



OFFICE OF THE PUBLIC ADVOCATE, GUARDIANSHIP ORDERS AND THE NATIONAL DISABILITY INSURANCE SCHEME

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Introduction

The National Disability Insurance Scheme (**NDIS**) is a new Commonwealth Government system of providing disability services to Australian residents under the age of 65 who have a permanent and significant disability. The NDIS is administered by the National Disability Insurance Agency (**NDIA**). The NDIS operates under the *National Disability Insurance Scheme Act 2013 (Cth)* (**the NDIS Act**). It is a system designed to enable people with disability to have greater independence, choice and control over the support that they receive and to be empowered to meet their own goals.

The NDIS will take over as the primary system for providing disability services, shifting responsibility from the States and Territories to the Commonwealth Government. It is expected that approximately 32,000 people in South Australia (children and adults) will receive NDIS support. South Australia was an NDIS trial site for children with disability. The roll-out of NDIS to adults in SA will commence on 1 July 2017 to 30 June 2018, starting with the Northern Adelaide, Barossa, Light and Lower North regions (**Area 1**).

For people who are existing State Government disability services clients, there is an additional phasing strategy within each NDIS roll-out area. For example, clients who are in specialist disability accommodation in Area 1 will start to transition to NDIS from 1 November 2017.

The shift of focus to greater choice and control, pursuit of goals and individualised services represents a positive change. However, it may also present some challenges for people with a mental incapacity (a cognitive impairment which affects decision-making ability). Some people will need support, assistance and advocacy to access the NDIS, develop their support plans and pursue their goals.

It is important to consider whether people with a mental incapacity will need to have a formal substitute decision-maker appointed to make the transition to NDIS. In particular, does the change to NDIS mean that some people will need to have a guardian to make significant decisions about their lifestyle and/or accommodation and an administrator for management of finances and legal affairs?

The Office of the Public Advocate (**OPA**) is involved because the Public Advocate can be appointed to act as guardian of last resort where there is no other person appropriate to act as guardian. In this Fact Sheet, we will focus on the NDIS and guardianship.

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Office
of the
Public Advocate

An independent
statutory office
accountable to the
South Australian
Parliament

Mental Incapacity and Access to the NDIS

In order to become a “participant” in the NDIS, a person must first make an “access request” to the NDIA. The access request must be in the form approved by the CEO and contain all the necessary information and documentation to support the request.

The State, Territory and Commonwealth Governments have agreed that people who receive certain State Government funded disability services (referred to as “defined programs”) automatically meet the NDIS disability eligibility requirements and so have a streamlined access process.

South Australia’s Department of Communities and Social Inclusion (**DCSI**) has provided the NDIA with the details of all existing disability clients. For clients in defined programs, completion of the access process generally involves a telephone call from an NDIA worker for confirmation of information.

If the person with a disability cannot confirm information themselves due to impaired mental capacity, then a representative can do so for them. Where it is known, DCSI have provided details of an alternative contact for people in this situation so that the access process can be completed. The alternative contact might be:

- A guardian;
- A family member or other person involved in the prospective participant’s life or care, where there is no guardian;
- A service provider where there is no guardian or other informal support-people available.

The NDIA has advised that a guardian is not needed to access the NDIS. A “common-sense test” will be applied to access requests and the request will be processed if it appears to be provided by a person with the prospective participant’s interests in mind. The NDIA have advised that while it may not be appropriate for a group home staff member to make an access request, it would be acceptable for a senior officer of the service provider organisation to do so.

Planning and Supports – Is a Guardianship Order Needed?

Service providers are unable to make decisions about NDIS support plans for their clients who have a mental incapacity due to a conflict of interest. If the person with a mental incapacity will require significant support and someone to make decisions about their NDIS plan, but they have no appropriate family, friends or advocate to help, a guardianship order should be considered.

In considering whether a guardianship order is required, ask the following questions:

- Do important lifestyle and accommodation decisions need to be made? *For example, deciding whether a change in accommodation, or other services, is necessary or would better meet the person’s needs?*
 - **If yes-** consider a guardianship order
 - **If no-** a guardianship order may not be needed

- Are there concerns that the needs and wishes of the person will not be expressed?
 - **If yes-** consider a guardianship order

- **If no-** a guardianship order may not be needed
- Is there another person who will ensure that the needs of the person are met by their support plan?
 - **If yes-** a guardianship order may not be needed
 - **If no-** consider a guardianship order

It should be noted that a person with a mental incapacity **will not** always require a guardian for NDIS planning. **Most people with a mental incapacity will be able to receive their NDIS supports without the need for a guardian.**

Determining whether a guardian is needed for decisions about NDIS support involves looking at the South Australian guardianship law and also the NDIA's processes and requirements. If it is thought that a guardian will be required to make decisions on the participant's behalf then an application needs to be made to the South Australian Civil and Administrative Tribunal (**SACAT**).

The following checklist may further help you to determine whether you need to make an application to SACAT for appointment of a guardian to make decisions about NDIS support:

1. Does the person have a mental incapacity?

SACAT can only appoint a guardian if the person has a mental incapacity and will require medical evidence.

Under section 17A(1) of the NDIS Act, people with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.

2. Can the person be supported to make decisions?

If it appears that the participant is unable to understand issues central to the development of their plan, due to a level of mental incapacity, efforts should be made to determine whether the participant can be supported to understand the situation and express wishes about their plan. This is consistent with the principles of the NDIS outlined in s17A of the NDIS Act.

3. Are there informal arrangements in place?

If the person is unable to understand and express wishes with support, informal support networks or private advocacy options should be considered. SACAT will look at existing informal arrangements and whether NDIS decisions can be made within these arrangements. The NDIA have confirmed that they will consult with a person's informal support network and may rely on service providers to tell them who is in that network.

Informal arrangements will not usually need to be formalised by a guardianship order to develop and implement a plan if they are appropriate and working well. For more information generally about informal arrangements and whether a guardianship order is needed please see OPA's Fact Sheet 23 "Informal Arrangements for People with Impaired Decision-Making Capacity":

http://www.opa.sa.gov.au/resources/information_sheets

If you suspect that a person does not have informal support in place but you know that they are currently funded and case managed by Disability SA, you should have a discussion with Disability SA about whether the person has a transition risk plan. Disability SA is undertaking extensive work to identify support networks for their clients who are at risk of having difficulties in the transition to NDIS. In some cases, Disability SA may be able to assist their clients in preparing for their planning meeting which may include attending the meeting with them if appropriate.

4. Can the NDIA appoint a “nominee”?

If informal arrangements are insufficient, NDIA can sometimes appoint a nominee as a substitute decision-maker. The NDIA will not appoint a service provider as nominee due to conflict of interest. It is important to note that, under the relevant NDIS Rules, nominees will be appointed in only rare and exceptional circumstances and the NDIA have made very few nominee appointments to date. More information about nominees can be found here: <https://www.ndis.gov.au/families-carers/what-are-nominees-and-guardians>

5. If all alternatives are exhausted and there is no less restrictive alternative, then a guardianship order will likely be needed to make lifestyle and/or accommodation decisions relating to the NDIS. If there are no private guardianship options, the Public Advocate may be appointed as guardian of last resort.

Role of the Public Advocate as Guardian

The primary role of the Public Advocate as guardian is to be a substitute decision-maker, including when appointed specifically to make decisions about NDIS support. This means that the guardian “stands in the shoes” of the person with a mental incapacity and makes decisions or gives consent as if the person were doing so themselves. Guardians have to follow certain principles when making substitute decisions, including ascertaining and considering the person’s past and present wishes and choosing the least restrictive alternative which enables them to be properly looked after.

As part of the decision-making role, the guardian can advocate on behalf of the person with a mental incapacity by asking questions, seeking more information or options and weighing up alternatives.

It is not the role of the Public Advocate as guardian to be a care provider, case manager or coordinator of supports. This means that OPA will not:

- manage the person’s plan;
- find out about options for service provision and link participants to service providers;
- negotiate with service providers; or
- co-ordinate interactions between multiple providers.

Coordination of supports is a service that can be funded under the NDIS if the NDIA deems that this type of service is reasonable and necessary.

If you require further information about guardianship and the NDIS or OPA's role as the guardian and decisions about the NDIS, please contact OPA on 08 8342 8200.