

NEW CHALLENGES IN MERITS REVIEW DECISION-MAKING

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Expanding jurisdictions, increasing numbers of parties representing themselves and the amalgamation of diverse tribunals all present challenges for decision-makers in merits review tribunals.

In July 2013, the *National Disability Insurance Scheme Act 2013* (the *Act*) came into effect. It gave the Administrative Appeals Tribunal jurisdiction to review 26 kinds of decisions of the National Disability Insurance Agency (NDIA) and, by amendment to the *Administrative Appeals Tribunal Act 1975*, a new Division of the Tribunal was established.¹

As well as giving effect to Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities* (CRPD) and providing for the National Disability Insurance Scheme (NDIS), the objects of the *Act* include supporting the independence and social and economic participation of people with disability, providing reasonable and necessary supports for participants in the NDIS and enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their support.²

The *Act* recognises the rights of persons with disabilities to determine their own best interests, to exercise choice and control, and to engage as equal partners in decisions that will affect their lives to the extent of their ability. Persons performing functions and exercising powers under the *Act* must do so in accordance with the rights enshrined in the CRPD and other international agreements to which Australia is party,³ and must have regard to the progressive implementation of the NDIS and the importance of ensuring its financial sustainability.⁴

The new jurisdiction presents some particular challenges for the Tribunal. The legislation is based largely on broad principles and is untested. It encompasses almost limitless individual circumstances. Issues of accessibility are raised beyond those encountered in the Tribunal's other jurisdictions where unrepresented applicants and people with disabilities, especially in social security matters, frequently appear.

As well as dealing with the physical accessibility of premises, applicants have a range of complex cognitive and other disabilities, some of them very complex, including difficulties of comprehension and communication, and there are often a number of people involved in an applicant's life, as family members, carers and others, with varying degrees of legal authority to act on their behalf.

The National Disability Insurance Scheme

The NDIS commenced on 1 July 2013. It had bipartisan support in Parliament and was remarkable for the short time between conception and realisation. It is being rolled out

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progressively around the country, until July 2019. As at 1 July 2014, it covered the Hunter region in New South Wales, the Barwon region in Victoria, the Perth Hills area in Western Australia, the Barkly region in the Northern Territory, 15 to 24-year-olds in Tasmania, children under 14 in South Australia, and adults and children of certain ages in the ACT.

The NDIS implements, in broad terms, the recommendations of the Productivity Commission's 2011 report, *Disability Care and Support*.⁵ The Commission described the existing disability support system as one 'marked by invisible deprivation and lost opportunities' which was 'underfunded, unfair, fragmented, and inefficient, and gives people with disability little choice and no certainty of access to appropriate supports'.⁶

The Commission observed that most people know little about Australia's disability system and have no idea how poorly they would be served were they to come to need it, yet:

... major disability can happen to anyone at any time – a simple fall can lead to quadriplegia, and an illness to severe brain damage. Most families and individuals cannot adequately prepare for the large costs of lifetime care and support. The costs of lifetime care and support can be so high that the risks and costs need to be pooled.⁷

The Commission proposed a system, to be known as the National Disability Insurance Scheme, to provide insurance cover for all Australians in the event of a significant disability, and that funding of the scheme should be a core function of Government, like Medicare. Its main function, and source of cost, would be long term, high quality care and support for people with significant disabilities. Everyone would be insured and an estimated 410,000 people would receive scheme funding support.

The NDIS would also aim to better link the community and people with disabilities, and would provide information to the community about disability, help break down stereotypes, and ensure quality assistance and best practice among service providers.

Consistent with being an insurance-based scheme, funding under the NDIS is not a form of income support and is not means-tested.⁸ Like all insurers, the Commission said, the scheme would aim to minimise long-term costs meaning that there would be a strong incentive to undertake early intervention where it was cost-effective to do so; the scheme would 'spend dollars to save more dollars', and people would not have to wait for basic supports such as wheelchairs and personal care, and it would encourage and support people with disabilities to participate in employment and the community generally.

In the Commission's view, the benefits of the scheme would significantly outweigh its costs; people would know there would be a properly financed, comprehensive system to support them in the event that they, or a member of their family, acquired a significant disability. It estimated that the NDIS would only have to produce an annual gain of \$3,600 per participant to meet a cost benefit and, given the scope of the benefits it would provide, that test would be passed easily.

The NDIS provides support for people with disability by way of:

- general supports such as coordination, strategic or referral services or activities;
- funding to persons or entities to enable them to assist people with disability to participate in economic and social life; and
- individual plans under which funding for reasonable and necessary supports is provided to persons with disability who qualify to be *participants* in the scheme.

It is principally in this third area that the Tribunal will be involved, in reviewing decisions concerning access to the scheme and funding for supports. The Tribunal can also review decisions concerning registration of providers of supports, parental responsibility for children, the appointment of nominees who act on behalf of participants in the scheme, and related matters.⁹

The National Disability Insurance Scheme Act 2013

The objects of the *Act* are set out in s 3. As well as giving effect to Australia's obligations under the CRPD, they include:

- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports for participants;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- promoting the provision of high quality and innovative supports that enables people with disability to maximise independent lifestyles and inclusion in the community; and
- raising community awareness of the issues that affect the social and economic participation of people with disability, and facilitating their greater community inclusion.

By s 209 of the *Act*, the Minister may make Rules prescribing a range of matters. The Minister has made Rules concerning matters including becoming a participant in the NDIS, plan management, supports for participants, timeframes for decision-making, children, and protection and disclosure of information.¹⁰

Becoming a participant in the NDIS

A person who meets the access criteria in s 21(1) of the *Act* becomes a *participant* in the NDIS. The access criteria comprise age, residence, and *disability* or *early intervention* requirements.¹¹

A person meets the *disability* requirements if she or he has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or to an impairment attributable to a psychiatric condition, which:

- is permanent, or likely to be permanent;
- results in substantially reduced functioning in communication, social interaction, learning, mobility, self-care or self-management; and
- affects the person's capacity for social and economic participation,

and the person is likely to require support under the NDIS for her or his lifetime.¹²

Early intervention means that a disability that is, or is likely to be, permanent will improve, or not worsen, if support is provided at an early stage, thereby reducing the person's future needs for supports.¹³

Reasonable and necessary supports

The NDIA must help each participant prepare a plan which is in two parts: a statement prepared by the participant of his or her goals, objectives, aspirations and personal circumstances; and a *statement of participant supports* prepared with the participant and

approved by the CEO of the NDIA which sets out the supports that will be funded or provided through the NDIS.¹⁴

According to the principles in s 4 of the *Act*, reasonable and necessary supports should:

- support people with disability to pursue their goals and maximise their independence;
- support people with disability to live independently and be included in the community as fully participating citizens; and
- develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

Not every support required by a participant will be funded or provided through the NDIS. The CEO of the NDIA (and so the Tribunal) must be satisfied in relation to each support provided or funded that it meets all of the following criteria in s 34(1):

- (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
- (c) 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;
- (d) the support will be, or is likely to be, effective and beneficial to the participant, having regard to current good practice;
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;
- (f) the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - (i) as part of a universal service obligation; or
 - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

Practice Direction for review of National Disability Insurance Scheme decisions

The decision to give the Tribunal jurisdiction to review decisions of the NDIA was not universally welcomed. Some thought the Tribunal too inaccessible, its procedures too formal and legalistic, and some questioned the ability of its members to determine complex disability matters and thought a specialist tribunal or an interim level of review, similar to the Social Security Appeals Tribunal, more appropriate.

The Tribunal recognised that it needed to deal with concerns about formality and legalistic procedures, to make its procedures as accessible as possible, and to incorporate into them, as far as possible, the principles of control and choice, and participation in decision-making, embodied in the *Act*. At the same time, it was important not to treat applicants with disabilities as a special case and sideline them from the wider Tribunal.

The Tribunal was also mindful, given the strong links between disability and poverty, that the majority of applicants would be unlikely to engage lawyers although, to some extent, that

concern has been met by the provision of a support person for every applicant to the Tribunal, and funding to Legal Aid Commissions for legal representation in 'complex or novel' cases (see below).

On 1 July 2013, the President of the Tribunal issued a Practice Direction for review of decisions in the NDIS Division.¹⁵ It aims to give applicants as much choice and control in the process, and for the process to be as quick, simple and non-adversarial, as possible. It describes what the Tribunal, the applicant and the NDIA must do to prepare for each stage of the process and encourages parties to reach agreement wherever possible. The Practice Direction and accompanying Facts Sheets are on the Tribunal's website.¹⁶

The process has been streamlined into a case conference between the parties six weeks after the application is lodged, followed by conciliation and a hearing if conciliation is unsuccessful, or a hearing only if the applicant wishes. The aim is to conclude each matter within 13 weeks.

Some features of the process are:

- a Case Officer is assigned to each applicant throughout the process;
- the Case Officer contacts the applicant or his or her representative within three days of the application being received to discuss the process, answer questions and ascertain any particular needs;
- on receipt of documents from the NDIA, the file is assessed by a Member, Conference Registrar and the Case Officer to consider what issues are raised by the application;
- a case conference between the parties is listed for six weeks after the application is lodged;
- parties leave the case conference with a written case plan setting out whether issues are agreed or remain in dispute, any further information required, what will happen next, the date of the conciliation or hearing and who will attend, and anything else that will make the process as quick and as fair as possible;
- the hearing is conducted in a non-adversarial manner, and legal formalities and language are discouraged; and
- oral reasons are given at the conclusion of the hearing wherever possible.

Legal representation and support

A unique feature of the NDIS is that all persons seeking review by the Tribunal are entitled to assistance under the National Disability Advocacy Program administered by the Department of Social Services (DSS). The *External Merits Review Support Component* comprises:

- access to a support person (the *External Merits Review – Support Component*); and
- access to legal representation in cases that raise 'complex or novel' legal issues.

Funding has been provided in each trial site to an agency to engage support persons who assist applicants at all stages of the process and advocate on their behalf if required.

The legal services component provides funding to legal aid agencies under arrangements with the agency in each state and territory. Funding is capped at \$6,720 per matter with a further amount of up to \$2,000 available to obtain expert reports. Applications are made to the Central Assessment Provider at the Department of Social Services. Guidelines for funding are on the DSS website.¹⁷

Applications to date

At July 2014, 21 applications had been lodged with the Tribunal. Several had been resolved by way of a case conference or conciliation, and three had been heard and finalised by way of a decision and published reasons.¹⁸ One decision has been made concerning the Tribunal's jurisdiction to determine an application.¹⁹ Other matters were at various stages of the process.

The matters that have been dealt with so far highlight some of the complexities of the legislation and the scheme generally, and the difficult questions of interpretation and application of the *Act* and Rules facing decision-makers. They include:

- where is the line between supports that should be funded under the NDIS and that which should be funded under other systems such as the health system;²⁰
- should the NDIS provide funding for a form of therapy for which there is emerging evidence of benefit but which is largely untested;²¹
- what is meant by substantially reduced mobility or social interaction or communication;²² and
- to what extent should families and communities be required to provide supports.²³

Other questions that have arisen include: how to assess 'value for money'²⁴ when considering the cost of support against potential benefits for an individual's quality of life; what weight should be given to the opinions of independent experts against the experience of families and therapists involved with an individual; and the tension between the need to ensure the financial sustainability of the NDIS generally and the needs of individuals.

In *Mulligan and National Disability Insurance Agency* [2014] AATA 373, the Tribunal had to decide whether Mr Mulligan met the disability requirements in the *Act*. He suffered from a number of conditions including a heart condition which limited his ability to walk and meant he could not mow his lawn. The only assistance he sought from the NDIS was someone to help him mow his lawn each month.

The first question the Tribunal had to consider was the meaning of disability in s 24(1). The question arose because 'disability' appears to be used with slightly different meanings in different parts of the *Act*. It was also not clear what it would mean to say that Mr Mulligan was 'likely to require support under the NDIS for his lifetime'. The Tribunal offered some tentative views but decided it was not necessarily finally to decide those questions because Mr Mulligan did not have 'substantially reduced functional capacity' in at least one of the areas set out in s 24(1)(c). Because each of the disability requirements in s 24(1) must be met, Mr Mulligan's application failed.

Mr Mulligan's appeal from the Tribunal's decision is listed for hearing by the Federal Court in March.

In *Young and National Disability Insurance Agency* [2014] AATA 401, Mr Young had emphysema and relied on portable oxygen. He also relied on insulin for his type 1 diabetes. There was no dispute that he met the disability requirements in the *Act* and he was receiving some funded supports. The Tribunal had to decide whether a portable oxygen concentrator, and an insulin pump which Mr Young preferred to injecting himself with insulin, were reasonable and necessary supports. It had to consider the meaning of 'clinical treatment' in the *Act* and whether the concentrator and pump were 'most appropriately funded or provided through the NDIS'²⁵. The Tribunal decided that both were more appropriately funded or provided under the general health system and affirmed the decision under review.

In *TKCW and National Disability Insurance Agency* [2014] AATA 501, the applicant was a child with autism. There was no dispute that he met the early intervention requirements in the *Act* and he was receiving a range of supports under the NDIS. The Tribunal had to decide whether funding for a form of music therapy, for funding for a carer to stay with his twin brother while TKCW attended speech therapy with his mother were reasonable and necessary supports.

The application turned on whether the particular form of music therapy was, or would likely be, 'effective and beneficial' for TKCW, 'having regard to current good practice'.²⁶ The Tribunal heard evidence from a speech therapist whose experience with children with autism was that the therapy was beneficial, and from an academic who said there was a lack of reliable research into its benefits. The Tribunal was not satisfied, on the information it had, that the therapy met the requirement in the *Act*. It also decided that funding for a carer for TKCW's brother was not reasonable and necessary support taking into account 'what it is reasonable to expect families, carers, informal networks and the community to provide'.²⁷ It affirmed the decision under review.

In December 2014, after this paper was presented, the Tribunal published its fourth decision: *ZNDV and National Disability Insurance Agency* [2014] AATA 921. The applicant child, who had Asperger's syndrome, was a participant in the NDIS and was receiving a number of funded supports. At issue was whether occupational therapy equipment to be used in his home was a reasonable and necessary support. The child was using similar equipment with an occupational therapist and his parents

The Tribunal heard evidence about the use of 'sensory motor interventions' for children with autism from the child's treating occupational therapist and from an independent expert. It was not satisfied that the proposed support met the 'value for money' criterion in s 34(1)(c) and affirmed the decision under review.

Conclusion

It is early days in the operation of the NDIS and the Tribunal's new jurisdiction. An independent review of the operation of the *Act* is to commence on its second anniversary.²⁸ Also on the horizon is the amalgamation of the Commonwealth merits review tribunals which will take effect on 1 July 2015. In the meantime, NDIS matters are proving to be among the most interesting in the Tribunal and without doubt among its most challenging.

Endnotes

- 1 By amendment to s 19 of the *Administrative Appeals Tribunal Act* 1975.
- 2 *NDIS Act* s 3.
- 3 *NDIS Act* ss 4, 5.
- 4 *NDIS Act* s 3(3)(b), s 4(17).
- 5 *Disability Care and Support*, Productivity Commission Inquiry Report No 54, 31 July 2011.
- 6 Productivity Commission Report, Executive Summary.
- 7 Productivity Commission Report, Executive Summary.
- 8 So, for example, funding under the NDIS has no bearing on, and is not affected by, entitlement to Disability Support Pension.
- 9 The AAT has jurisdiction to review 26 *reviewable decisions* by the NDIA: see *NDIS Act* 2013, Part 6.
- 10 All of the Rules can be found at www.comlaw.gov.au.
- 11 *NDIS Act* s 21.
- 12 *NDIS Act* s 24.
- 13 *NDIS Act* s 25.
- 14 *NDIS Act* s 33.
- 15 *Review of National Disability Insurance Scheme Decisions Practice Direction*, 1 July 2013.
- 16 www.aat.gov.au.
- 17 <http://www.dss.gov.au>.

- 18 *Mulligan and National Disability Insurance Agency* [2014] AATA 373; *Young and National Disability Insurance Agency* [2014] AATA 401; *TKCW and National Disability Insurance Agency* [2014] AATA 501.
- 19 *Burston and National Disability Insurance Agency* [2014] AATA 456.
- 20 *Young (above)*.
- 21 *TKCW (above)*.
- 22 *Mulligan (above)*.
- 23 *TKCW (above)*.
- 24 Section 34(1)(c).
- 25 NDIS Act s34(1)(f).
- 26 NDIS Act s34(1)(d).
- 27 NDIS Act s34(1)(e).
- 28 *NDIS Act* s 208.