# Transformation, Compliance and Enforcement in the NDIS
## - The Case for Service Agreements -

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## 1. ABSTRACT

### 1.1 What this Paper is about

This study is about the refusal of Victoria's Department of Health and Human Services (DHHS, the department) to abide by its obligations as a registered service provider with the National Disability Insurance Scheme (NDIS). As such, it is about the department denying NDIS participants their entitlement to a service agreement. Specifically, the department has refused to enter into service agreements with NDIS participants who reside in departmental residential accommodation.

### 1.2 The Facts

DHHS has denied that there is any need to develop service agreements with participants. They claim that providing a residential statement, as required by section 57 of Victoria's Disability Act 2006 (the Act), is all they need to do. The department wrongly claims that a residential statement equates to a service agreement with an NDIS participant.

The department ignores the fact that under the Act only the provider is required to develop a residential statement. Unlike a service agreement, which requires both parties to be involved and requires the input of the participant, and both parties sign-off on the agreement.

This paper expands on the relationship between the intent of the NDIS in transforming disability services, the necessity of compliance with NDIS requirements, and how the enforcement of such requirements, including service agreements, constitutes the measure of how much the disability sector is being transformed by the NDIS.

## 2. TRANSFORMING DISABILITY SERVICES

**2.1** The Productivity Commission's *Disability Care and Support* inquiry report of July 2011, in its first 18 words sounded a warning bell that reverberated across the whole of Australia. These words emphasised in the strongest way possible that the disability sector in all corners of the nation needed transforming: "*Current disability support arrangements are inequitable, underfunded, fragmented, and inefficient and give people with disability little choice*."

In 2013 the Productivity Commission's work resulted in a new legislated system for disability support, the National Disability Insurance Scheme. A new organisation, the National Disability Insurance Agency (NDIA), was charged with the responsibility of overseeing the Scheme and its rollout out across the nation.

The transformational potential of the NDIS is evidenced in the Productivity Commission's identification as to why change was needed. The Commission not only identified the need for change, but also stated that "*The flaws of the current system have driven strong demand for an entirely new approach."*

The concept of an entirely new approach meant that all that had gone before needed to be changed. Significantly, the new approach brought about by the NDIS emphasises choice and control for people with a disability. The approval of funded supports to the individual established a consumer choice model, enabling the individual participant to choose their service provider or providers. In addition, the establishment of service agreements provides a contractual protection for all NDIS participants to receive the services agreed with their individual providers.

### 2.2 The transformational impact of service agreements

The concept of service agreements should not be dismissed, or diminished by the suggestion that they constitute an administrative burden. Instead, service agreements must be recognised and promoted as a key transformational change in the delivery of services to people with disabilities. The development and implementation of service agreements is in keeping with the frequently repeated mantra of disability advocates, "*Nothing about us without us*".

The development of service agreements ensures that participants are active partners in determining their services and are fully involved in decisions that affect them. Further, by their very nature service agreements are a key element in terms of ensuring quality of service provision. As such, service agreements are a safeguard in terms of ensuring that what the provider has agreed to deliver will be delivered.

## 3. COMPLIANCE

### 3.1 The Basis of Compliance

As a Scheme, the NDIS regulates how particular mandated elements are required to be delivered. It is the NDIA which has been charged with the responsibility for ensuring that the various regulatory functions are met. The NDIS Act 2013 establishes the platform for the NDIS. The fact that the NDIS has been established in legislation cannot and must not be minimised or ignored. Emphasis is given to the contents of the Act through a set of legislated Rules. It is the Rules that provide the operational parameters for the Scheme. As with any other Rules, the NDIS Rules are mandated to ensure that all *players in the game* play fairly. Further, there are also policies and guidelines, and Terms of Business that provide clear direction as to the way the Scheme is required to operate.

Significant to this study, the 2013 Registered Providers of Supports Rules establish the requirements for service providers who wish to operate under the Scheme to be registered and in doing so to abide by the Rules. To emphasise this point, a criteria for approval as a registered provider is that the provider agrees to be bound by the Agency's terms of business (part 3.8). To be absolutely clear, it is necessary to understand that the Agency's Terms of Business for Registered Providers establish binding protocols and processes on a registered provider. The bottom line is that providers are required to comply with *"the NDIS Act, the Rules, all relevant NDIS guidelines, and all policies issued by the NDIA …"* This is a clear and indisputable requirement.

To further emphasise the significance of the Rules, there are the Specialist Disability Accommodation Rules 2016. These Rules are supported by the Terms of Business for

registered providers of specialist disability accommodation (SDA). These Terms of Business state that "*A Registered Provider must not provide SDA unless the Provider has a written service agreement with the participant that contains all of the terms listed below (Rules 7.12 to 7.15 of the SDA Rules)*."

### 3.2 Understanding relationships

In part, a key to understanding the significance of the NDIS is the fact that all states and territories have joined with the Federal government in signing up to its implementation. The significance for this study is that because the Victorian government is a signatory to the NDIS agreement, this commits Victoria's Department of Health and Human Services to fully abide by the parameters established for the NDIS. As a department of the Victorian government, and also as a registered NDIS provider, there can be no dispute that DHHS must comply with the NDIS Act, Rules, Terms of Business and other policies and guidelines.

Yet despite the indisputable need for compliance, Victoria's Department of Health & Human Services has refused to establish service agreements with NDIS participants who reside in departmental accommodation facilities. This unconscionable action flies in the face of Victoria's "sign up" to the NDIS agreement. This deliberate action knowingly ignores the Rules. This deliberate lack of commitment ignores the rights and entitlement of these NDIS participants to have a service agreement.

### 3.3 Residential Statements vs Service Agreements

In an attempt to rationalise their refusal to establish services agreements with NDIS participants, the department has claimed that residential statements as required under section 57 of Victoria's Disability Act 2006 are the equivalent of service agreements and therefore a separate service agreement is not required. The department has recently drafted a 16 page template for the residential statement in which it states that this statement "*also forms a service agreement between an NDIS participant and a service provider …*" To add further insult to injury, the template further claims that a separate service agreement is not required. To highlight the arrogance of the department, the template then goes on to say that if a participant does have a separate service agreement, the "*residential statement will take precedence over that agreement*". To put this in perspective, this not only means that the department is attempting to parade residential statements as if they are service agreements, but they are also dismissing a piece of Federal legislation as though it has no import whatsoever and the department's only responsibility is to adhere to its own legislation, as in the Disability Act 2006.

Wrong, wrong, wrong and wrong. This arrogance represents a slap in the face to NDIS participants residing in departmental disability accommodation.

Firstly, it is wrong because under Victoria's legislation it is the provider only who establishes a residential statement. As such, it neither includes nor requires the involvement of the participant. In other words, the person with a disability is simple being told "which way is up" or "This is how things will be."

Secondly, it is wrong because a residential statement is not signed by both parties to indicate agreement by both as to the contents of the document. It is only the provider who signs it.

Thirdly, it is wrong because a residential statement is not required to include the finite details concerning the service supports and their delivery.

Fourthly, it is wrong because it fails to acknowledge the significant differences between the words "*statement*" and "*agreement*". As already noted above, this wrongness is emphasised by the fact that a statement does not constitute an agreement between two parties. It is also wrong on the basis that any attempt to characterise a residential statement as a tenancy or occupancy agreement also ignores the distinction that must be made between the words "*statement"* and *"agreement".* As is the requirement for service agreements, tenancy and occupancy agreements also require input and agreement from both the landlord and the tenant.

The department's arrogance is further highlighted by their requirement that the residential statement template is to apply not only to their own services but also to accommodation services provided by non-government organisations. A statement in the template says if a participant already has a service agreement with his or her provider, then *"the residential statement will take precedent over that agreement."* In effect this means that the department is saying to NDIS participants, *"We don't care if you have a service agreement or not because our residential statement is the only document that counts."*

An argument promoted to support the establishment of residential statements only, and hence the denial of service agreements, is that a residential statement saves imposing an administrative burden on the participant. What utter nonsense. Given that the participant is not party to a residential statement, then participating in the development of a service agreement is unique. Essentially, the administrative burden argument promotes the notion that an NDIS participant should be denied his or her entitlement to have a service agreement simply because some bureaucrat has promoted the notion that its establishment constitutes an administrative burden. Perhaps the truth of this is that the statement is promoted in order to save departmental bureaucrats from having to participate in the development of service agreements.

Regardless of this however, the outcome cannot be ignored. That is, as has been the case in the past, the person with a disability will continue to be "kept in the dark" by being excluded from having a say about the nature of the services to be provided to him or her - So much for the transformational intent of the NDIS.

This paper contends that as defined by section 57 of Victoria's Act, a residential statement is simply that, a statement. It is not a service agreement. Nor can it be characterised as a tenancy or occupancy agreement because it is simply a statement. By denying the significance of the two words, "***statement"*** and ***"agreement",*** the department has failed to acknowledge that an agreement is a contract between two

parties, unlike a statement, which is simply a document prepared by one party and provided to the other.

This paper highlights the failure of DHHS to abide by the Rules and Terms of Business that it signed up for. And further, it highlights the failure of the NDIA to impose on DHHS, as a registered provider, the undeniable requirement to comply with the Rules and Terms of Business. Both failures are evidenced by the department's refusal to participate in the establishment of service agreements with NDIS participants who reside in departmental managed accommodation – a clear case of non-compliance.

### 3.4 The intent of rules

The reality of any legislation or rules is the extent to which their intent and mandate are applied. By DHHS refusing to abide by the service agreement requirements, and by the NDIA allowing this to happen, then essentially both organisations are thumbing their noses at the NDIS. In the first instance, compliance starts with the registered provider. In other words, as a registered provider the entity is effectively saying "*We undertake to abide by the legislation and the rules associated with it.*" Such an undertaking is unequivocal. It is not one that allows an individual provider, even one as large as DHHS, to be selective in which rules it will follow.

Compliance also requires the Agency, as the entity responsible for registration, to ensure compliance by registered providers with the rules and Terms of Business and policies and guidelines. To date, both DHHS and the NDIA have ignored the requirement for registered providers to establish service agreements. Instead, it appears as though a cosy relationship has been established between representatives of the department and the NDIA. With total disregard for the requirement for service agreements, it appears that this relationship has led to the NDIA accepting residential statements as though they are service agreements, and allowing the department to ignore its obligations towards NDIS participants who reside in their residential services.

### 3.5 Where is the complexity?

Despite the protestations and rationalisations articulated by representatives of the department, and the sitting on the sidelines of representatives of the NDIA, what is and should be a straightforward process seems to have been made unnecessarily complex. The reality is that the department can and must establish residential statements as required by section 57 of Victoria's Disability Act 2006. As a matter of fact, this is not a new requirement, as it has existed since the Act came into being some 12 years ago. Equally, however, the department must also establish service agreements, as separate documents, in order to abide by the rules for which the Victorian government has signed up to. Neither document is complex, neither document runs into hundreds of pages and nor can either document be used to represent the other. Therefore, what is the problem?

A number of reasons could be promoted as to why the department is refusing to establish service agreements. Among the many that have been promoted, the elephant in the room that has not been cited is that service agreements represent a formal contract between the department as a registered provider and the individual

NDIS participant. As a contract, a service agreement is therefore required to contain in a detailed format the nature of the services to be provided, along with any other associated information. This paper promotes the suggestion that the department is reluctant to expose itself to such requirements.

By contrast, non-government organisations have demonstrated their willingness to not only provide residential statement to their clients, but to also establish service agreements with clients who are NDIS participants. The unwillingness of the department to "play ball" demonstrates an arrogance that is beyond belief and certainly makes a mockery of all the statements the department makes about the rights of people with disabilities.

## 4. ENFORCEMENT

### 4.1 What action can the NDIA take?

Given the responsibilities imposed on both the department and the NDIA, the question therefore arises as to what action the NDIA can and should take in relation to the department's refusal to establish service agreements.

As a first and necessary step towards enforcement, the NDIA must acknowledge that the department as a registered service provider is failing to abide by the requirements. It must step outside its cosy relationship. Once this first step has been addressed, the NDIA must then have a frank and fearless discussion with the department as to the requirements and expectations for the department to establish service agreements with the NDIS participants in their care. In order to facilitate the outcome of such discussions, which must be the department's agreement to establish service agreements, the NDIA must then establish clear timelines as to when service agreements are to be established with current NDIS participants, as well as identifying timeline expectations for new NDIS participants as particular areas transition into the NDIS.

### 4.2 What happens if action is not taken?

Given the significance of service agreements in terms of transforming disability services, the NDIA and indeed the Federal Minister cannot and must not allow Victoria to thumb its nose at the NDIS by in effect running its own race. As such, if compliance is not forthcoming from Victoria, and all effort has been undertaken by the NDIA to persuade DHHS to comply, then there is no option but to publicly expose Victoria's intransigence and to deregister the department as a service provider. Contractual arrangements in relation to the NDIS in Victoria and the Federal government must then be severed.

If the NDIA and the Federal Government do not enforce what is required of registered providers under the NDIS, then in effect the whole intent of the NDIS as a transformational initiative goes out the window.

## 5. TIME TO FIX THE PROBLEM

### 5.1 This nonsense must stop

Victoria's refusal, via its Department of Health & Human Services, to meet the obligations to establish service agreements with NDIS participants, cannot be allowed to continue. Action must be immediate, and those in positions of power and responsibility must act now.

### 5.2 The Federal Minister

The Federal Minister must take up discussions with the State Minister in order to reinforce the requirements of the NDIS agreements, which Victoria has signed up to. The Federal Minister must emphasise that part of the agreement is establishing service agreements with NDIS participants residing in departmental facilities.

### 5.3 The CEO of the NDIA

The CEO of the NDIA must instruct his managers to enforce NDIS requirements of registered service providers, and have DHHS establish service agreements with NDIS participants.

### 5.4 The NDIA Compliance Manager

This manager must make sure that NDIA staff liaising with DHHS insist on service agreements being established, and instruct NDIA staff that they do not enter into cosy arrangements that allow service agreements to be ignored or substituted by residential statements.

### 5.5 Victoria's Minister for Disability

The Minister must instruct the Secretary of DHHS that all NDIS participants residing in DHHS accommodation are provided with their entitlement to have a service agreement. Further, that the Departmental Secretary is instructed that residential statements, as required under Victoria's Disability Act 2006, are not to be used or promoted as though they are service agreements.

### 5.6 The Secretary of DHHS

The Secretary of DHHS must instruct her managers to enforce NDIS requirements of registered service providers, and have DHHS establish service agreements with NDIS participants in addition to existing residential statements.

### 5.7 The DHHS Director of Transition

The Director must acknowledge the requirement for service agreements as a separate document with NDIS participants, and stop procrastinating and attempting to promote residential statements as though they were service agreements.

### 5.8 National Disability Service (NDS)

As the peak body for service providers the NDS must challenge the department as to why the department is refusing to abide by the NDIS requirement for service agreements, yet non-government organisations are following the rules. Further, the NDS must challenge any suggestion made by the department that a residential statement will take precedence over a service agreement, arguing that they are two separate documents, each with their own individual focus.

**5.9 Representative and Advocacy Organisations**

These organisations must do what they are meant to do, which is to ensure that people with disabilities are afforded their rights and entitlements. Therefore at a Federal and State level, these organisations must take up the issue and demand that DHHS meet its obligations as a registered service provider.

**5.10 NDIS Participants and their representatives**

These people must demand that the entitlement to have a service agreement is adhered to.

## 6 CONCLUDING COMMENT

**6.1 Lots of talk but little action**

For too long those with power and influence in the disability sector have been quick to "*talk the talk*" but reluctant to "*walk the walk*". The myriad of documents that have littered the past three decades promoting change in the disability sector have all had one thing in common: that the rights of the individual person with a disability must be promoted and protected.

**6.2 The missing element**

No matter what changes have been made for the better, the one missing element has been that of people with disability being active partners in determining the services and supports to be provided to them. The NDIS, through the provision of service agreements, represents a huge breakthrough in filling that void. By placing service providers on notice and clearly articulating an agreement as to what will be provided, along with establishing the person with a disability as an equal partner, the impact of service agreements as a transformational tool cannot be under-estimated.

**6.3 Just do it!**

The NDIS has been widely promoted as the most significant action ever to be established in the disability sector. It is therefore essential that the intent of the NDIS, by the application of the very letter of the laws and rules which govern its operations, is upheld. For too long successive ministers, senior bureaucrats, advocates and service providers, including DHHS, have either given lip service to the notion of rights and entitlements or have manipulated the rules to protect their own self-centred interests.

No longer can those within Victoria's department of Health and Human Services manipulate or ignore the mandates of the NDIS. No longer can those responsible for in ensuring compliance in the NDIA turn a blind eye to DHHS's breach of its registration as a service provider. And, no longer can the most senior bureaucrats and ministers ignore the fact that wrongs by way of an entitlement continue to be perpetuated against people with disabilities.

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