



Joint Standing Committee on the National Disability Insurance Scheme

**General issues around the implementation and
performance of the NDIS**

Introduction

The authors of this document, Villamanta Disability Rights Legal Service Inc (**Villamanta**) and RIAC are funded by the Department of Social Services to provide advocacy support for people with disability in relation to reviews and appeals of decisions related to the National Disability Insurance Scheme (**NDIS**). This submission arises as a result of our experience of our clients in this context, and also in the context of our broader disability advocacy.

The issues

This submission raises two issues occurring as a result of the implementation of the NDIS which have significant consequences for our clients, namely:

- Changing management of funding for NDIS supports when a new plan is created; and
- Management of refunds obtainable through consumer law protections

These issues are problematic, and in our view, undermine the principles of the Scheme as articulated at s 4 of the *National Disability Insurance Scheme Act 2013* (**the Act**) generally, and specifically the following principles:

- (4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.
- (7) People with disability have the same right as other members of Australian society to pursue any grievance.
- (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.
- (15) Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted.

The first issue also exposes participants to a significant level of risk, as explained below.

The Act gives effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities¹ and legislates specific rights for people with disabilities who are participants of the scheme. A right that is not enforceable is of no value at all. The issues discussed below render participant rights unenforceable, despite the legislative intent that they be available.

For participants this absence of enforceable rights exposes them to a significant level of risk to their wellbeing, safety, and potentially their life.

¹ Section 3

Managing funding for supports

Section 43 of the Act requires the National Disability Insurance Agency (**the Agency**) to provide participants with a choice in relation to how the funding for supports will be managed.

There are three options available to participants, either separately or in combination:

1. *Agency managed*, whereby the Agency manages funding and pays service providers directly.
2. *Plan managed* whereby an external registered plan management agency manages the funding and pays service providers.
3. *Self-managed* whereby the participant manages their own funding, pays providers, and claims the costs from the Agency's online system.

Of the three, Agency managed is the most restrictive, limiting participants to only using registered service providers.

While plan and self-management are attractive options for many participants, they can be absolutely critical for some participants, for including:

- Participants living in rural and regional areas where there are thin markets and scarcity of services;
- Participants with specific language or cultural needs and no access to registered providers who can meet those needs;
- Participants who may take years to build relationships of trust with a person/provider and who could significantly decline if the person/provider could no longer provide support.

While the Act allows for certain limitations on the participant's choice in relation to management of funding², this issue is separate from those decisions.

The issue as we have seen it

A participant has an NDIS plan. Their funding is either self or plan managed. Their supports are organised, and functioning well. There are service agreements, rosters, regular arrangements, and the NDIS funding is supporting the person in the way it was intended to do.

They have a plan review; this could be the scheduled review at the end of the prior plan, or an unscheduled review for another reason.

A new plan is prepared and approved and becomes active in the NDIS system. The new plan states that all funding in the plan is now Agency managed.

At this point, the participant does not have a copy of the plan. They may not even know it exists. The first sign that something has happened is:

- For self-managed participants, when they attempt to make a claim on the NDIS online system, and they have no funds available

² Section 44 limits the right to self-management in certain circumstances, and there are some other circumstances where specific supports can only be Agency managed due to the requirements of registration under separate rules.

- For plan managed participants, when their plan manager advises them they cannot pay their invoices.

There are now two problems:

1. The participant has engaged services under a service agreement³. The relevant service providers have provided the services, and has a contractual right to payment for those services. **The participant has no way to pay them**; services delivered after the commencement of the new plan must be paid from that plan. Unless the service provider is NDIS registered, they cannot be paid under the new plan.
2. The participant now has no access to the supports provided by service providers unless they can personally fund the services in order to comply with payment terms. Most participants do not. Without any notice whatsoever, the participant has all their supports ceased.⁴

The participant clearly needs to do something to have this issue rectified. Most participants do not have access to a single point of contact, so their only option is to contact the Agency's contact centre.

Operators within the contact centre do not have authority to change the management of funding in a participant's plan. Their advice is most likely to be that the participant should request an internal review of the decision.

The internal review process is discussed below, but first, there is a relevant question to be asked.

WAS A DECISION ACTUALLY MADE?

As we understand it, Agency managed is a default position when a new plan is created. This means that unless the planner creating the plan consciously selects plan or self-managed, the plan will be Agency managed.

A decision has not actually been made, a planner has simply failed to check a box, and as a result the participant now has unpayable debts and no access to supports.

The fact of no decision being made should sensibly mean that the decision can be easily undone. The reality is that it cannot. With nobody knowing how this happened, assumptions prevail, and the denial of plan or self-management is attributed to the kinds of risk specified in s 44.

SEEKING AN INTERNAL REVIEW

An internal review can take months. Meanwhile the participant has no access to supports, and has a debt they have no way of paying.

For some participants this is literally life threatening, due to their reliance on support for activities such as eating, toileting, bathing, transferring, and shopping for essentials.

³ Or, in the case of self-managed participants who are employing staff directly, they have employment contracts in place.

⁴ An example of this issue has been reported in media recently: See the Courier Mail story titled "NDIS Jarrad Quinns carers weren't paid for weeks after a change to the quadriplegics care package" (paywalled)

For other participants this situation leads to a decline in wellbeing and coping, and can result in outcomes such as hospital admissions, involuntary psychiatric admissions, interactions with police, arrest and detention, guardianship applications and loss of employment.

Another version of the issue

Some participants may seek to change a support or numerous supports in their plan from Agency to Plan Managed/Self-Managed before their plan expires.

This process requires a participant to lodge a 'Plan Review Request' under s.48 NDIS Act. The Participant Service Guarantee response time to a plan review request is 21 days.

What should be a simple tick box exercise can take 3 weeks (often longer) to perform. As discussed above, the consequences of delays in amending the plan management category can be dire.

Villamanta and RIAC spend hours responding to requests from participants and their supporters to escalate plan review requests that require urgent attention. This is a completely inefficient way to operate. Even if our organisations are at capacity, we do this out of a duty of care because there are often significant risk factors present for participants.

This is a totally avoidable situation which requires urgent change from the Agency.

Resolving the issue

Some participants who have requested an internal review of their funding management have been successful at having this decision (or default) rectified. As noted, this can take months.

Some participants have not, and have had to seek an external review at the Administrative Appeals Tribunal.

An issue that arose because someone did not tick a box can have dire consequences and continue to do so for many months. This is an extraordinary risk for participants who have a legislated right to have their preferences respected, to have the ability to innovate in the ways in which they receive their supports, to have continuity and confidence in their supports, and to have access to the supports they need.

We raise this issue with the Joint Standing Committee on behalf of the clients we have seen who have experienced this problem, and also for those participants who were unable to access advocacy support to resolve it. We know there are likely many people who could not access advocacy, and we have serious concerns about the impact of this issue on their safety.

What would make a difference?

NDIS participants have a legislated right to decide how their funding will be managed. One simple fix would be for this right to be accessible to the participant directly. For example:

- The default could be changed so that any new plan has the same management of funding as the previous plan unless a manual intervention occurred by the planner. If that intervention occurs, there is a requirement that the participant is notified and

has, at a minimum, a fortnight's notice that this has happened. Decisions of this nature are required to undergo a risk assessment before they are made, so as to ensure continuity of supports.

- The participant could be able to change their funding management via the online system. No Agency intervention would be necessary. In the event that there was a decision that certain elements of the plan, or self-management was not appropriate, this option could be blocked. The participant could still access other options and have them automatically implemented.
- The contact centre could be authorised to change funding management upon request by the participant or their nominee.

We ask the Joint Standing Committee to investigate this issue as a matter of urgency.

Consumer law protections

The NDIS changed the way supports are provided to people with disability by placing them in a position of control over the services they engage with, and providing the opportunity for them to contract directly with service providers.

This shift should provide NDIS participants with access to consumer rights, but the way that funding is managed, providers are paid, and plans dictate payment can effectively negate these rights entirely.

When a service provider charges for services the payment arrangements are dependent upon the management of funding within the participant plan.

If a participant is self-managed, they receive the invoice directly, and if it complies with the agreement with the provider, they pay the invoice and claim the funding from the Agency's online system. If a participant disagrees with the charges, they can engage in discussion with the provider and consumer law protections apply.

If a participant is plan managed, their input into approving the charges is variable. Some plan managers require the participant to approve each invoice before payment, others do not.

If a participant is Agency managed, they have no involvement at all in the process of paying service providers. A provider could accidentally overcharge them and the invoice would automatically be paid by the NDIA.

Enforceable consumer law protections would ensure that:

- A person does not pay an invoice they do not agree with, and they have the right to dispute charges that are incorrect.
- A person can claim a reimbursement when a payment is made for a product or service that did not meet certain standards.
- The person receives a benefit from a reimbursement made for incorrect charges or unacceptable products or services.

NDIS participants do not always have access to these protections.

If a participant is plan or Agency managed and a service provider invoices them, in all likelihood that invoice will be paid.⁵ Payment of that invoice then reduces the funding available to the participant for future support needs.

If the provider (inadvertently, or fraudulently) overcharged the participant, they can be left with insufficient funding in their plan to ensure continuity of supports. The legal process to seek a reimbursement of such a payment is one most NDIS participants do not have access to, and for those that do, takes months, if not years.

Meanwhile the NDIS participant has limited or no access to supports because their funding is depleted or exhausted. Their only option is to seek an urgent change of circumstances review from the NDIS, and hope their funding is replenished in time.

If they believe the claim was fraudulent, and have the capacity and support to do so, they can contact the NDIS fraud team, but this will not result in any outcome for the participant. They still have limited or no funding available.

Similarly, if they are able to or have support to do so they may submit a complaint to the NDIS Quality and Safeguards Commission (QSC). In our experience this does very little to support the participant with the immediate issue that they have limited or no funding available.

Villamanta and RIAC have spent many hours advocating for an urgent change of circumstances for participants left without supports, and on the verge of crisis. In most cases we have supported a participant to have what is effectively a plan “reset”. Their plan starts over and their funding is restored. That can involve many hours of advocacy for a participant to have access to the funding that the Agency determined they require, and which was made unavailable due to the actions of a service provider. We do that because there is no other choice; the participant cannot be without supports while consumer law issues are dealt with.

Meanwhile the service provider has still been paid. They may have accidentally misplaced the decimal point and been paid tenfold, or they may have overserved and taken advantage of a vulnerable person. Either way they have received the funding.

Even if legal action was taken by the participant, assuming they have the agency, support, energy and determination to do so, and the provider is required to repay the overcharge, that amount will be refunded into the NDIS plan that is no longer in effect. The NDIS participant cannot access this funding and it is of no benefit to them at all.

As a consequence, they have no legally enforceable consumer law rights in relation to services funded by the NDIS.

In one such situation, an individual established a new service in a regional area with limited access to services. They personally solicited individuals whom they had known from their previous employment and made verbal agreements for services. Most of these individuals had administration orders in place due to a Tribunal having determined that they didn't have capacity to manage their own finances, nor to enter into financial contracts. They had funding for supports on a group basis, such as one support worker to assist four clients.

⁵ Leaving aside the plan managers who ensure the participant has signed off on payment for the invoice.

The service provider then provided one support worker for each client, often times travelling from the same residence to the same outing, and returning, thereby charging each participant quadruple what they would have otherwise been charged for the same activity. Their funding ran out and they were left without any supports at all.

The plan managers paid the invoices, the service provider was paid for services that should never have been provided, and the participant was left unsupported.

Resolving the issue

If a person with disability is in control of their own NDIS plan, nobody should ever be able to be paid for providing supports under that plan without their consent. If the person does not have the capacity to understand these transactions, there needs to be a mechanism by which they are scrutinised on their behalf.

If a plan manager is involved, they need to be ensuring that the person agrees with the charges before they pay them, and for people with limited capacity to do so, and a reliance on unregistered providers, support needs to be made available for this to occur.

Postscript

The authors of this submission are not funded to provide an ongoing and detailed critique of all the shortcomings of the implementation of the NDIS. We are barely funded to provide advocacy support for reviews and appeals, much less the systemic issues that make this work more difficult.

Every day we are forced to make extremely difficult decisions about who we can assist and who we have to turn away.

It would be easy for us to ask that the Joint Standing Committee consider the level of funding available to advocates under the NDIS appeals funding. We are fully aware how that would there would be a perception that such a request is self-serving.

Actually it would be somewhat unproductive. There is an acute shortage of people with the skills and experience to do this work. Even if we had more funding, it would be difficult to hire people who can step up and do the job without us needing to invest a considerable amount of time in training and supporting them.

We are already overwhelmed and exhausted. We are writing these submissions late at night and on weekends because we have no time during our paid hours to dedicate to this. We do this because we see that no matter how much time we spend, the issues remain, and we are taking the calls from people who are desperate and hurting. Their situations are dire and the repercussions terrible.