**NDIS service agreements:**

making choice and control more real

June 2019

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| **Office of the Public Advocate** Level 1, 204 Lygon Street, Carlton, Victoria, 3053 Tel: 1300 309 337 [**www.publicadvocate.vic.gov.au**](http://www.publicadvocate.vic.gov.au/)  ISBN: 978-0-9875861-9-3  Produced by the Office of the Public Advocate  First published June 2019  © Office of the Public Advocate 2019  Reproduction without express written permission is prohibited. Permission may be granted to community organisations to reproduce, free of any charge, part or all of this publication. Written requests should be directed to the Communications Coordinator, Office of the Public Advocate, OPAComms@justice.vic.gov.au. | |

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Abbreviations

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| ACCC | Australian Competition and Consumer Commission |
| CAV | Consumer Affairs Victoria |
| Convention | United Nations Convention on the Rights of Persons with Disabilities |
| GST | Goods and Services Tax |
| LAC | Local Area Coordinator |
| NDIA | National Disability Insurance Agency |
| NDIS | National Disability Insurance Scheme |
| NDIS Act | National Disability Insurance Scheme Act 2013 (Cth) |
| NDIS Commission | NDIS Quality and Safeguards Commission |
| OPA | Office of the Public Advocate (Vic.) |
| Participant | a person deemed eligible by the CEO of the NDIA to access the NDIS |
| SDA | Specialist Disability Accommodation |
| VCAT | Victorian Civil and Administrative Tribunal |

Recommendations

Recommendation 1  
The NDIA should consider this report in its review of public information on the NDIS *Guardians and nominees explained* webpage.

Recommendation 2  
The NDIA should consider this report when it updates its training for planners and provide accurate information on the role of guardians in different jurisdictions for NDIA staff and contractors.

Recommendation 3   
The NDIA should promote the use of suitable and fair service agreements between providers and participants by revising the current sample agreement and guidance.

Features of the revised sample agreement and guidance should include:

* an accessible format for participants, including for people with a cognitive impairment
* provision for an outline of assistance to be provided to the participant to understand the agreement (such as support from an advocate, family member or friend)
* model fair terms with supporting guidance
* warnings against onerous provisions.

Recommendation 4

The NDIA should revise existing guidance and information to clearly state that while the expectation is that generally participants and service providers will enter into a signed service agreement, there are some circumstances in which it is necessary for service provision to proceed through a deed or an unsigned service agreement (statement of support) and that needed services should not be delayed by the documentation process.

Recommendation 5  
The NDIA should revise existing guidance and clarify that a service agreement may only be signed by a participant, or their legally appointed representative, who has understood and accepted the contract’s terms.

Recommendation 6  
The NDIA should improve the guidance and directions it gives to prohibit service providers from asking participants to sign service agreements that participants do not understand.

Recommendation 7  
The NDIA should review the examples in this report of imprecise, unfair and onerous terms contained in some service agreements and improve the guidance and directions it gives to promote and require fair service agreements.

Recommendation 8  
Disability advocacy and consumer rights organisations should consider the issues raised by this report when they are engaged with NDIS participants and where possible support NDIS participants to address any unfair NDIS service agreements by:

* reporting issues to the NDIS Commission as the primary industry regulator in the first instance
* referring unresolved or systemic NDIS market-place issues to the ACCC or its partner agencies in the state and territory jurisdictions when necessary.

**Recommendation 9**Service providers and their peak bodies should consider the issues raised by this report and adopt and promote best practice service agreements or statements of support toensure participants are not being required to enter into unfair or onerous service agreements.

Introduction

The Office of the Public Advocate’s (OPA’s) mission is to protect and promote the rights, interests and dignity of people with disability. It is a statutory office, independent of government and government services.

By virtue of its broad role within the Victorian disability, justice, mental health and health sectors, OPA’s work increasingly intersects with the National Disability Insurance Scheme (NDIS) as it rolls out across the state and country.

Through the interactions of OPA’s Advocacy, Guardianship and Community Visitors programs with the NDIS, the office has identified and developed a unique understanding of systemic and implementation issues raised by the NDIS. We have previously reported on the difficulties for people with complex and challenging support needs in obtaining adequate supports under the NDIS.[[1]](#footnote-1) OPA has also published a guide to explain decision-making for people with a significant cognitive impairment navigating the NDIS.[[2]](#footnote-2)

In the eight months to May 2019, OPA guardians were requested to sign 461 service agreements on behalf of NDIS participants. The number increased from 36 in October 2018 to 92 in May 2019. OPA guardians have been asked to sign many service agreements on behalf of participants which raise a range of serious concerns.

The purpose of this report is to describe OPA’s concerns about NDIS service agreements based on our experience and to make recommendations for their improvement. We note the issues raised are not unique to Victoria. OPA’s counterparts in other jurisdictions share similar concerns.

OPA provided the National Disability Insurance Agency (NDIA), Consumer Affairs Victoria (CAV) and the Victorian Government Department of Health and Human Services an opportunity to respond to a draft of this report. Their responses have been considered in the finalisation of this report. The response of the NDIA is also included as Appendix 1 of this report.

Context

The NDIS is a key element of the broader National Disability Strategy, which is part of a global movement to promote the equal and active participation of all people with disability.[[3]](#footnote-3) The United Nations Convention on the Rights of Persons with Disabilities (Convention) underpins this global effort. Article 12 of the Convention obliges governments to provide access to the supports people with disability may require to exercise their legal capacity.[[4]](#footnote-4)

Victoria also promotes the observance of human rights through the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter).[[5]](#footnote-5) This Act, which may apply to service providers, also provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination.

The National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act) contains general principles (s4), and general principles guiding actions of people who may do acts or things on behalf of others (s5).[[6]](#footnote-6) The following principles from the NDIS Act are of particular relevance:

* people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity (s 4(8))
* the role of families, carers and other significant persons in the lives of people with disability should be acknowledged and respected (s 4(12))
* the role of advocacy in representing the interests of people with disability should be acknowledged and respected, recognising that advocacy supports people with disability by:
  + promoting their independence and social and economic participation; and
  + promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and
  + maximising independent lifestyles of people with disability and their full inclusion in the community (s 4(13))
* people with disability should be involved in decision-making processes that affect them, and where possible make decisions for themselves. (s 5(a))
* the supportive relationships, friendships and connections with others of people with disability should be recognised (s 5(e)).

The obligation to put these principles into practice and support the legal capacity of people with disability needs to be evident in the operation of the NDIS.

Substitute decision makers and the NDIS

Under the Guardianship and Administration Act 1986 (Vic), the Victorian Civil and Administrative Tribunal (VCAT) may make orders to appoint a guardian, an administrator, or both.[[7]](#footnote-7) The extent of the Public Advocate’s authority as guardian is provided by the Act and the VCAT order. In particular, a guardian’s role does not extend to managing the person’s financial estate, which is instead dealt with through an administration order or other arrangements.

The relevant authority usually vested in the Public Advocate through a VCAT order is expressed in terms of ‘accommodation and access to services’. This enables a guardian to determine what services are suitable for the NDIS participant (participant), but the guardian has no authority regarding the person’s financial matters. This means, for example, that while a guardian may make a decision concerning what accommodation situation or service the person may live in, they are unable to sign a tenancy agreement.

The NDIS has its own substitute decision-making arrangements outside state-based guardianship laws, made under the NDIS Act.[[8]](#footnote-8) These arrangements are further developed in the National Disability Insurance Scheme (Nominees) Rules 2013 (Cth).[[9]](#footnote-9)

The rules recognise that, for some participants, there may be circumstances where the appointment of a substitute decision-maker is necessary and that the participant may be represented by a court-appointed substitute decision-maker (guardian or administrator / financial manager) under state or territory law.

The CEO of the NDIA can appoint a plan nominee. A plan nominee has designated powers that may include the preparation of a participant’s plan and management of funding for supports under the participant’s plan.[[10]](#footnote-10)

The NDIA publishes information on the NDIS**Guardians and nominees explained** webpage which contains the following statement:

As part of the appointment process for nominees the NDIA will have regard to whether the participant has a guardian, and will take the views of the guardian into consideration. There is a presumption that a guardian should be appointed nominee where their responsibilities are comparable to the duties of a nominee.[[11]](#footnote-11)

This presumption that a guardian will have comparable duties to a plan nominee is illustrative of some of the confusion surrounding the proper limitations on a guardian’s role and who may sign NDIS service agreements.

The NDIA is currently reviewing the information on this webpage and will consider this report as part of that review.

**Recommendation 1****The NDIA should consider this report in its review of public information on the NDIS *Guardians and nominees explained* webpage.**

Planning assistance

For NDIS participants, planning assistance is support provided by an NDIA planner or a Local Area Coordinator (LAC planner).

The NDIS website outlines the support provided by a LAC planner to participants. Assistance from a planner can extend to plan implementation support. This is assistance with finding and starting to receive the services set out in the participant’s NDIA approved plan.[[12]](#footnote-12)

Through their interactions with the participant, the NDIA or LAC planner can also explore with the participant whether they may need support to make decisions about service agreements. Independent support could be provided through advocacy support, formalised decision-making supports, support coordinators or a plan nominee arrangement.

OPA has observed that NDIA and LAC planners in many cases do not understand the role of a guardian.

The NDIA is currently reviewing its training for NDIA and LAC planners.

**Recommendation 2**

**The NDIA should consider this report when it updates its training for planners and provide accurate information on the role of guardians in different jurisdictions for NDIA staff and contractors.**

Support coordinators

Participants can be funded through their NDIS plan for assistance from a support coordinator to understand and implement their plan. The participant may receive funding for these supports in their plan, depending on the participant’s individual goals, plan objectives and aspirations.

The participant chooses their support coordinator. An advocate or other supporter can assist the participant to choose a support coordinator where this is uncontentious. Plan nominees and guardians with powers in relation to access to services can select a support coordinator on behalf of the participant.

There are three levels of support coordination that can be included in a participant’s plan.

**Support connection** builds upon the participant’s ability to connect with informal and funded supports.

**Support coordination** assists the participant to understand, implement and use their plan. A support coordinator works with the participant to manage service delivery tasks.

**Specialist support coordination** is a higher level of support coordination. It is for people whose situations are more complex and who need specialist support.[[13]](#footnote-13)

A funded support coordinator can connect the participant with service providers to deliver the services contained in their NDIS plan. They can also assist the negotiation process with providers and help ensure service agreements and service bookings are completed. A support coordinator cannot choose other providers, nor can they sign service agreements on behalf of the participant.[[14]](#footnote-14)

NDIS service agreements

The NDIA encourages participants and providers to enter into service agreements.

Service providers are responsible for ensuring the accessibility of service agreements to participants, including people with a cognitive impairment. This accessibility and the requirement to make reasonable adjustments relates to the information communicated about the service agreement and the service agreement itself.

A properly completed service agreement is a legal contract. The NDIA is not a party to a service agreement. It is a contract between the participant and their service provider.

There is no requirement in the NDIS Act or the rules made under the NDIS Act for service agreements to be signed in order for services to commence.

On the **Making a service agreement** webpage for participants, the NDIA provides basic information about service agreements. This information about NDIS service agreements includes the following dot points:

* You will normally need to make a written agreement with your provider(s). This is called a Service Agreement.
* Service Agreements should be simple and set out how and when your supports will be delivered.
* Service Agreements can be made between you and your provider, or between another person (like a family member or friend) and your provider.[[15]](#footnote-15)

The NDIA provides further information about service agreements and has toolkit guides on its website for providers.[[16]](#footnote-16) This guidance sets out the conditions concerning the formal agreement between a participant and their provider of services and supports. The guidance is aimed at providers of services (including not-for-profit organisations, businesses or sole operators) under the heading: **Making a service agreement** with a participant’.

A participant who chooses to engage someone to provide supports under an NDIS plan will generally enter into a written agreement with the provider (a Service Agreement). A Service Agreement will help to ensure that the participant and provider have an agreed set of expectations of what supports will be delivered and how they will be delivered. This agreement is a consumer contract between a participant and a provider, the NDIA is not a party to this agreement.[[17]](#footnote-17)

This information on the **Making a service agreement** webpage conveys the NDIA expectation that generally participants will enter a signed service agreement with their service providers.

The key elements of a service agreement identified by the NDIA include:

* the supports that will be provided
* the cost of those supports
* participant responsibilities
* provider responsibilities.[[18]](#footnote-18)

The information on the provider toolkit webpage includes a sample service agreement for providers to use as a template when they are working with participants and preparing a service agreement.[[19]](#footnote-19) The NDIA also provides a matching guide to service agreements for service providers and participants in an easy-English format.[[20]](#footnote-20)

The **Sample Service Agreement** and **Easy-English Guide to Service Agreements** that the NDIA has available on its website leave it open to service providers to insert potentially unfair participant responsibilities relating to cancellation, financial matters, indemnities, and other personal responsibilities. Such terms are likely to be unfair when the participant has a significant cognitive impairment.

OPA has observed unfair and onerous terms being added to service agreements under the sample agreement’s suggested heading of **What is expected of the participant?**[[21]](#footnote-21). An alternative template agreement and guidance should to be provided that disallows onerous provisions that are unfair to participants.

OPA notes that the NDIA does not have legislative powers to specify the terms that may be contained in service agreements. The NDIA does, however, play a critical role in providing authoritative information and guidance. The NDIA has indicated that it is in the process of reviewing its sample templates and guidance to see how these may be enhanced.

Recommendation 3

The NDIA should promote the use of suitable and fair service agreements between providers and participants by revising the current sample agreement and guidance.

Features of the new model agreement and guidance should include:

* **an accessible format for participants, including for people with a cognitive impairment**
* **assistance to the participant to understand the agreement (such as support from an advocate, family member or friend)**
* **model fair terms with supporting guidance**
* **warnings against onerous provisions.**

Signing agreements

Participants should usually have available the protection provided to them by the status and mechanisms that accompany a legally enforceable contract.[[22]](#footnote-22)

A contract happens when someone makes an offer to do something in return for a consideration (reward) and another party accepts that offer. This means that a contract is first a process of communication and negotiation and then a process of agreement. Contracts have terms that set out what has been agreed following this communication process.

All participants should have the best possible opportunity to negotiate and agree to the terms of a suitable service agreement. People can find it difficult to choose between different options and agree to something when this process, or the different options available, are outside their previous experience. This may mean that a participant will require support to learn about or try different options before they can agree on the service or provider that they will have in future.

A family member, friend, supporter or an advocate can assist a participant to understand what a service agreement says and what it will mean for them. They can support the person in the communication process to develop the terms of the contract, particularly the description of the service. A supporter or advocate does not have the legal authority to finalise negotiations and agree to the contract and sign it on behalf of the participant.

A signed service agreement can be the best way to establish what services are agreed to be provided and the terms for their provision. Generally, a signed service agreement will ensure the best protection for the participant.

The **NDIS Provider Toolkit** states that signing the service agreement is necessary, which is inconsistent with the other information provided by the NDIA on their website.

Both the participant and provider — or another nominated person (such as a participant’s family member or friend) and provider — will need to sign the Service Agreement once they have agreed on its contents.[[23]](#footnote-23)

The expectation promoted by the NDIA that service agreements will always be signed by participants or their representative contributes to the problems that we are exploring here.

The **Additional requirements for registered providers providing SDA**contained in the rules made under the NDIS Act for Specialist Disability Accommodation (SDA) set out a process that SDA providers must undertake for documenting an unsigned service agreement*.*

*Agreement with participant*

7.12 The registered provider must not provide SDA for a participant unless either:

(a) a written service agreement has been entered into between the provider and the participant in relation to the provision of the SDA; or

(b) the provider:

(i) has worked with the participant to establish a written service agreement in relation to the provision of SDA;

(ii) has provided a copy of the proposed agreement to the participant; and

(iii) provides SDA to the participant in accordance with the terms of the proposed agreement.[[24]](#footnote-24)

This process for documenting an unsigned agreement is an alternative that can be followed by providers of other services when the participant is unable to understand and enter into a contract. The term OPA uses for the documentation of this process is a ‘statement of support’.

OPA’s view on this alternative process and documentation corresponds with guidance related to Goods and Services Tax (GST) for service providers provided by the Australian Taxation Office which states that:

As long as you have written evidence of a legally binding obligation for you to make the supply to the participant as specified in the [NDIS approved participant] plan, the requirement for a written agreement is satisfied.[[25]](#footnote-25)

OPA notes that service providers will want to ensure they are adhering to the NDIS requirements provided in the NDIS Act and its rules. Service providers may be attempting to always obtain a signed service agreement, even when this would be inappropriate. Service providers may also feel they need to deny or delay services until they are able to obtain a signed service agreement. The NDIA needs to adjust the information it provides to reassure service providers that they can provide services without a signed service agreement and make clear the expectations regarding documentation that apply in these limited cases. The NDIA should also make it clear that service provision should not be unreasonably delayed while the documentation is being finalised.

If an agreement is to be signed, there needs to be clarity about who are the parties that have legal authority to sign agreements.

The NDIA publishes website information that suggests family members or friends may sign agreements on behalf of a participant.[[26]](#footnote-26) OPA does not support this approach. As a legal contract, a service agreement can only be signed with legal authority by the participant, or an appointed substitute decision maker with relevant powers, who has understood and accepted the contract’s terms. Potential substitute decision makers are a plan nominee, guardian, administrator (also known as financial manager in some jurisdictions) or an attorney, if the terms of the service agreement are within the scope of their legal authority.

Recommendation 4  
The NDIA should revise existing guidance and information to clearly state that while the expectation is that generally participants and service providers will enter into a signed service agreement, there are some circumstances in which it is necessary for service provision to proceed through a deed or an unsigned service agreement (statement of support) and that needed services should not be delayed by the documentation process.

Recommendation 5  
The NDIA should revise existing guidance and clarify that a service agreement may only be signed by a participant, or their legally appointed representative, who has understood and accepted the contract’s terms.

Unsuitable service agreements

A main concern that OPA has about the kinds of agreements being used by service providers is that many contain provisions that are unfair to participants. This is especially so where participants and plan nominees are entering into agreements containing onerous terms without receiving legal advice or assistance.

We have grouped the concerns and examples of problematical terms and clauses found in proposed service agreements into the following nine categories:

* anti-competitive matters
* assignment
* complaints
* description of services
* financial
* improper signing of agreements
* indemnity and liability
* negotiations
* personal responsibilities.

Anti-competitive matters

Some agreements contain exclusion clauses that attempt to limit a participant’s ability to engage or employ an employee of the service provider in the future. These matters might be included under sub-headings such as ‘your responsibility’ or ‘[service provider] employee’. These clauses seek to control access to employees of the service provider beyond the conclusion of the NDIS service agreement.

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| **Agreement examples**   * if engagement occurs within 6 [sometimes 12] months of that person last providing supports to you, a placement fee will be applicable * not to engage or employ any person the service provider used to provide supports unless the support service first agrees * a placement fee will apply to any casual/ temporary staff member introduced to the participant by the service provider who is engaged by you, a related company or associated firm on a permanent, contract/temporary, part-time or consultancy basis * the placement fee is to be paid on the commencement date of the candidate * the placement fee will be charged at a flat rate of $3,000.00 plus GST per placement * Accordingly, should Client desire to employ any of [the service provider] caregivers, such employment will be deemed in violation of these restrictions. In the case that Client wishes to employ any such caregiver within a three (3) year period of caregiver’s termination of employment with [the service provider], Client agrees to pay [the service provider] a one-time placement fee of TEN THOUSAND DOLLARS ($10,000.00), which amount shall be due within 10 business days of employment of such caregiver. |

Assignment

Some NDIS service agreements contain clauses that allow the service provider to sub-contract services to a future unknown service provider. By signing the NDIS service agreement, the participant consents to the service provider’s ability to assign all or part of their interest rights, and obligation under the agreement to a third party that they select, as shown in these examples.

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| **Agreement examples**   * the assignment is given effect by way of notice to the participant * reference in agreement to ‘us’ or ‘we’ will be taken to be reference to the notified assignee * the service provider will need to subcontract services from time to time in order to deliver the supports in line with the participant’s NDIS plan * in the event that the service provider arranges for services to be provided by a third party, it is the participant’s responsibility to pay the third party and the service provider [the initial service provider] is not liable for those fees. |

Complaints

While most service providers include a feedback, complaints and disputes clause within their NDIS service agreements, there is significant inconsistency in information being provided to participants regarding how to complain, and who is able to resolve complaints.

The following two examples illustrate the wide variation found in feedback, complaints and dispute clauses.

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| **Complaints examples**   * Both parties signing this service agreement record their intention that if any dispute or differences arises out of or in relation to the agreement, it will be resolved in the spirt of good faith and on a commercially realistic basis by negotiation or mediation. * [the service provider] applies the principal of “natural justice”. This means that a minimum standard of fairness is to be applied to the investigation and adjudication of a complaint. The requirement of natural justice includes: fully informing a person of any allegation made against them; giving them an opportunity to state their case, provide an explanation or put forward a defence; ensuring that proper investigation of the allegation occurs, that all parties are heard and relevant submissions considered; ensuring the decision-maker acts fairly and without bias. |

Better practice clauses include contact details for a range of different bodies and authorities. The participant is advised to contact these bodies if a complaint is not resolved, or the participant is not satisfied with the service provider’s resolution. While participants are commonly referred to the NDIA, some service providers refer participants to the Disability Services Commissioner, Mental Health Complaints Commissioner or ‘a third party’.

Description of services

OPA is concerned about the lack of meaningful description and detail of proposed services contained within the schedules of supports. This is very important if a participant seeks to rely on Australian consumer law for redress for poor performance.

Often the description of a proposed service within a schedule of support is brief and conveys little detail regarding the proposed service and how it is to be provided to a participant. The examples below are common descriptions found within schedules of supports, including some particularly concerning examples relating to proposed services with very high levels of funding.

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| **Typical agreement examples**   * short term accommodation and assistance, Saturday, standard intensity * assistance to access community, social/rec –individual higher intensity – weekdays * support for four hours on a Saturday * group based community, social and recreational activities * transport * improved daily living skills. |
| **Example from a $350,000+ service agreement**   * assistance with daily life/ self-care |
| **Example from a $450,000+ service agreement**   * Support: ‘assistance in a shared living arrangement for 3 persons – complex needs’   Amount: 53 weeks  Cost: $8,583.03  Total: $454,900.59  Funding Managed By: NDIS Portal |

It is noteworthy that there has been a small number of NDIS service agreements that do provide meaningful content within their schedule of supports. Good practice schedules of supports included a format that used brief sub-headings and descriptions for how, who, when, and where the proposed supports would be delivered. This level of detail within a schedule of supports assists in keeping the service accountable for the promised level of support.

Financial matters

In most cases where VCAT has appointed the Public Advocate as guardian with powers and duties to make decisions concerning access to services, the participant also has an administrator appointed by VCAT. The administrator has authority, powers and duties in relation to the participant’s estate. OPA cannot enter into agreements that relate to the person’s estate. NDIS service agreements often contain the following clauses for which the authority of an administrator, plan manager or plan nominee is required.

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| **Payment examples**   * payment of fees and charges are considered the responsibility of the participant whether the participant pay the service provider directly or through a funding body or financial intermediary * in the event of that a service provider is required to provide unplanned or additional supports, the support provider may be permitted to seek payment from either the NDIA or the participant themselves * if the service provider is unable to claim payment from the NDIA for some reason, the service provider may invoice the participant directly for any unpaid fees and charges * if services provided by the service provider exceed the allocated NDIS funding, it is the participant’s responsibility to pay the outstanding balance in accordance with the specified NDIS fee structure [these clauses can name both the participant and ‘the participant’s representative’ as being responsible for payment] |

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| **Cancellation examples**   * where a participant fails to present for services, the provider can charge a cancellation fee for a maximum of 2 hours of services within the period of any service agreement * if the participant does not provide notification of cancellation of appointment the service provider will invoice for the planned service * if participants fail to cancel an appointment with 24 hours notice, and the service provider is unable to arrange an alternative client appointment, the service provider may charge 50% fee on the first occasion * if the service provider incurs any third party cost related to the cancellation (such as taxi costs) the service provider is permitted to also charge the third party cost to the participant |

These cancellation clauses present difficulties for guardians as they have no day-to-day contact with the participant. There are often other service providers, including support coordinators, who are in a better position to provide notices of cancellation. This may require agreements between the service providers, but they receive no funding to do this and may object.

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| **Additional expenses example**   * community access fee   + $5.00 per day for community access fees into facilities. * additional cost   + participant will receive notice for ‘any additional cost for community based activities’. |

This ‘community access fee’ was described as a service cost. It was not included in the schedule of support nor was it reported as a service pursuant to the participant’s NDIS plan. The same NDIS service agreement provided for additional cost, separately and in addition to the service cost.

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| **Service booking example**   * by entering into this agreement, you agree that the service provider is authorised to make and accept service bookings and products described in your support package, on your behalf. |

NDIS service agreements often seek consent for the service provider to create a service booking on the portal. Consent to the making of service bookings by a service provider is likely to be a financial decision. Service bookings not only nominate the type of service and the dates of support, but also nominate the funding to be allocated to a given provider.

Agreements often include a separate ‘tick box’ for the participant to consent to the service provider creating a service booking.

Improper signing of agreements

Some service providers, once provided with an alternative deed document and explanation as to why the Public Advocate is unable to sign a service agreement, still attempt to have the participant sign the original NDIS service agreement regardless. It may be reasonable to conclude that the emphasis on the signing of the NDIS service agreements is an attempt to ensure that terms, which the Public Advocate considers to be onerous and unfair, can be enforced or relied upon.

**Recommendation 6  
The NDIA should improve the guidance and directions it gives to prohibit service providers from asking participants to sign service agreements that participants do not understand.**

Indemnity and liability matters

An increasing number of NDIS service agreements contain indemnity and liability clauses that the participant, by signing the agreement, is understood to acknowledge and accept, as shown in the first examples below. In many cases involving an OPA guardian, the services are specifically required to assist with a person’s behaviours. It is remarkable in these circumstances that service providers should propose agreements containing such provisions as shown in the examples.

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| **Typical examples**   * in the event a service provider employee has personal property damaged during the course of their shift by a participant or associated person, it is the service users funding body or guardian/primary contact’s responsibility to reimburse the total cost of damages to the service provider’s employee. * the service provider is not liable for reimbursement of broken/damaged property to the service providers employees, when the service provider is performing a shift under a brokerage arrangement |

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| **Behaviour support example**   * when [the support provider] is providing the supports to you, if you conduct yourself in a matter that causes any loss or damage to [the support provider] you are responsible for this and you must reimburse [the support provider] for the loss or damage suffered to [the support provider], except where [the support provider] contributes to the loss or damage * you agree to indemnify [the support provider] for any liability, loss or damage that [the support provider] incurs or suffers because of your actions. |

Negotiations

The **NDIS Price Guide** either allows or requires the cost of services to be negotiated between the service provider and the participant. These negotiated costs include incidents where a provider intend to claim travel cost from a participant; where a provider incurs cost when accompanying a participant in the community and the participant is to make a reasonable contribution towards the cost; and situations where there is a specific risk that a participant will frequently make short-notice cancellations for a support due to the nature of a person’s disability or the nature of support.[[27]](#footnote-27) These are inherently financial negotiations for which the Public Advocate does not have decision-making authority.

Participants who have limited decision-making capacity, without people in their life who support them to access services, may be disadvantaged should they be reliant solely on the provider to determine what is a reasonable contribution or appropriate individual arrangements.

Personal responsibilities

Matters that are outside the control of an OPA guardian (and sometimes a person’s plan nominee) are often included within NDIS service agreements under the heading ‘your responsibilities’.

These are responsibilities that tend to be personal in nature or within the participant’s sole control. It would be more appropriate for those matters to be the subject of an agreement directly with the participant. Such agreements should acknowledge any limitation on the participant’s capacity to understand or comply with obligations.

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| --- |
| **Agreement examples**   * treat staff with courtesy and respect * maintain a safe environment for support service staff to work in when visiting the participant’s home * provide a smoke free workplace for support service staff * respect support service staff property * advise service provider if surveillance cameras are being used to monitor the participant’s home, including the location of the camera and how any concern about the recorded conduct of an employee is raised. * to inform the provider if the allocated hours/budget in the NDIS plan has been exceeded prior to the provision of supports * provide equipment and cleaning products required for domestic assistance services |

**Recommendation 7****The NDIA should review the examples in this report of imprecise, unfair and onerous terms contained in some service agreements and improve the guidance and directions it gives to promote and require fair service agreements.**

OPA deed documents

In response to the unsuitable service agreements being presented to OPA for signing, OPA developed two template documents. Legally, these documents are a deed, rather than a contract.

A deed is a legal way of expressing a serious commitment or promise to do something. We have provided completed templates to service providers when a request is made of an OPA guardian to sign a service agreement for a person that they represent under a guardianship order. The templates are consistent with the exercise of the Public Advocate’s typical authority relating to access to services, but do not go beyond that authority into financial matters. They also do not include matters that are personal to the participant. Since October 2018, in only one out of more than 200 instances has a service provider said they will not enter into the deed. This was a new service provider and the participant with their guardian were able to choose from a range of alternative service providers.

The template deeds were adapted by OPA to each person’s circumstances and the services offered, before being provided to the service provider. This was a time-consuming task for OPA’s guardianship and legal staff, requiring significant dedicated resources.

From July 2019, OPA is making the deed template available on our website for download and completion by service providers. This will facilitate the process of completing the deed. It also allows the service provider to enter the service details that have been discussed directly with the participant and their supporters and guardian.

Consumer Protection

For a contract to be valid, it must be made according to law, including anti-discrimination and Australian consumer law.

OPA has been presented with a series of unsuitable service agreements, with unfair and onerous terms, as discussed in this report.

The NDIS Quality and Safeguards Commission (NDIS Commission) has a primary responsibility for ensuring NDIS providers and their workers are acting within the **NDIS Code of Conduct (NDIS Providers)**. The code requires service providers to act with integrity, honesty and transparency.[[28]](#footnote-28)

The Australian Competition and Consumer Commission (ACCC) provides information that can help service providers comply with Australian consumer law.[[29]](#footnote-29) The ACCC and CAV and their equivalent agencies in other jurisdictions can also receive reports about businesses that may have breached the Competition and Consumer Act 2010 (Cth).[[30]](#footnote-30)

The ACCC can take a range of actions when it becomes aware of breaches of the Competition and Consumer Act 2010 (Cth). One of the ACCC’s key priority areas is conduct involving a significant new or emerging market issue. Its strategies to encourage compliance and enforce the law can include resolution by litigation, amongst other formal enforcement approaches. The ACCC also coordinates and works with other agencies to implement these strategies.[[31]](#footnote-31)

OPA considers that the ACCC and the state and territory consumer regulators have a key role to play in ensuring that NDIS service agreements are lawful and fair. These bodies can intervene to support compliance with Australian consumer law where market-place issues are unable to be addressed by the NDIS Commission as the direct industry regulator.

Organisations that support the human and consumer rights of people with disability also have a potential role in bringing attention to any unfair agreements that they encounter. For example, disability advocacy and consumer organisations can encourage good practice from service providers when they are providing advocacy support to NDIS participants. The OPA deed templates provide an example of good practice that can be used to document the arrangements for NDIS participants through a contract, deed or statement of supports.

OPA recognises that most service providers want to do the right thing and adopt best practice. Service providers and industry peak bodies can also use the OPA deed and other examples of good practice to promote better practice and put an end to unfair agreements.

**Recommendation 8  
Disability advocacy and consumer rights organisations should consider the issues raised by this report when they are engaged with NDIS participants and where possible support NDIS participants to address any unfair NDIS service agreements by:**

* **reporting issues to the NDIS Commission as the primary industry regulator in the first instance**
* **referring unresolved or systemic NDIS market-place issues to the ACCC or its partner agencies in the state and territory jurisdictions when necessary.**

**Recommendation 9  
Service providers and their peak bodies should consider the issues raised by this report and adopt and promote best practice service agreements or statements of support to ensure participants are not being required to enter into unfair or onerous service agreements.**

Conclusion

OPA has conveyed these issues to the NDIA. OPA has included the recent response from the NDIA in this report at Appendix 1. OPA welcomes the commitment from the NDIA to continue discussions and enhance the guidance provided to participants and providers.

OPA looks to the emerging role of the NDIS Commission to assist with developing and requiring good practice when participants are entering into NDIS service agreements.

We also note the key role of the ACCC and the state and territory consumer regulators in the NDIS framework for services to people with disability. OPA has raised the issues identified in this report with CAV to explore any further follow up action that should be taken to address these issues.

OPA will distribute this report for consideration by agencies with a role to play in ensuring fair service agreements. We call on other safeguarding and advocacy bodies in Australia to explore the issues raised by this report and to consider taking appropriate action. OPA seeks to work with other agencies to ensure fair service agreements for all NDIS participants.

Providing appropriate guidance to service providers will help ensure they develop service agreements or deeds with acceptable terms. OPA will be seeking further monitoring and action so that participants, their plan nominees or guardians are not being required to enter into unfair and onerous agreements.

# Appendix 1. NDIA Response to the draft report

Thank you for the opportunity to review the Victorian Office of the Public Advocate’s (OPA) report: NDIS Service Agreements: Making Choice and Control More Real.

The National Disability Insurance Agency (NDIA) acknowledges the efforts of the OPA to prepare this paper and appreciates being given the opportunity to provide comment on the draft recommendations. While the below comments are intended to assist you in understanding the NDIA’s approach to the recommendations in the report, we would like to continue to engage with you about these matters to do what we can to assist.

As the OPA’s recommendations address a number of related matters, we thought it may be useful to provide our response utilising the broad themes covered by your report. These being:

* guardians and nominees
* the NDIA’s legislative powers
* provider payment obligations
* the NDIA’s role in providing support regarding service agreements
* other related matters.

***Guardians and nominees:*** Information on the National Disability Insurance Scheme (NDIS) website (‘Guardians and Nominees explained’ webpage) is consistent with the NDIS Act 2013 and the NDIS (Nominees) Rules 2013. The NDIS (Nominees) Rules 2013 does not presume that a court-appointed decision-maker has duties comparable to a nominee. Where a court-appointed decision-maker’s responsibilities are comparable, they will ordinarily be appointed nominee. The NDIA is currently reviewing information on the ‘Guardians and Nominees explained’ webpage and will incorporate the OPA’s feedback on this matter when reviewing this material.

From an internal training perspective, the NDIA is currently reviewing its New Starter Program to ensure the NDIA continuously enhance the way we upskill our Planners and Local Area Coordinators (LACs). Work is also continuing with Disability Advocacy Network of Australia (DANA) to finalise in-depth disability awareness training for Planners and LACs with a stronger focus on human rights and the social model of disability. This includes development of an introductory eLearning module following extensive consultation with DANA and other peak bodies.

***NDIA’s legislative powers:*** Participants are free to choose providers that best suit their needs and circumstances. In this context, service agreements are between a participant and chosen provider. This aligns with the guiding principle of the NDIS Act, which gives participant’s choice and control in relation to the providers they engage to deliver their supports.

With one exception, the NDIS Act and its subordinate legislation does not mandate the requirement for service agreements. The one exception is where the NDIS (Specialist Disability Accommodation) Rules state that a service agreement is required for Specialist Disability Accommodation.

Whilst service agreements are recommended as good practice, NDIA is unable to enforce these as an obligation under the NDIS Act. Therefore NDIA is unable to dictate the terms that should, or should not, be included in any service agreement. However the NDIA is prepared to look at the sample templates and guidance it provides.

The NDIA will take action where required to ensure providers are fulfilling their obligations under the NDIS Act 2013, NDIA’s Terms of Business, and the Price Guide. The NDIA has a range of controls in place to ensure compliance with the Terms of Business and to support transparent business transactions between providers and participants.

Providers must not exceed the price limits included in the NDIS Price Guide when providing supports to participants who are NDIA-managed or plan-managed. Self-managed participants can use registered or unregistered providers and are not subject to pricing controls in the NDIS Price Guide.

The NDIA sets price controls for specific NDIS supports to ensure participants receive the opportunity to obtain the reasonable and necessary supports from their NDIS plan. The Price Guide includes price limits, which are the maximum prices that registered providers can charge NDIS participants for specific supports. There is no requirement for providers to charge at the maximum price for a given support or service. Participants and providers are free to negotiate lower prices. Not all NDIS support items have price limits.

If a participant believes a provider has breached the NDIA Terms of Business they are encouraged to complete a complaints form on the NDIS website at [www.ndis.gov.au/contact/feedback-and-complaints](file://ndiastaff.ndia.gov.au/Data/Users/VIC/GEELON-Cnr-Market/SB0079/Documents/www.ndis.gov.au/contact/feedback-and-complaints) or call NDIA on 1800 800 110.

The NDIA encourages participants to raise any concerns about the quality of the services they are receiving with the provider directly. If the matter cannot be resolved, it should be referred to the relevant oversight body for action, which differs in each state and territory until the NDIS Quality and Safeguards Commission (NDIS Commission) is fully rolled out.

***NDIA’s role in providing support relating to service agreements:*** Participant choice and control is paramount and a key objective of the NDIS Act. In line with the principles of the NDIS Act, participants are free to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports. This includes the right to negotiate the terms included in service agreements.

When engaging with a provider, participants are encouraged to develop a service agreement, which details the type, cost and duration of supports the provider will deliver. The NDIA makes this recommendation so that participants and providers are clear about what has been agreed to, and the rights and obligations of each party to the service agreement.

While acknowledging the absence of NDIA’s legislative powers to enforce service agreements, or to specify the terms and conditions to be contained within service agreements, the NDIA does produce reference material to support participants to be informed consumers when entering into a service agreement and is prepared to look further at this in terms of how such guidance could be improved to assist in meeting the participant protection objectives referred to in your report.

The NDIA has published an Easy English Guide to Service Agreements on the Provider Toolkit to assist participants and providers when creating a service agreement. The Sample Service Agreement refers to relevant pages in the Easy English Guide to Service Agreements.

While service agreements are between a participant and provider, you are aware that the NDIA has published a sample service agreement on the Provider Toolkit for providers and participants to assist them to create their own tailored service agreements. As referred to above we are prepared to look into how these sample service agreements might be enhanced.

NDIA encourages participants to know their rights under Australian Consumer Law. The Australian Competition and Consumer Commission has resources for people with disability: [www.accc.gov.au/focus-areas/information-for/consumers-with-disability](http://www.accc.gov.au/focus-areas/information-for/consumers-with-disability) (external).

Providers should be aware of their obligations under Australian Consumer Law when creating a service agreement with a participant. The Australian Competition and Consumer Commission has information to help businesses, (including not-for-profit organisations) that supply goods or services to consumers with disability or to NDIS participants: [A guide to competition and consumer law: for businesses selling to and supplying consumers with disability](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.accc.gov.au_publications_a-2Dguide-2Dto-2Dcompetition-2Dand-2Dconsumer-2Dlaw-2Dfor-2Dbusinesses-2Dselling-2Dto-2Dand-2Dsupplying-2Dconsumers-2Dwith-2Ddisability&d=DwMG3g&c=JnBkUqWXzx2bz-3a05d47Q&r=AjCS4gCh6qOZct2ZR7-f33cSwnVn394hOCBxmiZgYlvogOlcY7CX9tgxz7nKEBTo&m=BCxl-_Al2RuVhRwQH8OLkaa8vVxsOZaFwQvc6eGISAk&s=LzVWBujKZNfc8eKGNcfgBUPZF4-YG1xM7wZEWI4RfjQ&e=) (external).

With regard to who can enter a service agreement, as the NDIA is not party to service agreements, it is unable to direct who can and cannot enter into service agreements for the delivery of NDIS supports. This is a matter for the parties entering into these agreements. The NDIA provides assistance to participants with complex support needs to effectively connect with providers via a Support Coordinator. The new Complex Support Needs Pathway ensures that a Specialised Planner has worked closely with the participant, their family and carers and relevant existing services (such as health, justice and mental health) to develop and implement the NDIS plan. This includes a detailed plan handover meeting with a skilled Support Coordinator to facilitate utilisation of NDIS funds and connections with other government and community services.

***Provider payment obligations:*** In relation to the OPA’s suggestion that the NDIA should underwrite the financial arrangements to pay for approved NDIS supports included in service agreements, please note that NDIA does not have visibility of service agreements between participants and providers and as such cannot reasonably agree to terms or conditions included in an agreement between a participant and a provider.

For participants who have their plans managed by NDIA, registered NDIS providers can obtain confidence regarding payment by making a service booking for the agreed monetary value of the services they will deliver to participants via the NDIA’s myplace portal. It is worth noting that only registered NDIS providers can deliver supports to NDIA-managed participants. Participants who elect to self-manage or have their plan managed for them are responsible for engaging with and paying providers in line with their NDIS plan.

***Other related matters:*** As you know the NDIS Quality and Safeguards Commission (NDIS Commission) will commence operating in Victoria from 1 July 2019. The NDIS Commission is a new independent Agency established to regulate the NDIS market, provide national consistency, promote safety and quality services, resolve problems and identify areas for improvement.

Among their functions, the NDIS Commission will ensure NDIS providers and workers adhere to the NDIS Code of Conduct (NDIS Providers). An obligation under the NDIS Code of Conduct (NDIS Providers) is for providers and workers delivering NDIS supports to act with respect for individual rights to freedom of expression, self-determination and decision-making in accordance with relevant laws and conventions.

The NDIS Code of Conduct (NDIS Providers) applies to both registered and unregistered NDIS providers. The NDIS Commission has a range of regulatory actions available if a NDIS provider has been found to breach the NDIS Code of Conduct (NDIS Providers).

***Conclusion:*** Thank you for the opportunity to provide comment on OPA’s NDIS Service Agreements: Making Choice and Control More Real report.

The NDIA appreciates the detailed information contained within this report and will utilise this feedback to review the guidance available to participants and providers to ensure information and references in relation to service agreements is clear and consistent.

National Disability Insurance Agency

6 May 2019

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