

23 June 2023

NDIS Review Secretariat
Department of the Prime Minister and Cabinet
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Submission to the NDIS Review

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to share our submission to the National Disability Insurance Scheme (**NDIS**) Review.

Consumer Action's service-delivery and advocacy work can provide valuable insight into the nature and structure of consumer markets and how they systemically disadvantage low-income individuals and households. Our financial counsellors and lawyers advise and assist people experiencing financial hardship and consumer law issues daily. The data Consumer Action collects, as well as the reflections of our staff, indicate a large client base struggling with financial hardship and vulnerability.

As part of Consumer Action's NDIS project, we prioritise data collection and analysis for clients calling our advice lines with NDIS related matters. Concerningly, our casework reveals that NDIS participants often receive goods and services through their NDIS funding that breach Australian Consumer Law (**ACL**) and do not meet their needs. NDIS participants may also experience poor outcomes and harms due to service providers' use of unfair contract terms and action by external debt collectors. Without better safeguards, these problems can leave NDIS participants with insurmountable debt, unnecessary stress and anxiety, impaired credit reports, impacts to their health and mobility due to unsuitable products, and even the risk of bankruptcy and loss of their home. We are also concerned about the impact on First Nations communities given the overrepresentation of Aboriginal and/or Torres Strait Islander peoples amongst our clients with NDIS related issues.

There are several opportunities for reform that would address these problems and work to minimise the harm to NDIS participants as consumers:

1. Introduction of a standard form NDIS service agreement to prevent service providers using unfair terms or requirements, such as punitive cancellation penalties.
2. Requiring registered providers to report on their use of external debt collectors and legal action on NDIS-related personal debt following 'overspends'.
3. Targeted monitoring of providers to establish whether they are complying with ACL and charging no more than allowed through NDIS plans.

4. Making the NDIS Quality and Safeguards Commission available for resolving consumer disputes relating to NDIS service providers, including where legal action has been initiated.

More details around these suggested reforms points are provided below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy, and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians, and our advocacy supports a just marketplace for all Australians.



Casework insights

Australians with disabilities, whether they are NDIS participants or not, are more likely to be experiencing poverty and financial hardship than Australians without disabilities.¹ Callers to our advice lines with disabilities (particularly those whose primary income source is the Disability Support Pension) are often struggling with debt and affordability issues related to their most fundamental needs and living expenses. 44% of Australians with a disability receive a government support payment², and current income support rates are not sufficient to keep pace with the rising cost of living, let alone the additional support and care costs associated with living and/or caring for someone with disabilities. We support the recommendations of Raise the Rate to permanently increase income support payments and implement additional supplementary payments for people with disability.³

People struggling to cover their essential living costs on limited income and support payments rely on the NDIS to fund the goods and services they need to care for themselves, and issues with unfair service agreements, 'overspends', ACL guarantees breaches, and inadequate dispute resolution mechanisms are severely undermining the efficacy of the NDIS in supporting Australians with disabilities. Many NDIS participants cannot afford to pay more than their NDIS allocated funding for the things they need to live, and there is a pressing need for better safeguards against participants accruing debts they have no means of repaying, for the most essential goods and services. Our clients also often reported being misled or mistreated by providers who did not meet their obligations under the ACL, and they were either unsure about their options to make a complaint or had already exhausted their options through the existing mechanisms and had still not reached any resolution. Our lawyers and financial counsellors have also indicated that clients with NDIS-related issues commonly did not view their NDIS issues as ACL breaches and were not aware of their rights and guarantees under the ACL in relation to the goods/services they receive through NDIS funding.

The disability rights movement has had a long-standing and critical focus on paternalism and how people with disabilities are disempowered, neglected, and exploited in relation to systemic ableism.⁴ The power imbalance that exists between people with disabilities and people without disabilities must be central to any consideration of how best to support people with disabilities to live equally and autonomously. We are concerned by how this power imbalance persists in consumer law issues and NDIS transactions, placing our clients at increased risk of being misled and mistreated by providers and making it more difficult to receive appropriate advice and support. The NDIS is incredibly large and contains a number of serious issues and areas for concern, and we find that consumer law is generally not an area of focus for advocates in the space. Consumer Action's body of work and expertise positions us in this critical gap. All aspects of NDIS, including consumer law and debt matters, should affirm that people with disabilities are deserving of care and entitled to a life where they can thrive.

Jude's reflections on the following page illustrates some of the issues commonly experienced by NDIS participants. Jude is a former client who has been assisted through our legal service.

¹ Australian Council of Social Service & UNSW Sydney, *Poverty in Australia 2018*, https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf.

² Australian Institute of Health and Welfare, *People with disability in Australia*, 2022, <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/income-and-finance/income>.

³ Raise the Rate, *FAQs*, <https://www.raisetherate.org.au/faqs>.

⁴ S Clifton, *Hierarchies of power: Disability theories and models and their implications for violence against, and abuse, neglect, and exploitation of, people with disability*, 2020, p. 3, <https://apo.org.au/node/309065>.

Jude's story

"I make it my business to know because I hate injustice. I'm speaking on behalf of the people who can't speak for themselves. I'm a mother of two who can't speak up for themselves, who are very vulnerable members of the community."

Jude is a woman with an acquired brain injury who also uses a wheelchair and has two children with severe disabilities. Her experiences as a NDIS participant and a carer, as well as what she has heard from other community members, have fuelled her passion for advocating against the injustices of the current NDIS system.

Jude told us that there are a number of untrained workers and dodgy organisations operating as NDIS providers that are ripping off their clients. She described these providers as approaching the NDIS as a "money-making scheme" and having no training or experience working with people with disabilities and providing proper care for them. Jude also discussed her own experiences with being exploited and overcharged for services. She told us that one provider was adding an extra half hour to the invoice for every shift to take an additional \$100 per week from Jude's NDIS plan, and that maintenance workers have charged well above what the job was worth for work at her home, including a gardener who charges for 2 hours of work but is only ever there for half an hour. Jude said she has read "horror stories" from other NDIS participants in forums such as Facebook groups, and that she knows there are support workers who have no qualification or training and are charging something like \$59 per hour for their services. She told us that these workers do not have the skills to provide care and support for people with disabilities, particularly those who have high support needs. Jude emphasised that the lack of regulation, training, and oversight was the main problem she saw for the NDIS and its participants.

She suggested that there needs to be better enforcement and monitoring of NDIS providers, and that organisations need to be registered with the NDIS to provide services to participants. Jude stressed that people with disabilities need a more prevalent and powerful voice in NDIS regulation. She spoke to us in depth because she wants to be a voice for the many who cannot speak up, and she believes that voices such as hers need to be heard at all levels.

The poor service, overcharging, and mistreatment experienced by NDIS participants is especially egregious in Jude's opinion because of the vulnerability of the clients. As Jude put it, people with disabilities and their families put their trust in these providers, only to be exploited for financial gain. She was especially worried about people who live alone and have no witnesses or other advocates to support them when they are being potentially scammed by NDIS services.

Jude also provided a message to the NDIS and to the Hon Minister Bill Shorten MP:

"As a disabled person in a wheelchair and with a brain injury, and also being a parent and carer of two severely disabled people, I would say start policing the NDIS. Start making all organisations register... get rid of all these dodgy providers who are ripping off clients by ripping off the system. Make sure that the assessors of the NDIS also have training in disability, make sure support workers are trained in disability. You are working with some of the most vulnerable people in the community, they need to be treated equal and with respect. They need their needs met."

The NDIS and First Nations communities

Consumer Action is currently undertaking an integrated practice project partnership with Victorian Aboriginal Legal Service (VALS). Data indicates that 44% of clients supported by VALS in association with this project presented with a disability. Of the 65 cases recorded by our legal and financial counselling advice lines that involved NDIS participants in 2022, 9.2% also involved First Nations clients. First Nations communities are similarly overrepresented among NDIS participants more broadly, making up 9.3% of NDIS participants in December 2022.⁵ While our casework data does not provide comprehensive insights into how First Nations clients might experience consumer law issues associated with the NDIS differently to non-Indigenous clients, we know that these general issues will impact First Nations communities disproportionately due to the percentage of NDIS participants who are also First Nations.

Additionally, the financial disadvantage and exclusion experienced by people with disabilities is compounded for those who are also First Nations. The Australian Securities and Investments Commission's (ASIC) Indigenous Financial Services Framework has recognised that historical policy and legal frameworks have prevented First Nations peoples from engaging with financial systems, and that access to money and financial services has generally only occurred within the last two to three generations.⁶ First Nations people with disabilities are particularly likely to be experiencing financial hardship and vulnerability as they navigate the NDIS.

First Nations peoples with disabilities who are engaging with the NDIS are already dealing with unique issues around cultural safety and distrust of government services⁷, and the NDIA has launched their First Nations Strategy in partnership with the First Peoples Disability Network to improve the NDIS and its efficiency in achieving meaningful outcomes for First Nations communities⁸. The Strategy is a critically important piece of work to more effectively engage and support First Nations NDIS participants, but seemingly does not include any specific focus on consumer law issues and ACL. We would like to see the Strategy incorporate efforts to increase understanding of and safeguard the consumer rights of First Nations NDIS participants. Consumer law issues are exacerbating the difficulties that First Nations communities face in receiving safe and quality services. Reform based on our recommendations would alleviate some of the significant pressures (particularly financial pressures) on First Nations NDIS participants.

Standard form service agreement to prevent unfair terms

Service agreements between NDIS participants and service providers relate to the provision of goods and services that are 'reasonable and necessary' in support of a person's disability requirements. It follows that the service agreements underpinning the delivery of these supports should be fair, accessible, and comprehensible. However, we are aware that NDIS participants find that service agreements are too complex, jargon-heavy, overly long, unclear, and include punitive cancellation terms and other unfair terms. Power imbalances are an important consideration and NDIS participants are often disempowered relative to businesses and service providers when it comes to negotiating and agreeing to terms of service.

The fairness of NDIS service agreements is an under-interrogation issue in NDIS advocacy; but we are not alone in these concerns. In its June 2019 report, the Victorian Office of the Public Advocate (OPA) investigated the suitability of NDIS service agreements and the increasing number of requests for OPA guardians to sign these agreements on

⁵ NDIS, *NDIS Quarterly report to disability ministers: Q2 2022-23*, 2022, p. 21, <https://www.ndis.gov.au/media/5698/download?attachment>.

⁶ ASIC, *Indigenous Financial Services Framework*, 2023, p. 19, <https://download.asic.gov.au/media/35wnoxy/asic-indigenous-financial-services-framework-published-february-2023.pdf>.

⁷ J Gilroy, 'Here's why the planned NDIS reforms discriminate against Aboriginal and Torres Strait Islander people', *The Conversation*, 2021, <https://theconversation.com/heres-why-the-planned-ndis-reforms-discriminate-against-aboriginal-and-torres-strait-islander-people-160183>.

⁸ NDIS, *First Nations Strategy*, 2023, <https://www.ndis.gov.au/about-us/strategies/first-nations-strategy>.

behalf of participants.⁹ The OPA detailed several unfair and unreasonable terms or clauses that appeared in NDIS service agreements, including:

- Anti-competitive clauses that would impose significant fees if a participant engaged the services of a caregiver during a set period after the end of the service agreement.
- Terms that appear to reserve broad rights for the provider to make decisions relating to the financial aspects of the agreement on behalf of the participant and pass on any subsequent costs to participants.
- Broad terms under which participants agree to reimburse or indemnify service providers for any loss caused, which may unfairly seek to impose liability on participants.
- The imposition of personal responsibilities on NDIS participants that go beyond what is reasonable to request, such as requiring participants to provide equipment or cleaning products.

The OPA have also implemented standard form NDIS deeds for participants with an appointed OPA guardian to safeguard against issues of the scope of authority and the unfair terms of provider service agreements.¹⁰

We have also identified service provider contract terms that seek to limit liability for breaching consumer guarantees in the ACL to, for example, the total amount of money received from the NDIA for the provision of services. We are also concerned about provisions which limit the obligation of plan managers in informing participants when their funds are low. NDIS participants should not be expected to effectively manage their funding and finances without being fully and properly informed of where they stand.

The broader experience of financial services and consumer markets confirms that disclosure alone is not an effective consumer protection mechanism.¹¹ Disclosure does not address the complexity of decision-making, consumers often do not pay attention to disclosure information, and the effects vary significantly between different individuals and situations. NDIS participants are systemically disempowered by ableism, and these power dynamics must be considered in service agreements and transactions. For First Nations NDIS participants, this disempowerment is compounded, and disclosure is even less likely to sufficiently inform and empower them to make the decisions they need to make. As discussed in Jude's story, NDIS participants place their trust in providers, and this trust can only be well-earned and well-founded by clear, consistent, and culturally safe standards that are enforced across services. Standard form agreements or standard terms would help prevent service providers from burying unfair terms in fine print and difficult to understand terminology, preventing the harm done and limiting future disputes.

To address these issues, we recommend the implementation of a standard form agreement between registered service providers and NDIS providers, including basic protections such as:

- Fair cancellation terms.
- Terms minimising the risk of service providers over-servicing and charging beyond a participant's NDIS fund budget for that service.
- Other terms addressing risks of NDIS plan overspends and accrual of personal debt by participants.

Debt collection harassment and litigation against NDIS participants

Consumer advocates are deeply concerned that, in the absence of necessary safeguards, NDIS participants are facing inappropriate debt collection and legal action over unpaid invoices following so-called 'overspends'. It is

⁹ Office of the Public Advocate, *NDIS service agreements: making choice and control more real*, 2019, <https://www.publicadvocate.vic.gov.au/opa-s-work/research/108-ndis-service-agreements-making-choice-and-control-more-real>.

¹⁰ Office of the Public Advocate, *Frequently asked questions about OPA's NDIS deeds*, 2022, <https://www.publicadvocate.vic.gov.au/guardianship-and-administration/opa-s-ndis-deeds/frequently-asked-questions-about-opa-s-ndis-deeds>.

¹¹ Australian Securities & Investments Commission, *REP 632 Disclosure: Why it shouldn't be the default*, 2019, <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

worrying that NDIS participants may be pursued personally for debts where the funding has run out and the service provider continues to seek payment, especially where the participant may not have been aware of the limits of the funding and only engaged the service on the understanding that the NDIS would cover the cost. NDIS participants and their families are often not adequately informed of how their funding is being spent and when it might be exhausted. In some cases, our clients have only been told that their funding has run out at the point where they had outstanding invoices that suddenly could not be covered by the NDIS plan funds. NDIS participants who experience circumstances of 'overspends' may then be pursued through debt recovery mechanisms for the outstanding amount and risk bankruptcy, loss of assets such as their home, further debt accrual, and credit reporting consequences. Debt recovery action is also often extremely distressing for the person being pursued and can have significant impacts on their general health and wellbeing. Ava and Sara's story below illustrates the challenges NDIS participants may face in relation to 'overspends' and associated debt collection.

Case Study – Ava and Sara

Ava lives with severe disabilities requiring 24-hour care for all personal care activities. Sara is Ava's mother as well as plan nominee and power of attorney. Sarah has two other children and contributes to the family's mortgage repayments by working casually in hospitality.

As plan nominee (and payment nominee), Sara on behalf of Ava is responsible for managing her NDIS plan and the supports it budgets for. To assist Sara, who only has time to self-manage a small portion of the NDIS plan, the NDIS plan includes \$10,000 funding for a Support Co-Ordinator (to help link Ava with appropriate workers) and \$2,000 funding for a Plan Manager (to help with paying invoices).

In mid-January, the usual Support Co-Ordinator left for maternity leave and was replaced by a temp worker who was difficult to contact. In the first week of April, the Plan Manager called Sara to let her know all of Ava's NDIS plan funds had been depleted prematurely, and there weren't funds available to cover the \$15,000 worth of outstanding invoices received for March.

Sara contacted the NDIA to see if they could cover the debt, however she was told the 'overspend' wasn't for "approved supports" and so were unable to cover the debt. On close inspection of the invoices – Sara noticed that for several months prior, the incorrect codes had been inputted into invoices which had led to the unexpected overconsumption of NDIS funds. No one had picked these issues up. Overwhelmed, Sara ignored the constant debt collection contact, until eventually six months later she was served with a Form 5A with 21 days to respond to a Magistrates Court application made against her. Consumer Action represented Sara along with the assistance of pro bono counsel given the complexity and urgency of her case.

The negative impacts of debt collection are particularly pronounced for First Nations people, for whom debt can contribute to the intergenerational trauma of their long-term financial exclusion as well as their broader economic and emotional wellbeing.¹² First Nations communities are likely to have low trust in financial and debt recovery systems because of their historical exclusion and continued difficulty navigating these systems. A participant contribution to the Indigenous Financial Services Framework described a woman who was fearful of losing her home and children due to her debts¹³, and this would clearly be a particularly salient and terrible fear for First Nations people who have existing experiences of sanctioned displacement and breaking up of their families. NDIS participants, and especially First Nations NDIS participants, are commonly experiencing vulnerability that makes it difficult to manage debt issues and self-advocate in debt recovery processes.

¹² ASIC, *Indigenous Financial Services Framework*, p. 21.

¹³ Ibid.

The NDIA are not parties to service agreements and do not fund 'overspends'. It is not clear whether the NDIA have mechanisms in place to monitor the number of participants affected by debt issues incurred under service provider contracts, the extent of the debts, and their consequences. While the NDIS Quality and Safeguards Commission has a complaints function, it does not deal with or prioritise consumer complaints. The lack of accessible, effective, and free dispute resolution for these problems leaves the NDIS participants (and other parties) in the difficult position of attempting to defend legal action, often without adequate legal support. We note that NDIS providers are discouraged from engaging in practices that take advantage of NDIS participants including "expending funds contrary to a person with disability's approved plan"¹⁴ and that a failure to meet of these obligations may amount to breaches in the consumer law and contravention of the NDIS Code of Conduct. To provide better safeguards, we recommend requiring registered providers to regularly report on their use of external debt collectors and legal action. We also support the proposal of the Consumer Law Committee of the Law Council of Australia to implement a standard clause stating that the provider may not spend any amount over that which has been allocated without prior express permission from the participant.

Monitoring ACL compliance

Our casework indicates a number of ACL guarantees breaches by providers who have not delivered a product/service to the standard that the NDIS participant was expecting, and which they require for their safety, mobility, and wellbeing. Several clients reported that they had purchased wheelchairs that were defective, not fit for their needs, and did not meet the promises of the providers, while another was left with a undriveable car after using NDIS funding to have it modified for purpose. We have also been notified that clients have been delivered wheelchairs that are different to the models they tried and agreed to purchase at the time of ordering. These clients have had their quality of life severely impacted by goods and services that did not comply with ACL guarantees regarding the safety, durability, and function of the product and that were not fit for the purposes specified by the client and/or the provider.

ACL breaches have particularly serious consequences where the transaction involves NDIS approved and funded products/services, and many participants cannot afford to wait the time it takes to lodge complaints and reach resolutions through the standard channels. A person left without a functioning mobility aid or the regular support they require is living an extremely and unfairly restricted life and may also be experiencing significant pain and distress as a result. NDIS participants need and deserve to have their guarantees and rights under ACL met and protected, and to feel confident that any issues will be promptly and appropriately addressed.

We recommend targeted monitoring of providers to establish whether they are complying with ACL, particularly with respect to providing quality products/services and charging no more than allowed through NDIS plans. We also recommend that the NDIS Commission establish mechanisms for a complaint handling process where participants can contact the Commission for assistance in the resolution of matters involving ACL breaches.

Dispute resolution mechanisms

A pressing issue for our clients with NDIS issues is the lack of accessible dispute resolution pathways. Several of our clients have lodged complaints with the NDIS Quality and Safeguards Commission and/or the NDIA fraud team and received no helpful response, often leaving them feeling distressed and lost as to their situation and how they can resolve it. NDIS participants feel once again disempowered and neglected by the system that is ostensibly designed to support them, impacting not only their access to justice and resolution but also their self-image and wellbeing.

¹⁴ Australian Competition and Consumer Commission, *Joint letter from the ACCC, NDIA and NDIS Commission*, 2021, p. 3, <https://www.accc.gov.au/about-us/publications/joint-letter-from-the-accc-ndia-and-ndis-commission-january-2021>.

The Australian Competition and Consumer Commission (ACCC) recommends that NDIS participants lodge complaints with the NDIS Commission and the NDIA and escalate to the Commonwealth Ombudsman if they are not satisfied with the outcome.¹⁵ However, the NDIS Act does not obligate the Commission to undertake any resolution process following complaints and the NDIA has no regulatory framework defining its complaints handling function, meaning it is not required to make any decision about the fraud complaints it receives and there are no minimum obligations owed to the complainant. An NDIS participant may only be given a reason for the Commission's decision as to their complaint if they compel the Commission to do so, and even then this reasoning does not need to be provided in writing. Similarly, the NDIA gives itself broad discretion concerning how they deal with reports of fraud and when they might inform participants about any action taken. Participants making complaints to the NDIS Commission and the NDIA may not even receive an explanation for the decision pertaining to their complaint, let alone any meaningful assistance or resolution.

As discussed above, we have found that our clients tend to view their NDIS-related issues as separate to other consumer law and credit/debt matters, and they would therefore likely look to NDIS channels first and foremost as a means of resolving their problem. Dispute resolution processes, particularly through the NDIS Commission, need to be more readily available to NDIS participants with the objective of increasing the number of appropriate consumer outcomes. Further reflections from our client Jude, this time relating to challenges with the NDIS Quality and Safeguards Commission, are presented below.

We recommend that the NDIS Quality and Safeguards Commission be made available for and obligated to resolving consumer disputes relating to NDIS service providers, including where legal action has been initiated. We recommend amendments to the NDIS Act to remove, as far as possible, the discretion for the NDIS Commission to not undertake a resolution process. Any amendments need to appropriately resource the Commission to ensure that not only are resolution processes more readily available, but that these processes are managed by suitably qualified staff so that the process is efficient and meaningful.

Jude's story

When asked about the NDIS Quality and Safeguards Commission, Jude said that the process was not accessible or efficient:

"You have to wait months for a result and then the results are not always what you want. You're not really getting justice."

She told us that effective regulation and dispute resolution were critically important for 'fixing' the NDIS, and that funding issues were only the tip of the iceberg.

"People need answers, and they need them quick."

¹⁵ Australian Competition and Consumer Commission, *Consumers with disability – Where to go for advice or complaints*, 2019, p. 1, <https://www.accc.gov.au/system/files/Consumers%20with%20Disability%20campaign%202019%20-%20Complaints%20factsheet.PDF>.

We thank you again for the opportunity to provide comments on the NDIS and the consumer law issues facing participants. Please contact Tania Clarke (Acting Chief Executive Officer) on (03) 9670 5088 or at tania@consumeraction.org.au if you have any questions pertaining to this submission.

Yours sincerely

A handwritten signature in black ink that reads "Tania Clarke". The signature is written in a cursive, flowing style.

Tania Clarke

Acting Chief Executive Officer

CONSUMER ACTION LAW CENTRE

