Villamanta
DISABILITY RIGHTS LEGAL SERVICE

Submissions to the

NDIS PROVIDER AND WORKER REGISTRATION TASKFORCE

on

Recommendation 17: A new risk-proportionate model for regulation of providers and workers

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PO Box 7328
GEELONG WEST VIC 3218

ABN 32 690988 235

☎ Information: 1800 014 111
☎ Admin: 03 5260 1845
💻 Email: legal@villamanta.org.au
💻 Website: www.villamanta.org.au

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Executive Summary

We thank the NDIS Provider and Worker Registration Taskforce (**Taskforce**) for the opportunity to make this submission on behalf of the NDIS participants who have shared their stories with us and provided their insights into the ways they interact with the Scheme and their supports.

In our view mandatory registration would impose a significant restriction on people with disability while simply not achieving the stated benefits.

We make the following recommendations, which are described in further detail below:

- We recommend the Taskforce consider the level of income received by the business in determining which entities would be considered a provider that must be registered.
- We recommend the Taskforce consider ways in which there could be visibility of who is receiving NDIS funding which do not rely on mandatory registration.
- We recommend the Taskforce consider ways of preventing fraud which do not rely on mandatory registration.
- We recommend the Taskforce consider alternative ways of empowering participants to receive their services safely and appropriately without relying on mandatory registration.
- We recommend the Taskforce consider ways in which isolated and unsupported participants receiving supports from a single provider, especially in closed settings, can be protected by mandatory registration

About Villamanta Disability Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc. (**Villamanta**) has been providing advocacy and legal services to people with disability since 1990.

We want an equal Victorian community for people with disability. We promote laws and systems that protect human rights. We work alongside people with disability to advocate on legal problems.

We want to see these outcomes.

- More people with disability, especially those with cognitive impairment, get legal advocacy.
- People with disability feel more confident to self-advocate.
- Legal services get better at being easy to use.
- Laws and systems do a better job at making the community equal for people with disability.

We are funded to provide advocacy under the National Disability Advocacy Program; NDIS Appeals and the National Legal Assistance Partnership Agreement.

Our Experience with NDIS Providers and Workers

Villamanta engages in the following activities which inform this submission:

- **Telephone Information Service** – our intake team have around 2,000 contacts per year from people with disability seeking assistance. While many of these callers are referred to a more appropriate service, our intake team spend time with them discussing the issue to identify the correct referrals. These narratives often include discussion about how they engage with NDIS providers and their satisfaction with the options available to them.
- **Advice calls** – our legal team provide discrete advice to over 150 people with disability per year. Providing legal advice requires a sound understanding of the circumstances of the person, which often includes discussion about how they engage with NDIS providers and their satisfaction with the options available to them.
- **Case work – non-NDIS Appeals**. The majority of our clients are NDIS participants. Even when working with clients on matters that are not NDIS Appeals, the way their NDIS supports work is often a matter with significant relevance, for example:
    - Guardianship
        - Where a service provider has made the guardianship application
        - Where the decisions to be made are about the services to be engaged
        - Where engagement with services would provide the supports that would negate the need for a guardian
    - Administration
        - Where a service provider has made an administration application
        - Where the issues leading to this application are in fact payment of NDIS services
        - Where access to more appropriate supports would negate the need for an administrator
    - Housing and service issues
        - Housing providers are frequently involved in NDIS to some extent
        - Service providers are mostly NDIS providers, whether registered or not
        - We have made numerous complaints to the NDIS Quality and Safeguards Commission about NDIS providers
    - Supervised Treatment Orders
        - All STO clients are NDIS participants who rely on NDIS providers for access to the community and behaviour support to limit the imposition of restrictive practice including chemical restraint
    - Financial abuse and family violence
        - Access to appropriate and relevant support services often provide a protective mechanism in these situations
- **NDIS Appeals** – while the appeals themselves are about funding and not related to use of NDIS services, the way services are engaged and working is inevitably the subject of a great deal of discussion when supporting clients through an appeal.

The reasons why participants do not support mandatory registration

We acknowledge there is a diversity of opinion in the community about mandatory registration. We understand that some participants believe that mandatory registration provides better safeguards, although we have not had that feedback from our client base.

In our experience, the main reasons NDIS participants do not support mandatory registration of providers (and therefore limitations on how they can use their funding) are as follows:

- There is a risk to participant choice and control, because it is likely that some smaller providers will choose not to register; therefore not be able to be chosen by participants.
- Mandatory registration would require individuals to request their provider to register. This is seen by some participants as a breach of their privacy, especially with respect to their sensitive health information. Not everybody wants to (or should be required to) disclose their disability status in every interaction they have with businesses and agencies.
- Mandatory registration would prevent participants from using their funding in specific contexts:
  - When overseas
  - When making many online purchases
  - From business that don't consider themselves disability providers (the bike shop that fixes a wheelchair tyre, the supermarket selling continence supplies, gardening and cleaning businesses, and see also Case Studies 1 and 2 below)
- Registration does not in any way guarantee safety of participants or quality of service. Some of the most notable cases of abuse and neglect occurred within registered providers and involved screened and highly qualified staff.
- It is not clear what problem is being solved by a recommendation that has such significant impacts on participant choice and control, innovation, community connection and privacy.

The problem to be solved

The NDIS Review does not provide any data to demonstrate the problem which this recommendation seeks to address.

It does make some broad statements in the discussion prior to the recommendation, which suggest the assumptions relied upon. It is our view that these assumptions should be tested before being used as a basis for removing choice and control from NDIS participants.

WHAT IS A PROVIDER?

The discussion begins with this statement:

> *In the NDIS, the registration process aims to ensure that providers and their workers are reputable and have the skills and knowledge to deliver supports.*

This statement is problematic from the outset. Given that the proposal (at Recommendation 10) for an electronic payment system, which relies on all recipients being registered, is about the movement of money, the concept of "provider" is any entity that is paid out of NDIS funding.

This immediately removes choice and control from participants, because it reduces their supports to those available in the disability sector.

In our view, no person with disability has even been made safer by relying on government agencies, regulation and traditional disability service providers. Safety of people with disability is improved by being better connected to the community and by being supported to make the right choices for their circumstances.

Proportionate response

We suggest that the "model" needs to start from a definition of what is a provider for the purposes of this change, because this directly impacts the choice and control of participants.

If it is any entity paid for anything, problems will arise immediately. See Case Studies 1 and 2 below, which provide examples of businesses receiving NDIS funding which would not consider themselves to be disability services, and would be unlikely to register as a provider because:

- The proportion of income coming to them from NDIS funding is insignificant
- They do not know what registration entails, and do not have the motivation to inform themselves, given the low value financially
- They may not even be aware that they receive any income from NDIS funds, because their clients may not tell them.

Some non disability businesses may choose to register; for example Bunnings and pharmacy chains would likely have sufficient infrastructure to determine that registration is low risk and beneficial to some customers. That doesn't mean that all businesses will, or should.

We recommend the Taskforce consider the level of income received by the business in determining which entities would be considered a provider that must be registered.

WHAT IS VISIBILITY?

The NDIS Review then goes on to state that:

> *While registration is not a guarantee of either safety or quality, it ensures visibility and does indicate a provider has taken steps to deliver supports professionally and competently, and is an important way of holding providers to account.*

While recognising that registration does not actually provide a safeguard, the NDIS Review argues that "visibility" is important, and also that somehow registration improves professionalism and competence.

The visibility referred to is clearly not from the perspective of the participant who is choosing to contract with the business, and Recommendation 10 (Action 10.3) makes it clear that it refers to the visibility of payments, rather than providers themselves.

It is not clear how registering every business in Australia that could potentially charge an NDIS participant for something will improve standards, especially considering most of those would be at the lower end of the risk scale, and provider obligations. At the lowest end, this consists only of compliance with the Code of Conduct (which the NDIS review itself describes as "basic expectations" and describing "broad community expectations of expected behaviours for providers and workers involved in support delivery"), worker screening for certain staff and ongoing monitoring and compliance.

Visibility of financial transactions and level of business being conducted is a different question, and there are alternative solutions available that would avoid the negative consequences for participants described above.

Proportionate response

The vast majority of financial transactions involving NDIS funding will be with businesses that have an ABN. The ABN for transactions is currently:

- Agency managed funding - the ABN would be held by the NDIA
- Plan managed funding – we understand plan managers are required to enter the ABN when submitting claims
- Self managed – records are required to be kept, but there is no requirement to provide ABN's when making claims

A requirement for self managed participants to enter the ABN of the business from which they purchased would be a far lower impact on participants choice and control, and privacy, than the proposal that all providers must be registered. User friendly interfaces would make this easier (eg saving previously entered ABNs for future reference).

This would not address situations where:

- The participant is purchasing an item second hand (from an individual and there is no ABN)
- The participant is purchasing online/from overseas
- The participant is overseas and using supports locally
- The participant is direct employing and does not have an ABN but are registered for PAYG withholding

There would need to be some flexibility/exclusions that would allow for this.

We recommend the Taskforce consider ways in which there could be visibility of who is receiving NDIS funding which do not rely on mandatory registration.

WHAT DOES VISIBILITY ACHIEVE?

We note the commentary in relation to Recommendation 10, specifically referring to providers being able to claim from NDIS plans without confirmation that services were provided.

We agree that this is a problem, and that significant fraud has been allowed to occur in this manner. We have received many calls from participants and nominees stating that:

- Service providers had overcharged; and
- The NDIS or plan manager had paid the invoice without them checking it; and
- Their only recourse was to report the matter to the NDIS Fraud Team and the NDIS Commission, neither of which returned the funding to their plan

Also, see Case Studies 3 and 4.

Proportionate response

There are simple solutions to these issues:

- The closer the approval process for payment is to the participant, the less likely that providers can overcharge. Self-managers by definition are far less likely to pay for services not delivered.
- Plan managers should be required to have a process whereby the participant/nominee authorises the payment of invoices, with any required support provided by someone independent of the provider. Where an invoice is subsequently disputed, the disputed amount should be withheld from any future payments until such time as the account is rectified.
- Where funding is Agency managed there must be improved access to information by participants/nominees, and the ability to see invoices that have been paid, and raise concerns directly if they dispute these. The Agency must also audit providers more regularly, in collaboration with the participant who has been billed, especially where there has been any claim of overcharging or fraud.

Requiring providers to be registered will not prevent fraudulent claims. Improving the capacity of the person receiving the supports to authorise or dispute payments will always be a better safeguard against fraud than will a Commonwealth agency which allows providers to submits invoices for payment with no review process.

If the NDIA were to require the ABN of each provider, and then monitor claims by ABN sudden spikes in the income of particular providers would be noticeable. A new ABN that quickly moves to claiming significant amounts would be detectable and investigations could occur.[1]

We recommend the Taskforce consider ways of preventing fraud which do not rely on mandatory registration.

UNREGISTERED PROVIDERS – WHAT DO WE KNOW?

The NDIS Review goes on to state that:

> *This growth in unregistered providers has been driven by a large number of self-managing and plan-managing participants — 29 per cent of participants self-manage all or part of their plan and around 60 per cent use a Plan Manager, and both can access unregistered providers. Similarly, the ability to access unregistered providers has driven demand for self-management and plan-management.*

We are unaware of any evidence that suggests that self or plan management cause providers to be unregistered. All of the feedback we have had from participants and their nominees has been that they choose providers based on whether they can provide what the participant wants, and their experience with the provider. Many have moved away from traditional providers because of their poor experiences, and have been more satisfied with smaller, newer business who are more flexible and adapt their service offering to the participant.

It would be our observation that many of these new providers are unregistered because of the cost and administration involved, and participants do not see any specific benefit in a provider being registered.

The NDIS review goes on to state that:

> *Unregistered providers are not required to meet any specific standards beyond the basic expectations in the NDIS Code of Conduct, which describes broad community expectations of*

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[1] We assume that data matching with the ATO could identify whether the claims are being matched by withholding of PAYG, an indicator that staff are being paid. Another key feature of these providers is the mismatch between support hours claimed and the number of staff available to have carried out this work.

> *expected behaviours for providers and workers involved in support delivery. This means that there are many providers 'flying below the radar' with limited regulatory oversight. This leaves participants potentially exposed to risk — particularly those who have complex needs or circumstances.*

We receive more complaints about registered providers, particularly large established providers, than we do new unregistered providers. While we cannot know the profile of providers not meeting community expectations, we have seen no evidence that there is data suggesting that registration is a factor.

If regulatory oversight means the NDIS Commission complaints process, then in our experience most providers, registered or not, are operating with limited regulatory oversight, and participants are potentially exposed to risk in many circumstances.

Proportionate response

We do not agree with the implied position that registration reduces risk, and that NDIS participants are safer if the NDIS Commission knows who is providing their supports. In our experience, risk is reduced when a participant is supported to choose their own supports, make complaints when they are not satisfied with the support delivered, change services if they choose, and to have personal agency when dealing with service providers.

The current complaints process through the NDIS Commission does not achieve that, and appears more focused on collecting data than actually assisting people to resolve a complaint. We have seen only a tiny proportion of complaints result in an outcome for the participant, and more often the NDIS Commission will inform the complainant to pursue the matter under the *Australian Consumer Law* (which they often have no means to do).

Further, anecdotally we would suggest that the move to unregistered providers has been due to the increased market power participants have in relation to small providers. While they may not be able to convince a large provider to provide a more individualised service, a small provider has more incentive to retain a customer by being flexible.

In our experience, participants are expecting the NDIS Commission to operate more like an industry ombudsman. An industry ombudsman is required to work through complaints until they are resolved to the satisfaction of the customer, and can make decisions that providers must comply with, including compensation. Often the provider is charged for the resolution service when it does not reasonably resolve the matter at an early stage, providing incentive for resolution. Industry ombudsman services can provide consumers with an alternative to courts and tribunals.

We recommend the Taskforce consider alternative ways of empowering participants to receive their services safely and appropriately without relying on mandatory registration.

What are the actual problems?

STRUCTURAL ISSUES

We note that comments of the NDIS Review that:

> *Some participants may not fully understand the risks they are engaging with, how to manage them or what their rights are, or may have more limited capacity to advocate for themselves. This is a particular concern for the majority of adult participants who have a cognitive disability. Many would benefit from support for decision-making, as would the around 50 per cent of participants aged 18 years or below who may require additional support, especially as they move through the adolescent years towards adulthood.*

Villamanta focuses on issues that affect people with cognitive impairment. We are confounded by the above statement leading to a recommendation that all providers be registered.

In our view the safeguard occurs not from giving more power to the regulator, but bringing the support closer to the participant. In our experience, several structural issues are regular contributors to abuse by service providers:

- Support co-ordination not being funded or available to a person who needs assistance negotiating appropriate services
- Support co-ordination not being independent of the services provided, severely undermining its supportive capacity
- Support co-ordinator being incompetent
- Absence of peer support to advise participants that they have the right to complain, the right to advocacy and the right to quality supports
- Insufficient funding for independent advocacy to support those individuals who do seek to assert their rights
- New providers charging significant amounts for support types that do not require registration, across multiple plans, without accountability

Proportionate approach

In our experience, people with cognitive impairment can manage risks if they have supports along the way, and are able to reach out to someone independent if things go wrong.

The availability of independent supports is a crucial safeguard, as is connection to the local community, including peer support.

The only area where we agree with the recommendation for mandatory registration is where providers are able to abuse and exploit participants by removing them from accessing independent assistance, peer support or community connection, and where they are accessing significant funding for multiple participants.

In these instances, the ability of the NDIS Commission to prevent the provider accessing more funding, by means of deregistration, is an important lever.

We recommend the Taskforce consider ways in which isolated and unsupported participants receiving supports from a single provider, especially in closed settings, can be protected by mandatory registration

Case Study 1 – The cheaper, more efficient option

Lara is an NDIS participant. Lara uses an electric wheelchair to access the community, and relies on accessible taxis for this when they are travelling beyond where their wheelchair and public transport will take them. The taxi company will not allow pets to be transported in their vehicles.

Lara's cat Moxi needs to see the vet for routine vaccinations and a check-up. The vet is about 20km away, and public transport is not an option for this route.

Lara's support worker is a cat lover, and is happy to transport Moxi to the vet, but Lara would need to travel by taxi to accommodate their wheelchair.

Lara's vet has a home visiting service which costs $50.

When making the decision in the past, Lara had calculated their options as follows.

Take Moxi to the vet		**Vet comes to Moxi**	
Taxi	$54.50	Travel charge	$50.00
Support worker time	$130.94		
Support worker mileage	$39.20		
TOTAL	$224.64	TOTAL	$50.00

If Lara elects to pay the travel charge, she relies on using an unregistered provider (the vet) for this small amount. It is unlikely the vet would consider they are an NDIS provider nor be interested in registration.

Mandatory registration would remove this option for Lara, despite being cheaper and more appropriate to her circumstances.

Case Study 2 – Thinking outside the square

Reg has an intellectual disability and struggles with preparing meals more complex than a sandwich. He has celiac disease and cannot eat gluten. He has support workers assist him with meal preparation at times, but finds this difficult to schedule around his community access and personal appointments.

With the assistance of his support co-ordinator he has negotiated an arrangement with a small business in his neighbourhood, whose owner is also celiac, for cooked meals to be dropped at his home once a week. He pays for the ingredients, and the meal prep is paid out of his NDIS funding.

This is an important social connection for Reg, is cost effective and his choice.

The small business owner would be unlikely to consider themselves an NDIS provider, nor consider registration useful to them.

Case Study 3 – The system weaknesses that do not safeguard participants

We were asked to assist a number of clients who had no NDIS funding left.

Upon investigation, the following narrative emerged.

All the residents lived in the same residence where supports were provided onsite. They did not have support co-ordination organised, although some of them did have funding for it in their plan. Many of them were subject to administration order whereby State Trustees managed their finances for them. Only one had any informal support, and this person was not their nominee. They were all plan managed.

They had been attending group activities in the community, mostly together, with provider X.

A person who had worked for X left and set up their own business. They signed the residents up for support co-ordination and individual supports, using up all the funding in their plan prior to the end of the plans, and then withdrawing all supports.

When we received copies of the invoices issued to these residents, a pattern became clear: they were doing pretty much the same as they had been doing with X, but now they each had a support worker, each travelled in a separate vehicle, but all attended the same location at the same day and time. Instead of 1:4 supports they were receiving 1:1. There was no evidence they needed 1:1, and they certainly didn't have funding in their plan for 1:1.

The plan managers paid the invoices despite the funding being used at a far higher rate than the participants could afford.

This could not have happened if:

- The NDIA planner had ensured there was an independent support co-ordinator in place, rather than leave the individuals to organise this themselves
- Support co-ordination was required to be independent of other supports so that the participants could be assisted to spend their funding in accordance with their budget, or seek the evidence to have their funding increased
- Plan managers were required to ensure that participants were making informed decisions about using their funding at a higher rate than their plan allowed

Complaints were made to the NDIS Commission about this provider. The NDIS Commission responded to the complaints three years later, by which time we no longer had instructions in relation to this matter.

Case Study 4: SIL houses and organised crime

We have received numerous calls and reports of the following scenario, although we have not been able to meet any of the participants due to the nature of their circumstances.

Many of the organisations involved are owned or related to former Supported Residential Services (SRS) proprietors, but certainly not all. Many of the businesses are operated by related entities, and there have been multiple allegations that they are connected to organised crime.

Others are relatively benign, and were commenced by an individual wanting to help people and simply not knowing what they were doing.

Nonetheless, by the time the story comes to us, the broad outline is as follows.

A participant with a significant NDIS plan (generally over $100,000) is approached by a business and offered a set-up that sounds terrific. It includes living in a lovely home, having great supports, at the benign end may include pizza for dinner, at the other end drugs, alcohol, televisions. This person can meet them in all sorts of places – we have heard multiple stories of this occurring in medical settings, but also former SRS proprietors seeing their former residents in the street, or through networks and contacts. Most frequently the participants do not have any informal supports, but those who do are encouraged to distance themselves from those people.

The provider is rarely, if ever, registered, and the participant either already was plan managed, or is assisted to become plan managed to access these services. The services signed up for can include effectively all their funding, with related services being used for therapies and support co-ordination.

The participant takes up the offer, and the resultant arrangements are not at all what they were promised. But now they are reliant on the provider, they generally have no access to a phone, and no idea who they could call anyway. They are moved to a house with many other people and the 1:1 supports don't eventuate. Their NDIS funding is drained and they are evicted from the home because they no longer have funding to pay. There is no evidence of a change in their support needs to facilitate a plan review, because their needs didn't change. Their funding was simply stolen.