# Case note: McCutcheon v National Disability Insurance Agency [2015] AATA 624 (21 August 2015)

## Background

In *McCutcheon* v *NDIA*,the Administrative Appeals Tribunal (the Tribunal) delivered a detailed set of reasons interpreting important provisions of the *National Disability Insurance Scheme Act 2013* (Cth) (the Act), and the relevant Rulesand Operational Guidelines which govern decisions about ‘reasonable and necessary supports’ that can be funded by the National Disability Insurance Agency (NDIA) for participants in the NDIS (the Scheme).

The Applicant, Ms McCutcheon, has disabilities including spina bifida and scoliosis. She became a participant in the Scheme in 2014. She had previously been eligible for State government funding for her disabilities under an Individual Support Package (ISP). Under her ISP, Ms McCutcheon was able to access chiropractic treatment for neck and back pain, and to realign her upper spine. She received this treatment regularly from 2008 until she was transferred to the Scheme. The NDIS approved funding for 3 sessions of chiropractic treatment to assist Ms McCutcheon’s transition to the NDIA, after which funding ceased.

The NDIA decided not to fund further chiropractic treatment on the basis that it was not a ‘reasonable and necessary support’, because it was not satisfied that:

1. chiropractic treatment will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice (s. 34(1)(d)); and
2. chiropractic treatment is most appropriately funded or provided through the National Disability Insurance Scheme, 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:
   1. as part of a universal service obligation; or
   2. in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability (s. 34(1)(f)).

## Effective and beneficial for the participant having regard to current good practice – s. 34(1)(d)

### Current good practice

The meaning of ‘current good practice’ was first considered by the Tribunal in *TKCW* v *NDIA* [2014] AATA 501*.* In *McCutcheon*,the Tribunal applied *TKCW* and emphasised that the starting point for consideration of current good practice will dependon ‘the particular condition and an individual’s circumstances*’.* Further, it will be:

a matter for evidence as to such things as the extent to which a treatment or therapy is recognised as effective and beneficial, and is practised, by health professionals [77].

In *McCutcheon*, the Tribunal referred to the body of literature about chiropractic treatment in evidence to conclude that there was ‘ample evidence that it is widely used for a range of conditions’*.* However, the relevant issue for determination was whether it represented current good practice. The Tribunal was persuaded by the opinion consistently expressed by the Applica

nt’s chiropractor and physiotherapist, and an expert called by the NDIA, that in the Applicant’s case, chiropractic treatment had a role to play in maintaining her level of function, even though long term functional improvement could not be expected. Further, the Tribunal accepted evidence that chiropractic treatment, included as part of a ’collaborative approach’ with other treaters, was current good practice in the Applicant’s case [82].

### Effective and beneficial

Section 34(1)(d) also requires that ‘current good practice’ be ‘effective and beneficial for the participant’. The Act does not define ‘effective’ or ‘beneficial’. The Tribunal referred to the ordinary meaning of these words, having regard to their dictionary definitions. The Tribunal determined that the meaning of the words should be considered ‘in a therapeutic context’. In that context, the Tribunal said ‘effective and beneficial’ means ‘treatment that does what it is intended to do and which produces a benefit for the participant’ [35]*.*

The *National Disability Insurance Scheme (Supports for Participants) Rules 2013*deal with the assessment and determination of reasonable supports that will be funded by the NDIS, and provide that in deciding whether a support will be, or is likely to be, effective and beneficial, the NDIA may consider evidence including ‘published and refereed literature and any consensus of expert opinion’(r 3.2(a)), and ‘the lived experience of the participant or their carers’(r. 3.2(b)).

Importantly, the Tribunal observed that Rule 3.3 *‘*indicates that expert opinion may be necessary but does not suggest that only expert evidence will be sufficient for this purpose’ [77]*.*

This is an important point. The NDIA’s approach in *McCutcheon* was to rely on expert evidence regarding a literature review of medical trials examining the effectiveness of chiropractic treatment in cases of ‘chronic low back pain’ as a complete answer to the question of whether chiropractic treatment could ever be considered a ‘reasonable and necessary support’ under the Scheme [76]. This approach suffered from a number of evidentiary problems. Firstly, the expert conceded the limitations of the research she had undertaken, given a number of factors including time constraints and an incomplete brief of the Applicant’s disabilities. Secondly, she characterised the Applicant’s disability as more akin to ‘failed back surgery syndrome’, for which there was a lack of relevant literature. Thirdly, she acknowledged that ‘it is very hard to say what treatment a patient does or does not need based on literature because an individual approach is always required’[62].

On the issue of the weight to be accorded to the literature, the Tribunal concluded:

Dr Sherry readily acknowledged the limitations of the research she was able to do in the short time available to her and the limited role that literature can play in determining the most effective treatment in an individual case. In particular, she acknowledged the limited clinical history she had and the limited relevance of the studies to Ms McCutcheon’s particular conditions. Against this are a number of studies suggesting positive outcomes which also suffer from limited relevance to Ms McCutcheon’s particular conditions. In these circumstances Ms McCutcheon’s lived experience is especially relevant [84].

### The lived experience of the participant and their carers

*McCutcheon* is the first case in which the Tribunal has considered evidence of ‘lived experience’, and the weight to be accorded to that evidence in determining the question of what is, or is likely to be, effective and beneficial for the participant. The Tribunal said it understood the Applicant’s ‘lived experience’ to mean:

her first-hand knowledge, experience and understanding of her conditions and her various treatments, [which] will inevitably be subjective. How much weight “lived experience” should be given will depend on all of the available evidence. Where it is consistent with reliable, relevant, independent evidence, it will likely be given a good deal of weight. Where it is at odds with other evidence, it may be given less weight. Where reliable, relevant, independent evidence is lacking, evidence of “lived experience” may be particularly important [86].

The Tribunal decided that the Applicant’s evidence of her lived experience ‘must be given very considerable weight’*.* In coming to that conclusion, the Tribunal was satisfied that the Applicant’s evidence was consistent with independent evidence from her chiropractor, physiotherapist and the NDIA’s expert, that chiropractic treatment maintained her mobility and general functioning. The Applicant’s evidence was especially relevant given the Tribunal’s finding that the available medical literature was of limited relevance to her particular conditions.

## Most appropriately funded by the NDIA and not more appropriately funded through general systems of service delivery – s. 34(1)(f)

The importance of ensuring the financial sustainability of the NDIS so that it functions as an insurance-based scheme is emphasised throughout the Act. The 2011 Productivity Commission Report regarding the proposal for a national disability insurance scheme stated that it would be important that the NDIS did not respond to funding shortfalls in mainstream health services by providing its own substitute services. This policy consideration is reflected in the Act, Rules and Operational Guidelines.

Rule 7.4 of the NDIS (Supports for Participants) Rules provides that the NDIS will be responsible for funding supports related to a person’s ongoing functional impairment that enable them to undertake activities of daily living. Importantly, in the *McCutcheon* case, the rule provides that these funded supports include:

maintenance supports delivered or supervised by clinically trained and qualified health professionals where these are directly related to a functional impairment and integrally linked to the care and support a person requires to live in the community and participate in education and employment.

The *Operational Guideline – Planning and Assessment – Supports in the Plan – Interface with Health* also provides guidance on this question. Relevantly, the Guideline provides that ‘therapeutic support’, including assistance by allied health professions suchasphysiotherapycan be funded by the NDIS where the primary purpose of the support is to ‘maintain a level of functioning including long term therapy/support required to achieve small incremental gains or to prevent functional decline’*.*

The NDIA submitted it should not be responsible for funding chiropractic treatment because it was ‘clinical treatment’of a health condition (chronic pain). The NDIA argued that because a rebate was available for chiropractic treatment under Medicare, that indicated it was more appropriately funded by the health system.

The Tribunal acknowledged that ‘it is not easy to draw clear lines around what is clinical treatment of health conditions’ (which the NDIS will not fund) and supports that meet the description contained in r. 7.4 (which the NDIS will fund)*.*

It said:

The fact that a Medicare rebate is available for a treatment might suggest that it is more appropriately funded by the health system than the NDIS, but not necessarily. The Operational Guideline states that “assistance” by allied health professions including physiotherapy and occupational therapy, both of which are covered by the *Chronic Disease Management – Individual Allied Health Services under Medicare* program, is more appropriately funded by the NDIS than other parties if it is maintenance care whose primary purpose is to provide ongoing support in order to maintain a level of functioning including long-term therapy/support to prevent functional decline. It may be that “assistance” connotes something different from “treatment” but, if so, it is not clear why the Guideline refers to “long term therapy/support”.

The NDIA accepts that physiotherapy (for which the *Chronic Disease Management* rebate is available) may be funded as a *reasonable and necessary support* but says it may only be funded for a specified number of sessions aimed at assessment and assisting a person establish home-based exercise, rather than treatment. If the first part of that is correct, I cannot see why chiropractic treatment is necessarily excluded from being a reasonable and necessary support. It is not clear from the Rule and the Guideline why funding for physiotherapy is necessarily limited as described but, even if it is, I cannot see a basis for not funding chiropractic for a purpose such as proposed by Dr Sherry [108 - 109].

The Tribunal concluded that it was satisfied that chiropractic treatment for the Applicant was most appropriately funded by the NDIA, and not more appropriately funded through the health system. However, it was at pains to point out that its decision was made in the context of evidence that, in the Applicant’s case, treatment should be part of a ’collaborative approach’ for a specified time. The Tribunal noted in conclusion that:

Each participant’s plan must include a date by which it will be reviewed and may specify the circumstances in which it will be reviewed: s 48(5). As well, a participant may request a review at any time, and the CEO of the NDIA may conduct a review on his or her initiative at any time: s 48(4) and (5). These provisions reflect that a plan is a “living document” that may change according to a participant’s changing goals and aspirations, and needs for support. It will be important for Ms McCutcheon’s treaters to bear in mind that, if continuing effectiveness and benefits of chiropractic treatment, or any other treatment, cannot be demonstrated, it may no longer satisfy the requirements for funding as a *reasonable and necessary support* [113].

*This case note was prepared by Rosalinda Casamento, Senior Lawyer, Victoria Legal Aid.*