



## Joint Standing Committee on the National Disability Insurance Scheme

Brisbane 8 October 2019

### ADDITIONAL INFORMATION

#### Issues of NDIS Planners Breaching the NDIS Act:-

QAI considers that the standard practices engaged in by NDIS Planners are not consistent with key provisions of the NDIS Act. In particular, we note the following provisions, examples of breaches of which are outlined below:

- 1. Section 3(1)(c) support the independence and social and economic participation of people with disability; section 3(1)(h) raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability; section 4(8) people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity; section 5(b) people with disability should be encouraged to engage in the life of the community; and section 31(h) advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations.**

Case study: when Participants request supports to engage in the community (1:1), they are advised that can only be facilitated through a group setting (day service) and that Participants should 'be with other people like them'. SIL also is an example that is incongruent with the notion of community inclusion as an individual.

- 2. Section 3 (1)(e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.**

Case study: Participant requested a specific support coordinator, and provided this information to the Agency, both verbally and in writing. The planner then facilitated a request for service to a provider not previously discussed with the participant (as an in-kind support).

- 3. Section 4 (3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.**

Operationally: Participants having their plans reduced significantly at their second plan review, due to underutilisation when expressing difficulty in implementing the plan.

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

- 4. Section 4 (9) People with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs and section 5 (d) the cultural and linguistic circumstances, and the gender, of people with disability should be taken into account;**

Case study: Planner met with Participant's parent who does not speak English, without an interpreter and then decreed their Plan to be Self-Managed, but without Support Coordination included in the Plan.

Operationally: The Agency mischaracterising review requests; more specifically, when an internal review (s100) has been requested, completing a section 48 review instead, which impedes on a Participant's right to external review.

- 5. Section 4 (10) People with disability should have their privacy and dignity respected.**

Case Study: A Self-Managing Participant noticed in the portal that Agency staff had made a service booking with a provider and checked that the Participant would share the Plan with the provider. The Participant had not agreed to share the Plan with any providers either through the portal or in any way. The default in the portal is that the Participant must then explain their reason for changing this

Operationally: Participants' phone numbers, date of birth and address are printed on their NDIS plans (not just the cover page), as well as the sharing of information as default for sharing information with service provides on the portal.

- 6. Section 4 (13) The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by: (a) promoting their independence and social and economic participation; and (b) promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and (c) maximising independent lifestyles of people with disability and their full inclusion in the community.**

Operationally: Planners and delegates continually refusing to speak to advocates on behalf of the participant, even when specifically requested by the Participant.

- 7. Section 5 (a) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves.**

Case study: Participant did not need nor want 24 hour support. A provider lodged a SIL quote which was approved with a new plan subsequently approved, without any knowledge or consent of the participant or the legal guardian.

Operationally: Participants having SIL quotes approved without their knowledge or input (communication between Provider and Agency with no participant involvement).



- 8. Section 17A (1) People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.**

Case study: Planners making notifications and applications to the Tribunal for Public Guardian to be appointed.

- 9. Section 20 If a person (the prospective participant) makes an access request, the CEO must, within 21 days of receiving the access request: (a) decide whether or not the prospective participant meets the access criteria; or (b) make one or more requests under subsection 26(1).**

Operationally: The Agency fails to provide outcomes nor information requests within 21 days consistently.

- 10. Section 31 (a) be individualised.**

Operationally: The use of typical support package removes individualisation of funding, using a 'cookie cutter' approach, and replicates the outdated model that the NDIS was meant to replace. SIL is an example of non-individualised funding even where Participants wish to share some of their supports. This could be articulated in their individualised Plans and not left to the Service Provider to allocate at their whim.

- 11. Section 31 (j) facilitate tailored and flexible responses to the individual goals and needs of the participant.**

Operationally: The use of categories in a plan reduce flexibility in funding, restricting Participants' choice and control. In many instances the categories are inappropriate and for self-managers create unnecessary bureaucratic red tape in making payment requests.

- 12. Section 33 (1) A participant's plan must include a statement (the participant's statement of goals and aspirations) prepared by the participant that specifies.**

Operationally: Planners and delegates changing the wording of goals which are given in writing and reiterated verbally at planning meetings. As mentioned in the hearing, the Participants' statements should be their own and owned by them and not adapted, redacted or used against them by the Agency.

- 13. Section 33 (4) The CEO must endeavour to decide whether or not to approve the statement of participant supports as soon as reasonably practicable, including what is reasonably practicable having regard to section 36 (information and reports).**



Case study: Participants are waiting up to 2 - 3 months for plans to be approved after the planning meeting.

**14. Section 37 (2) A participant's plan cannot be varied after it comes into effect, but can be replaced under Division 4.**

Operationally: Planners and delegates are conducting 'light touch/desktop' reviews, which can alter goals, plan management and funds in a plan, while removing the Participants' rights to external merits review as they are not approving a new plan, simply altering the original. This has implications on external merits reviews jurisdiction to review such plans. Case studies are endless.

**15. Section 47 (1) A participant may give the CEO a changed version of the participant's statement of goals and aspirations at any time.**

Case study: Planners refusing to change goals in Participant's Plan, when the goals did not accurately reflect the Participant's goals (ie: often because they were not recorded in the Plan according to the Participant's wishes)

**16. Section 48 in its entirety.**

Operationally: Participants are not notified within 14 days of requesting a review. Planners are also conducting reviews under section 48, instead of section 100, which impedes Participants' external review rights.

**17. Section 100 (6) The reviewer must, as soon as reasonably practicable, make a decision.**

Operationally: Participants are waiting months and months for outcomes of internal reviews.

\* Note: A reference to "operationally" means we see it across the board and have too many case studies to count. A reference to "case study" means we have either a current or closed file where this has occurred.

**Protracted delays and hindrances for Participants by NDIA bureaucracy**

Our focus is to prioritise AAT Appeals in accordance with our funding agreement. Where possible, to circumvent escalation, internal reviews are designed to be of mutual benefit to the Participants and the Scheme in terms of economy and ensuring that people are not disadvantaged or placed under further duress.

Most participants who reach out to our organisation or who are referred to us come at times when their distress has already reached mammoth proportions. Background information for you to the current issues arose due to:-



1. Highly adversarial responses from NDIA representatives in the Administration Appeals Tribunal; and
2. Protracted delays by nonsensical responses to properly submitted documentation and signed authorities.

We sought to have instigated:-

- A clear directive to all NDIA staff to work in conjunction with NDIA Appeals advocates and to support the rights and intent of the NDIS legislation to access advocacy support from accredited and funded advocacy organisations.
- Protocol of Engagement with Advocates be included in the training of all NDIA staff.

After repeated contact and complaints by advocates across Australia a Consent Working Group was established to address the delays and barriers to advocacy and some progress has been made with new Consent procedures for advocates. There are still some fine details to be developed.

However, while matters requiring escalation to the National Reviews Team (NRT) had given much improved results and with more timely responses, it has recently been noticed that Section 100 reviews sent to the NRT are now being returned to the local offices. This is clearly not independent of original decision makers and is unacceptable.

We wrote to the Acting CEO of the NDIA requesting that if this has occurred due to an increased or overload of matters for the NRT, that it be communicated to advocates and participants, and the Agency should ensure that appropriate measures are in place to deal with the increase.

We also reported that NDIA staff in Queensland believed that they have forwarded reviews to the NRT and have not been aware of the changes in practice and their reviews had been sent back to local offices..

QAI received a call from a member of the National Escalation Team to assure us that only Section 48 reviews were sent to the local offices or were 'light touch reviews'. However, ALL QAI reviews that have been sent back to local offices are Section 100 reviews.

### **Issues with Internal Reviews**

Participant's own words, posted in social media and consent provided to QAI:-

*"Looking for AAT info. Case conference tomorrow 2pm. RoRD submitted in Sept 2018 against August 2018 plan. 'July 2019 RoRD declined by NDIS and in August 2019 new annual plan received with further cuts. Lodged AAT review 16.8.19, two days after new plan date and it was accepted. NDIA Early response team and contact from three NDIS lawyers between 16th August and today 8th October. BUT at 4.38pm today, less than 24 hours before the case conference, the third NDIS lawyer emails a letter seeking the Tribunal list the matter for a directions hearing on jurisdiction as new plan August 2019 would not be covered by any orders made from this review as it only applies to 2018 plan. A new internal review would need to be requested BUT they suggest a fast track internal review of current plan? I know this is confusing, wonder which review we are talking about. If no suggestions it's at least getting some insight into the \$30million spent on legal*



*contractors instead of participant plans. Our case is complex but we haven't even got to try and work that out. Is there a way of the reviews, reviews of reviews, reviews of reviews of reviews OOPS missed the annual deadline so go back to the start..."*

Excessive delay in reaching a decision on the first Internal Review is not consistent with the model litigant rules, which the NDIA are bound by.

Another example is - *LQTF and National Disability Insurance Agency [2019] AATA 631 (2 April 2019)* – a good consideration of the complexities of, and confusion caused by, the NDIS review process.

The NDIA is at times avoiding reviews by approving a small adjustment to a Plan such as an application for Assistive Technology. This was not merely added to the existing Plan but a new Plan which replicates the original but included the Assistive Technology was provided although the Participant only discovered the new date on the Plan by chance.(changing the review date from March 2020 to August 2020). While there is an Internal Review Application on foot, there has been no more formal consideration or reference or communication regarding the Internal Review Application.



