



27<sup>th</sup> March 2017

**National Disability Insurance Scheme (NDIS) Costs study**  
**Productivity Commission**  
**GPO Box 1428**  
**CANBERRA CITY**  
**ACT 2600**

**E-mail: [ndis.costs@pc.gov.au](mailto:ndis.costs@pc.gov.au)**

To the Productivity Commission Review Officer,

**FSC response to the National Disability Insurance Scheme (NDIS) Cost Study**

The Financial Services Council (FSC) welcomes the opportunity to make the following submission to the Productivity Commission's review of the NDIS Costs.

**About the FSC**

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry participants represented by the FSC are responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Amongst the organisations the FSC represents in this submission are the majority of Australia's licensed trustee companies; and the States and Territories' public trustee entities from the Australian Capital Territory, Victoria, New South Wales, Queensland, South Australia, Tasmania and Western Australia. (In this submission, we will for convenience refer to licensed trustee companies and public trustee entities, collectively, as 'Trustees'.) A core community need that Trustees fulfil is to provide services as substitute decision-maker for individuals in relation to their financial affairs. This service is often required where an individual has impaired decision making capacity due to a disability. Accordingly, due to the particular cohort involved, many individuals for whom Trustees act under substitute decision making appointments are participants in, or entitled to become participants in, the NDIS.

**Summary**

In this submission, the FSC focuses on:

*More appropriate recognition of substitute decision-makers to ensure NDIS service efficiency*

Currently there is inadequate formal recognition, within the NDIS framework, of the role of substitute decision-makers (especially for financial matters) who are authorised to act for a participant under State and Territory laws. (For convenience, in this submission, such substitute decision-makers will be referred to as 'decision-makers'.)

This issue has a number of cost impacts for the NDIS. In our view, the issue mainly affects the following cost drivers: (a) the number of participants in the scheme; (b) the quantity of supports received by scheme participants; and (c) the costs associated with operating the scheme. It may also indirectly affect the price paid for supports.

By way of example, Victoria's public trustee entity, State Trustees Limited, acts as financial manager (administrator) for approximately 1200 clients in the North Victoria catchment. In each such case, the Victorian Civil and Administrative Tribunal has decided that the client lacks decision-making capacity for financial matters and requires a decision-maker to act for them. In total, approximately 5000 State Trustees clients in Victoria have been identified as possibly eligible for NDIS support funding. Similarly, the Public Trustee in Queensland estimates that two-thirds of their client database, equating to approximately 6000 clients with rights to disability services, will be eligible for support under the NDIS. These figures suggest that the Trustees represent a major stakeholder in the success of the NDIS as a whole.

The FSC suggests this issue should be addressed by the NDIS Act, and the relevant NDIS Rules, being amended to more appropriately recognise the role of such substitute decision-making appointments made under State and Territory laws.

We provide the following additional background in relation to each of these issues.

Thank you for the opportunity to provide a submission in relation to the NDIS Costs. If you have any questions in relation to material outlined in this letter, please do not hesitate to contact us.

Yours sincerely

**NITHYA IYER**  
Senior Policy Manager, Trustees

### **More appropriate recognition of substitute decision-makers to ensure NDIS service efficiency**

In the FSC's view, there is inadequate formal recognition under the NDIS regime of the role of decision-makers appointed to act for participants under State and Territory laws, especially in relation to financial matters.

We believe based on our experience to date that this issue is having the following effects of relevance to NDIS costs:

- (a) Some individuals who would be eligible to be participants in the NDIS are not accessing the scheme, and therefore missing out on supports for which they would otherwise be eligible;
- (b) Supports being received by some participants may be being duplicated by services that are being funded from the participants own resources; and
- (c) The assessment costs associated with operating the scheme may be higher than would otherwise be the case due to the NDIA not having the benefit of adequate information and knowledge exchange with existing decision-makers. This may also indirectly affect the price paid for supports.

The appropriate recognition of the role of Trustees as decision-makers and a more efficient and cooperative process for the exchange of information and planning would help prevent inefficient and unnecessary expenditure, and ensure that service providers giving supports to participants are providing value for money.

### **Types of decision-makers under State and Territory laws**

For present purposes, there are two broad types of decision-maker: (a) those appointed by the individual; and (b) those appointed by a court or tribunal.

An adult individual may themselves arrange (at a time when they have decision-making capacity to do so) the appointment of a financial decision-maker, typically through an enduring power of attorney for financial matters, or an equivalent appointment. (The applicable term used for such an appointment varies between jurisdictions.) A decision-maker in respect of financial matters may also be appointed where a State or Territory court or tribunal determines that an adult individual, by reason of a disability, does not have decision-making capacity in respect of his or her financial and property affairs, and needs a decision-maker (in this submission, called a 'financial manager'; again, the applicable term varies between jurisdictions) to make financial decisions for the individual.

A financial decision-maker (whether appointed by a court/tribunal or the individual themselves) may be a person other than a Trustee, such as a member of the individual's family, or a professional with experience in financial or legal matters. (Trustees are, however, subject to a significantly higher degree of regulation when providing such services, by reason of the legislative and regulatory frameworks to which they are subject.) A Trustee in the role of decision-maker in relation to an individual's finances will need to have an understanding of the individual's financial situation, and their requirements and wishes. In the case of an NDIS participant, the knowledge and information held by appointed substitute decision-makers –

including both Trustees and other appointed individuals – would be of direct relevance to what should be included in a client’s NDIS plan.

Importantly, State and Territory laws dealing with substitute decision-making already provide a framework of safeguards where decisions are to be made in the least restrictive manner, and in a way that promotes maximum autonomy for the individual, and encourages their ability to make decisions for themselves as far as possible. These decision-makers are immersed in a wide range of decisions regarding the welfare of the individual, ensuring that they receive entitlements due to them and that money expended on their behalf promotes their social and personal well-being.

#### *Concerns regarding NDIS participants who have a decision-maker*

As noted above, individuals for whom decision-making arrangements (whether solely for financial matters or otherwise) are required are often persons with a disability, and therefore are more likely than the general population to also be participants, or entitled to become participants, in the NDIS.

Currently, instead of giving full recognition to the status of independent decision-making appointments, the NDIS regime establishes a new type of substitute-decision maker, known as a nominee. This appointment can only be made by the CEO of the NDIA.

Where a participant in the NDIS has a decision-making arrangement in place, the NDIS regime gives only limited recognition to the decision-maker. (The relevant NDIS Rules include definitions for the two broad types of decision-makers.<sup>[1]</sup>) If the decision-maker’s role is relevant to the role of a nominee, the NDIA CEO is obliged to take into account the existence of the decision-maker, and obtain the decision-maker’s views, in relation to any decision as to whether a nominee should be appointed for the participant, and, if so, who that nominee should be; a nominee, once appointed, will also be required to consult with such a decision-maker. But there is no recognition of the authority of the decision-maker to access information relevant to the interests of the participant, or to make decisions for the decision-maker within the scope of their decision making authority.

There are several matters the NDIA CEO is required to have regard to when deciding whether to appoint a particular person as a nominee. One of them is ‘the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee’.<sup>1</sup>

The problem with requiring appointed decision-makers to become plan nominees is that, in a given case, being a plan nominee may impose obligations on a decision-maker that go beyond, and/or are inconsistent with, the scope of their role under the relevant State or Territory law,

---

[1] See the National Disability Insurance Scheme (Nominees) Rules 2013, which establish definitions of ‘court-appointed decision-maker’ (which extends to the guardian of a child) and ‘participant-appointed decision-maker’: See the Appendix.

<sup>1</sup> National Disability Insurance Scheme (Nominees) Rules 2013, rule 4.8(a). The Queensland Civil and Administrative Tribunal has decided in a number of cases that the most appropriate substitute decision making appointment for decisions regarding the NDIS is that of a guardian, which is a role that does not have power to make decisions in respect of financial matter.

with the result that they are subject to conflicting duties. This leads to the potential for the decision-maker to find themselves liable either for a breach of duties under the State or Territory laws, or for potential breach of penalty provisions under the NDIS Act, or both.

However, unless a decision-maker does become a nominee, the only recognition of their role will be limited to those narrow aspects just mentioned. They will not be permitted by reason of their role to receive a copy of the participant's plan. (Indeed, their mere receipt of the plan may expose them to a potential fine, in the case of a body corporate, of up to \$108,000.) They will not even be able to be informed by the NDIA whether or not a plan exists. The result is that there may be expenditures that the decision-maker is incurring on the participant's behalf which, unbeknownst to the decision-maker, are already being funded as supports through the NDIA. It will also be more difficult for the decision-maker in general to make appropriate financial plans for the participant. The NDIS Act prevents the NDIA from providing participant information to a non-nominee, irrespective of whether the person is solely responsible under State or Territory law for decision making in respect of the participant's financial affairs. It should be borne in mind that the State and Territory regimes are themselves based on principles of only resorting to substitute decisions where necessary, and ensuring that any such decisions are subject to appropriately stringent safeguards.

#### *Challenges with capacity to consent*

A participant may give express or implied consent to the release of their NDIS information, including their plan, to their decision-maker.<sup>2</sup> However, many participants for whom Trustees act as decision-maker do not have the decision-making capacity, even if supported, to understand the nature and effect of providing such consent, and so cannot validly give consent, whether express or implied. In these circumstances there is a need for the status of the decision-maker to be recognised.

There has been a concerted attempt as between the FSC, on behalf of Trustees, and the NDIA, to find a mutually acceptable mode of facilitating the identification of mutual clients. However, the persistent barrier in agreeing on a Memorandum of Understanding for exchange of information remains the requirement of the NDIA (based on their interpretation of what the NDIS Act allows) that the relevant Trustee must become the plan nominee in order to receive information about a participant's plan.

The FSC acknowledges that there has been consultation with Trustees to varying degrees as per their role as a major stakeholder. For example, the Public Trustee of Queensland has had extensive and regular engagement with the NDIA Directorate on this issue. However, this engagement is hindered by the lack of appropriate recognition under the NDIS regime of the role of decision-makers appointed under State and Territory legislation.

#### **Recommendations**

The exact cost repercussions of the issue identified above cannot be measured, due to the lack of available information. But the experience of Trustees suggests that this situation is resulting in (a) over-servicing of some participants; (b) under servicing of other participants; (c) provision

---

<sup>2</sup> NDIS Act, s 60(2)(d)(iii).

of inappropriate supports in some cases; and (d) some potential participants not taking advantage of their eligibility for supports.

In this context, it is the FSC's recommendation that:

- (a) The NDIS Act should be amended to give appropriate express recognition to decision-makers appointed under State and Territory law.
- (b) Such decision-makers should not generally be required to become a nominee in order to receive information as to the content of the participant's plan, where that information will assist in the decision-making in respect of the participants' wider finances and in assessing whether the plan's content is appropriate for the participant. This is consistent with the authority such decision-makers have to access information relevant to their role as decision-maker, for example, when appointed under the relevant State or Territory guardianship laws.

If need be, a separate category of nominee could be designed under which the conflict between the decision-maker's duties under State and Territory law and those under the NDIA Act and Rules is adequately resolved.

- (c) The NDIA should develop an administrative process to ensure that at the time of registration it identifies all participants who have a decision-maker appointed. The process should include:
  - (i) Follow up contact with the decision-maker;
  - (ii) advance notice of the Planning Meeting so the decision-maker is in a position to make available to the NDIA the relevant financial information;
  - (iii) a mechanism for the decision-maker to provide information direct to the NDIA on an individual participant basis;
  - (iv) provision of the draft Plan(s) to the decision-maker for comment in terms of implications for the client's personal finances; and
  - (v) repeat of processes (i) - (iv) in the Plan review phase.

We believe such a legislative change, coupled with complementary changes to the Rules, can help ensure that the two sets of substitute decision making regimes (the regime applying under State and Territory laws on the one hand, and that established under the NDIS on the other) are able to work together cohesively and efficiently to ensure optimum outcomes for participants (including by efficiently and accurately identifying mutual clients), and to minimise the risk of inappropriate costs.

We also suggest that, going forward, there be a dedicated resource within the NDIA to manage interactions with decision-makers, in particular with Trustees, who between them have many thousands of participants and potential participants as their clients.

### **Other cost-related issues**

The NDIA's current process for assessing eligibility over the phone in conversation with participants and via documents gathered through government agencies disadvantages people who are unable to make complex financial decisions. In many instances the participant's

contact details are only that of a government agency, and the NDIA are unable to make contact directly with the participant. This leads to individuals who may be eligible not being enrolled in the scheme. Court or tribunal appointed decision-makers, such as Trustees, who are in more frequent constant contact with participants are better equipped to provide information and support eligibility requirements on behalf of the potential participant. The lack of flexibility in assessing eligibility criteria based on documented evidence is compromising access to services for the most vulnerable people in the community.

There is a cohort of individuals with complex needs that are not being served by the NDIS as they are not linked into current support services. These individuals do not have case managers or service providers and advocates are unable to engage on behalf of the individuals without guardianship arrangements.

A consistent nation-wide approach within the NDIA for participants with decision-making impairment would also make the transition to the NDIS easier for these individuals, many of whom find the current eligibility and planning activities challenging.

It is also perceived by Trustees that the current rollout timetable is putting pressure on the systems and processes of the NDIA, which is resulting in high rates of staff turnover and over simplification of processes which are unable to cope with the huge variation of need in the disability sector.

Based on plans of current participants that have been viewed by Trustees, the plans vary widely and lack detail on specific support and expenditure items. Most plans have a dollar amount noted against the outcome and are no different from bulk billing funding that the plans are supposed to replace. The soft copy of the plan available online, however, does have more detail, but unfortunately does not always correlate with the copies given to participants. The planning process consists of filling present day information into a structured template without regard to future possibilities or options available to a participant. In many cases, the planning process has not led to consistent and equitable processes for participants. For example, participants living at home have received huge support coordination funds compared to participants living in supported accommodation although both participants maybe engaging with similar day services and community engagement activities.

## APPENDIX

### Definitions of decision-makers under the NDIS Rules

***Court-appointed decision-maker***: a person is a ***court-appointed decision-maker*** in relation to a participant if the person, under a law of the Commonwealth, a State or a Territory:

- (a) has guardianship of the participant; or
- (b) is a person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee.

***participant-appointed decision-maker***: a person is a ***participant-appointed decision-maker*** in relation to a participant if the participant has entered into a formal arrangement with the person under which the person is able to make a decision on the participant's behalf (for example, a power of attorney, an advance health directive or appointment as an enduring guardian under State or Territory law).



