Victoria Legal Aid

Inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition

Submission to the Joint Standing Committee on the NDIS

14 March 2017

Civil Justice Program – Victoria Legal Aid

Disclaimer. This submission includes case examples based on the stories of our clients. For some case examples VLA obtained the consent of the client and de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.

About Victoria Legal Aid

Victoria Legal Aid ("**VLA**") is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA is the leading provider of legal services to Victorians with disabilities and mental illness, with more than 21,560 clients in 2015-16 – or 26 per cent – disclosing that they fall within this category.

VLA's specialist services to people with disability and mental illness include the:

- ***Mental Health Disability Law Sub-Program*** (MHDL Program), which provides expert legal advice and advocacy to people diagnosed with mental health issues and those who experience some form of disability, particularly cognitive neurological disability, amongst them:
    - People who have been found not guilty but are indefinitely detained pursuant to a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA), or who are at risk of being removed from the community and placed in such a facility under the CMIA.
    - People with intellectual disabilities who are detained under the *Disability Act 2006* (Vic) in a residential treatment facility for compulsory treatment following a (quasi-) criminal order or in a disability residential service pursuant to a supervised treatment order.
    - People with mental illness who are detained in psychiatric hospitals pursuant to a compulsory inpatient treatment order under the *Mental Health Act 2014* (Vic) (Mental Health Act).
    - People with disabilities who are in fact informally detained, but outside of a specific legislative detention regime, in residential services, aged care facilities or hospital facilities.
- ***Independent Mental Health Advocacy* program** (IMHA), a state-wide non-legal advocacy service for people receiving compulsory treatment under the *Mental Health Act 2014* (Vic). IMHA advocates support and assist people to make or participate in decisions about their assessment, treatment and recovery.
- ***Commonwealth Entitlements Sub-Program***, which provides advice and representation to people seeking review and appeal of decisions relating to eligibility for the Disability Support Pension (DSP). This team provides weekly advice clinics in the Administrative Appeals Tribunal (AAT). The Commonwealth Entitlements team also assists people with other Centrelink related matters, as well as applicants challenging decisions of the National Disability Insurance Agency (NDIA) at the AAT.

Summary of submission

VLA's submission reflects our practice experience, and the key objectives of the *National Disability Insurance Scheme Act 2013* (Cth) (the Act):

> **Key objectives under section 3 of the Act:**
>
> (a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006;
>
> (c) support the independence and social and economic participation of people with disability;
>
> (e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
>
> (g) promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community;
>
> (h) raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability

While many issues arise in respect of the application of the National Disability Insurance Scheme (NDIS) to psychosocial disability, including basic definitional questions as to what qualifies as such a disability, this submission focuses on the way in which NDIS services might assist in providing clear, effective and individual pathways back into the community for people who have been confined in mental health facilities or detained in forensic settings.

VLA's submission focusses on 1(a) and 1(h) of the Committee's terms of reference, touching also on 1(e). It is informed by VLA's significant experience in the provision of services to clients in receipt of forensic disability services and clients detained for extended periods in the mental health system. It is our experience that this cohort of clients has difficulty leveraging services that might assist them to transition back into the community and that there is insufficient effort and too few resources devoted to giving people with psychosocial disabilities a pathway out of extended detention and severe restriction on liberty.

Unnecessary and prolonged periods of detention of people with cognitive and psychiatric disabilities raise fundamental issues of compatibility with Australia's international human rights obligations and the protection and performance of fairness and equality before the law.

Appropriate options for moving people out of detention, and into the community, should be at the forefront in decision making about access NDIS services to people with psychosocial disabilities, given the relevant legislative objects of the scheme.

Legal background: the Act and Rules

VLA notes the general principles set out in s 4 of the Act, and the principles (at s 31 of the Act) relating to the preparation, review and replacement of a participant's plan, to the effect that the plan should seek to advance:

- "the right of the participant to exercise control over his or her own life";
- "the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations";
- "the choice and independence of the participant";
- "tailored and flexible responses to the individual goals and needs of the participant".

These principles give content to the concept of "reasonable and necessary supports" (see s 34 of the Act), are expressed further in the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (the Rules). The Rules, in Schedule 1, recognise that for participants with mental health problems, the NDIS will cover "supports that … enable a person … to undertake activities of daily living and participate in the community and social and economic life" (see cl 7.6). In respect of people in the justice system, the Rules recognise that for participants in secure mental health facilities, plans should provide for supports "to facilitate the person's transition from the custodial setting to the community" (Schedule 1, cl 7.23 – 7.24). There is considerable uncertainty as to what the law, so articulated, will mean in practice for people in secure mental health facilities (including those facilities which might not be properly characterised as "justice system" facilities).

In light of this, it is critical for the Committee and the NDIS to consider the scope and form of the transition supports to be provided to participants with psychosocial disabilities subject to restrictions on liberty. The below case studies show the potentially complex circumstances to which these supports will need to be adapted to respond.

Issues in transition from long-term detention or confinement

In VLA's experience, issues which arise in respect of the transition of people experiencing mental health problems from long-term detention or confinement (and thus issues which should shape the approach to developing and administering NDIS plans) include:

- Limits on individual's capacity to initiate and broker their own alternative supports in the community (due to their cognitive or psychiatric impairment and ongoing detention), leading to reliance on the support of detaining/treating services to progress pathways into the community.
- Inadequate use of individualised planning around better supports for the person, risk amelioration and reduction of restrictions over time.
- Stigma against those with mental illness and disability who have a forensic/criminal history. This can limit the person's access to less restrictive accommodation and orders.
- Rigid pathways for transition and lack of flexibility for people who, due to their disability, struggle to comply with rules that may not be necessary.
- Insufficient resources to implement the treatment and services necessary to allow people to progress to a less-restrictive community setting (for example people who have been approved to have leave are not able to use it because there are insufficient staff to escort them).
- Siloed service systems and facilities, which means they are unable to properly meet people's full individual needs holistically (the inability of the mental health service system to cater to and support a person with cognitive disability is particularly problematic).
- Lack of appropriate community accommodation or suitably supportive discharge destinations.

VLA's practice experience, and examples of such issues in planning for the transition of people with psychosocial disabilities, are illustrated in the case studies below.

Peter's experience

Peter has both an intellectual disability and a mental illness. He has been in a Secure Extended Care Unit (SECU) in a hospital for a number of years despite his mental state being stable, because the service has been unable to arrange suitable discharge accommodation. He requires supported accommodation because he is quite vulnerable. He has been seriously assaulted in SECU before by other patients, however for unknown reasons the police investigation did not progress. Staff acknowledge that SECU is not an appropriate care setting for him.

The key issue preventing him from leaving is the separation in service provision between disability services for his intellectual disability, and mental health services for his mental illness. Disability services in his case have deferred to his mental health treatment as he is currently in SECU, yet he really requires supported accommodation to have any option of discharge. Peter lacks capacity to make progress on these issues himself, and he requires assistance with charting individual pathways leading to more appropriate accommodation for him.

Jamal's experience

Jamal arrived in Australia at the age of 17 as a refugee. Soon after arriving he was imprisoned. While in prison he was diagnosed with a severe mental illness and transferred to a psychiatric institution. In 2014 Jamal damaged some property and assaulted a staff member at the institution. He was arrested and charged. Jamal declined to seek bail as he did not want to return to the hospital. After some time in Melbourne Assessment Prison he was transferred to Thomas Embling Hospital, Victoria's specialist high security forensic psychiatric facility.

In January 2015 Jamal received a sentence of imprisonment for time already served, rendering him eligible for immediate release. He was immediately placed on a civil mental health order detaining him at Thomas Embling Hospital, where he remains.

The treating team at Thomas Embling Hospital quickly determined that it was not a clinically appropriate environment for Jamal and attempted to have him transferred to a Secure Extended Care Unit (SECU) in a hospital in the community. However, the SECU at which Jamal had previously been treated refused to take him back, and other SECUs refused him because he was not in their geographical 'catchment' area. Other services to which Jamal might have been discharged, such as a community care units or supported residential services, also refused to take him. Public housing might not be available for up to two years. Jamal remains detained in an inappropriate forensic facility more than two years after his sentence finished, notwithstanding the clinical evidence that such an environment is neither necessary nor suitable to his needs.

Jamal's guardian has decided that the only possible discharge accommodation would be private rental. However, due to Jamal's institutionalisation, the guardian is only prepared to approve this if Jamal receives significant mental health and disability support, and graduated leave to the accommodation, from the hospital.

An application has been made for NDIS funding. The provision of funding would be an essential part of Jamal's effective transition: he needs financial support to secure accommodation for a period prior to his discharge, so he can make transitional visits. He needs a range of other supports to ensure he can effectively make the transition. In the absence of funding to pay for supports, Jamal faces the prospect of indefinite detention in high security forensic facility.

Troy's experience

Troy is a young man with a diagnosis of a severe mental illness and intellectual disability.

In 2009 he became mentally unwell and was involved in an incident on public transport. He was placed on a custodial supervision order (CSO) with a nominal term of seven and a half years, and committed to custody at Thomas Embling Hospital.

At the conclusion of his nominal term, the court conducted a statutory 'major review' of Troy's order. At a major review the court must vary a CSO to a non-custodial supervision order unless satisfied that doing so would seriously endanger the public.

At the major review, the Court confirmed the CSO on the basis that Troy continued to require close supervision and support. It would appear that this support could be better provided in the disability sector, but this transition has not yet been commenced.

An application for NDIS funding has been made. It is essential that funding is provided while he is still in custody, if he is to make the transition from detention to the community. Without funding he will remain in custody indefinitely.

Clear, effective and individual pathways back into the community

Properly functioning, the NDIS can and should act as a circuit breaker in resolving the types of difficulties we have set out above. It should enable participants to access necessary services in the community. A core benefit of the NDIS is the ability to provide particular funding for planning roles, such as "plan support coordinators" to assist participants to leverage supports to enable them to transition out of long-term detention or confinement. For this reason, potential participants should have ready access to the NDIS, at an early stage, with a focus on exploring options for them to transition into the community.

Issues and recommendations

1. Barriers to understanding and accessing the scheme

In our experience, the nature of the NDIS as an "opt-in" scheme can present particular barriers for individuals with mental health conditions, particularly those who are in institutions, as it necessarily requires access to personal information (including historical information) and ongoing coordination between an applicant, treating practitioners, and the NDIA. In effect, this means that a person's ability to access the NDIS can be dependent on the availability of support, and the willingness of treating practitioners or other professionals to advocate for their clients.

Systematic and technological barriers can also exist to prevent individuals in institutions (as well as other people) from accessing the NDIS. For example, at the time of writing, NDIS Access Request Forms (ARFs) are not available online or in electronic format. Individuals wishing to obtain an ARF must call a dedicated hotline and provide preliminary information in order for an ARF to be sent to them. This has presented challenges for individuals who lack the capacity or ability to navigate the system.

> **Recommendation 1: Tailored information and support to facilitate access to the scheme**
> Ready access should involve tailored and easily available information about how to apply to become a participant in the NDIS, as well as support for individuals to make access requests and to obtain evidence required to satisfy the statutory access criteria.

2. The need for clear criteria

Preliminary data from the NDIA indicates that the rate of rejection for NDIS access requests for those with a psychiatric impairment is significantly higher than other disability types.[1] Based on our

[1] *IAC advice on implementing the NDIS for people with mental health issues* accessed online: https://www.ndis.gov.au/about-us/governance/IAC/iac-advice-mental-health

experience, this may relate to a lack of specialised knowledge among assessors within the NDIA, as well as potential difficulties relating to the application of the legislative criteria.

One issue may be related to the requirement in the Act that an impairment must be permanent (or likely to be permanent) in order for a person to meet the eligibility criteria. There is no definition of 'permanent' offered in the Act, and while s 24 makes some provision for an impairment to be variable in nature, there is no further guidance for decision makers on how to interpret this provision. Some psychosocial disabilities are highly episodic, and many manifest in different ways depending on context. Neither of these features warrants the refusal of access requests by persons with psychosocial disabilities. Indeed, refusal of access on such a basis would have a particularly unhelpful impact on the transition of people with disabilities out of long-term detention or confinement.

Similarly, there is also little available guidance on the meaning of 'substantially' reduced functional capacity in the context of psycho-social disability. Based on our experience, clients with psycho-social disability present with unique experiences and challenges that are distinct from other disability types. Again, the fact that a person's social circumstances provide some amelioration of an underlying condition which impacts functional capacity, should not be used as a basis for a refusal of an access request.

Further difficulties can and have occurred as a result of the additional residence requirements that apply during the full-scheme transition period. Rule 4.1 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* require a person to satisfy additional residence requirements in order to become a participant in the NDIS. Schedule 1 to the rules set out when a person meets the additional residence requirements by virtue of residence in a prescribed area at a prescribed time. Currently, there is uncertainty as to how these rules will be applied to individuals who normally reside in a prescribed area but who are detained in a non-prescribed area, and vice versa. This uncertainty can act as a further barrier to providing timely intervention for individuals in temporary or indefinite detention.

Recommendation 2: Clear guidelines or policies on NDIS access criteria
Clear rules or policies should be developed in order to provide certainty. These rules or policies should reflect the episodic nature of some kinds of psychosocial disability, and the fact that the manifestation of a psychosocial disability may be affected by surrounding circumstances, such as the extent and nature of family supports. People with disabilities should not be penalised for an episodic cessation of some symptoms, or the temporary amelioration of the effects of their disability by their circumstances. The application of residency requirement rules, especially during the NDIS transition period, should be clarified.

3. The place of informal supports in identifying 'reasonable and necessary' supports

In VLA's experience, difficulties have arisen when determining the reasonable and necessary supports available to participants with mental health conditions. These include, among other things, identifying appropriate family, carer and "informal" supports, and locating appropriate accommodation.

In order for a support to be funded under the NDIS Act, it must meet the criteria in section 34 of the Act. This includes, among other things, that there is evidence that the support is likely to be effective and beneficial for a participant, that the support takes account of what is reasonable to expect families, carers, networks and the community to provide, and that the support is most appropriately funded or provided through the NDIS rather than other systems of service delivery such as the health system. Additionally, a support will not be funded if it is deemed to be a 'day to day living cost' or is likely to cause harm to a participant.

Since, in VLA's experience, individuals with psychosocial disability (especially people in long-term detention) not infrequently have limited social support, carers and the community should be encouraged to engage with and support individuals to maximise independence and dignity, rather than being considered "informal supports" who are able to bear the financial burden of care.

The use of these provisions to justify substantially reduced funding for participants with psychosocial disabilities, would militate against the achievement of the scheme's objectives of dignity and independence.

Recommendation 3: Considering reasonable and necessary supports through the lens of the CRPD and other legislation
The NDIA should provide clear guidance on the application of the reasonable and necessary criteria in cases of psychosocial disability. This should reflect the principles of independence and dignity embodied in the CRPD, as well as in various pieces of domestic legislation.

4. Challenges caused by the interface of the NDIS and the health system

Currently, there is a high level of uncertainty surrounding the interface between the health system and the NDIS. For example, the NDIA has indicated that it will not fund clinical services and treatment for "health conditions", medications, post-acute care and psychogeriatric care.[2] This is the case even if these services are not funded under the health system. This is likely to create particular

[2] NDIS 'Mainstream interface: Mental health services' Fact sheet, accessed online : https://www.ndis.gov.au/html/sites/.../supports_ndis_fund_mental_health2_0.docx

difficulties for individuals transitioning from detention, and it is anticipated that there will be a high proportion of people who will not receive funding for vital mental health services and support. Lack of clarity in this area has resulted in lengthy and complex tribunal cases, and continues to be a challenge for VLA clients. In our experience, clients are often advised that the NDIA will not fund a particular support without receiving any support or information about how that support may be funded under alternative systems. Better coordination between services is vital to ensuring that clients with psychosocial disability do not slip through the cracks.

Recommendation 4: Clarity and coordination surrounding the interface with health
In circumstances where the NDIS cannot legitimately fund a health related support, participants with mental health issues, particular those in institutions, should be given support or referral to services to assist them to navigate the health/NDIS interface.

Concluding remarks

The NDIS is founded on principles of choice and control, independence and self-management. In order for these to be fully realised, it is essential that individuals with mental health conditions are actively engaged in the preparation of their plan, and that there is clarity and certainty surrounding the delivery of supports. Where a person is detained or confined without their consent there is an additional human rights impetus to ensure that appropriate supports can be accessed quickly and effectively if they would enable the person to transition into the community.