

Submission by the  
Commonwealth Ombudsman

**Review of the *National Disability  
Insurance Scheme Act 2013***

Submission by the Commonwealth Ombudsman, Michael Manthorpe

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## Introduction

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to make an informal submission to the Department of Social Services (DSS) regarding the review of the *National Disability Insurance Scheme Act 2013* (the NDIS Act).

As part of its broad oversight role of Commonwealth Government administration, the Office has oversight responsibility for the actions of the National Disability Insurance Agency (NDIA). The Office handles complaints about the NDIA's administrative actions and decisions. We can also consider complaints about contracted organisations who deliver services on behalf of the NDIA, including Local Area Coordinators who conduct information gathering and pre-planning interviews and Early Childhood Early Intervention partners.

The purpose of the Office is to:

- provide assurance that the organisations we oversight act with integrity and treat people fairly
- influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action; and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

Through the investigation of complaints about the actions of a Commonwealth department or agency, the Office can build a detailed picture of an agency's operations. In addition to resolving individual complaints, the Office monitors programs to identify systemic issues which raise concerns about public administration matters.

The Office is committed to working closely with the NDIA, DSS, the National Disability Insurance Scheme Quality and Safeguards Commission, the community, service providers and people living with disability and their families, to understand the way the NDIS is working in practice, and influence systemic improvement in the administration of the Scheme.

## Issues for consideration

Our submission to the review of the NDIS Act is based on feedback received by the Office through complaints as well as general feedback from NDIS participants, families, carers, providers, advocates, community organisations and peak bodies obtained through our community engagement.

The submission outlines our observations about the NDIA's administration of the NDIS, including its processes and procedures relating to specific aspects of the legislation. Based on our investigation of complaints and monitoring of issues associated with the NDIS, there are a number of elements of the NDIA's administration of the Scheme which we consider could warrant consideration under the review.

We have addressed these issues in two sections. First, we have outlined aspects of the NDIS Act which we consider could require legislative amendment and/or clarification through this review, and second, we have outlined aspects of the NDIA's administration, which we consider are potentially inconsistent with the NDIS Act and its intent.

## **Issues requiring clarification under the legislation**

### **1. Date of effect of decisions following internal and external review**

#### *Date of effect issues*

The Office considers there is a need to clarify the date of effect of internal and external merits review decisions made by the NDIA, or the Administrative Appeals Tribunal (AAT).

Section 100(6) of the NDIS Act states that a reviewer must as soon as practicable, make a decision either confirming the reviewable decision, varying the reviewable decision or setting aside the reviewable decision and substituting a new decision.

The NDIS Act, however, does not specify the date a review decision should apply from if the NDIA's original decision is varied or set aside through the merits review process (that is, whether it applies from the date of the original decision or from the date the review decision was made). This has arisen as an issue in complaints to the Office particularly where funding for supports is increased as a result of the review and can have a significant effect on participants

For example, in one case, the NDIA decided at internal review to increase the participant's transport budget as part of their new plan. During our investigation, it became apparent that the crux of the participant's complaint to the Office was the date of effect of the decision to increase the funding for transport following the internal review process. In January 2019, the NDIA advised us that it does not have a policy position on whether it back pays or reimburses participants following the internal review process. It undertook to seek advice about this, with a view to forming a policy position, as the NDIS Act is silent on what date a decision comes into effect. The NDIA acknowledged that it does not discuss the issue of back payment with participants, instead NDIA deals with requests for reimbursement on a case by case basis, with some participants having received reimbursement amounting to backpay.

We are aware from a recent investigation that the NDIA has formed a policy position regarding the date of effect of decisions changed at merits review. In October 2019, the NDIA advised the Office that its view is that where a person lodges an internal review request which results in the decision being varied or set aside, the date of effect of the decision is the date of the original decision that was under review. We agree with this position.

While we acknowledge the NDIA appears to now have a settled policy position regarding this, we consider that it would be appropriate for the legislation to clearly set out the date of effect of all reviewable decisions under the NDIS Act, as we continue to receive complaints on this issue.

The review of the NDIS Act could also consider the question of NDIA's capacity to offer back-payment, particularly in cases where the participant may have spent their own funds to access supports pending the outcome of the review process. In our view, this would lead to greater consistency and fairness for participants.

## **2. Section 100 internal review request delays and advice to participants to consider withdrawing their review request**

A common issue highlighted in complaints to the Office is delays by the NDIA in dealing with participant internal review requests under s 100 of the NDIS Act.

We have received complaints from participants who have requested an internal review of their plan which has been delayed for a number of months. The NDIA has then sought to address the issues in the participant's review request as part of their scheduled plan review under s 48 of the NDIS Act. Indeed, in some cases, we have heard that the NDIA has asked the participant to withdraw the internal review request because it believes it has addressed the relevant parts of the participant's review request under s 100, through the s 48 scheduled review.

We are also receiving complaints and feedback from stakeholders that the NDIA is discussing with participants whether they would like to withdraw their internal review request as their scheduled plan review is about to occur.

For example, in one case, the NDIA informed the participant that they could withdraw their internal review request and the NDIA would conduct their scheduled plan review more quickly, rather than waiting for the outcome of the s100 internal review process which would be delayed.

In another case, a participant was asked whether they wanted to withdraw their internal review request after it had not been actioned for approximately 12 months. The participant chose to withdraw their internal review request because they said they felt satisfied with the supports available to them in the new plan.

We note that the purpose of internal review is distinct from the plan review undertaken under s 48. The s 100 internal review considers whether the correct and preferable decision has been made. The s 48 scheduled plan review is to assess whether the supports in the plan are appropriate to meet the participant's current needs. The decision of the s 100 internal review will be backdated to the original plan decision. The s 48 scheduled plan review decision will not. If a participant withdraws their s 100 internal review request and they remain dissatisfied with the outcome of the scheduled plan review, they will need to reapply for internal review of the newly approved plan.

It is our view that it is not appropriate for the NDIA to delay internal reviews and then seek to deal with the issues with s 48 scheduled reviews. Rather the NDIA needs to ensure that it is handling participants' review requests in a timely manner, so as not to encroach on the scheduled plan review date.

### 3. Confusion around when a plan ends, and associated problems with ‘plan gaps’

In addition to delays in actioning internal review requests, the Office has also received complaints and stakeholder feedback regarding delays with the NDIA undertaking a participant’s scheduled plan review by the date nominated in the NDIA’s business system.

Under the NDIS Act, plans cease when they are replaced by another plan or a person ceases to be a participant in the scheme.<sup>1</sup> The Office has observed plans lapsing in the NDIA’s business system based on nominated scheduled review dates.<sup>2</sup> This in turn causes an administrative ‘gap’ in funding for plan supports for participants, which is not provided for in the NDIS Act.

Complaints to the Office highlighted the NDIA adopting inconsistent approaches to addressing plan gaps. In some cases, the NDIA took action to extend plans, sometimes for up to a further 12 months. In other cases, the NDIA allowed the plan to lapse and then when a new plan was approved (some time later), it subsequently extended the original plan up to the day before the commencement of the newly approved plan.

For example, in one case, the NDIA advised the participant’s plan was extended due to not being able to complete a scheduled plan review meeting before the end date of the plan based on staff capacity. As a result of our investigation, the Office learned the NDIA’s decision to extend the participant’s plan and not conduct a face-to-face plan review was in accordance with that particular NDIA regional office’s process for the participant cohort, at the time, rather than a whole of agency policy or legislative provisions.

In another case, the NDIA confirmed the scheduled plan review had been delayed by around three months, in part due to a delay in requesting additional evidence from the participant. Once completed, the review resulted in an increase in funded supports for the participant. The policy applied by the NDIA in this case was that where a participant is waiting for a plan review and their plan has expired, it would cover the cost of supports that are in line with what the participant was receiving in their previous plan until it approved the next plan.

Given the importance of supports, particularly supports for daily personal activities, it is critical that participants have access to these supports regardless of whether the NDIA has an administrative ‘plan gap’ period. While we understand that the NDIA has updated its business system to ensure that plans do not lapse on the system.

We suggest that DSS consider whether the NDIA should have a power to extend a scheduled review date in some circumstances to ensure a person does not experience a gap or consider whether the current process is appropriate. The Guarantee could also address timeframes for completing scheduled plan reviews to ensure that instances where these are delayed are minimised.

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<sup>1</sup> *National Disability Insurance Scheme Act 2013*, (NDIS Act) s 37(3).

<sup>2</sup> Under the NDIS Act, while the Chief Executive Officer may decide to review a participant’s plan at any time, they must conduct a review before the plan’s review date (ss 48(4) and (5) of the NDIS Act).

#### **4. Timeframes for completing reviews**

As part of the Guarantee, the Office welcomes timeframes being built into the legislation for the completion of unscheduled plan reviews and internal reviews.

In May 2018, the Office published a report, *Administration of reviews under the National Disability Insurance Scheme Act 2013*, in which 20 recommendations were made and accepted by the NDIA. A particular focus of the report was timeliness in handling a participant's request of review. At the time of the report, the NDIA acknowledged some reviews were up to nine months old and that there was a backlog of review requests.

Under the NDIS Act, the NDIA must complete plan reviews and internal reviews 'as soon as reasonably practicable'.<sup>3</sup> The absence of timeliness standards or average review completion timeframes, is problematic for both the NDIA and participants. In particular, the NDIA is unable to manage the expectations of participants about the time it will take to complete their request for review. This lack of certainty is a key driver of complaints to the Office about the NDIA.

We are continuing to follow up the NDIA's implementation of the recommendations made in our report and we acknowledge the NDIA has made some progress in doing so. However, we consider there is significant work for the NDIA to do in order to address timeliness in completing reviews to ensure the backlog does not continue to grow. Indeed, complaints about reviews continue to represent a third of complaints to the Office about the NDIA. We are hopeful the Guarantee will address this issue, and help ensure that the participant can access merits review in a reasonable timeframe, which is well before the scheduled review date for the plan.

#### **Issues for policy clarification**

##### **1. NDIA's treatment of Comorbid/multiple disabilities when making access decisions**

The Office has identified a need for clarification around the intended interpretation and application of the legislation regarding planning for participants with multiple or comorbid impairments.

We have received complaints that indicate the NDIA is limiting the types of reasonable and necessary supports it will include in a participant's plan to only those supports which directly relate to the specific or primary impairment or impairments for which the participant was initially assessed, when they were granted access to the Scheme.

This is problematic for participants with multiple or comorbid impairments because the NDIA only requires its staff to obtain the minimum evidence necessary for a participant to access the scheme. The NDIA's Staff Manual – *Access Decision Making for Access Assessors* notes that

*A person only needs to meet the disability requirements for one disability. Therefore there is no need to request further information for secondary disabilities.*<sup>4</sup>

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<sup>3</sup> NDIS Act, ss 48(3) and 100(6).

<sup>4</sup> NDIS Staff Manual – Access Decision Making – January 2019, provided by NDIA in the course of an investigation by the Office

This means that at the point where it is determining a prospective participant's access to the Scheme, the NDIA is not requiring or considering evidence of participants' 'secondary' or 'additional' disabilities or impairments. As a result, the NDIA does not have the information and evidence it requires to make an informed decision about participants' reasonable and necessary supports when it comes to the stage of developing a statement of participant supports, to be included in a participant's plan.<sup>5</sup>

Under the *NDIS (Supports for Participants) Rules*,<sup>6</sup> a support will not be provided or funded if it is not related to the participant's disability. Section 24 of the NDIS Act sets out the disability requirements for a person to be granted access to the scheme. Under s 36, we note the NDIA can request further information about a participant's disability or require the participant to undergo an assessment for the purpose of preparing or deciding whether to approve a statement of participant supports.

However, rather than making a request under ss 36(2) to obtain further evidence, we understand that in some cases, the NDIA has declined to fund supports for participants' additional impairments, or has advised participants to lodge additional access requests, to have their 'secondary' or additional disabilities assessed for access to supports in the Scheme.

DSS may wish to consider clarifying in the NDIA's internal staff guidance that they can request further information from the participant when preparing their plan.

Complaints to this Office also indicate that participants are often left unsure of what supports are funded in their NDIS plan, why they are not able to access reasonable and necessary supports for their 'additional' impairments, and whether or not they are required to provide further supporting information to the NDIA, to access the supports they need. Some of these issues might be able to be addressed at an early stage by the NDIA communicating its decisions and reasons more clearly.

## **2. Timeframes for deciding Access Requests**

Section 20 of the NDIS Act provides that if a person makes an access request, the CEO must either decide whether the person meets the access criteria, or request that the person provide further information or undergo an assessment<sup>7</sup>.

If additional information or an assessment is requested, once that information is provided, the CEO must decide whether the person meets the access criteria or request further information within 14 days (see s 26(2)). This Office has assessed a number of complaints where participants have experienced significant delays in the access process, after responding to requests for further information from the NDIA.

DSS may wish to determine if the timeframes set out in s 26 timeframes are built into the NDIA's existing policies and procedures to ensure that staff are aware of them.

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<sup>5</sup> NDIS Act, s 34

<sup>6</sup> Rule 5.1(b) <https://www.legislation.gov.au/Details/F2013L01063>

<sup>7</sup> In accordance with ss 26(1) of the NDIS Act.

### **3. Notice requirements for reviews under section 48, and 'light touch' reviews**

The Office has observed that the NDIA does not appear to issue a decision notice to participants following an unscheduled review or light touch plan review undertaken under s 48 of the NDIS Act. Following a s 48 review, we understand that participants receive only a copy of the new plan and no decision notice. By contrast, when the NDIA undertakes an internal review under s 100(2) of the NDIS Act it does issue a decision notice.

Leaving aside whether the requirements of s100 apply to s 48 decisions, it is our view that it would assist participants to receive a written notice after a s 48 unscheduled review that their plan has been changed, provide advice about what aspects were changed and what review rights are available to them should they disagree with the decision.