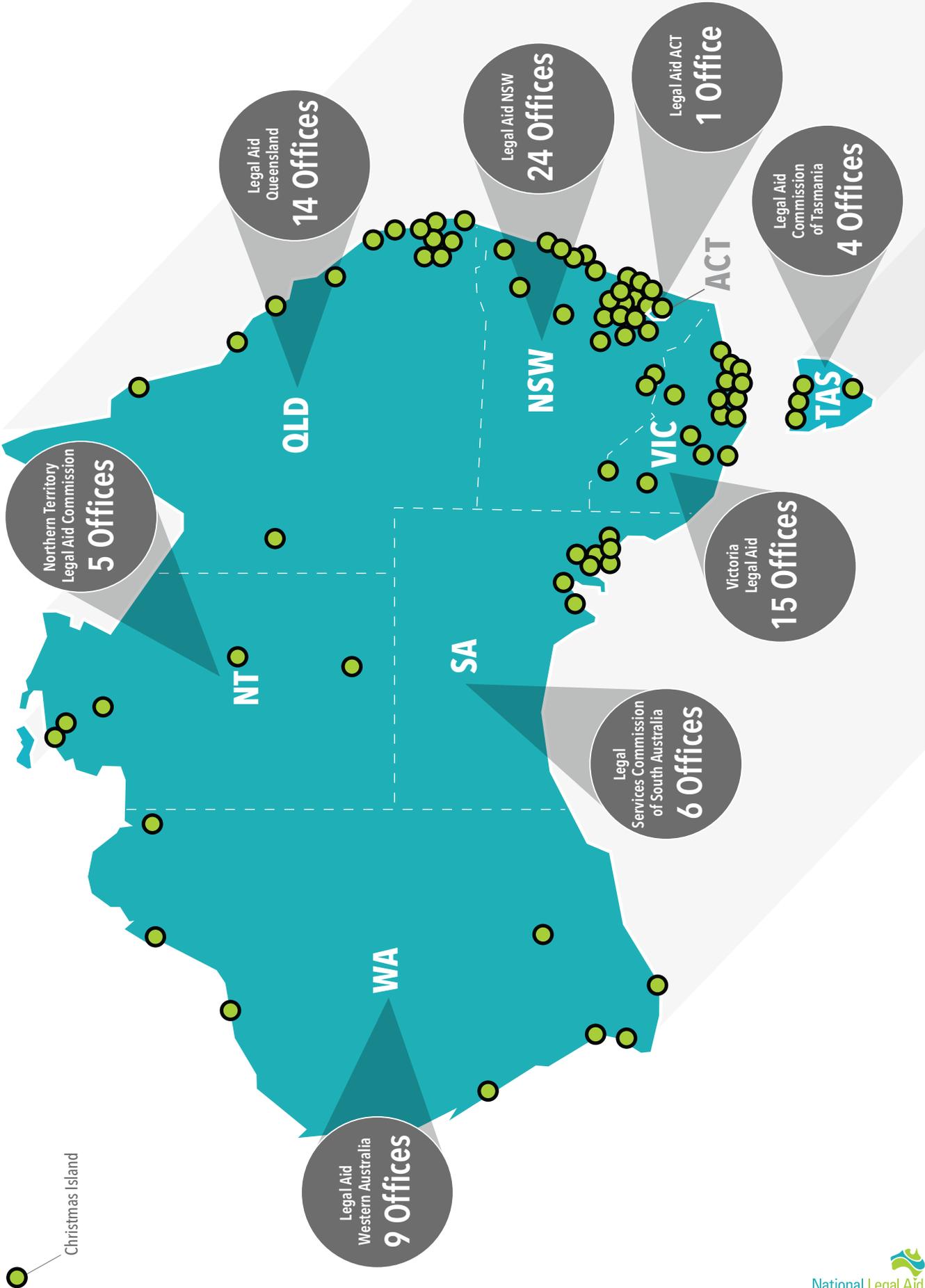


Sources: National Legal Aid Statistics <https://nla.legalaid.nsw.gov.au/nlareports/>
National Partnership Agreement on Legal Assistance Services 2015-2020

Notes:

- i) Duty lawyer services include Family Advocacy and Support Services.
- ii) Legal advice includes work accompanying the advice e.g. drafting of legal letters, telephone advocacy on someone's behalf etc.
- iii) Community legal education resources reported here are Commonwealth law related only. More services were provided for state/territory law matters.

Reach across Australia



Responsive legal assistance

Legal aid commissions (LACs) are the main providers of legal assistance services in Australia,¹ and provide nearly all the legal assistance representation services at courts and tribunals.

In 2018-19 LACs provided in excess of 2 million services (in all law types) to people across the country. These services were delivered from LAC offices and by way of outreach including through health justice partnerships.

Background

LAC services are provided consistently with the priorities specified by inter-governmental partnership agreements on Legal Assistance Services and with the state and territory enabling legislation of the respective LAC. The current agreement is the National Legal Assistance Partnership for 2020-2025, which commenced on 1 July 2020.

Litigation is a response of last resort for LACs and the NPA also specifies that “Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate.”²

Legal representation services

Legal representation services include legal representation in fully contested matters including the provision of independent children’s lawyers and child representatives as requested by the family law courts and child protection courts respectively, as well as full legal representation services for parties with matters predominantly in the family law, family violence, child protection, and criminal law courts.

Duty lawyer services and family advocacy support services

Duty lawyer services are provided in civil law courts and tribunals including the family law courts, the Administrative Appeals Tribunal, and as many local courts as possible including state and territory family violence courts. “The presence of duty lawyer services on the day at court has been proven to contribute to the effectiveness and efficiency of the court process for both the client and the court or tribunal”.³

Family Advocacy and Support Services (FASS) are provided at some registries of the family law courts⁴ to assist families experiencing domestic violence as they move through the family law system. The FASS integrates duty lawyers with specialist family violence workers to help families navigate between the federal and state court systems and connect people with trauma-informed help such as risk assessments and safety planning.

1) Productivity Commission 2014, Access to Justice Arrangements, Inquiry Report No. 72, Canberra vol 2 667.

2) Productivity Commission 2014, Access to Justice Arrangements, Inquiry Report No. 72, Canberra vol 2 667.

3) An evaluation of Legal Aid NSW’s Early Intervention Unit Duty Service at Parramatta Family Law Courts, Law and Justice Foundation, 2012 www.legalaid.nsw.gov.au/data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf found that the duty service contributed to the efficiency and effectiveness of the court process by: diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action; and contributing to the resolution of matters on the day through the drafting of documents, including providing a ‘reality check’ with clients – while explaining the processes and implications and negotiating with other parties for clients.

4) The services in the Northern Territory are primarily delivered from the Darwin Local Court and the Katherine Local Court due to demand for services at these locations.

Responsive legal assistance (continued)

Dispute resolution services

Dispute resolution services are provided as a necessary first step in all matters which are appropriate for such service delivery. All LACs operate programs which provide legally assisted models of dispute resolution conferences, and which achieve very high settlement rates, e.g. in 2018-19 the national average settlement rate was 77%. The LACs organise conferences, including providing the Chairperson for these conferences, and ensure parties who qualify for a grant of legal aid are legally represented.

Whenever settlement is achieved these services avoid the cost of resources associated with court proceedings, including the cost of court administration and hearing time.

Legal advice, information and referral services

The legal advice, information and referral services, and community legal education, are non-means tested services designed as prevention and early intervention strategies. These services are provided on-line, by phone, and face to face.

LACs produce information and self-help resources and provide community legal education services to further support self-representing parties with various problem types.

COVID-19

In March 2020 LACs moved with relative agility to deliver the majority of legal assistance services online, maintaining legal assistance and social support services, and supporting the safety of our community.

Supporting an improved system

- 2 million services to the public
- Family dispute resolution – 77% national settlement rate
- Your Story Disability Legal Support – Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Your Story Disability Legal Support is a free national service, providing information and legal advice to people about safely sharing their story with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The Australian Government funds National Legal Aid and the National Aboriginal and Torres Strait Islander Legal services to deliver the national service.⁵

- Family Advocacy and Support Services

Family Advocacy and Support Services at the main registries of the family law courts deliver legal assistance and social support services to families with family law matters who have been affected by family violence.

Family Violence Law Help website <https://familyviolencelaw.gov.au/> is a family violence and family law community legal education resource developed by NLA to complement the Family Advocacy and Support Services.

This national website houses family violence resources and information about the Family Advocacy and Support Service in each state and territory.

National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department.

- Independent children's lawyers

Provision of independent children's lawyers.

Dedicated website (<https://icl.gov.au/>) and suite of publications to provide information, news and resources to the public about the role of the independent children's lawyers in family law proceedings, and also the professional development and mentoring for those undertaking the role.⁶

Independent children's lawyers training program comprising online and face to face training modules and tested learnings.

- Commonwealth Family Violence and Cross-examination of Parties Scheme administered by LACs

This Scheme protects victims of family violence from being cross-examined by alleged perpetrators.

- amica - online dispute resolution system

amica assists separating couples in Australia to resolve their family law disputes with less reliance on formal pathways.

National Legal Aid gratefully acknowledges the sponsorship of the Commonwealth Attorney-General's Department in developing amica.

⁵ Your Story Disability Legal Support website, <https://yourstorydisabilitylegal.org.au/Home>

⁶ In response to the release of the Australian Institute of Family Studies Independent Children's Lawyers Study Final Report 2nd edition, June 2014, and with NLA taking on sole responsibility for independent children's lawyer training as from May 2017.

Supporting an improved system (continued)

- Consumer outcomes

Membership of the Australian Banking Association Consumer Outcomes Group and participation in the development of customer focused guidelines.

Providing legal assistance to disadvantaged consumers which was recognised by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as often of critical importance to the customer's position making a large difference to their situation.⁷

- *What's the law?* Australian law for new arrivals

What's the law? was produced for national use in the Adult Migrant English Program (AMEP) and addresses 10 commonly experienced legal issues. The kit includes a DVD with 10 photo stories, information for teachers and activity sheets. The kit was evaluated in 2014 with teachers and in 2016 a research study, focusing on one of the *What's the law?* modules, found that it improved the participants understanding of the law. The study was published in 2018 in the *Journal of Law and Social Policy*.

This resource was developed by the eight Australian state and territory legal aid commissions, and inspired by the resource *Getting to know the law in my new country*, produced by the Footscray Community Legal Centre in Victoria.

- National consultations and submissions, including in response to parliamentary inquiries and reviews by the Australian Law Reform Commission, ensuring an experience informed national response. For example:

Family law

- Joint Select Committee on Australia's Family Law System (Sept 2019 to Oct 2020)
- Review of the family law system by the Australian Law Reform Commission (Sept 2017 to March 2019)
- Family Law Amendment (Parenting Management Hearings) Bill 2017, Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Other Measures) Bill 2017 Exposure draft and public consultation paper and the Senate Legal and Constitutional Affairs Committee Inquiry
- Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 Exposure draft and public consultation paper, Commonwealth Attorney-General's Department
- Parliamentary inquiry into a better family law system, House of Representatives Standing Committee on Social Policy and Legal Affairs

Elder abuse

- The provision of legal assistance services to help prevent and respond to elder abuse with specialist response units networked to the community.
- Australian Law Reform Commission Elder Abuse Inquiry, Issues Paper and Discussion Paper.

⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (2019) vol 1, 490-3.

Looking forward: working for fair justice

- Implementation of the National Legal Assistance Partnership Agreement 2020-2025.
- Responding to the report on the Review of the family law system by the Australian Law Reform Commission.
- Lawyer-assisted family law property mediation - extending the LACs' successful legally-assisted family dispute resolution program to family law small property matters.

National Legal Aid gratefully acknowledges the support of the Commonwealth Attorney-General's Department for the delivery of this pilot.

- Participating in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
- Supporting consumers following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
- Responding to elder abuse.
- Hosting the International Legal Aid Group Conference 2021

"The International Legal Aid Group (ILAG) is a network of legal aid specialists including Chief Executives and Managers from Legal Aid Commissions, high ranking Civil Servants and leading Academics from over two dozen countries. ILAG's mission is to improve evidence-based policy-making in the field of poverty legal services through discussion and dialogue relating to international developments in policy and research. ILAG focuses primarily on the particular issues raised in jurisdictions which have established highly developed systems of legal aid. However, ILAG is expanding its brief to include jurisdictions with less developed systems and has a real interest in how technology can be used to improve access to justice."⁸

⁸ International Legal Aid Group website <http://www.internationallegalaidgroup.org/>

Working together: legal assistance service providers

Legal assistance in Australia is provided by four main groups of providers, each of which receives funding from either or both of the Commonwealth and respective State or Territory governments.

The four main funded providers are:

- Legal aid commissions
- Aboriginal and Torres Strait Islander Legal Services
- Family Violence Prevention Legal Services
- Community legal centres.

“While all four providers offer a mix of services from legal education to casework for individuals and groups of clients, the targets for their services differ, as do their size. All four employ mixed service delivery models, with a focus on holistic services.”⁹

The mixed service delivery model involves the use of both in-house lawyers and private lawyers who are prepared to work for legal aid rates which are significantly less than market rates. In addition to the contribution made by private lawyers through the mixed service delivery model there are various schemes of pro bono assistance and volunteering.

Relationships between legal assistance providers

Good relationships and co-operative arrangements exist between legal assistance service providers. These relationships and arrangements ensure that services are extended as far as possible, and that issues such as legal conflict are addressed. They also ensure that people receive the service most appropriate to their individual need.

Nationally, relationships and co-operation are supported by the Australian Legal Assistance Forum constituted by representatives of the peak bodies for all legal assistance providers. <http://www.nationallegalaid.org/home/australian-legal-assistance-forum-alaf/>

Locally, providers also meet regularly for jurisdictional service planning purposes and to ensure that referral networks, including in relation to non-legal support for clients, are strong.

⁹ Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report No. 72*, Canberra, 767.

Charter of National Legal Aid

Membership

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

The LACs are independent statutory bodies that provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. LACs provide in excess of 2 million legal services each year.

One of the NLA directors, on a rotation basis, is the Chair and primary spokesperson for NLA.

Purpose

NLA's purpose is to:

- lead and encourage a national system of legal aid which allows economically disadvantaged people to obtain access to justice, and
- provide a forum for engagement at a national level with government/s, stakeholders, community; and for the individual LACs to engage with each other about best practice of legal aid and related issues.

Beliefs

NLA is guided by belief in the rule of law and the importance of an effective, efficient, independent justice system which is accessible to everyone. These are the cornerstones of a civil and democratic society.

Priorities

In 2019-20 key priorities for NLA include:

- Achieving an increase in core funding to legal assistance service providers with that funding to be adjusted each year in accordance with the Consumer Price Index, so that more services can be delivered to people in need.
- Responding to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
- Working with government and service providers to ensure the most appropriate response following the release of the report of the Australian Law Reform Commission's Review of Family Law.
- Support for adequate funding for the Aboriginal and Torres Strait Islander legal services as the 'specialised legal assistance services for Aboriginal and Torres Strait Islander people'.¹⁰

¹⁰ Productivity Commission 2014, Access to Justice Arrangements: Overview, Inquiry Report No. 72, Canberra, 767.

Charter of National Legal Aid (continued)

Strategies

NLA:

- maintains a set of policies which provide the basis for our work in advocating for equitable access to justice;
- is supported by a secretariat and by a number of working groups and networks including a representative of each of the LACs with expertise in the respective area of legal aid business, and
- meets regularly for strategic planning purposes.

Co-operation

There are four main government funded legal assistance service providers in Australia, including the LACs, community legal centres, Aboriginal and Torres Strait Islander legal services and Family Violence Prevention Legal Services.

NLA is a member of the Australian Legal Assistance Forum (ALAF), comprised by representatives of the above legal assistance service providers and the Law Council of Australia representing Australian lawyers and their state and territory representative bodies, a signatory to the ALAF Statement of Co-operation, and provides the ALAF Secretariat.

New Zealand

There is a strong alliance between NLA and Legal Aid Services New Zealand. The legal aid alliance facilitates the sharing of information, the showcasing of initiatives, and contributes to the development of best practice. A representative of Legal Aid Services NZ attends NLA meetings to discuss matters of mutual interest.

Further information

Further information about NLA and the work that we do, can be found at



<http://www.nationallegalaid.org/>

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