

forensic



# **National Disability Insurance Scheme Review**

**Office of the Public Guardian submission  
July 2023**

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## About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in the child protection system or staying at a visitable site.

OPG promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through the following functions:

- The guardianship function undertakes structured (supported and substitute) decision-making in relation to personal matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The community visiting function independently monitors visitable sites (authorised mental health services, the Forensic Disability Service, places where specified NDIS participants reside, residential services with level 3 accreditation (boarding houses/hostels), and other places prescribed by regulation), to inquire into the appropriateness of the site and facilitate the identification and escalation of complaints for resolution by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to express their views and wishes and participate and make decisions where possible.

OPG also provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them, and
- community visiting, which monitors and advocates for the rights of children and young people in the child protection system including foster, kinship and residential care, and all children and young people staying at other visitable locations (youth detention centres, police watch houses, authorised mental health services and other residential facilities).

OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, OPG will seek and take into account the views and wishes of the child to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

## Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the National Disability Insurance Scheme Review (the Review). The views of the Public Guardian contained in this submission do not represent the views of the Queensland Government.

This submission raises issues relating to the experiences of OPG's clients who interact with the National Disability Insurance System (NDIS) and proposes solutions to the problems we have identified. A summary of the Public Guardian's recommendations appears below.

### The Public Guardian recommends:

1. Funding for independent decision-making support to be provided to NDIS participants with cognitive impairment as a core support in their plan.
2. NDIA planners should be trained to consider whether participants have appropriate support throughout the planning process and refer them to appropriate support avenues, including independent advocates, if required.
3. The development of accessible and user-friendly resources on how to navigate the NDIS for participants and people providing decision-making support.
4. The development of minimum training, qualifications, and experience standards for support coordinators as a prerequisite to performing their role.
5. As soon as an NDIS participant becomes subject to a formal public guardianship order they should automatically be eligible for the complex support needs pathway, with the ability to choose to opt out.
6. The development of plans for clients with complex supports needs are facilitated by NDIA planners with experience, expertise and/or qualifications in fields relevant to both the client's life circumstances and any applicable mainstream interfaces.
7. The NDIA strengthen its monitoring of plan spending where the plan is managed by the NDIA by developing an automated plan monitoring system that could alert the NDIA when there is a disproportionate spend for the duration of a plan or when the fund spend reaches a certain threshold and an overspend is imminent.
8. The NDIA to ensure that unused funding is not removed from plans in circumstances where the underspend is due to a lack of service providers; this funding should be retained so that participants are able to immediately access services when an appropriate provider becomes available without having to undergo a formal plan review.
9. The NDIA should allow for both longer plans and the rollover of plans when a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change.
10. The NDIA should provide the following to the participant and/or their decision supporter prior to a formal decision being made on an NDIS plan:
  - Reasonable notice about area/s of the plan where the NDIA is looking to refuse or reduce funding;
  - Details of the specific and critical issues on which the funding decision is likely to turn;
  - The evidence or information they intend to rely upon in support of their position; and
  - The opportunity to directly address the issues and evidence provided.

11. The NDIA to provide as standard to all NDIS participants and their decision supporter a comprehensive statement of reasons why a plan has not been approved, where the plan funding has been reduced, or a request for funding for a particular support has been refused.
12. Where an internal review outcome affirms the original decision to refuse or reduce funding for supports, the NDIA's template should require the delegate to directly refer to the evidence they relied upon when making their decision.
13. Training for NDIA planners on interpreting medical reports and the need to adhere to the advice of professionals when making decisions on a participant's plan.
14. Targeted training for NDIA staff about the role of formal guardians and the right of a guardian to be provided with information about a participant's plan.
15. For participants transitioning out of the Forensic Disability Service System, planning meetings should include the NDIA and State Disability and Health agencies to develop a plan to jointly fund housing and supports for people on forensic disability orders so they may transition into the community.

## OPG's role with the NDIS

OPG primarily interacts with the NDIS through two statutory functions, namely adult public guardianship, and community visiting and advocacy for both children and young people in the child protection system, and adults with impaired decision-making capacity staying at visitable sites.

Under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, the Public Guardian may be appointed as guardian or attorney for an adult with impaired decision-making capacity. While an adult may choose to appoint the Public Guardian as their attorney, a guardianship appointment may only be made by the Queensland Civil and Administrative Tribunal (QCAT) as a last resort, in circumstances where there is no other appropriate person available for appointment. Although the function of these roles can include making substitute decisions on behalf of the adult in relation to services funded under the NDIS, the Public Guardian promotes a supported decision-making approach and encourages adults with impaired capacity to have maximum participation and minimal limitations in decisions affecting their lives.

When appointed as guardian or attorney to support decisions relating to the provision of services, the Public Guardian advocates for represented people to access the NDIS or alternate supports. For clients requiring NDIS-related support, this includes:

- liaising with the client, their support network, health professionals and service providers to register the client with the NDIS
- arranging the necessary assessments and collating information to ensure the client's needs are clearly understood by the NDIA, and
- attending NDIS planning meetings with the client, and subsequently support the client to make decisions to utilise their NDIS plans and choose their own service providers.

Guardians can provide advocacy for represented people who need to access NDIS supports if it relates to a service provision decision; however, they do not provide case management or the monitoring or policing a client's NDIS plan.

Queensland's community visitors form part of the statutory framework of the *Public Guardian Act 2014* (PG Act) and is identified as an important safeguard in the NDIS Quality and Safeguarding Framework. Community visitors protect the rights and interests of children and young people in the child protection system, and adults with impairments staying at visitable locations, including:

- for children and young people, where they reside in out of home care, or sites where they are receiving NDIS-funded respite services, and
- for adults with decision-making impairments, premises (except private homes or aged care facilities) where they live and receive the following NDIS-funded supports: high intensity daily personal activities, assistance with daily life tasks in a group or shared living arrangement, specialist positive behaviour support that involves the use of a restrictive practice, and specialist disability accommodation.

Community visitors have an important role within the NDIS complaints scheme, supporting participants at visitable sites to exercise their rights. While the NDIS Quality and Safeguards Commission is the primary agency responsible for regulating quality and safeguards for NDIS participants, community visitors provide oversight services and can act as the 'eyes and ears' when they visit.

## ISSUE: Decision-making support

### The challenge

An ongoing issue of concern to OPG is the high volume of guardianship appointments that have accompanied the introduction of the NDIS. In the 2021-22 financial year, of the 496 new orders by QCAT appointing the Public Guardian for people under the age of 65, 303 orders were made specifically for NDIS matters (service provision). This represents over 60% of the total new appointments of the Public Guardian for people under 65 years. A formal guardianship appointment should be an option of last resort in circumstances where a person lacks decision making capacity for a matter, given the significant human rights restriction on the person's autonomy and equal recognition before the law.

The current complex nature of the NDIS and the need for ongoing reviews of plans is such that, once appointed for service provision, OPG will likely be engaged with the client for life and is a restrictive approach. In our experience, an adult can be capable in all areas of their life but will need decision making support solely to access and implement the NDIS.

OPG has clients that can be supported to make decisions around their needs under the NDIS, but do not have the ability to navigate the administrative hurdles involved with the NDIS. This often results in Tribunals appointing a substitute decision maker as a protective response, when additional decision-making support could negate the legal declaration of incapacity which removes their decision-making rights.

Even participants with family members who would readily assume the role of informal or formal decision-makers will seek to have the Tribunal appoint the Public Guardian as a decision-maker only because of the complexities of the NDIS. Daunted at the prospect of navigating the elements of the NDIS, family members often assume that OPG, as a body connected to government, will be better equipped to help the participant.

As outlined above, a participant experiencing stability and who is remaining with the same service provider will continue to have a substitute decision-maker appointed only because the plan is due to

expire. In several instances, OPG has provided information to QCAT around stable services for a client with no need for decisions to change these services. This has resulted in an initial revocation of the guardianship appointment. However, service providers have been unwilling to accept express views and wishes from the client that they do not wish to change service provision because of their impairment because of the risk they carry in with an informal, supported decision being made. This results in another application to the Tribunal for the appointment of a substitute decision maker to generate the “formal” decision. In most cases the decisions sought are to maintain services with existing providers.

In another example, a participant’s continence aids were not able to be supplied and a personal cost would be incurred for the items if a guardian was not appointed to make a formal decision to agree to the service provision of this assistive technology. The perceived need for ongoing guardianship appointments to make formal administrative decisions about anything NDIS related is counterintuitive to the purpose of the NDIS to provide adults with independence and to build capacity to make their own decisions. The operating paradigm for the NDIS, including service providers, is based on risk mitigation (often dressed as protection for the participant) and administrative convenience, whereas its operating premise should be based on the rights of the participant.

At its core, the NDIS should be focused on upholding the human rights of people with a disability by facilitating choice and control over their lives. However, the steady increase in formal guardianship for adults with impaired decision-making capacity to access and participate in the NDIS, is an indication that the scheme itself and all those operating within the scheme are not embracing a rights-based supported decision-making model of support for people with a cognitive disability.

## Solutions

### Funded decision-making support separate to formally appointed substitute decision-makers

Decision making support for a participant with cognitive disability is a core disability support. Therefore, independent decision-making support should be provided as a standard line item in their plan and should be able to be utilised for all decisions that a participant feels they needs support for.

Having funded support to make decisions across all aspects of a person’s life is essential in building their decision-making capacity and would provide them with the tools, experience, and confidence to potentially have decision-making support reduced as their decision-making capacity is built and possibly eventually removed from their NDIS plan. With capacity building being fundamental to the purpose of the NDIS, funding for independent decision-making support as a core support would be a welcome reform. It safeguards a participant’s rights to retain their legal capacity to make their own decisions and to exercise their choice and control.

It should also be noted that the need to move towards a funded independent supported decision-making model for people with a disability has been a strong theme to emerge from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. If the NDIS is to fully adopt a human rights-based model of decision making and move away from unnecessary reliance on the formal substitute decision making system within guardianship frameworks, funded decision-making support must be provided as a core disability support.

It is important for providers of any decision-making support to be independent of a participant’s accommodation and core support providers, to prevent any undue influence or conflict of interest.

## User-friendly resources

Direct participant involvement in planning is fundamental to the integrity of the process and the core NDIS tenets of choice and control. A strong planning process should ensure that participants lead the development of their plans without exception, and their nominee, supporter or decision maker is able to contribute through an advocacy or representative role, if applicable. To better support the participant's involvement in navigating the NDIS process, publicly available educational material is essential to allow an adult to make their own decisions, as much as possible. However, existing educational tools published by NDIS are only available in writing and are not accessible and user friendly, posing a particular challenge for adults with an intellectual disability.

OPG recommends the development of accessible and user-friendly resources on how to navigate NDIS for participants and people providing decision-making support. Practical tools could include step-by-step online training and YouTube tutorials on issues such as "how to choose a provider" and provide real-life examples and case studies. The NDIS should also utilise the power of social media to reach participants and provide education on how to navigate the scheme.

OPG acknowledges the recent release of the NDIS Supported Decision Making Policy which we see as a valuable tool to provide guidance to all people on how to support a participant to make decisions about the NDIS. We are optimistic that accessible and user-friendly resources will be developed to accompany the policy to ensure it has a genuine impact and reach the people who need it the most.

### Recommendation 1:

Funding for independent decision-making support to be provided to NDIS participants with cognitive impairment as a core support in their plan.

### Recommendation 2:

NDIA planners should be trained to consider whether participants have appropriate support throughout the planning process and refer them to appropriate support avenues, including independent advocates, if required.

### Recommendation 3:

The development of accessible and user-friendly resources on how to navigate the NDIS for participants and people providing decision-making support.

## ISSUE: Support coordination

### The challenge

Support coordination has been a valuable role in the NDIS and should be maintained. However, OPG has observed a lack of clear understanding around the role of support coordinators as distinct from other roles in the NDIS, such as guardians, local area coordinators and plan managers.

Participants who require multiple supports from numerous service providers significantly rely on support coordination to ensure the cohesive delivery of services under their plan. In our experience, the absence of effective NDIS support coordination can see the implementation of a participant's plan fall apart. The Public Guardian can consequently be appointed as the participant's formal decision maker to remedy the problems, when in fact it is the support coordinator's responsibility to:

- support the participant to navigate NDIS systems and process
- establish their supports under the plan, including negotiating with providers
- assisting participants to choose and control how to make the best use of their supports in the plan
- evaluate how effectively the supports have been met, and continue to meet, the participant's needs
- track progress towards pursuing the participant's goals, including how their current supports contributes, and
- adjust the mix of supports or how they are delivered according to the participant's needs and wishes<sup>1</sup>.

When a guardian is appointed, there is often a mistaken assumption that the guardian will subsume the responsibility to perform these key roles.

## Solutions

### Training

To improve the standards of support coordinators, we recommend requiring minimum training, qualifications, and experience standards for support coordinators as a prerequisite to performing their role.

These changes could potentially negate the need to restrict a person's legal capacity by having a substitute decision maker appointed if the extent of a support coordinator's role was better understood and implemented in practice.

#### Recommendation 4:

The development of minimum training, qualifications, and experience standards for support coordinators as a prerequisite to performing their role.

## ISSUE: Complex pathways

### The challenge

The introduction of the Complex Support Needs Pathway team has been a very positive development, which has resulted in successful NDIS plans and outcomes for participants subject to guardianship orders. However, in our experience, the process for a client to enter the NDIS Complex Support Needs Pathway could be streamlined or automated for participants.

Currently, participants must go through the standard planning process and then be referred to the Complex Support Needs Pathway. Many participants under guardianship are an inherently vulnerable group, given a Tribunal has declared they do not have decision making capacity in some or all areas of their life and they require a substitute decision maker. Where the Public Guardian is appointed as a last resort, it also implies the Tribunal has found that they do not have a support network, or that their support network is not willing or able to support them in their decision making.

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<sup>1</sup> National Disability Insurance Agency, updated 7 September 2022, 'Monitor plan budgets and support effectiveness', accessed 7 July 2023, <https://www.ndis.gov.au/providers/working-provider/support-coordinators/monitor-plan-budgets-and-support-effectiveness>

## Solutions

Given the inherent complexities involved for a participant which results in the appointment of the Public Guardian, a Tribunal order should automatically meet the definition of 'complex' for NDIS purposes and a participant be deemed eligible for the Complex Support Needs Pathway, without the need for a separate application process. While this would automatically deem the participant to be eligible, the participant should still be provided with the control to choose not to elect the Complex Support Needs Pathway, in other words, to opt out.

Streamlining the process for people under a public guardianship order to enter the Complex Support Needs pathway will allow faster and more flexible outcomes for these clients.

We also recommend that the NDIA planners supporting participants under a public guardianship order are adequately trained in fields relevant to both the participant's life circumstances and any applicable mainstream interfaces.

### Recommendation 5:

As soon as an NDIS participant becomes subject to a formal public guardianship order they should automatically be eligible for the complex support needs pathway, with the ability to choose to opt out.

### Recommendation 6:

The development of plans for clients with complex supports needs are facilitated by NDIA planners with experience, expertise and/or qualifications in fields relevant to both the client's life circumstances and any applicable mainstream interfaces.

## ISSUE: Plan utilisation

### The challenge

Plan management can support participants by:

- managing and monitoring a participant's budget
- managing a participant's NDIS claims and disbursing funds to providers for services delivered
- providing regular statements to a participant to show the financial status of their plan including prompt notification of over or under utilisation
- offering increased choice and control to a participant over plan implementation and utilisation through additional plan financial assistance.

Participants can also receive advice from plan management providers about how to best utilise their NDIS plan funding, which can assist in building a participant's financial capacity and knowledge.

OPG has observed that when a participant's plan is managed by the NDIA, there is insufficient monitoring of expenditure which can result in an under or over utilisation of plan funds. In the absence of adequate monitoring by the NDIA, there becomes an expectation that guardians or support co-ordinators will perform this function to ensure plans are being utilised as intended.

Where a participant's plan is managed by the NDIA, it should not be the responsibility of an appointed guardian to monitor or manage the funds.

OPG has observed instances of service providers overusing participant plan funding. This can leave the participant without supports for the duration of the plan after funds are prematurely exhausted.

Conversely, plans being underutilised is also an ongoing issue experienced by OPG clients. This is often attributable to a market that has not yet caught up to the increased demand for service providers that accompanied the introduction of the NDIS. This is a particular problem in regional and remote areas where there is a scarcity of registered NDIS providers to meet the demand.

The shortage of providers can lead to funding being reduced at the plan review stage on the basis that the plan could not be fully implemented due to a lack of specialists and service providers. This can lead the NDIA to conclude those services were not required at all. In OPG's experience, the participant continues to need the services funded under the original plan, but due to the current thin market of service providers in certain regions and particular specialist services, the funds were unable to be used and are at risk of being removed from the plan under review.

## Solutions

### Improvements to plan management

OPG believes there is a need for the NDIA to strengthen its monitoring of plan spending where the plan is managed by the NDIA.

To support NDIA oversight of plan overutilisation, OPG also proposes the development of an automated plan monitoring system that could alert the NDIA when there is a disproportionate spend for the duration of the plan or when the fund spend reaches a certain threshold and an overspend is imminent.

#### Recommendation 7:

The NDIA strengthen its monitoring of plan spending where the plan is managed by the NDIA by developing an automated plan monitoring system that could alert the NDIA when there is a disproportionate spend for the duration of a plan or when the fund spend reaches a certain threshold and an overspend is imminent.

#### Recommendation 8:

The NDIA to ensure that unused funding is not removed from plans in circumstances where the underspend is due to a lack of service providers; this funding should be retained so that participants are able to immediately access services when an appropriate provider becomes available without having to undergo a formal plan review.

#### Recommendation 9:

The NDIA should allow for both longer plans and the rollover of plans when a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change.

## ISSUE: NDIA reasons for decision

### The challenge

#### Plan approvals

OPG experiences inconsistent NDIS plan approval decisions for different clients, without reasons explaining the decisions. It is often unclear why a decision is made to refuse or reduce funding when medical reports and other assessments indicate the funding is necessary for the participant. Based on OPG's observations, planners tend to rely on subsection 34(1)(c) of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act), i.e. "value for money", as a reason to reduce or refuse all funding, which is inherently vague terminology. While that is the legislative provision under which the decision can be made, it does not provide the explanation of how that provision has been applied i.e. the necessary reason for decision, required by the applicant.

Section 34(1), "Reasonable and necessary supports" provides a list of matters which the CEO must be satisfied of in relation to the funding or provision of each such support under an NDIS plan. Subsection 34(1)(c) provides that one of these criteria is that "*the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support*". In circumstances where the refusal of funding is based on value for money there is often no other explanation provided to justify the decision.

The lack of quality reasons, including a reliance on determinations of "reasonable and necessary" based on "value for money", means that participants do not have the information necessary to enable them to properly challenge the NDIA decision.

#### Internal review

In the absence of information about why a decision has been made, it is challenging to know what next steps to take to achieve a positive outcome for the participant. When appointed as a participant's guardian, OPG will commonly apply resources to pursue an internal review of the decision by the NDIA under section 100 of the NDIS Act, "Review of reviewable decisions", to obtain reasons for decision and pursue a review. In our experience, the internal review process undertaken by the NDIA is a resource intensive activity that regularly fails to achieve a reasonable outcome for the client.

In OPG's experience, the NDIA's internal review process routinely does not seem to adequately review the decision. The internal review outcome often appears to merely affirm the original decision without referring to evidence that supports their decision on review or countering the evidence produced by OPG which demonstrates the requested support is reasonable and necessary.

#### Absence of procedural fairness

It is established at law that where a statute confers power on a public official to adversely affect a person's rights or interests, procedural fairness principles regulate the exercise of that power, unless the statute expressly excludes those principles by plain words of necessary intent.<sup>2</sup>

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<sup>2</sup> *Kioa v West* (1985) 159 CLR 550, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

More specifically, procedural fairness requires that a decision maker give the person:

- reasonable notice that an adverse decision may be made
- notice of the specific and critical issues on which the decision is likely to turn
- information about any adverse, relevant, and credible evidence that has been obtained from other persons
- a fair opportunity to directly address the issues and evidence.<sup>3</sup>

The NDIS Act does not expressly exclude the application of procedural fairness in relation to a decision to refuse or reduce plan funding. It is reasonable to categorise a decision made by the NDIA to refuse or reduce plan funding to a participant as a decision which adversely affects that person's rights or interests, such that the requirements of procedural fairness apply.

It appears common for the planning meeting (whether this be for a new plan or a plan reassessment) to proceed with no indication from the NDIA of an intention not to fund the requested supports or continue previously funded supports, with the plan subsequently issued with funding for these supports reduced or refused. We acknowledge that procedural fairness may be afforded to participants through their participation in planning meetings to the greatest extent possible. However, OPG believes there is an opportunity to better adhere to the requirements of procedural fairness when the NDIA could provide reasonable notice to the participant of a decision not to fund all or part of a plan before formal notice of the decision is issued.

#### *Not seeking additional information*

Section 36 of the NDIS Act provides the CEO of the NDIA with the power to make requests for information and reports for the purposes of preparing and approving a participant's plan.

Under the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, rule 4.1 of Part 4 "Needs Assessment" outlines what the CEO is to do when deciding whether to approve a statement of participant supports under section 33 of the NDIS Act. It states:

"The CEO is to—

- identify goals, aspirations, strengths, capacity, circumstances, and context
- assess activity limitations, participation restrictions and support needs arising from a participant's disability
- assess risks and safeguards in relation to the participant
- relate support needs to the participant's statement of goals and aspirations."

This rule appears to place a positive obligation on the NDIA to actively seek information about the participant to fully understand their circumstances when deciding whether to approve a statement of supports. This position is supported by the NDIA's own Operational Guidelines.

#### *External review*

After what is often an unsuccessful internal review, OPG is then required to expend time and resources to support a participant to seek an external review of the NDIA's decision or internal review outcome by the Administrative Appeals Tribunal (AAT). What commonly follows is a case conference held prior to

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<sup>3</sup> *Kioa v West* (1985) 159 CLR 550.

the AAT hearing date resulting in an agreement by the NDIA to make a new plan in favour of the client and the AAT will then acknowledge the agreement between parties. In these cases, it was the involvement of the AAT that resulted in the case conferences and subsequent satisfactory outcome for the client.

OPG has in several instances achieved a satisfactory outcome following the involvement of the AAT; an indication that the internal review process being conducted by the NDIA may not be adequately considering evidence in reaching a decision.

## Solutions

### Procedural fairness

OPG submits that the NDIA has the opportunity to better adhere to procedural fairness principles before making a decision which may be adverse to the client.

This would involve the NDIA providing the following to the participant and/or their decision maker prior to a formal decision being made on the plan:

- Reasonable notice about the area/s of the plan where the NDIA is looking to refuse or reduce funding.
- Details of the specific and critical issues on which the funding decision is likely to turn.
- The evidence or information they intend to rely upon in support of their position.
- The opportunity to directly address the issues and evidence provided. This would include providing the participant or their decision maker with the opportunity to seek additional evidence to address the issues.

The introduction of these steps into the NDIA's decision-making process may then resolve the issue of the NDIA failing to actively seek additional information to support the making of a properly informed decision about whether to approve supports. Providing this information about why a decision may be made to refuse or reduce funding under a plan could also lessen the need for an internal review application to be made as the reasons would be clearly articulated.

### *Relying on evidence when making decisions*

The implementation of the procedural fairness requirements into the NDIA's planning process may also encourage the delegate to adequately reference and rely upon evidence when making decisions. The proposed adverse decision, and the reasons for it, will be discussed in a more robust manner and the NDIA will be required to produce evidence to support its position as part of the process.

### *Relying on evidence when conducting internal reviews*

It is recommended that where an internal review outcome affirms the original decision to refuse or reduce funding for supports, the NDIA's template prompts or requires the delegate to directly refer to the evidence they relied upon when making their decision. The current format of the internal review outcome document includes a list of 'Materials reviewed' but delegates do not appear to make specific reference to the evidence relied upon to support their decision. It is recommended that footnotes could be used to link the decision in the body of the document to the relevant piece of evidence relied upon to support it in the 'Materials reviewed' list.

### *Feedback loop*

When an external review by the AAT results in the provision of funding that goes against the NDIA's position in the internal review, it would be expected that the NDIA would conduct its own operational review and take on board any learnings from the AAT decision. This will assist the NDIA to identify where staff may require additional training or supervision and to inform their practice development.

### *Cost considerations*

It is acknowledged that implementing procedural fairness requirements into the NDIA planning process could on the face of it appear to increase the time and cost involved in that particular part of the NDIA process. However, there is an important benefit, and potential cost saving associated with increasing the likelihood of the NDIA making the correct funding decision at an earlier stage, through an inclusive and consultative process. It is reasonable to presume that if this type of process were to be implemented effectively, the number of matters that become subject to internal review by the NDIA and then external review by the AAT would reduce, thus offsetting some of the potential cost and time impost.

A transition period should be provided if the NDIA intends to reduce funding partially or significantly so that providers can help develop or source supports from other systems.

### **Training for NDIA planners**

In addition to implementing changes to process that adhere to the principles of procedural fairness, OPG recommends training for NDIA planners on interpreting medical reports and the need to heed the advice of the professionals when making decisions on approving funding for supports in a participant's plan. It is important that planning decisions adequately consider any assessments or reports provided by allied health professionals or service providers who are currently providing disability support. Responsibility is on the NDIA to undertake a higher level of analysis of these reports to avoid required supports being refused in plans, contrary to medical advice.

#### **Recommendation 10:**

The NDIA should provide the following to the participant and/or their decision supporter prior to a formal decision being made on an NDIS plan:

- Reasonable notice about area/s of the plan where the NDIA is looking to refuse or reduce funding;
- Details of the specific and critical issues on which the funding decision is likely to turn;
- The evidence or information they intend to rely upon in support of their position, and
- The opportunity to directly address the issues and evidence provided.

#### **Recommendation 11:**

The NDIA to provide as standard to all NDIS participants and/or their decision supporter a comprehensive statement of reasons why a plan has not been approved, where the plan funding has been reduced, or a request for funding for a particular support has been refused.

#### **Recommendation 12:**

Where an internal review outcome affirms the original decision to refuse or reduce funding for supports, the NDIA's template should require the delegate to directly refer to the evidence they relied upon when making their decision.

**Recommendation 13:**

Training for NDIA planners on interpreting medical reports and the need to adhere to the advice of professionals when making decisions on a participant's plan.

**Recommendation 14:**

Targeted training for NDIA staff about the role of formal guardians and the right of a guardian to be provided with information about a participant's plan.

## ISSUE: Forensic Disability Service System

### The problem

The Queensland Forensic Disability Service System provides for a population of people with an intellectual or cognitive disability who are under a Forensic Order (Disability). These orders are made in circumstances where the person is alleged to have committed a serious offence and is found to be either of unsound mind at the time of the offence, or unfit for trial because of their intellectual disability. Adults under a Forensic Order (Disability) can be supported in the community, or be classified as an inpatient and require involuntary detention within the Forensic Disability Service or an Authorised Mental Health Service. The Forensic Disability Service System is governed by the *Mental Health Act 2016* (administered by the State Health department) and the *Forensic Disability Act 2011* (administered by the State Disability department).

It is important to note that while persons under a Forensic Order (Disability) have been charged with an indictable offence, this charge has never been tested in a court of law. Therefore, whether the offence was committed at all, and if so by the relevant person, has not been proven to the requisite standard (which is the criminal standard of proof – 'beyond reasonable doubt').

When it comes to transitioning a small number of very complex clients out of the Forensic Disability Service or an Authorised Mental Health Service, there is a complicated interface between the Forensic Disability Service System and the NDIS with multiple systems involved, including the disability, mental health and justice systems. OPG clients have faced significant challenges transitioning out of the Forensic Disability Service or an Authorised Mental Health Service and back into the community.

For example, OPG has observed a considerable funding gap between the NDIS and state for accommodation and supports, which impacts the opportunities for the most complex clients to transition from a detained setting to appropriate accommodation in the community. The intensive accommodation funding offered by the NDIS, Specialist Disability Accommodation, is only available to NDIS participants who have an extreme functional impairment of very high support needs connected with their disability. Specialist Disability Accommodation is not available to participants under forensic orders who have moderate functional impairment, but high criminogenic housing and support needs. For this reason, there are also no NDIS service providers willing or able to provide the necessary housing and support for the funding amount provided in the participant's plan.

In the absence of co-ordinated Commonwealth and State planning and funding for appropriate housing and core supports, these participants have no other option but to involuntarily remain in the Forensic Disability Service or an Authorised Mental Health Service for extended periods of time, which hinders their opportunities to achieve any kind of independence.

## Solution

To better support participants subject to a Forensic Order (Disability) to regain their independence and who are ready to transition out of the Forensic Disability Service or an Authorised Mental Health Service, OPG recommends NDIS planning meetings are jointly held with State Disability and Health agencies (depending on the State or Territory) to develop a co-ordinated and shared plan to jointly fund adequate housing and supports so the participant may successfully transition into the community.

### Recommendation 15:

For participants transitioning out of the Forensic Disability Service System, planning meetings should include the NDIA and State Disability and Health agencies to develop a plan to jointly fund housing and supports for people on forensic disability orders so they may transition into the community.

## Conclusion

We trust the NDIS Review team will consider the suggestions made in this submission. OPG is optimistic that the Review will yield positive outcomes for people with impaired decision-making capacity who engage with the NDIS.