

An exposé

THE NATIONAL DISABILITY INSURANCE SCHEME A Dirty Deal Denies Transformational Opportunity

We Have a Dream!

“Welcome, ladies and gentlemen, to an Australian society where people with disability do truly have the same rights and responsibilities as all other Australians. Where the laws and rules established to promote the rights of people with disability and protect their entitlements and choices are vigorously defended by those who run the disability system.”

If the National Disability Insurance Scheme (NDIS) was operating as intended these words could constitute the opening to a conference entitled – *Success at last – The NDIS Delivers Entitlements, Choice and Control.*

Sadly these words ring hollow. Despite the many fine sounding pronouncements that underpin the introduction and functions of the NDIS and its operational arm the National Disability Insurance Agency (NDIA), there are still some significant deficits. In short, the new system is failing people with disability, at least in Victoria. Entitlements are being denied, and real choice, at least in accommodation, is illusionary. Victoria’s Department of Health and Human Services (DHHS) ignores the very rules to which the Victorian government is a signatory.

Opening Statement

The establishment of the NDIS was hailed as the most significant development ever in disability in Australia. The hopes of people with disability, their families and advocates were raised to the point where in effect the cry became –

“At long last we will have a system that puts people with disability first, simplifies navigation and offers real choice and control. A transformational system that will discard the shackles of bureaucratic power and control.”

But now, after almost five years of operation and the full rollout continuing over the next couple of years, the system must be exposed to examination. In part this requires an examination of three key questions:

- Firstly, how effective are the actions of the people responsible for managing and rolling out the system?
- Secondly, are all the states and territories genuine in their acceptance of and in working towards applying both the intent and letter of the NDIS?
- After five years of operation are those in charge any closer to closing the gap between the rhetoric of rights and choice and a centralised control?

This paper exposes a number of significant issues that need to be fixed. The system and those in charge are failing. The system is collapsing under the weight of an over-burdened bureaucracy headed by state based bureaucrats hell-bent on holding onto power and authority.

The system is what might be called a *closed system*. This being in the sense that the federal Minister and Victoria’s Disability Minister exhibit a siege mentality by closing the door to communication. The NDIA Chief Executive Officer (CEO)

can only be contacted by writing to Canberra and then there is no response. In Victoria, the bureaucrats operate on a closed mind approach whereby their word is promoted as law. They simply dismiss any alternative views with vigorous contempt.

The paper contends that no matter what principles, objectives, rules, regulations and quality and safeguarding practices are established, the functional application of the system must ultimately be about the people for whom it has been designed. The paper also contends that no matter how much the *glitterati* of the disability sector - politicians, senior bureaucrats, policy isolates and advocacy organisations - promote a surface picture of success, the underbelly of the NDIS is in real strife.

Australia's history is littered with arm wrestles between the federal authorities and those in the states and territories, particularly in those circumstances where power and money are at stake. Unfortunately the creation of the NDIS was never addressed from a *green fields site* approach. The result has been one where the carve-up of disability has become more about a subtle battle over existing power and funding than it is about intent.

This paper addresses a number of key areas by focusing on the ills that are evident in Victoria.

1. The Driver for Change – An important reminder

(i) In 2010 the then Gillard government charged the Productivity Commission with the task of enquiring into a *National Disability Long-term Care and Support Scheme in Australia*. As a result, the Productivity Commission produced a report in July 2011.

(ii) Significantly the Productivity Commission in the first paragraph of the Overview of its report stated:

“Current disability support arrangements are inequitable, underfunded, fragmented, and inefficient and give people with a disability little choice. They provide no certainty that people will be able to access appropriate supports when needed. While some governments have performed much better than others, and there are pockets of success, overall, no disability support arrangements in any jurisdiction are working well in all of the areas where change is required. The current arrangements cannot be called a genuine ‘system’ in which different elements work together to achieve desired outcomes.”

(iii) Essentially the above statement emphasises that:

- Among the many deficits fragmentation and inefficiency existed;
- The entire system across Australia was broken as in not one single jurisdiction could claim to be working well;
- Choice for people with a disability was limited;
- Change is required in many areas;
- There was not a single system.

- (iv) As such, it seems reasonable to conclude that the principle objectives of the NDIS would be to address the significant deficits identified by the Productivity Commission.
- (v) Therefore, given the damning summation the obvious question after now almost five years of operation, including three years of trial sites, must be - *Why do many of the same deficits continue to exist?* Some might argue that the system is still in transition and thus further time is still required in order for total change to be effected. Not so, argues this paper. Surely the purpose of having three years of trial sites was to work through the necessary changes and iron out any problems.
- (vi) There is little evidence to show what was learnt from the activities undertaken in the trial sites and what actions, if any, were identified as being necessary to ensure a smooth transition. Despite reports having been written there is little explanation as to what was learnt and there is an absence of clear statements as to what must happen during the transition.
- (vii) A single system can reasonably be argued to be the most important requirement promoted by the Productivity Commission. A national system where no state or territory has the right to go along its own path. Or, in other words, *one nation-one system*.
- (viii) Given the pre-eminence of a single system, the writers contend that each state and territory must therefore act in such a way so as to promote and practice a single system. Further, the principal players, as in the Disability Reform Council, the federal Department of Social Services, the NDIA, and in the case of Victoria – the Department of Health and Human Services, must grasp the nettle of a single system.
- (ix) Yet, how can it be, when in the case of Victoria a special agreement has been struck between NDIS/NDIA and the Victorian Government? Part of this agreement allows the Victorian government to bypass Service Agreements between NDIS participants and providers. A document entitled a ***Disability Accommodation Collaboration Agreement*** between a registered Disability Support Provider and a Specialist Disability Accommodation (SDA) Provider allows both providers to totally disregard service agreements.
- (x) Just as Judas went behind the back of Jesus and sold him out for 30 pieces of silver so we must ask – Who were the Judases that conspired to sell out the rights of people with disability in order to satisfy their own selfish and “*make life easy*” needs.
- (xi) Yet, despite this grubby deal, the purveyors of deceit, as in the Victorian government and the NDIS/NDIA, continue to use the language of change. Language that although positive in its intent, in reality seeks to promote the illusion that the meaning associated with

particular words such as choice, control, entitlement, is actually translated into complementary action.

- (xii) Apart from the divide between the intent of language and its application there is also a continuing problem where what can be described as the concept of *power over people* is very much alive. This is in the sense that the firm hand of bureaucrats, by their actions and manipulation of the rules, actually limits choice for people with disability by maintaining control and dictating what will be done and how it will be done.

2. Power and Control

- (i) A single system demands a single entity with real authority. It must also be a system that demands those in charge being willing to apply the rules without the usual big 'P' and small 'p' politicking between the various power brokers. And, it demands the cessation of those in power seeking to exert influence by continuing to control people with disabilities and their families.
- (ii) Given the deficit identified by the Productivity Commission that "... *no disability support arrangements in any jurisdiction are working well ...*" it beggars belief that many of those, at least in Victoria, who oversaw the failed system have been retained and are now responsible for overseeing the transition of the NDIS in Victoria. Yet, there are strong indicators that these same people, despite having failed once, are now having difficulty in letting go. They still exhibit the same command and control behaviours and seek to maintain an influence that contradicts the establishment of a single system.
- (iii) Despite Victoria's self-congratulatory approach to the management and delivery of the disability sector in Victoria, as in telling the rest of Australia how they *lead the way*, the reality is that their over-blown egos cannot be allowed to dictate their dismissal of the NDIS as a single system.
- (iv) Current practices exhibited by DHHS in Victoria send strong signals that little has changed, and Victoria is scrambling to hold onto its power base. However, worse than this, it also sends a signal that Victoria has not grasped the concepts of choice, entitlement and rights.
- (v) The following examples detail how Victoria is dragging the chain in terms of establishing a single system.

3. The Multiple Cases of the Disappearing Rights

- (i) The following current real live examples highlight how, at least in Victoria, power retention is very much alive and how the power of DHHS overrides all.

- (ii) **The case of the transfer of disability accommodation:** Given the Victorian Government is seeking Expressions of Interest (EOI) for entities external to DHHS to manage disability accommodation services, people with disabilities and their families reasonably assume that DHHS will no longer be involved, either in the delivery, the management or the monitoring of disability accommodation. However, advice provided by a departmental representative brings this expectation into question. At public forums to inform people with disabilities and their families about the EOI, a departmental representative has told them that DHHS has a right to continue to control, given Victoria's financial contribution to the NDIS. The representative went even further to suggest that DHHS would "always" be in a position of control over non-government organisations.
- (iii) In part, the pronouncements of the DHHS representative seem to be tied to the current arrangements concerning "in kind" funding. A matter that should be emphasised as being one that the Productivity Commission has strongly urged be discontinued.
- (iv) The issue in relation to this case example is one where DHHS is clearly reluctant to hand over the reins to other providers. Just so long as states and territories, as in the case in Victoria, continue to seek to hold onto power and control, then the NDIS will never fulfil its intent of a single national system.
- (v) **The case of denial of a right to have a service agreement:** Service agreements must be accepted as providing a significant platform on which entitlement, quality and safeguarding are based. NDIS documentation, and in particular rule 7.12 of the NDIS Special Disability Accommodation Rules and the Terms of Business, are categorical in stating that a written service agreement **must** be entered into between the provider and the participant.
- (vi) It is worth noting that the Rules and Terms of Business have their roots in the NDIS Act 2013. Yet despite this, for almost two years Victoria's DHHS has categorically refused to enter into service agreements with NDIS participants. DHHS denies the NDIS participants their entitlement to be engaged in working to establish a written service agreement.
- (vii) The Victorian Government and its Department of Health and Human Services are not alone however in this subterfuge. The deceitful agreement struck between the NDIS/NDIA and the Victorian Government highlights in Module 4 of the Provider Toolkit that a residential statement, as required under Victoria's Disability Act 2006, may "take the place of a service agreement between an SDA provider and participant". This is in the context of the Disability

Accommodation Collaboration Agreement being promulgated for Victoria.

- (viii) The hypocrisy of this deal defies logic and constitutes a breach of the NDIS Rules and Terms of Business. No matter how considered, a **residential statement** under Victoria's Disability Act can in no way be deemed to reflect the requirements of a **service agreement**. This being particularly given that a residential statement is prepared and issued by DHHS to the participant without any involvement of the participant. By contrast, a service agreement requires joint participation, joint deliberation and joint agreement, and therefore sets the service agreement as a contract.
- (ix) To demonstrate how this deal reflects the depths of grubbiness and deceit, and despite the agreement advising that a residential statement can take the place of a service agreement between an SDA provider and participant, this agreement was struck without any involvement of participants and without the agreement of any participants.
- (x) As such, this example demonstrates how the power of the bureaucrats, both at the NDIS/NDIA and DHHS level, have been prepared to ignore the concepts of entitlements and rights, simply in order to ensure a smooth path is laid for the bureaucrats.
- (xi) **The case of contradiction in the right of choice of provider:** The Disability Accommodation Collaboration Agreement as mentioned further above is identified as an agreement between a registered Disability Service Provider and a Specialist Disability Accommodation provider. This agreement relates to "*the provision of support and accommodation services to mutual clients*". In essence, this means that the accommodation provider reaches an agreement with the support provider without participants having any say as to whom their support provider might be.
- (xii) The incongruence of this supposed agreement is highlighted even more, given the situation that exists in Victoria where all disability accommodation as provided by DHHS also sees the department as providing the support services. Indeed, it would also be a rare exception anywhere in Victoria in the funded sector for this to be any different, whereby a single agency does not provide both the accommodation and support.
- (xiii) Therefore, in effect the disability accommodation Collaboration Agreement establishes an agreement where an organisation, be it DHHS or an NGO, is agreeing with itself. Again, of course, highlighting that this is without any involvement or agreement by NDIS participants.

- (xiv) The agreement struck between the NDIS/NDIA and the Victorian Government, and Victoria's Disability Accommodation Collaboration Agreement, are shameful agreements. Each must be trashed, and the true intent of the NDIS, whereby NDIS participants have a right to choose their provider, must be established.

4. The NDIA – Where is the Chief Executive Officer?

- (i) The famous “*Where Is Wally?*” cartoons have exercised the minds of many in seeking to find the elusive Wally in a sea of faces and situations. This exercise can in many ways describe the hunt for the NDIA's Chief Executive Officer (CEO). The average citizen can only make contact by writing to a GPO address in Canberra.
- (ii) Yet despite this, and after five months, correspondence from the writers of this paper to the CEO has gone unanswered without any acknowledgement that the correspondence has even been received.
- (iii) Attempts to use the various lines of communication imposed by the NDIA have also failed to elicit a response. Ultimately, it must be the NDIA Chief Executive Officer who takes full responsibility for the way in which the Rules are applied and for engagement with the sector.
- (iv) The starting point for the overhaul of any system and the creation of one where the focus is people must be that of communication. As such, the Chief Executive Officer must come out of hiding and explain what he intends to do about the deficits as highlighted above. It cannot be ignored that Victoria's Department of Health and Human Services is a registered provider with the NDIS. As such, it has agreed to abide by all the rules and terms and policies that underpin the establishment of the NDIS.
- (v) As stated by Rule 7.12 of the SDA Rules, “*a registered service provider cannot provide SDA for the participant unless a written service agreement has been entered into with the participant*”. To the writers' knowledge, the NDIA has not exerted any authority over DHHS to ensure that this happens. Instead, it seems reasonable to conclude that DHHS has called the tune and simply does as it likes.
- (vi) It is too simplistic, and indeed represents avoidance to suggest that “*all will be well*” when the NDIS is fully rolled out in Victoria. Not so. Clearly old habits die hard, and in any event, NDIS participants must be able to exercise their rights and entitlements now. After all, would anyone suggest that if allegations were made about sexual abuse that it would be okay to hold off doing anything until the Quality and Safeguards Commission has jurisdiction in Victoria – some 15 months away?

(vii) The NDIA Chief Executive Officer is presumably appointed to make things happen in accordance with the rules. The challenge is his.

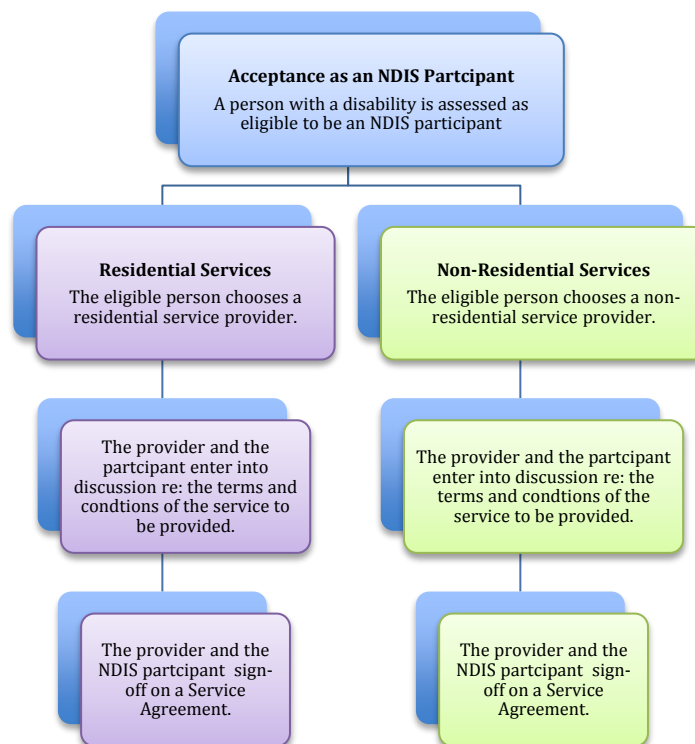
5. What is Complex about Service Agreements?

(i) The answer to the above question is – *nothing*. Yet, the bureaucrats in Victoria’s DHHS and representatives of the NDIA have ducked and weaved in order to allow DHHS not to engage NDIS participants in being able to exercise their entitlement.

(ii) By doing so these same bureaucrats have not only ignored the rules but have instead replaced the official NDIS rules with ones that they have made-up in order to suit their avoidance agenda. They have blatantly obfuscated in a way that can only be described as unconscionable conduct.

(iii) To illustrate the ease of what should be applied in terms of service agreements the following chart outlines what the process should be.

The Pathways to NDIS Service Agreements



(iv) The significance of service agreements should not be dismissed or cast aside as something that can be held over until the full rollout of the NDIS.

- (v) Service Agreements are, as a matter of law, representational of Object 3(1)(c) of the NDIS Act *“to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.”*

6. What has to Happen and Who Will Take the Lead?

- (i) If we again ask the question - How effective are the actions of the people responsible for managing and rolling out the system? – Based on the above significant deficits, the answer must be, at least in Victoria - *Poorly*.
- (ii) If we again ask the question - *Are all the states and territories genuine in their acceptance of and in working towards applying both the intent and letter of the NDIS?* – The answer for Victoria must be that they are not genuine in the acceptance of and working towards applying both the intent and letter of the NDIS.
- (iii) If we again ask the question - *After five years of operation are those in charge any closer to closing the gap between the rhetoric of rights and choice and a centralised control?* – At least for Victoria the answer must be a resounding - *No*.
- (iv) Clearly, the following actions must occur:
- i. Service agreements must be immediately established for NDIS participants in DHHS accommodation.
 - ii. Once the EOIs are finalised in Victoria and particular services are allocated to particular bidders, DHHS must withdraw and release its control.
 - iii. The *Disability Accommodation Collaboration Agreement* must be torn up.
 - iv. Providers including joint providers must engage NDIS participants in establishing individual service agreements.
 - v. The NDIA CEO must immediately act to ensure adherence by registered providers to the NDIS rules and Terms of Business.
 - vi. The NDIA CEO must be willing to engage directly with the sector.
 - vii. The Federal Minister must ensure that the NDIA CEO meets his obligations to establish the NDIS in accordance with the intent and letter of its legislation.

- viii. Victoria's Disability Minister must direct his department to follow the rules, instead of allowing DHHS to ride roughshod over NDIS participants.
- ix. Each person with the power and responsibility must now exercise that power and responsibility to ensure the rights and entitlements of people with disabilities are enacted.

7. A Privileged Position - Each Member of the COAG Disability Reform Council Holds a Privileged Position

- (i) The COAG Disability Reform Council is the principle direction-setter for the NDIS.
- (ii) The same Council has the ultimate power and responsibility to not only set the rules but to also ensure that all jurisdictions who have signed up to the NDIS meet their obligation to adhere to each and every rule.
- (iii) There can be no avoidance of what has to happen. The politics of federal-state and territory relationships cannot be allowed to water down the intent of the NDIS.
- (iv) There can be no transgression of what has been written into law as in the NDIS Act 2013 and the rules and Terms of Business that give operational structure to the Act.
- (v) The Council members cannot delegate their authority to bureaucrats whose agenda contradicts the intent of the NDIS.
- (vi) In those instances where the bureaucrats have crossed the line and abused the rights and entitlements of people with disability, by creating their own "rules", the Reform Council member responsible for the jurisdiction associated with the particular bureaucrats must pull them into line.
- (vii) No matter what rationalisation is proffered by the peddlers of transgression, the Council Members must not allow themselves to be diverted from transforming the disability sector across the whole of Australia.
- (viii) The Council Members must not allow themselves to be lulled into accepting the illusion that it is OK to wait until the full rollout of the NDIS before applying the NDIS rules.
- (ix) ***The time is now!*** People with disabilities have waited long enough. It was in 1986 that Victoria's Intellectually Disabled Persons Services Act came into being. Over three decades since the notion of rights and a person with a disability being "... entitled to exercise maximum control over every aspect of ..." his or her life.

- (x) ***The time is now!*** For the Reform Council to exercise the power and responsibilities invested in it. Power and control to ensure that the NDIS rules underpinning the rights and entitlements for people with disability are enacted now. Will this be done?
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End of Paper

Background to the Authors

- Max Jackson and Margaret Ryan are partners in a boutique consultancy. Part of their consultancy includes addressing current issues in the disability sector.
 - Their combined background in the disability sector, in a variety of roles including direct care, teaching, senior management, training and development, investigations and consultancy, spans some 69 years.
 - They have been regular contributors to the many consultations and inquiries that have been conducted by various entities over the past two decades.
 - On the matter of the particular issues raised in this paper, the writers have engaged with representatives of Victoria's Department of Health and Human Services and the National Disability Insurance Agency.
 - It is of significance that the writers provide a significant amount of pro bono support to people with disabilities and their families. As such they have an in-depth appreciation of the "world of disability" from the perspective of the end users. In particular they have the experience to be able to cast a critical eye over the gap that occurs between policy and what might be called philosophical intent, and service delivery.
 - The writers are also very familiar with the current trends in disability, the legal framework that underpins the notion of rights and entitlements, and the background to and the roll out of the NDIS.
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