



LIVING WITH DISABILITY
RESEARCH CENTRE



LiDs Seminar – October 10 2018
Dr Darren O'Donovan, La Trobe Law School
An update on NDIS appeals decided by
the Administrative Appeals Tribunal (AAT)

Dr Darren O'Donovan

“Speaking NDIS”: Emerging Lessons from the AAT

“Speaking NDIS”: The Importance of Evidence?

- **LJJY and National Disability Insurance Agency [2018] AATA 3506 (18 September 2018)**
- Each element of a service needs to have a measurable outcome
- “The Applicant’s parents have engaged a junior therapist to assist him after school. She is usually engaged for a two hour session (3:15pm to 5:15pm), twice per week. The therapist assists by meeting the bus in the afternoon, escorting the Applicant home, and engaging with him on a one-on-one basis.”
- Decision shows that when hours are bundled and packaged into one holistic programme, the Agency can break that apart and ask you to identify the specific benefit to a particular component.

Speaking NDIS: The Importance of the Benefit Conversation

- Is there a hierarchy of goals?
- Social and economic participation, or reasonable and necessary support that yields reduced need for future supports, that sustains carers and promotes or protects capacity?
- Do we have an evidence base for how the support we require “pays off” in the NDIS sense?

“Speaking NDIS”: Carers and Investment logic

Paragraph 10.7 of the *NDIA Operational Guidelines – Planning (Chapter 10)*, makes the following commitment in relation to Agency’s reliance upon informal supports:

- “...the ongoing capacity of family members and carers to provide these informal supports can often be critical to the wellbeing of participants.
- Support loads and other factors such as illness or ageing can place a carer’s wellbeing at risk and compromise their capacity to continue in their caring role. Accordingly, the NDIA recognises that sustaining these informal supports **can often be an integral component of meeting a participant’s needs.**”

Treatment of employment of carers

- Perosh v NDIA: funding for transport “In particular, it represents value for money, and having regard to the circumstances of the family, it is not reasonable to expect his Mother or Father to drive him to and from TAFE” (both worked, mother had flexible time arrangement)
- David v NDIA: “the reduction in the funding request made by the Applicant reflects a contribution made by other sources of transport, particularly using the van owned by his mother and driven by her, his girlfriend or a carer.”
- PNFK v NDIA: “mother had expressed a wish to undertake full time work. It found that it was “necessary to give her time to gear up” for full time employment. The issue could be reviewed when the plan concluded in six months, in meantime, the extra funding was to support her to transition to full time employment.”

Speaking NDIS 2: Function versus treatment

- BMBC Eligibility Decision
- Applicant clearly flagged as someone who could benefit from supports, but those supports were found more appropriately provided in the health system.
- Despite the emphasis on psychotherapy sessions about how to manage her were 'health' – continuing care.
- COAG principles: “Treatment is defined here as activities associated with stabilisation and management of mental illness (including crisis, symptom and medication management) and establishment of pathways for longer term recovery.”

Function versus Treatment: Mazy v National Disability Insurance Agency

- Maintenance supports by clinically trained health practitioners will be funded under the Scheme where the supports are *“related to a person’s ongoing functional impairment and that enable a person to undertake activities of daily living”* and where they are *“directly related to a functional impairment.”*
- Registered Nurse to help give injections was required as Ms Mazy could not self-administer her injections. And was directly related to **the care she needs to live in the community.**
- A health maintenance element in a broadly functional project.
- No solid definition of treatment

Line Items, Multidisciplinary Teams and Case Management

- Recent Report of the Victorian Office of the Public Guardian on Complex Needs and the NDIS which stressed that:

“Many people in this cohort have large, multidisciplinary care teams and multiple service providers. However, the NDIA does not fund case management and does not always provide funding for care team communication, information sharing and training. For example, unlike under his ISP, there was no funding in Brian’s NDIS plan for his psychologist to attend care team meetings or provide updated risk assessments. Similarly, unlike under her ISP, the following were not funded under Yasmin’s plan:

- any of the team of allied health professionals who had provided clinical leadership
- regular meetings between her support providers”

- Recalls the funding of a multidisciplinary diagnostic assessment in LMNT
- Are the multidisciplinary actions there to support function or clinical recovery?

Cost Envelope: The Systemic Impact of AAT rulings

- YPRM: “The existence of diabetes-specific services accessible to the child, whatever their shortcomings, and the provision of learning support assistants at her school, suggest a design feature in the arrangement of government and non-government organisation service provision that such services are the responsibility of funding sources outside of the NDIS.”
- “There is some evidence as to the relative value for money of the support requested. Ms Noble has made enquiries which indicate that it would be more expensive to relocate Ms Mazy and provide some support for the administration of the insulin she requires than it would be to continue to provide the services of *Nurses on Wheels*. In addition, extra support for a day care program would be required if Ms Mazy moved to alternative accommodation.”
- What is missing in this debate?

Speaking NDIS 3: “Model Figures are to be reasoned with not declared”

- *BIJD v National Disability Insurance Agency*
- two days of in-home care for a child with disabilities unable to attend childcare centre (development delay, susceptibility to infection). This was appropriately funded by the NDIS but **not value for money**.
- Tribunal rejected submission that this was just respite by another name, but noted the childcare only delivered some limited functional benefits
- Agency tabled evidence that 617 million was at stake.

Difficulties for the Agency when relying on figures

- Its data appears only episodically in its submissions to the tribunal, and is broad in scope.
- Cost does not address the different benefits and goals of participants.
- Only where a situational is generalizable can it be applied.

Deputy President Humphries:

If the section is to be construed as saying that any decision which adds significantly to the cost of the Scheme is to be eschewed, then the Tribunal would have little difficulty in finding for the Agency. However, financial sustainability surely entails the making of value judgements about the cost of widening the Scheme's scope versus the benefits so conferred. Significant additional cost may be justified if the benefits thus conferred are also significant. Adopting the construction urged on the Tribunal by the NDIA proceeds on the assumption that the NDIA has already made decisions pitching the level of support for disabled Australians at the right level, and that to supplant those decisions in favour of more generous ones, irrespective of the merits of doing so, is *ipso facto* wrong. It is doubtful that this was the intention of the legislature. It might also be suggested that the notion of a scheme's *financial sustainability* is itself a function of the nation's overall liquidity and its priorities, matters over which the Tribunal may lack competency to make findings.

Putting it all together: David and Perosh

- Transport guideline target amounts not prominent in reasoning
- Both individuals had constructed goals that were reliant on transport, and had compelling benefit cases
- Both had families who lacked adequate cars and were working
- Both were assessed (not by the Agency) as incapable of taking public transport
- Both communicated that it was funding for, not funding because...

Support Co-ordination

- participants have complex or high intensity needs;
- participants needs are not stable; participants have cognitive disabilities
- are likely to have difficulties in finding and coordinating their own services and who do not have family or other supporters with the knowledge or resources to take on this role;
- taking on this type of role may unnecessarily increase the strain on family or supporters;
- Rural locations where there are limited services easily available.

Thank You



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Special Seminar

- **Professor Jan Tøssebro** Professor of Social Work, Norwegian University of Science and Technology (NTNU), Trondheim, Norway
- Delivering Intensive Support Services to People with Disability and Complex Support Needs in Norway: Findings from a Recent Study

Wednesday 31 October 2018

3:00 pm - 5:00 pm

**Seminar Room 1.34, Level 1 of the
Borchardt Library, La Trobe University,
Bundoora Campus**

