

10 August 2020

Queensland Productivity Commission
PO Box 12112 George Street
BRISBANE QLD 4003

To Whom It May Concern

We value the opportunity to contribute to the *Inquiry into the National Disability Insurance Scheme (NDIS) market in Queensland*. Spinal Life Australia is Queensland's leading provider of advocacy, therapy and supports for individuals with spinal cord damage and other physical disabilities. Our organisation supports more than 2,000 people across Queensland, Northern New South Wales and Western Australia to live as independently as possible with their disability.

Yours sincerely,



Mark Townend
Chief Executive Officer
Spinal Life Australia



Queensland Productivity Commission: Inquiry into the National Disability Insurance Scheme (NDIS) market in Queensland

August 2020

Contents

About Spinal Life Australia	2
Introduction	3
Information – Accuracy and Consistency for Service Providers.....	3
Assistive Technology	5
Housing	7
Personal Support Workers in Hospitals	8
Transport Funding	9
Workforce Training and Retention	10
Transition from Hospital to Home	12

About Spinal Life Australia

We are Queensland's leading provider of advocacy, therapy and supports for people with spinal cord damage. Our vision is for people with a spinal cord damage to live in an equitable, inclusive, integrated community, independently able to access every aspect of, and contribute to, the fabric of their region.

Initially called the Paraplegics Welfare Association, our services focused on advocacy, healthcare, and lifestyle advice, as well as personal assistance. These services expanded to include support networks for members and employment assistance, along with peer support to assist people and their families with the transition from the hospital to home and the community.

In the 60 years since establishment, we have developed specialist knowledge and services and we are Queensland's leading organisation for people with spinal cord damage, post-polio and transverse myelitis.

We are led by a board that is required by our guiding constitution to have a majority of representation from people living with spinal cord damage, and as a registered NDIS provider, our agency has been intimately involved in supporting people with disability to transition to the NDIS.

We have aspirations to be nationally recognised for the quality of our advocacy efforts – outlined in our advocacy charter, developed in conjunction with our customers and endorsed by our board.

It is with this in-depth, specialised and focussed knowledge that we lodge this submission for the consideration of the Queensland Productivity Commission.

Introduction

Spinal Life Australia's submission is separated into topic areas related to common issues encountered by the organisation when providing services. The suggested questions in the issues paper are included in each topic to provide a link to the terms of reference and the objective of the inquiry.

Information – Accuracy and Consistency for Service Providers

- *What are the impediments to achieving coordinated service provision and how could they be removed?*

An ongoing issue that prevents service providers making confident business decisions is the lack of consistent information from the National Disability Insurance Agency (NDIA) and lack of access to decision makers who share an equivalent responsibility for the accuracy of the information they provide. Liability for acting on incorrect information falls either on the participant or the service provider.

Service providers have access to the same information centre as participants through the enquiries@ndis.gov.au email address or by phoning 1800 800 110. Responses to emails sent to enquiries@ndis.gov.au can be delayed and sometimes do not get a response at all. Calls to the 1800 contact centre yield different answers to the same question. The provider.payment@ndis.gov.au email was recently discontinued with provider's payment and financial queries now going through the enquiries@ndis.gov.au email, making it even more difficult to obtain a response from the NDIA.

With the National Disability Insurance Scheme (NDIS) moving much of the decision-making responsibility onto the individual, it has shifted the burden of poor decision-making onto service providers.

Spinal Life Australia provides services that need to be maintained daily. Clients with high level spinal cord damage may not be able to independently get out of bed, use the bathroom or prepare their own food. A break in services to these clients would have serious health consequences for the participant.

NDIS participants may overspend their core funds and run out of money for personal care and supports before the end date of their plan. Due to the importance and type of services provided to some clients, it would endanger the client to pause services until more funds have been allocated.

The responsibility for this falls on the individual and the financial burden falls on the service provider. In good faith, Spinal Life continues providing services where the service is critical, such as daily bowel therapy, showering and assistance hoisting out of bed. If an individual cannot access these services when they need them, their only other option is admission to hospital.

In some circumstances, when a participant runs out of funding before the end date of their plan, it can take the NDIA months to review the plan and reallocate funding. In this circumstance, Spinal Life absorbs the cost of those services until the NDIA pays for the services outside the plan funding. Applying to be reimbursed for services outside regular plan funding can take 6 to 12 months. Spinal Life has had some claims go over 24 months with no correspondence from the NDIA confirming or denying the reimbursement. This extended period where funds have been expended by service providers to ensure the safety and wellbeing of the NDIS participant places an unreasonable burden on providers facing increasing competition, high workforce turnovers and small margins. The waiting period for providers for these

'outside the normal portal system payments' occur through no fault of the providers and it is unacceptable that providers should bear this burden. This can arise because of poor planning on the participants part and poor timing of plan reviews.

Some self-managed participants do not have the ability to manage their own funds well. When a self-managed participant doesn't claim their expenses on time, before the end of their plan, the old funds are no longer able to be used, meaning services provided under an old plan cannot be claimed from a new plan. In this instance, Spinal Life would need to wait for reimbursement outside the regular plan funding or not receive the payment at all, which, as expected, has impacted cash flow.

Everyday administration can also take months, such as remittance advice. Spinal Life may not receive remittance advice at all from the NDIA and can sometimes wait months before being able to correctly allocate funds.

Sometimes, an administrative error on the part of a provider, which should be easily amended, escalates risks to participants due to unnecessary delays. An example occurred on 15 May 2020, where Spinal Life incorrectly claimed \$95,280 against a plan-managed client's budget. Spinal Life could usually reverse a claim immediately however, in this case, it couldn't be done (there is usually a 'cancel payment' button on the lower right-hand side of the screen which was missing on this claim). Spinal Life were paid for the claim the next day. Spinal Life called the NDIA on 16 May 2020. They suspected there was an IT error and a job was logged. We received a reference number for the call and an IT ticket number. We were advised to email the issue to enquiries@ndis.gov.au, which was done, with 'URGENT' in the subject line, as the client was currently short \$95,280 in their plan. Spinal Life called again on 19 May 2020 and was given another reference number and told to escalate the issue (by email) to the NDIS finance team.

All this time our finance team held the funds and now had to roll it from last financial year to this one. Spinal Life received no response to the enquiry. On 27 July 2020, two and a half months later, the 'cancel payment' button reappeared, and we cancelled the claim.

Spinal Life has had no communication from the NDIS regarding this issue. While the call centre staff were very helpful, they couldn't assist with the issue.

During the earlier days of the scheme, the organisation was able to speak with the finance team directly, who were very good at solving issues. This is no longer the case. Fortunately, there was no impact to this particular client as they had sufficient funds in their plan; however, there could be other cases where the participant has services ceased by the provider due to a lack of funds.

Other issues that negatively impact participants and lead to increased unfunded work having to be carried out by service providers include the rectification of plan errors. Equipment and other supports are regularly added or removed from plans with no explanation or justification. The only way to rectify the mistake is to have the plan reviewed, creating an opportunity for further mistakes to occur. Without a simplified review process that recognises when mistakes have been made by the NDIA, plan funds and unfunded support hours will continue to be spent rectifying mistakes.

Assistive Technology

- *Is there enough guidance about how the NDIA determines the supports that it funds to meet participants' needs?*
- *Does the NDIS provide Queensland participants with enough choice and control over the supports they receive? If not, what factors are constraining the ability of participants to exercise choice and control?*

A lack of communication and transparency around decision making for Assistive Technology (AT) causes delays, frustration, and duplication of work. On occasion, we have experienced instances where an application for AT equipment is rejected by the NDIS and the therapist wasn't advised directly, with little, or no written feedback provided for the rejection. Additionally, we are finding that these outcomes can vary according to the individual interpretation of the planner. Two applications for clients with a similar level of injury and similar functional needs may result in one person getting their equipment approved and the other person having their equipment declined.

This lack of communication and transparency of internal NDIA policy creates rules that occupational therapists do not know they need to meet. For instance:

Spinal Life assisted a 65-year-old man with incomplete paraplegia who uses a manual wheelchair for all mobility. He applied for a mobile shower commode as he was no longer able to manage showering and toileting without one. The client is very tall and standard shower commodes were unsuitable as they were too low, making transfers unsafe. He applied for a RAZ shower commode, a commode commonly used by individuals with spinal cord damage, at a cost of \$3,345.50. After months of waiting, the NDIS said they would only partly fund the shower commode as it was over the cost of a 'standard' commode. When the occupational therapist questioned the decision, the NDIA officer was unable to give further explanation of the decision and the therapist could not speak with anyone who could provide further clarity.

The client was so frustrated with the process that he couldn't face a decision appeal and paid the gap in funding for the commode.

The question of whether the NDIS can partially fund a support that has been found reasonable and necessary was decided by the *McGarrigle* case and has been addressed in another section of this submission. The existence of internal NDIA policy that establishes 'standard' costs for assistive technology creates unknowable obstacles for occupational therapists and participants.

Therapists are encountering other issues that have been ongoing since the introduction of the NDIS. These include:

- Participant frustration due to extended wait times once reports have been submitted.
- Extensive complex home modification approval times causing quotes to expire, requiring additional quotes and additional wait times.
- Confusion around low-cost assistive technology – who can access it, on what equipment it can be spent, to what value, and how often.

- Plan review dates change regularly, which impacts the occupational therapist's ability to plan for and complete NDIS plan review documentation, which can lead to significantly poorer outcomes for clients.

Further issues occur due to the ongoing relationships some therapists have with their clients. Spinal Life's therapists have an ongoing relationship with their clients, whereby clients engage a therapist to deliver AT prescriptions, after providing a quote for the services. The therapist works with the client to maximise their goal and functional outcome with the best AT to meet their needs.

Spinal Life's therapists complete in-home trials to make sure that the prescribed item meets the needs of the client and helps them reach their personal goals as documented in their plan. In this process, our therapist can become a participant's de facto support coordinator in the absence of dedicated support coordination funding. This happens as the Local Area Coordinators are not providing enough assistance to our client group and it becomes incumbent on Spinal Life to support our clients to navigate the complex NDIS system. Obviously, our staff are unable to charge for this time, so they are completing regular unfunded work.

We are finding that Support Coordination (SC) is funded inconsistently across clients. There seems to be no transparency around the decision-making process. Participants on their second and third plan, who had SC funded in their initial plan, are having their SC funding withdrawn. There is a general pattern appearing that unless the participant has a diagnosed cognitive impairment, SC is not included in a participant's plan. We, as service providers, are finding that unless the client has SC in their plan, clients can become confused around the NDIS processes and they are not getting the most benefit out of their plans.

Due to the complexity of the care and equipment needs for someone living with spinal cord damage, services that have an ongoing relationship with participants are absorbing costs associated with a lack of SC. Participants are using their therapist to troubleshoot non-clinical issues with equipment provision (e.g. advising suppliers to make service bookings, how to make service bookings, with the aim of supporting timely provision of equipment to clients). This would typically be the responsibility of a SC. Some participants are simply using services that they trust to get accurate information that may not be available from their LAC or the NDIA itself. The combination of withdrawal of SC funding from NDIS plans and the Queensland Government aiming to remove funding for advocacy services will mean that NDIS participants are unlikely to be able to effectively exercise choice and control and understand and manage their NDIS plans.

Travel costs continue to be an issue when providing specialist therapy services. The NDIS price guide allows a provider to claim travel time up to 30 minutes to an appointment and 30 minutes returning from an appointment in MMM 1-3 areas (Modified Monash Model). For service providers based in Brisbane, this area extends about 140km North and South, and extends to Toowoomba (120km) to the West, as the MMM area relates to the area in which the service was provided. It is possible for a service provider to book multiple appointments and divide and reduce the cost of travel to each participant. Under the current system however, a therapist travelling from Brisbane to Toowoomba would need to see a minimum of six clients, or eight clients for travel to Noosa Heads. Spinal Life is currently absorbing significant travel costs. The current system reduces the choice for participants who wish to use specialist therapy providers.

Housing

- Are there significant overlaps or gaps in services between the NDIS and other schemes and services?

The NDIS provides funding for home modifications for participants who own their own homes. It also provides Specialist Disability Accommodation funding for a projected 6% of participants who have the highest support needs in the scheme.

Close to one third of people (29%) with a disability are renting.¹ The NDIS provides minor accessibility improvements to a rented dwelling with the permission of the landlord and proof of long-term tenure. There is, however, a severe lack of accessible dwellings available on the private rental market. For someone who uses a wheelchair for all their mobility, moving into an inaccessible rental before it has been modified and improved is at best, unsafe, and at worst, impossible.

The Queensland Government website with information on “[h]ousing for people with disability” links to a non-disability specific site for information on accessing housing in the private market.² The Queensland Government suggest “searching websites online”,³ including www.realestate.com.au. There were 16,130 rental properties in Queensland listed on www.realestate.com.au, a popular real estate listing website, on 31 July 2020. Without a dedicated accessibility filter, a keyword search for ‘disability’ found 26 dwellings, and a keyword search for ‘wheelchair’ found 22 dwellings available in all of Queensland.

The current situation is summarised succinctly by the Australian Network for Universal Housing Design:

In 2009, in response to the severe lack of accessible housing, the Australian Government called housing, community and human rights leaders together to develop the national Livable Housing Design guideline and strategic plan “so that, by 2020, all new homes would be constructed to meet agreed universal design standards”.

The Council of Australian Governments’ (COAG’s) 2010-2020 supported the voluntary approach of Livable Housing Design and the negotiated target in the 2010-2020 National Disability Strategy.

*Livable Housing Design as a voluntary approach was a failure.*⁴

The Queensland Housing Strategy 2017-2027 reports that 25,000 people with disability on low incomes live in inappropriate/unsustainable settings.⁵

¹ Australian Government, Australian Institute of Health and Welfare, *People with Disability in Australia 2019 In Brief*, Pg 12.

² <https://www.qld.gov.au/housing/public-community-housing/eligibility-applying-for-housing/housing-for-people-with-disability> accessed 31 July 2020.

³ <https://www.qld.gov.au/housing/renting/finding-place-to-rent/choosing-rental-property> accessed 31 July 2020.

⁴ Submission by Australian Network for Universal Housing Design to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 14 December 2019 <https://aduhdblog.files.wordpress.com/2020/03/anuhd-submission-to-the-disability-royal-commission.accessible.pdf> accessed 31 July 2020.

⁵ Queensland Government, *Queensland Housing Strategy 2017-2027*, Pg 3. https://www.hpw.qld.gov.au/data/assets/pdf_file/0022/8185/qldhousingstrategy.pdf accessed 31 July 2020.

Without appropriate housing, NDIS participants lack the safety and psychological needs necessary to work towards achieving the goals in their NDIS plans and goals for their everyday lives.

Personal Support Workers in Hospitals

- *Are the respective roles of the Australian and Queensland governments with respect to the NDIS clear and complementary? If not, has this caused problems?*
- *How well do supports provided by the NDIS complement, support and interact with other services participants receive, such as health, aged care, education, justice and transport?*

Prior to the introduction of the NDIS, individuals with spinal cord damage, who were inpatients in a hospital, frequently utilised the services of their personal support workers to maintain some of their daily routines, such as bowel and bladder therapies.

Spinal Life wrote to the NDIA and sought advice on the scenario below and who would be responsible for bowel therapy while in hospital:

‘Jane’ is living with an acquired spinal cord injury, the level of which requires Jane to be assisted to undertake bowel therapy every second day. Jane’s bowel routine has been established for some time, and Jane’s personal support workers (PSWs) understand the routine and are able to carry it out competently, regularly, and reliably, preventing any complications. Jane is a participant in the NDIS and her support workers are funded by the NDIS. Jane is required to be admitted to hospital as an inpatient.

The NDIA has so far declined to fund the work of PSWs for inpatients in these circumstances. In correspondence from the NDIA, they believe that “state and territory governments have agreed their health systems will fund the reasonable adjustments required to accommodate and support the functional impact of a person’s disability.”⁶

‘Reasonable adjustments’ are required under existing discrimination legislation to avoid indirect discrimination. This exists independently of the NDIS and is a requirement for most public mainstream services.

Whether or not the health service discriminates against an individual by not assisting with bowel therapy misses the point of the choice and control a participant is granted under the *National Disability Insurance Scheme Act 2013* (NDIS Act). Removing an individual’s right to choose someone they know and trust to undertake such an intimate task undermines the objective of the NDIS Act.

Regardless of this, under existing agreements, the NDIS remains responsible for funding activities of daily living while a person is engaged with mainstream services, such as health, a workplace or place of education. “The NDIA and other governments are all working together through the Disability Reform Council (DRC) and the Senior Officials Working Group (SOWG) to resolve any issues where these services

⁶ Correspondence from the NDIA, 10 September 2019.

interact. This includes clarifying the Applied Principles and Tables of Support (APTOS), which outline the roles and responsibilities of different sectors who deliver supports to people with disability.”⁷

Under the APTOS, in the indicative roles relating to ‘health’, bowel care is listed as the responsibility of the NDIS:

*The delivery of routine personal care required due to the impact of a person’s impairment/s on their functional capacity to enable activities of daily living (e.g. routine bowel care and oral suctioning) including development of skills to support self-care, where possible.*⁸

When services are used for ‘time limited rehabilitation’ or recovery, they are the responsibility of the health system. When they are for ongoing ‘maintenance’, they are the responsibility of the NDIS.⁹ Only services that are new, time-limited or based on recovery become the responsibility of health. All maintenance supports remain the responsibility of the NDIS.

In a 2019 survey of Spinal Life members, 80% reported having been admitted to hospital in the last two years. 50% report some significant gaps in care levels provided in relation to the care and supports they normally receive from their PSW or carer. Of those individuals, half reported a decrease in the level of care in relation to bowel therapy, personal hygiene supports and access to mobility equipment.

Transport Funding

- *Are the plans that are being developed fit-for-purpose, and funded to deliver efficient supports to meet participants’ needs?*
- *How can the NDIS better assist people to participate in labour markets, education and community activities?*

In 2017, a 21 year old participant, Liam McGarrigle, appealed a decision of the Administrative Appeals Tribunal, which had allowed the NDIA to fund a portion of his transport costs instead of fully funding those costs which had been found to be reasonable and necessary in accordance with section 34 of the NDIS Act. He won his Appeal in the Federal Court in the case *McGarrigle v National Disability Insurance Agency [2017] FCA 308*.

The decision in *McGarrigle*, by which reasonable and necessary costs must be fully funded by the NDIA, has ongoing implications for the funding of transport needs of participants in the scheme.

The NDIA has failed to implement policy change as a result of *McGarrigle*. It is not fully funding reasonable and necessary transport for participants as a matter of course. Subsequent cases confirm that the NDIA’s policy in relation to funding transport is leading to appeals in the court system, which causes stress and delay for participants and strain upon the scheme itself.

⁷ National Disability Insurance Scheme, NDIA working with state and territory governments, <https://www.ndis.gov.au/understanding/ndis-and-other-government-services/ndia-working-state-and-territory-governments> accessed 3 August 2020.

⁸ Principles to Determine the Responsibilities of the NDIS and Other Service Systems, Pg. 4.

⁹ Ibid.

The NDIA is acting in an ongoing breach of section 34 of the NDIS Act, subsequent to the decision in *McGarrigle*. In the three years since this decision, the Agency has not changed the policy in its Operational Guidelines in relation to transport funding.

According to the NDIS Operational Guidelines, “there are three levels of supports for transport assistance”.¹⁰

Level 1 - The NDIS will provide up to \$1,606 per year for participants who are not working, studying or attending day programs but are seeking to enhance their community access.

Level 2 - The NDIS will provide up to \$2,472 per year for participants who are currently working or studying part-time (up to 15 hours a week), participating in day programs and for other social, recreational or leisure activities.

Level 3 - The NDIS will provide up to \$3,456 per year for participants who are currently working, looking for work, or studying, at least 15 hours a week, and are unable to use public transport because of their disability.

*Exceptional circumstances: participants may receive higher funding if the participant has either general or funded supports in their plan to enable their participation in employment.*¹¹

The NDIS must fund transport costs for participants which are reasonable and necessary, as prescribed by factors listed in section 34 of the NDIS Act.

Spinal Life has sought independent legal advice that informs this section of the submission. Our organisation is currently having senior counsel review this legal advice to enable our organisation to make a submission to challenge the position of the NDIS in relation to transport. The full legal advice is included with this submission.

Workforce Training and Retention

- *What changes have occurred in employment practices as a result of the NDIS? What has been the impacts on workers?*

Spinal Life is a traditional disability service organisation and provides extensive training and extended competencies for client specific needs. The NDIS Quality and Safeguards Commission recognises the need for this training through the NDIS Practice Standards, which require higher level competency for certain services. Spinal Life’s training reduces preventable and expensive illness and complications that can burden other mainstream systems, such as health. Despite this, direct consumer platforms are ‘disrupting’ traditional markets by providing services without regular safeguards for clients and workers alike, safeguards such as training and recognised employer-employee relationships. Spinal Life and other traditional providers are training the personal support workforce at our own expense.

The NDIS Practice Standards specify the quality standards to be met by registered NDIS providers when providing supports and services to NDIS participants. This includes a High Intensity Daily Personal Activities Module: Complex Bowel Care, Enteral Feeding and Management, Tracheostomy Management, Urinary

¹⁰ <https://www.ndis.gov.au/participants/creating-your-plan/plan-budget-and-rules/transport-funding> accessed 27 July 2020.

¹¹ Ibid.

Catheter Management, Ventilator Management, Complex Wound Management. The NDIS Practice Standards creates an important benchmark for providers to assess their performance, and to demonstrate how they provide high quality and safe supports and services to NDIS participants.¹²

Spinal Life provides extensive training to all new PSWs. The organisation provides two days paid training for every new PSW. A PSW will also get four days on-the-job training, working with an experienced PSW. The organisation employs two Registered Nurses as trainers, one with a Masters qualification in Clinical Education with 17 years' experience. The training is practical and delivered in-person, covering:

- Safe manual handling techniques for the safety of the PSW,
- Hygiene and infection control,
- Skin integrity including pressure area care,
- Bowel care including bowel therapy,
- Bladder support and catheter care,
- Musculoskeletal support including spasms and passive exercises,
- Medication assistance,
- Safe transferring including hoisting, slide sheets and boards,
- Dressing, feeding, teeth cleaning and personal care,
- Spinal cord specific conditions including dysreflexia and thermoregulation issues.

Spinal Life also runs client and topic specific extended competency training to address specific client needs including stoma care, bladder flushing, transanal irrigation, and Percutaneous Endoscopic Gastrostomy (PEG) feeding.

Even before the introduction of the NDIS Practice Standards, Spinal Life provided paid training to all its PSWs. As an established provider, Spinal Life recognises the unique care required to support individuals with spinal cord damage. Spinal Life has always understood the critical nature of the care provided by a PSW and the preventative and undervalued nature of the care provided.

Pressure wounds are areas of damage to the skin, and the underlying tissue caused by constant pressure or friction are a common and preventable issue for individuals with spinal cord damage. This type of skin damage can develop quickly for anyone with reduced mobility who uses a wheelchair.

Griffith University studied the cost of pressure injuries in Australian public hospitals and found that "[t]he treatment cost across all states and severity in 2012-13 was estimated to be A\$983 million per annum, representing approximately 1.9% of all public hospital expenditure or 0.6% of the public recurrent health expenditure. The opportunity cost was valued at an additional A\$820 million per annum."¹³

Importantly, the study highlights "the economic waste for the Australian health system associated with a largely avoidable injury. Wastage can also be reduced by preventing moderate injuries (Stage I and II) from

¹² NDIS Quality and Safeguards Commission, *NDIS Practice Standards: NDIS Practice Standards and Quality Indicators*, January 2020, Version 3, Pg 4. <https://www.ndiscommission.gov.au/sites/default/files/documents/2019-12/ndis-practice-standards-and-quality-indicators.pdf> accessed 31 July 2020.

¹³ Kim-Huong Nguyen, Wendy Chaboyer, and Jennifer A Whitty, *Pressure injury in Australian public hospitals: a cost-of-illness study*, *Aust Health Rev*, 2015 Jun; 39(3): 329-336.

developing into severe cases (Stage III and IV), because the severe cases, accounting for 12% of cases, mounted to 30% of the total cost.”¹⁴

Direct consumer platforms promise lower costs to consumers and higher wages to PSWs. They don’t, however, provide training to workers or offer traditional employee safeguards. The platforms ensure that support workers are not legally affiliated with the platform (i.e. not a partner, employee, independent contractor, or agent). Insurance is provided through fees to the platform and insurance excesses are shifted back to the worker in the event of a claim. Support workers are required to source their own training, which increases staff turnover for traditional providers who are used as providers of free or paid training.

Spinal Life employs around 800 personal support workers across Australia. The current attrition rate for PSWs is around 35% per annum.

Costs such as insurance and training are required for disability support work. Shifting the cost burden onto traditional providers, mainstream health services and support workers themselves is efficient for single entities like direct consumer platforms, but inefficient for the market and system as a whole.

A government supported and funded workforce development strategy is needed, aimed at retaining and attracting staff in the sector.

Transition from Hospital to Home

The creation of NDIS liaison officer positions in all major Queensland Health facilities has benefited both patients and medical facilities and staff, resulting in more appropriate and timelier implementation of NDIS funding packages for patients. We encourage the Queensland Government and the NDIS to improve transitions from hospital to home including providing efficient and effective communication and processes with all parties.

Spinal Life encourages the consideration of alternatives to accelerate discharge of patients from the Spinal Injuries Unit back to home (from outsourcing transitional accommodation, to advocating to the Commonwealth Government to develop more flexible NDIS funding to enable people to hire accessible amenity blocks, to enable earlier return to their communities of residence).

¹⁴ Ibid.

Principal

Fiona Kennedy
B.A. (Hons) Dip. Ed. LL.B. (Hons)
Accredited Family Law Specialist



Senior Associate

Julia Marler
B.A., LL.B

Associate

Anna Delaney
LL.B (Hons)



ADVICE TO SPINAL LIFE

THE RESPONSE OF THE NDIA TO THE DECISION IN MCGARRIGLE

Introduction

1. The National Disability Insurance Scheme ("the Scheme") must fund transport costs for participants which are "reasonable and necessary", pursuant to section 33(2)(b), and as prescribed by factors listed in section 34, of the National Disability Insurance Scheme Act 2013 (Cth) ("the Act").
2. In 2017, a twenty-one (21) year old participant in the Scheme, Mr McGarrigle, appealed a decision of the Administrative Appeals Tribunal of Australia ("AATA"), which had allowed the National Disability Insurance Agency ("the Agency") to fund a portion of his transport costs instead of fully funding those costs which had been found to be "reasonable and necessary" in accordance with section 34. He won his Appeal to the Federal Court in the case *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 ("McGarrigle").
3. The decision in *McGarrigle*, by which reasonable and necessary costs must be fully funded by the Agency, has ongoing implications for the funding of transport needs of participants in the Scheme.
4. At paragraph 94 of the decision, Justice Mortimer states in relation to "support" in general and by implication, transport for Mr McGarrigle, in particular, the following:

P.O. Box

P.O.Box 13125
George Street, QLD 4003

✉ admin@delaneyanddelaney.com.au
✉ www.delaneyanddelaney.com.au

Brisbane Office

Level 7 Northpoint
231 North Quay
Brisbane Qld 4000

✉ 07 3236 2604
✉ 07 3236 2607

Wilston Office

131 Kedron Brook Road
Wilston QLD 4051

✉ 07 3856 5600
✉ 07 3856 5700

*Once a decision is made that the support, as identified and described, is reasonable and necessary, then subject to the other requirements in s 33(5) and s 34, the scheme requires and contemplates that support “will” be funded. In my opinion, that can only mean **wholly or fully funded** (emphasis added).*

5. It is the thesis of this Advice that the Agency has failed to implement policy change as result of *McGarrigle*. It is not fully funding reasonable and necessary transport for participants as a matter of course. Subsequent cases confirm that the Agency’s policy in relation to funding transport is leading to appeals in the court system which causes stress and delay for participants and strain upon the Scheme itself.

The Agency in Breach

6. Arguably, the NDIA is acting in an ongoing and deliberate breach of section 34 of the Act, subsequent to the decision in *McGarrigle*.
7. In the three (3) years since this decision, the Agency has not changed the policy in its Operational Guidelines in relation to transport funding: in particular, “Guideline 12 Including Specific Types of Supports in plans: Operational Guideline –Transport” (**Annexure A**).
8. It is the thesis of this Advice that the policy in this Guideline, in its current form, is antithetical to the legislation and to the principle in *McGarrigle* in that:
 - a. It creates levels or categories which are not prescribed, and not in concert with, the legislation;
 - b. It creates caps in funding associated with the categories;
 - c. It places inhibition on the application of the principle in *McGarrigle* by which all supports found to be reasonable and necessary should be **fully** funded.
9. Further, advocates for participants seeking funding of transport should rebut submissions by the Agency which rely on these levels in the current Operational Guidelines and emphasise how the legislative framework is interpreted in the cases which follow *McGarrigle*. This approach is more likely to achieve outcomes which approach the participant’s goals, objectives and aspirations.

How binding are decisions of the Federal Court on subsequent decisions?

9. In accordance with the Doctrine of Precedent in Australian law, a decision of the Federal Court will be binding on a lower court, the AATA, when the Tribunal is making decisions in cases about the funding of supports pursuant to section 34 of the NDIS Act. The principle decided in *McGarrigle*, the ratio decidendi in the Reasons for Judgment, binds the AATA when it is deciding cases with similar facts. In every case where a support is found to be “reasonable and necessary” it must be fully funded by the NDIA. It also means that support needs which are commensurate with Mr McGarrigle’s are likely to be found to be “reasonable and necessary”.
10. Cases which have very different facts may be distinguished. An Agency eager not to fully fund transport costs might dispute what is reasonable and necessary on the facts.

The Operational Guidelines

11. The Agency’s Operational Guidelines¹ are not binding at law. They are not legislation passed by Parliament. They should, however, reflect the legislator’s intention as made law by the Act and be modified in response to the interpretation of that Act in binding precedent cases.
12. These Guidelines have been frequently referred to by the AATA, when making decisions in relation to transport, as a relevant consideration.
13. The Operational Guidelines should facilitate funding pursuant to section 34 of the National Disability Insurance Scheme Act 2013 (Cth) (“the NDIS Act”).
14. Section 34 prescribes the factors a support, and in particular, a transport support, must satisfy, to be funded:

(1) For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:

(a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;

¹ In this Advice the term Operational Guideline is used as a general term to encompass that policy document of the Agency.

- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;*
- (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;*
- (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;*
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;*
- (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:*
 - (i) as part of a universal service obligation; or*
 - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.*
- (2) The National Disability Insurance Scheme rules may prescribe methods or criteria to be applied, or matters to which the CEO is to have regard, in deciding whether or not he or she is satisfied as mentioned in any of paragraphs (1)(a) to (f).*

14. The CEO of the Agency and the AATA should generally apply the Operational Guidelines unless they are unlawful². In *McGarrigle*, Her Honour, Justice Mortimer, did not make a finding that the policy stated in Operational Guideline 12 and in the "Participant Transport Fact Sheet" was inconsistent with section 34 of the Act because she concluded that was something she did not need to determine.
15. However, it could be argued that the Guidelines, in their current form, are antithetical to the very principle of fully funding what is reasonable and necessary: that the Guidelines are, in fact, unlawful.
16. At 12.2 the Operational Guidelines state:

There are generally three levels of funding support for transport. The levels are used to provide a transport budget for participants. In exceptional circumstances, participants may receive

² *Drake and Minister for Immigration and Ethnic Affairs (No 2) [1979] AATA 179*

higher funding if the participant has either general or funded supports in their plan that enable their participation in employment.

Level 1

- *the NDIS will provide up to \$1,606 per year for participants who are not working, studying or attending day programs but are seeking to enhance their community access.*

Level 2

- *the NDIS will provide up to \$2,472 per year for participants who are currently working or studying part-time (up to 15 hours per week), participating in day programs and for other social, recreational, or leisure activities.*

Level 3

- *the NDIS will provide up to \$3,456 per year for participants who are currently working, looking for work, or studying, at least 15 hours per week, and are unable to use public transport because of their disability.*

17. The concept of three defined levels of funding, each with rigid parameters, would seem inimical to the principle in *McGarrigle* and to the legislation. The capped amounts in the levels will be arbitrary in application to a particular participant, having no relationship to assessing which supports are “reasonable and necessary” in that person’s circumstances.
18. At paragraph 103 of her decision, Justice Mortimer explains how the Tribunal and, by implication, how the CEO of the Agency would need a “*detailed assessment of Mr McGarrigle’s needs, and the benefits he received, from the activities for which he required the transport*” to decide whether five return trips to and from his home each week were reasonable and necessary support. This is not an exercise in categorising a support to fit it into a level and accepting the cap in that level.
19. It could be argued that Local Area Co-ordinators (LOCs) and Planners designing plans with participants are currently using Guidelines which are wrong at law. They will be taking irrelevant considerations into account and not be taking into account relevant considerations.
20. If the Agency develops a plan which does not fund the component of transport exceeding the cap of \$2,472 because the participant fits into Category 2, and yet that component is “reasonable and necessary”, then the plan is in contradiction to the finding in *McGarrigle*. If the Agency does not fund that component of transport which costs more than \$2,472 because the participant is not

working, looking for work or studying and, therefore, does not fit into level 3, then the planner is taking into consideration an irrelevant consideration.

21. In *McGarrigle* the Federal Court agreed with the Tribunal the decision of which had been appealed by Mr McGarrigle on the issue of policy documents created the Agency. The Tribunal had concluded that at least one policy document relied upon by the Agency was not consistent with the Act:

The Tribunal took into account what it described as "Fact sheets" published by the Agency. These facts sheets purported to place funding level caps on support for transport costs. The Agency referred the Tribunal to another document entitled "Work Practice – Guide to Funded Supports, Operations Branch version 2.1", which the Tribunal acknowledged appeared only to be in draft form but which it nevertheless took into account on the basis that it formed part of the Agency's policy framework. That document also purported to place caps around the amounts of funding available for transport costs. There was a further internal document in the form of a checklist for staff, entitled "NDIA – Plan Review – Conversation Tool", which contained the following statement:

Funding should never equate to the total funding required for transport -- it is only ever a contribution.

53. *Correctly in my opinion (and consistently with the observations of Bowen CJ and Deane J in Drake), at [57] of its reasons, the Tribunal explained why it considered this statement was not consistent with the legislative scheme and, correctly, did not follow the "instruction".*³

Delay

22. The CEO of the Agency has a duty to act as soon as reasonably practicable to decide whether or not to approve the statement of participant supports pursuant to section 33(4) of the Act. The Operational Guidelines may well be causing delay and the CEO may need to amend them to avoid being in breach of that duty subsequent to the finding in *McGarrigle*.
23. This is very clearly highlighted in *Castledine and NDIA 2019 AATA 4240* ("Castledine") which applied the principle in *McGarrigle*. Mr Castledine was a man in his late twenties with severe intellectual disability, attention deficit hyperactivity disorder, autism spectrum disorder, uncontrollable epilepsy and bipolar disorder. The Agency had resisted fully funding Mr Castledine's transport costs. In each of his five (5) plans his transport was funded as follows:

1. First Plan commencing 28 September 2016 - **\$2,472.00** contribution towards transport related costs (Mr Castledine sought an internal review of this Plan);

³ *McGarrigle* at paragraphs 52 and 53

2. Second Plan commencing 27 April 2017 – Transport funding of **\$1,260.00** (Mr Castledine made Application to the AATA in relation to this Plan);
 3. Third Plan commencing 18 December 2018;
 4. Fourth Plan commencing 24 December 2018 – total core supports funding of **\$1,397.08** for “transport”;
 5. Fifth Plan commencing 23 June 2019 - **\$2,767.00** for “Transport”.
24. At the final hearing Mr Castledine proposed the funding of transport costs in the amount of **\$10,829.00**.
25. His application had been made in April 2017, the final hearing occurred in February 2018 and the decision was handed down October 2019 after the provision of further evidence due to relevant intervening event.
26. The NDIA’s issues in relation transport at the beginning of the final hearing were:
- (1) how much of this travel is really directly connected Jake’s disability and how much something else; and then the second issue is what hourly rate really should be applied – sorry, mean kilometre rate – should it be the 66 cents or should it be the 77 cents; and what is the underlying idea behind that.⁴*
27. At paragraph 70 of the decision, the Tribunal indicates that the Agency finally agreed to fully fund the transport costs, but not until some point during the Final Hearing:

*At the commencement of the hearing, the NDIA initially took issue with the mileage that had been claimed by Mr Castledine. Counsel for the NDIA acknowledged that it was mindful of the approach in McGarrigle v National Disability Insurance Agency [2017] FCA 308 (McGarrigle); and the NDIA accepted that once it was identified that there was a need for a transport support, **it was to be fully funded**. The NDIA also indicated at the hearing that it did not take issue with Mr Castledine’s need to use a private car for transport, rather than public transport or third party vehicles, accepting that the latter option was not feasible, given Mr Castledine’s difficulties when exiting a car.*

⁴ Castledine and NDIA 2019 AATA 4240 at paragraph 71

28. This concession at final hearing is frustrating in that Mr Castledine's matter was before the Tribunal for two and a half years; he had five (5) plans approved during the course of the proceeding; and, after making these submissions, but prior to the handing down of the Judgment, the NDIA approved the subsequent plans which did not make provision for transport in accordance with its submissions. In the Closing Submissions for the NDIA, filed 19 November 2018, the Agency proposed **\$9,441.12** for transport costs.
29. The transport costs approved in all the plans approximated Category 1 (\$1,606.00) and Category 2 (\$2,472.00) of the Operational Guidelines.
30. Mr Castledine's mother produced log books and adduced evidence of the day trips at the final hearing.
31. The Tribunal finally found that his transport to and from his mother's home and to and from places in the community should be fully funded. It adopted a method of determining finding per kilometre:

333. *The Tribunal considers that it is not necessary for it to be concerned as to the numerical particularisation of the Mr Castledine's travel costs. Instead, applying the criteria in s 34(1) of the NDIS Act, the Tribunal considers that Mr Castledine should be funded for all travel he undertakes, on any day of the week to and from Ms Castledine's house to the DHHS Unit, and for any travel to and from the DHHS Unit to places in the community. It is accepted by the parties that it is not feasible for the safety of Mr Castledine, his carers and members of the public for Mr Castledine to catch public transport. For the same reason, he cannot travel by taxi or hire car. The travel described above will assist Mr Castledine to live an independent and active life, and the additional costs involved in travelling by private vehicle over travelling by some other means (for instance, by public transport, taxi or hire car) are incurred solely by reason of his disabilities, as was accepted by both parties.*

334. *The rate per kilometre requested by Mr Castledine is based on the transport allowance rate prescribed in clause 20.5 of the Social, Community, Home Care and Disability Services Industry Award 2010 (**Industry Award**) being \$0.78 per kilometre. The NDIA contended that the Industry Award covered employers and their employees and that it did not apply because Ms Castledine did not employ service providers. It was further contended that it*

was inappropriate to apply the Industry Award “by analogy as not all service providers may be “employees”; some may be self-employed” and that “it benefits some, but not all, workers in the industry”. The NDIA contended as follows:

Given the NDIS is a statutory scheme, there is utility in considering the provision of travel expenses under similar statutory schemes. Those schemes similarly apply in actuarial approach. The Safety, Rehabilitation and Compensation Act 1988 (Cth) (the Comcare scheme), the Military Rehabilitation and Compensation Act 2004 (Cth) and the Defence Rehabilitation and Compensation Act 1988 (Cth) (the MRCC schemes) – similar insurance schemes – provide a rate of 60c per kilometre for any travel expenses over 50 kilometres. The Veterans’ Entitlements Act 1986 (Cth) provides a rate of 35.5c per kilometre for travel expenses.

335. *The Tribunal considers that the appropriate rate that should apply to every kilometre of travel for the purpose identified in paragraph [331], is the rate prescribed by the Australian Taxation Office from time to time, for the purpose of calculating an individual’s tax deductions relating to travel in a private vehicle.²³⁹ The Tribunal considers that this rate reflects the generic quantification of the cost to an individual of running a car arrived at by the Commonwealth Government and is applicable in the context of determining funding for transport supports in the form of travel by private vehicle of a participant under the NDIS being a Commonwealth Government administered scheme.*

The Operational Guidelines and what it is reasonable to expect families, carers, informal networks and the community to provide

Section 34(1) (e) and Rule 3.4(a)

32. In the case of *JQJT and NDIA 2016 AATA 478 6 July 2016* (“*JQJT*”), the Administrative Appeals Tribunal of Australia considered when parents should fund transport for children with disabilities, rather than the NDIS funding those support needs. *JQJT* was a thirteen (13) year old boy with severe autism, severe intellectual and language delay, and attention deficit hyperactivity disorder when the Tribunal was making its decision.

33. The National Disability Insurance Scheme (Support for Participant) Rules 2013 (“the Rules”) have the force of law and “are about assessment and determination of reasonable and necessary supports that will be funded for participants under the scheme”⁵.

34. Rule 3.4(a) provides the following exception to transport for which the NDIA is to make provision for the participant, that is, a support which is not reasonable and necessary:

Rule 3.4 In deciding whether funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide, the CEO is to consider the following matters:

(a) for a participant who is a child:

- (i) that it is normal for parents to provide substantial care and support for children; and*
- (ii) whether, because of the child’s disability, the child’s care needs are substantially greater than those of other children of a similar age; and*
- (iii) the extent of any risks to the wellbeing of the participant’s family members or carer or carers; and*
- (iv) whether the funding or provision of the support for a family would improve the child’s capacity or future capacity, or would reduce any risk to the child’s wellbeing;*

35. In *JQJT*, on the issue in rule 3.4 (a), as to what it is normal for parents to provide, the Tribunal differentiated between the transport his parents provided during the week to go to and from school and to go to horse riding and the funding he was seeking for travel for his support worker on weekends and during school holidays.

36. The AATA decided that funding the participant’s weekend community access support should include transport: that this transport was not an incidental cost of everyday life for most people, was incurred solely and directly as a result of the disability support needs and was ancillary to another support that is funded (rule 5.2).

37. The Tribunal considered it relevant that, notwithstanding the NDIA submission that the purpose of community access support is not respite for the parents, *the extent of any risks to the wellbeing of the participant’s family members or carer or carers* is relevant pursuant to Rule

⁵ Explanatory Statement to the National Disability Insurance Scheme (Support for Participant) Rules 2013 issued by Authority of the Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform page 1.

4.3 (iii). The Tribunal considered respite was a secondary benefit which went to wellbeing of the family.

38. Although *JQJT* is a helpful decision as to the definition of “reasonable” and parents’ provision of transport, in this case the Tribunal took into consideration:

1. NDIA Fact Sheet: Mainstream interface: Transport for children
2. NDIA Participant transport fact sheet

39. The Tribunal considered these fact sheets an indication of Agency policy. The second fact sheet provided for the three (3) categories in Operational Guideline 12 and the Tribunal adopted the lowest level category of funding for weekend transport for JQJT as his transport costs for community access on the weekend did not involve attending work, study or day programme.

40. Operational Guideline 12, in its current iteration, now refers to this case.

41. If the thesis in this Advice is accepted, then this is the case of an Operational Guideline which is inimical to the law influencing a decision of the Tribunal which, in a circular fashion, is then used by the Agency to support its Operational Guideline.

42. *JQJT* is a case decided before *McGarrigle*.

The first transport case after *McGarrigle*: Mr Perosh

42. In *Perosh and NDIA 2018 AATA 980 23 April 2018* (“*Perosh*”) the AATA considered some of the same issues as the Tribunal in *JQJT*, but it applied the principle in *McGarrigle*. At paragraph 54 of the decision in *Perosh*, the Tribunal stated that, to its knowledge, this was the first case concerning transport costs to apply a Federal Court decision. It found the Mr Peter Perosh’s taxi transport, to and from TAFE twice a week for thirty-one (31) weeks a year and to and from the gym once a week for fifty-two (52) a year, should be fully funded since this transport was “reasonable and necessary”.

43. The Agency had submitted in its Statement of Position to the Tribunal in *Perosh* that “reasonable and necessary supports” could be partially funded by the NDIA “as it may be reasonable for a participant’s family member, carers, informal networks and/or the community to provide some of

this support”⁶. The NDIA had relied on the AATA decision in relation to Mr McGarrigle⁷ but this decision had been successfully appealed in the Federal Court.

44. Mr Perosh sought funding for taxi fares to and from TAFE for thirty-one (31) weeks a year totalling **\$6,200**; taxi fares to the gym once a week for fifty-two (52) weeks totalling **\$1,664**; and taxi fares for an outing with a carer for 52 weeks totalling **\$1,664**.
45. In relation to travel to TAFE, the Agency argued that, rather than catching taxis, he could rely on his mother to drive him to train station in the morning, he could catch a train to a bus station and then a bus to TAFE. On the return trip he could book a taxi to replace his mother’s assistance from the train station to home.
46. In each of his three (3) plans his transport was funded as follows:
6. First Plan commencing 24 October 2016 - **\$2,626** ;
 7. Second Plan commencing 15 November 2016 – **\$2,626**;
 8. Third Plan commencing 27 February 2017- **\$2,626**
47. The AATA noted at paragraph 12 of the decision:
- the manner in which the NDIA assesses Transport costs, it uses three levels of costs. In Mr Peter Perosh’s circumstances, the amount of \$2,625.00 equates to Level 2 of the NDIA transport costs.*
48. This is not the manner in which the AATA made the decision in Perosh.
49. The AATA relies upon the legislative framework and the interpretation of sections 33 and 34 in *McGarrigle*.
50. The Tribunal went through the legislative framework, quoting **section 33** of the Act which sets out the content of participant’s plans and what the CEO of the Agency must have regard to when approving statement of the participant’s support; **section 34(1)** which describes the relevant factors to the definition of “reasonable and necessary”; **section 3** which describes the objects of the Act; **section 4** which describes the general principles guiding actions under the Act.

⁶ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at paragraph 12

⁷ *McGarrigle and NDIA* [2016] AATA 498

51. In analysing the position of the Respondent, the AATA in *Perosh* also quotes **rule 5.1(d)** whether the transport was a day to day cost attributable to Mr Perosh's disability and found that it was.

52. It then quotes **Clause 7.21 of Schedule 1** of the Rules:

Transport

7.21 The NDIS will be responsible for:

- (a) supports for a person that enable independent travel, including through personal transport-related aids and equipment, or training to use public transport; and*
- (b) modifications to a private vehicle (ie not modifications to public transport or taxis); and*
- (c) the reasonable and necessary costs of taxis or other private transport options for those not able to travel independently.*

53. Mr Perosh was a young adult with spastic quadriplegic cerebral palsy. There was "not much" evidence before the Tribunal that he could travel on public transport independently and without difficulty. It found that the NDIS should be responsible for his transport pursuant to Clause 7.21(c).

54. The AATA considered the issues in section 34(1) and found as follows:

83. First, I find that the taxi fares from Mr Peter Perosh's home to the TAFE at St Leonards and return is a reasonable and necessary support. This cost fulfils the criteria set forth in section 34(1) of the NDIS Act. In particular, it represents value for money, and having regard to the circumstances of the family, it is not reasonable to expect his Mother or Father to drive him to and from TAFE. It also fulfils the criteria in the Support Rules.

84. The length of the academic year is 31 weeks, and Mr Peter Perosh attends the TAFE twice a week.

85. Second, I find that the taxi fares from Mr Peter Perosh's home to the gym in Castle Hill and return is a reasonable and necessary support. This cost fulfils the criteria set forth in section 34(1) of the NDIS Act. In particular, it represents value for money, and having regard to the circumstances of the family, it is not reasonable to expect his Mother or Father to drive him to and from the gym. It fulfils the criteria in the Support Rules.

86. Mr Peter Perosh attends the gym once a week for 52 weeks per year.

87. *Third, I find that the taxi fares from Mr Peter Perosh's home for outings to Castle Towers and return is not a reasonable and necessary support.*
88. *In his evidence, Mr John Perosh said that he takes his son to swimming on Saturday afternoons, and on two or three evenings after work he takes him to the shops. I find that further outings do not comply with paragraph (e) of section 34(1) of the NDIS Act because I find it is reasonable for Mr Peter Perosh's family to arrange further outings for him. In coming to this view, I am mindful of the need to ensure the financial sustainability of the NDIS.*
89. *In accordance with the decision of Mortimer J which was upheld by the Full Federal Court in the McGarrigle case which I have quoted above, the NDIS is required to pay the full costs of the taxi fares to and from the TAFE, and to and from the gym.*

High point: airplane tickets for carer “reasonable and necessary”

55. In *David and National Disability Insurance Agency [2018] AATA 2709* (“David”) the AATA applied the principle in *McGarrigle*⁸ and referred to the “helpful decision” in *Perosh*⁹. It is a significant decision in relation the section 3, the Objects of the Act: in particular the objects in section 3(c) to support independence and social and economic participation and section 3(e) to enable the exercise of choice and control in pursuit of goals.
56. Mr David a man is a man born in 1992 who has a condition called Nemaline Myopathy which is a progressive muscle disorder leading to muscle weakness and respiratory failure. He uses a ventilator twenty-four (24) hours a day. He has thermoregulation difficulties. He uses a wheelchair and lives with his mother.
57. Mr David's goals are noted in the decision:
- The Applicant's “First Goal” is to significantly increase his independence and preparation to move out of home. His “Second Goal” is to pursue a career in sports management, play competitive sport and be an active community member. Under the heading “My longer term goals and aspirations” the Applicant stated he wishes to maintain his mobility, limb function and access the equipment he needs to be independent. Secondly, he wishes to gain paid employment in sports management. Thirdly, he wishes to move out of home and live independently.*¹⁰

⁸ *David and National Disability Insurance Agency [2018] AATA 2709* at paragraphs 24 to 27 and 91

⁹ *ibid* at paragraph 90

¹⁰ *ibid* at paragraph 13

58. In the Reasons for Decision, the Tribunal makes no mention of funding in accordance with the three (3) levels set out in the Operation Guidelines.
59. The Tribunal refers to the significance of Mr David's goals, objectives and aspirations pursuant to the objects of the Act and the **section 34(1) (a) (b) and (c)** criteria throughout the judgement when considering his application to the Tribunal related to a plan which commenced on 19 July 2017 providing \$6,000 for transport costs. The NDIA opposed any increase in this funding except \$1,000 increase in core supports to facilitate participation in interstate competitions.
60. The tribunal ordered the NDIA to fund:
1. Taxi fares for 40 trips for work, 11 sports matches, 10 VEWSA meetings, 10 visits to his father, 48 sports training sessions or visits to friends 40 hospital appointments or volunteer events;
 2. Participation fees and airplane tickets for a carer to attend interstate sporting events with Mr David twice a year.
61. On the issue of public transport (**Clause 7.21 of Schedule 1** of the Rules) the evidence by occupational therapists and his doctors supported the Applicant's claim that there was significant risk of disconnection or malfunction of the ventilator on public transport. The problem of manoeuvring his motorised wheelchair was also considered. The Tribunal accepted that:
- The risks identified, although they may be at the lower end of probability in terms of their occurrence, do nonetheless have potentially catastrophic consequences up to and including death if they occur. Overall this is not a risk that the Applicant should be required to take.*
62. In relation to the issue provision of the support that is reasonable to expect families (**section 43(1)(e)**), his mother's "remarkable level of support" being present at night, providing assistance with his day to day need and specifically, in relation to transport, having purchased a van for him, for which she pays registration and insurance, petrol and maintenance and which she uses to drive him places as much as she is able¹¹.
63. The Agency proposed the use of support workers to drive him in van rather taxis and paying for this through core supports funding. The Tribunal rejected this argument accepting Mr David's

¹¹ ibid at paragraph 85

submission that it not only takes away his independence, but also forces him to use more support worker hours than he needs to because sit waiting for him having driven him somewhere. In this context, the Tribunal referred to **section 34(1)(f)** and the requirement that support be most appropriately funded through the NDIS and not through other systems of deliver or support identified in the section.

64. The tribunal approved participation fees and airplane tickets for a carer to attend interstate sporting events with Mr David twice a year, taking into consideration:
- a. The Applicant contention that central his goals is to compete in interstate sports tournaments;
 - b. That such participation would be a feature of his goal to assert his independence;
 - c. That he was President of a sporting body, VEWSA;
 - d. That he had achieved All Australian Team selection in the Powerchair Soccer Team¹².
65. In deciding how many times a year these fees and tickets should be funded, the Tribunal considered the evidence before of sporting events the available and to which Mr David had been invited.
66. The Agency contended that if the Tribunal were minded to fund a carer for these events it should be one or two a year not three, which the Applicant sought.
67. In this context the Tribunal does not mention the issue of the need to ensure the financial sustainability of the National Disability Insurance Scheme (**section 4(17(b))**). This issue is still to be tested in the Federal Court.
68. In *David* the Tribunal states that it chooses to fund two (2) trips which “strikes a balance between the competing contentions” and correlates the making of this decision with the “level of estimation” which is required in assessing damages “for breach of contract”.
69. This decision is a significant shift from the cases prior to *McGarrigle*.
70. In *McGarrigle* the Federal Court rejected the Tribunal’s finding that funding 75% of “reasonable and necessary” transport costs “strikes an appropriate balance”:

¹² Ibid at paragraphs 93 to 95

by the remark “strikes an appropriate balance”, read in the context of what it said in [62]-[63] about Mr McGarrigle's family taking an additional “burden” (the Tribunal's word) of providing transport for him for some of the trips, the Tribunal was referring to matters other than the financial sustainability of the NDIS scheme. The Tribunal's approach in [64] stemmed from what I have found to be its erroneous understanding of the task of forming a state of satisfaction about what are reasonable and necessary supports. In proceeding on the basis that it could decide that a reasonable and necessary support should only be partially funded, the Tribunal engaged in a “balancing exercise” about what proportion should be funded. In doing so, it rejected the 50% figure of the delegate and adopted the 75% figure.¹³

71. The AATA in *David*, then, is not performing the balancing exercise rejected in *McGarrigle*. It is not finding a support reasonable and necessary and then funding a proportion of that support.
72. The competing contentions are about whether two (2) or three (3) trips to internet sporting events are reasonable or necessary. These contentions have nothing to do with three (3) arbitrary levels or categories of funding.

Recent Cases in which the AATA takes the 3 Levels Operational Guidelines into account

73. In *KLMN and NDIA 2017 AATA 1814 20 October 2017 I* (“*KLMN*”) the Tribunal found that the person was entitled to level 3 transport funding. Having considered the decision in *McGarrigle* and stated that it is was not satisfied that the additional transport funds sought by *KLMN* were reasonable and necessary, it then went on rely on a level in the Operational Guidelines. The amount calculated by the Tribunal in *KLMN* to be reasonable and necessary was “around \$3,550”, but the Tribunal still ordered the payment by the Agency of the level 3 amount of \$3,456.
74. In *Medcalf and NDIA 2018 AATA 3893 16 October 2018*, the parties agreed after the final hearing and before determination by the Tribunal, that transport should be funded in accordance with level 3 in the Operation Guidelines.

¹³ *McGarrigle* at paragraph 112

Conclusion

75. The successful advocacy in *McGarrigle*, *Carseldine* and *David* relied upon facts which established the transport supports were reasonable and necessary in accordance with the subsections of section 34(1).
76. The issues left undecided in *McGarrigle* remain undecided in subsequent cases. The cases have not established:
- a. how the financial sustainability of the NDIA should affect decisions;
 - b. whether the policies of the NDIA in Operational Guidelines are unlawful.
77. When advocating for Participants, submissions as to the unlawful nature of the Operational Guidelines are not yet explicitly supported by case law, notwithstanding the passing reference in *McGarrigle* to policy inconsistent with the legislation, outlined in paragraph 21 herein.
78. A detailed assessment of needs, and the benefits received, from the activities for which the Participant requires the transport, supported by the objective evidence of experts and documentation, is supported by case law.

Yours faithfully,



Fiona Kennedy

Principal Solicitor

DELANEY & DELANEY

Including Specific Types of Supports in Plans Operational Guideline - Transport

12. Transport

Transport supports include supports that enable participants to build capacity to independently travel, including through personal transport-related aids and equipment, or training to use public transport.

A participant's transport supports may also include the reasonable and necessary costs of taxis or other private transport options for participants who are not able to travel independently, as well as transport to and from school for students.

Transport supports only relate to participants and do not relate to travel for families, carers or providers of supports. However, providers of supports may claim reasonable travel time when delivering reasonable and necessary supports in the home, or when accompanying participants to access the community.

When considering whether transport is a reasonable and necessary support, the NDIA *must* consider, amongst other matters, whether the support is related to the participant's disability (see what are the general criteria for supports).

A support will not be provided or funded under the NDIS if it relates to day-to-day living costs (rule 5.1(d) of the Supports for Participants Rules).

Day-to-day living costs may include rent, groceries or utility fees, however, this is not an exhaustive list. Transport is an incidental cost of everyday life for most people and, therefore, can also be considered to be a day to day-to-day living cost.

However, the NDIS may fund day-to-day living costs that are incurred by a participant solely and directly as a result of their disability support needs (rule 5.2(a) of the Supports for Participants Rules).

These additional living costs (i.e. those incurred by a participant solely and directly as a result of their disability support needs) may be funded under the NDIS if they relate to reasonable and necessary supports.

Before including any transport support in a participant's plan, the NDIA *must* also be satisfied that the support will assist the participant to pursue their goals, objectives and aspirations.

In addition, the NDIA must take into account what is reasonable for families, carers, informal networks and the community to provide. In relation to transport, this consideration may be different for participants who are children as compared to participants who are adults.

When considering whether a proposed transport support represents value for money, the NDIA will compare the costs of transport to the overall costs of alternative supports which may provide a similar level of independence or reduce a participant's future needs for supports. For example, vehicle modifications.

The NDIA may also consider what options may be available for the participant in their local community, or whether funding other supports has the potential to build a participant's capacity to engage in local community activities.

Transport should only be funded where it has been determined to be reasonable and necessary, where it is an additional cost incurred solely and directly as a result of a participant's disability support needs and, where ancillary to another funded support, it is a cost which the participant would not otherwise incur.

It does not follow, merely because transport is ancillary to a funded support, that it should be funded. The circumstances in which transport may be funded are strictly limited. Transport *must*:

- relate to a support that has been determined to be reasonable and necessary; and
- be an additional cost and incurred solely and directly as a result of disability support needs; and
- where transport is ancillary to another funded support, it must be a cost which the participant would not otherwise incur (see JQJT and NDIA [2016] AATA 478 at [35] (✓)).

The NDIS will *not* be responsible for:

- ensuring that public transport options are accessible to a person with disability, including through the funding of concessions to people with disability to use public transport;
- compliance of transport providers and operators with laws dealing with discrimination on the basis of disability, including the *Disability Standards for Accessible Public Transport 2002*;
- transport infrastructure, including road and footpath infrastructure, where this is a part of a universal service obligation or reasonable adjustment (including managing disability parking and related initiatives); or
- support to compensate for the lack of a public transport system.

See also the support most appropriately funded or provided through the NDIS? In particular, transport.

12.1 Transport and considerations relating to children

Parents of NDIS participants aged under 18 years have a responsibility to meet their child's daily transportation requirements. However, some children may require additional assistance, for example children who cannot use public transport or their parent's vehicle, even if modified, due to their disability.

The NDIS will generally not fund day to day living costs associated with caring for children, including transport costs, as parents are expected to meet a child's everyday transport requirements (see JQIT and NDIA [2016] AATA 478 at [35] [27]).

When considering whether transport is a reasonable and necessary support for a child, the NDIA *must* take into account what is reasonable for families, carers, informal networks and the community to provide (section 34(1)(e)).

What is reasonable for a family to provide in respect of a particular support should be considered in light of the support they have to provide the child generally because of his or her disability (see JQIT and NDIA [2016] AATA 478 [39] [27]).

When considering whether funding for transport for a participant who is a child takes account of what it is reasonable to expect families, carers, informal networks and the community to provide, the NDIA will consider:

- that it is normal for parents to provide substantial care and support for children;
- whether, because of the child's disability, the child's care needs are *substantially* greater than those of other children of a similar age;
- the extent of any risks to the wellbeing of the participant's family members or carer or carers; and
- whether the funding or provision of the support would improve the child's capacity or future capacity, or would reduce any risk to the child's wellbeing. (rule 3.4(a) of the Supports for Participants Rules).

The NDIS will be responsible for supports that a student requires that are associated with the functional impact of the student's disability on their daily living activities, such as transport to and from school (rule 7.13 of the Supports for Participants Rules).

When considering if specialist transport to and from school for a participant who is a child is a reasonable and necessary support the NDIA will consider:

- if any other transport option is available and appropriate; and
- whether providing the supports would substitute for parental responsibility.

12.2 Transport and considerations relating to adults

A participant will generally be able to access funding through the NDIS for transport assistance if the participant cannot use public transport without substantial difficulty due to their disability.

The funding the NDIS provides will take into account any relevant taxi subsidy schemes available to the participant and does not cover transport assistance for carers or family members to transport the participant for everyday commitments.

There are generally three levels of funding support for transport. The levels are used to provide a transport budget for participants. In exceptional circumstances, participants may receive higher funding if the participant has either general or funded supports in their plan that enable their participation in employment.

Level 1

- the NDIS will provide up to \$1,606 per year for participants who are not working, studying or attending day programs but are seeking to enhance their community access.

Level 2

- the NDIS will provide up to \$2,472 per year for participants who are currently working or studying part-time (up to 15 hours per week), participating in day programs and for other social, recreational, or leisure activities.

Level 3

- the NDIS will provide up to \$3,456 per year for participants who are currently working, looking for work, or studying, at least 15 hours per week, and are unable to use public transport because of their disability.

When considering whether funding for transport for a participant who is an adult takes account of what it is reasonable to expect families, carers, informal networks and the community to provide, the NDIA will consider:

- the extent of any risks to the wellbeing of the participant arising from the participant's reliance on the support of family members, carers, informal networks and the community; and
- the suitability of family members, carers, informal networks and the community to provide the supports that the participant requires, include such factors as:
 - i. the age and capacity of the participant's family members and carers, including the extent to which family and community supports are available to sustain them in their caring role;

- ii. the intensity and type of support that is required and whether it is age and gender appropriate for a particular family member or carer to be providing that care; and
 - iii. the extent of any risks to the long term wellbeing of any of the family members or carers (for example, a child should not be expected to provide care for their parents, siblings or other relatives or be required to limit their educational opportunities); and
- the extent to which informal supports contribute to or reduce a participant's level of Independence and other outcomes;
 - for all participants – the desirability of supporting and developing the potential contributions of informal supports and networks within their communities.

This page current as of 10 October 2019