



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

Joint Standing Committee on the NDIS
PO Box 6100
Canberra ACT 2600

10 September 2020

Dear Committee,

NDIS Workforce Inquiry – Response to questions on notice

We refer to the above and thank the Committee for the opportunity to give evidence to the Committee on Tuesday 18 August 2020.

In the course of this hearing, we accepted two questions from the Committee on notice. We were then provided further questions via email. Our response is as follows.

Issues regarding planning process

As discussed at the Hearing with the Committee, QAI provided a submission on planning in 2019. We confirmed that we are yet to see improvements from the National Disability Insurance Agency (NDIA) and the Local Area Coordinators (LAC) in relation to planning and planning outcomes. All issues raised in our planning submission are still evident today. There are also additional issues which have come to light since our planning submission.

Payment of informal supports

The NDIA has long held the stance that participants cannot employ nor pay informal supports to provide any level of care, unless there are exceptional circumstances.¹ Whilst QAI understands the complexities that can arise from commercialising informal relationships, there have been instances of the NDIA making decisions in circumstances in which they do not have the authority within the *National Disability Insurance Scheme Act 2013* (Cth) to do so. Please see **attached** our correspondence to Minister Robert on 10 August 2020 and his office's reply on 31 August 2020. We consider that the Minister's response does not address the NDIA's conduct in operating outside their legislative authority, nor does it address the needs of participants to be provided with care.

¹ National Disability Insurance Agency, *11. Sustaining informal supports* (Web Page, 18 July 2019)
<<https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-sustaining-informal-supports>>.

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Patron: His Excellency The Honorable Paul de Jersey AC

Poor quality plans

A recommendation QAI put to the Committee as part of our planning submission was the abolishment of Typical Support Packages (TSPs). We consider that the system is inherently flawed; it is impossible to provide an individualized scheme, by forcing individuals into standardized packages. The lack of individualization of plans to ensure an individual's needs are met is resulting in a steady flow of internal reviews.

Scheduled reviews after internal reviews

QAI has previously discussed how difficult the NDIS can be to navigate for people with complex disability. This has not changed. People with complex disability, including parents of children with complex needs, often have no option but to exercise their review rights to ensure the participant's fundamental needs are met. Unfortunately, due to the poor planning process and TSPs, many participants and their informal supports are needing to request a resource-intensive internal review after every planning meeting.

Case study

RB² requested a review of a reviewable decision for her son NB's* NDIS plan. NB's plan was increased from \$25,000 for 12 months to \$100,000 for 6 months. RB attended the local office for her son's scheduled plan review. Despite the outcome of the internal review, which was conducted less than five months earlier, and found that NB's complex needs meant NB required a significant amount of support, NB's subsequent plan was approved with \$20,000 worth of supports for 12 months (even less than the initial plan that was the subject of the internal review). RB now must undertake a further internal review, the second such internal review she has needed to pursue within seven months relating to her son's funded supports.

QAI recommends the NDIA implement a simple two-step cross-referencing process to ensure improvements made to a participant's plan through an internal review are not subsequently lost. At the time of a scheduled plan review, delegates ought to:

1. Check whether the plan subject to the scheduled review is a result of an internal review within the previous 12 months;
2. If the plan is the result of an internal review, delegates ought to re-instate all supports agreed through the internal review process. Detailed reasons must otherwise be provided for any supports not re-instated.

² Name changed to protect privacy.



Not related to disability

QAI have seen an increase in participants and their informal supports requesting advice because funding for support, services, and assistive technology 'is not related to the disability they gained access for'. QAI finds this incredibly frustrating as this issue has been dealt with by the Federal Court in the case of *Mulligan v National Disability Insurance Agency*, in which Justice Mortimer stated:

The term "disability" is used in the Act, and in s 24, as a descriptive concept for the overall effect of a person's impairments on that person's abilities to participate in all aspects of personal and community life.³

The Federal Court made it clear that the threshold issue of access is distinct from the subsequent issue of funding of supports.⁴

If a person meets the access criteria in relation to one impairment, the supports they receive need not be limited to addressing the participant's needs in relation to that one impairment. All impairments should be considered for the purposes of planning, and the supports that will be funded should be determined by assessment against section 34 of the Act and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth).

The notion that someone has gained access based on a single disability is a concept which fails to acknowledge that an individual may have multiple impairments which equally affect them and appears to be perpetuated by the fact that the NDIA's system does not allow for the entry of more than one 'primary' impairment. It is not uncommon for planners to then pigeonhole participants as they look solely at the person's 'primary' disability and limit funding for supports in that person's plan accordingly. A failure by the NDIA to consider and include supports in relation to all of a person's impairments may then be the subject of an internal review of the decision to approve such a plan.

Parental responsibility

QAI has been providing advice and ongoing assistance to a number of elderly parents who have been told by the NDIA that the reason they will not provide funding for supports is that they have parental responsibility. Parents for people over the age of 18 do not have parental responsibilities and as such, the NDIA cannot rely on parents as a cost-saving method in reducing supports.

Disregarding of evidence

There is no doubt that as the NDIS has evolved, so has the requirements for evidence to support a participant's requests. The level of evidence required to support even basic requests such as additional community support hours is beyond what one would expect to be reasonable. Although many participants and their informal supports are gathering evidence (usually from General Practitioners, Occupational Therapists, Psychologists and Speech Therapists), the delegates of the

³ *Mulligan v National Disability Insurance Agency* [2015] FCA 544, [51] (Mortimer J).

⁴ *Mulligan v National Disability Insurance Agency* [2015] FCA 544, [151-152] (Mortimer J).



NDIA are often ignoring and disregarding clinical recommendations and implementing plans based on TSPs.

Planning meetings without participants

Participants who have complex needs and participants who reside in group homes under the Supported Independent Living (SIL) model and other group home environments such as hostels are often excluded from their planning meetings. In these cases, delegates of the NDIA are meeting with service providers to discuss the participants needs, quoting on levels of supports and in some case creating goals for the participant without the participant's knowledge.

Case study

JL* lives with 3 other NDIS participants. She has been approved for support at a 1:4 ratio under SIL. There is evidence to show that JL is not receiving the support she needs due to the low ratio of support and her high needs. This evidence is in the form of physical injuries and incident reports. JL's mother and legal guardian was planning on putting forward JL's case for increased support at JL's meeting. However, JL's mother was never advised the meeting was occurring and the NDIA met with JL's service provider. A new plan was approved with the same 1:4 ratio. JL's mother had to request an internal review and despite asking both the service provider and the NDIA, she is still unaware how much funding JL was approved for, as SIL amounts are no longer shown on plans.

Inconsistent operational guidelines

Justice Mortimer ruled in *McGarrigle v National Disability Insurance Agency* that:

*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.*⁵

Despite this ruling, the NDIA have failed to update the transport operational guidelines and continue to use operational guidelines which are inconsistent with the NDIS Act.

Impact of the *Human Rights Act 2019 (Qld)* on the NDIS Workforce

We also undertook to respond to the Committee regarding the impact of the *Human Rights Act 2019 (Qld)* (HRA) on the NDIS workforce.

In our written submission to this Committee, we noted the historic discrepancy in disability services provided between different states and territories, with human rights-informed approaches taken in those jurisdictions with legislative protection for human rights. This was part of our recommendation for a consistent national approach to worker screening to ensure a consistent baseline of protections for all people with disability.

⁵ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [93] (Mortimer J).



We also called for a well-equipped, well-trained and person-centred human rights-based “provider of last resort”, to provide the baseline care previously provided by states and territories in circumstances where alternate care was not available, to be available as broadly as possible.

While the impact of the HRA in this space is still largely unexplored, given that the substantive obligations under this legislation only commenced from 1 January 2020, we note the following potential implications.

As state legislation, the HRA does not establish a cause of action against the NDIA or the Federal Government. However, for people with disability receiving supports from registered NDIS service providers, the providers are considered functional public entities and must ensure that they comply with the HRA. This obligation entails giving proper consideration to the rights of recipients of their service (including at the point of access to their services – ensuring that access is not discriminatorily or inequitably refused)⁶ and ensuring decisions made are compatible with the HRA. We consider that relevant rights include the right to protection from torture and cruel, inhuman or degrading treatment,⁷ freedom of movement,⁸ freedom of expression,⁹ taking part in public life,¹⁰ privacy and reputation,¹¹ cultural rights,¹² and cultural rights of Aboriginal and Torres Strait Islander persons.¹³

Workers employed by NDIS service providers also benefit from the protections afforded by the HRA.

Why have you recommended that SIL funding be abolished? What impact do you think this would this have on the NDIS workforce?

Further to the information provided on 18 August 2020 (reported on page 23 of the transcript), we note as follows.

SIL is a model of funding under the NDIS. For a person to have SIL approved in their NDIS plan their service provider is required to submit a ‘roster of care’. This is essentially a timetable of support that the individual receives in the context of their shared living arrangements. The NDIA have recently updated the Supported Independent Living Operational Guidelines and have introduced standardized rates acknowledging that the cost of SIL should be the equivalent of the cost of personal care supports.¹⁴ While this is an improvement as service providers are no longer quoting this support and there is greater transparency around the costs of this support, it does not go far enough to ensure the choice and control of NDIS participants to access quality services.

When a participant can flexibly access all their supports, they have greater choice and control over the services they receive, when they receive services, who they live with and where they live. This

⁶ *Human Rights Act 2019* (Qld), s 15.

⁷ *Human Rights Act 2019* (Qld), s 17.

⁸ *Human Rights Act 2019* (Qld), s 19.

⁹ *Human Rights Act 2019* (Qld), s 21.

¹⁰ *Human Rights Act 2019* (Qld), s 23.

¹¹ *Human Rights Act 2019* (Qld), s 25.

¹² *Human Rights Act 2019* (Qld), s 27.

¹³ *Human Rights Act 2019* (Qld), s 28.

¹⁴ National Disability Insurance Agency, *Supported Independent Living Operational Guidelines* (web Page, 30 June 2020) <<https://www.ndis.gov.au/about-us/operational-guidelines/supported-independent-living-operational-guideline>>.



ensures that quality services providers are able to be chosen, rather than the participant being forced to accept the provider with a 'vacancy' or the cheapest SIL quote.

In our experience people who have been able to secure flexible core funding have been able to employ more staff, ensure quality of their services, more actively participate in their local community and ultimately build their capacity. We believe that this will expand the market as smaller and more responsive service providers will be able to move into the space that larger SIL and block funded providers once dominated.

On 28 August 2020, Minister Stuart Robert announced reforms to provide people with true choice and control over a flexible support package¹⁵ – in line with the purpose and objectives of the NDIS. SIL funding should not be the exception to this positive step forwards.

What impact is current NDIS pricing having on the workforce?

Further to the information provided on 18 August 2020 (reported on page 23 and 24 of the transcripts) we note as follows.

In our experience, people who are self-managing or plan managed are able to effectively utilise their funds to receive reasonable and necessary supports as well as to cover the administrative and training costs of staff.

Engaging with larger service providers seems to be more problematic as they charge the maximum allowable price guide rate as well as additional charges for staff meetings, training and administration. This essentially means that for the same funds a participant may not be able to receive all the support that has been determined as reasonable and necessary by the NDIA.

We have noticed a trend towards support workers starting their own small businesses or becoming sole traders. This allows them to be paid more for their time while the NDIS participant also benefits as they often do not pay as much per hour – allowing them to access more support.

Why do regional, rural and remote areas have higher overheads? Why do participants in these areas need more funding? Do you have any specific examples that it would be useful for the Committee to be aware of?

The Queensland market still has a long way to go in order to be able to meet the needs of people with disability. We have noticed that even in larger rural towns, such as Toowoomba or Rockhampton, it can be very difficult for people to access all of the supports they require due to a lack of services, long wait lists and travel times for the providers.

One of the biggest considerations that we feel is required for rural and remote participants is adequate 'travel' for service providers to be able to provide support to people in their homes and local communities. We have supported several NDIS participants and their families with AAT Appeals specifically relating to additional travel time for therapists and support workers to ensure that they were able to access the reasonable and necessary support.

¹⁵ The Hon Stuart Robert MP, *Landmark reforms to deliver on the promise of Australia's National Disability Insurance Scheme* (Web Page 28 August 2020) <<https://ministers.dss.gov.au/media-releases/6156>>.



Another consideration is the lack of services and therefore the possibility that there may be other people in rural and remote communities who do not have the diagnosis or evidence to access supports through the NDIS. By facilitating NDIS supports into these communities it may also open up access to services for people who are not on the NDIS, such as through a GP management plan.

Providers working with Aboriginal and Torres Strait Islander people are also likely to encounter greater overheads as it will take time for the community and participant to trust the provider and they will often need to work with several community members in order to support individuals.

What are your views about the need for ‘provider of last resort’ – has this changed since the coronavirus pandemic has impacted Australia?

As a result of the coronavirus pandemic, the issue of NDIS participants paying informal supports has become more apparent. We have spoken to several NDIS participants who have wanted to pay their informal supports, during this time, with their NDIS funds for several reasons including; their service providers closing down or limiting services, self-isolating and not wanting external people to enter the home, support workers needing to self-isolate and being unable to attend shifts.

Do you think the NDIS Quality and Safeguards Commission currently has enough power to oversee providers? What changes, if any, would you recommend and what impact would those changes have on the How could NDIS workforce?

Ultimately the role of the NDIS Quality and Safeguards Commission needs to be focused on the NDIS participant. We have set out our recommendations for change in relation to the operation of the Commission in our submission to the Committee’s inquiry into the NDIS Quality and Safeguards Commission (31 July 2020). Changes are always going to impact the workforce; however, this is a workforce supporting vulnerable, isolated and often marginalized people and so it needs to be the most accountable.

Yours faithfully,

Emma Phillips
Principal Solicitor | Deputy Director





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Systems and Individual Advocacy for vulnerable People with Disability

10th August. 2020

The Hon. Stuart Robert,

Minister for the National Disability Insurance Scheme,

Dear Mr. Robert,

Queensland Advocacy Inc. is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Our organisation is funded by the Department of Social Services to deliver advocacy for individuals seeking assistance with reviews and appeals of decisions by the NDIA. Our focus is to prioritise assistance for people involved in external reviews in the AAT in accordance with our funding agreement.

We have written on several occasions to former CEOs of the NDIA as well as the Chair of the NDIA Board in regard to issues we see impacting the efficient and effective delivery of supports to participants and prospective participants of the NDIS.

On this occasion, we are writing to you regarding the recent increase in requests for help which our organisation has received from participants who have sought to engage a family member as a paid provider of their supports. These participants have either been told by their plan manager or support coordinator that this is 'not permitted' or they have been advised in writing in an internal review decision letter from a delegate of the NDIA CEO that their request to pay a family member to provide supports has been 'refused'.

On each occasion, our advocates have had to dedicate an advice appointment to the participants and/or their families to explain that the NDIA do not have the authority within the *NDIS Act 2013* (Cth) or subordinate legislation to make a decision about a participant's provider of choice, whether it be a private employee, family member or through an external service provider. This is often a difficult task, particularly in the context of the participant having a formal internal review decision letter from a delegate of the CEO telling them otherwise.

It also often requires follow up work from the advocate to help the participant subsequently withdraw any application they may have made for an internal or external review, and to convince

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the participant's plan manager and support coordinator to accept invoices issued by the family member providing support.

The examples below demonstrate the difficulties experienced by our client participants and the impact of the erroneous and inconsistent responses by the NDIA and associated entities.

1. In the first example, the NDIS Participant was previously paying a family member to provide about 30 hours per week of support. This was recommended by the Participant's psychologist, along with a well-structured transition plan, due to the complex trauma and mistrust that the Participant experiences. The Participant sought approval to pay their family member from the NDIA and was advised that the request was declined. The Participant lodged an Internal Review of this decision and received an Internal Review Outcome Letter, stating that paying the family member was not reasonable and necessary. The Participant was then advised by the NDIA to lodge an Application for Review to the Administrative Appeals Tribunal if they did not agree with this decision, which the participant proceeded to do.

The Participant was not seeking an increase in their supports. The delegate of the CEO ought to have written to the participant to advise them that the issue of who they engage to provide supports is not a reviewable decision. Had the delegate done so, this is where the matter would have ended.

2. In another example, the NDIS Participant was seeking approval from the NDIA to pay their family member due to their complex mental health needs. The NDIA declined this request and advised the Participant to lodge a change of circumstances review request. The NDIA declined to review the Participant's plan, and the Participant subsequently requested an Internal review of this decision which was upheld. It wasn't until this point in time that the Participant was able to be linked with QAI, and be provided with the advice they required from the outset – that the NDIA has no authority to prohibit a participant from paying their family members as paid supports and this 'purported' decision is not reviewable.

Again, the Participant in this case was satisfied with the level of support funding provided within their NDIS plan but they were erroneously advised to pursue a review (of a non-reviewable decision).

Our request

The NDIS Operational Guidelines, [Including Specific Types of Supports in Plans Operational Guideline – Sustain informal supports](#) provide guidance as to when payment of a family member as a support provider may be appropriate (in one or more exceptional circumstances), and we direct our clients to these guidelines to help inform our advice to them.

However, these are only guidelines and are not the law.

Consideration must be made as to whether the guidelines need to be legislated to give the NDIA authority to make decisions regarding the payment of family members. If this occurs, such decisions must respect a participant's choice and control and provide a participant with full rights to review a decision with which they disagree. We would be pleased to contribute to any consultation regarding such legislative reform if this is pursued.



In the meantime, given this is a prevalent and pressing concern for many NDIS Participants we request that the NDIA:

1. Provide training to all staff who have delegated decision-making authority as to the limits of the decisions they can make and the decisions which are reviewable;
2. Amend the Operational Guidelines to make clear that approval or permission from the NDIA is NOT required for a participant to pay a family member to provide them with supports; and
3. Develop and circulate a publication for local area coordinators, plan managers and support coordinators to dispel the current myth that approval from the NDIA is required before a participant may engage a family member to provide them with supports.

We ask that this issue be given your urgent attention as we are encountering it on a frequent (weekly) basis, diverting scarce resources to respond to enquiries that are a product of the incorrect information that is currently circulating within, and outside of, the NDIA.

We look forward to hearing from you at your earliest convenience.

Yours sincerely,

Michelle O'Flynn

Director





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Dear Ms O'Flynn

Thank you for your letter of 10 August 2020 to the Hon. Stuart Robert MP, Minister for the National Disability Insurance Scheme, regarding participants seeking to use NDIS funds to pay family members. The Minister has asked me to reply to you on his behalf.

Strengthening informal supports, including families and carers, is a key principle of the National Disability Insurance Scheme (NDIS). Our current position that the National Disability Insurance Agency (NDIA) will only fund family members in the most exceptional circumstances is to ensure the role played by families in providing informal supports is sustained. We acknowledge the important role family members play in the lives of their loved ones who have a disability.

I note your comments regarding legislative reform and direct you to the Department of Social Services, as the department responsible for the NDIS legislative reform agenda to discuss your offer to contribute to any consultation.

You may be aware that the NDIA is working to make the NDIS easier to understand and provide clearer information about how we make decisions. One of the first examples of this is a new format for our Operational Guidelines (OGs). Through the refresh of our OGs we will publish all our internal and external guidance about how we make decisions so there is consistent information internally and externally for NDIA staff, participants and stakeholders. Paying family members to provide supports will be captured when we undertake the refresh of the following current OG in coming months, including Specific Types of Supports in Plans – Sustaining Informal Supports.

We will progressively roll out our refreshed OGs over the financial year. As part of the release we are actively seeking feedback on the design approach as part of our continuous improvement of these important materials

Thank you again for writing.

Yours sincerely

Jo Collins
Branch Manager
Service Guidelines and Practice

31 August 2020