

Independent Advisory Council to the NDIS

Equitable access to the NDIS by people with cognitive disability in touch with the criminal justice system

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Executive Summary

Purpose

To identify enhancements to current National Disability Insurance Agency (NDIA) function and practice to maximise equitable access for individuals with cognitive impairment who are in touch with or at risk of contact with the criminal justice system.

This paper is to be read in conjunction with the Independent Advisory Council (IAC) '*Equitable access to the NDIS by people with disability on the margins*'.

Summary of key issues

There is a significant danger that people with disability who are in contact with justice systems will continue to experience disadvantage as a result of the *Applied Principles between the NDIS and Justice* (Applied Principles) and the inability of justice systems to meet their responsibilities under the National Disability Strategy (NDS) and their obligations under the *Disability Discrimination Act-1992*-(DDA).

The Applied Principles assign to justice agencies the responsibility for “the assessment of cognitive ability, psychiatric conditions and other matters required to assess a person’s ability to plead in court or considerations prior to sentencing or diversion”. This means that justice agencies control the gateway to reasonable adjustment, diversion and disability support. Experience across all jurisdictions indicates that they in fact only provide cognitive and other assessments in very limited circumstances and commonly do not recognise signs that a person has a cognitive impairment. Opportunities for diversion and early intervention are lost.

In addition, the Applied Principles do not appear to acknowledge the fundamental difficulties faced by people with cognitive impairment in understanding and dealing with police and court processes and the disability support that is required in this context.

Recommendations in relation to the people in touch with Justice systems:

The IAC recommends that the NDIA:

1. Reviews the Operational Guidelines (OG’s) *Planning and assessment – supports in the plan – interface with justice*, taking into account the concerns raised in this paper.
2. Learns from the model in place in Barwon (including the model’s funding of an initial plan to allow a support coordinator to engage the person and develop a support plan that will assist with court diversion) and establish in other states/territories collaborative arrangements between the NDIA and justice agencies to ensure the prompt provision of disability support for people seeking diversionary or non-custodial outcomes from criminal charges.

3. Provides reasonable and necessary support for people with cognitive impairment to deal with police and court processes and to meet court imposed conditions. This includes ensuring that workers are appropriately skilled.
4. Ensures Information, Linkages and Capacity building (ILC) provides services experienced in outreach, capacity building and support for people on the margins including:
 5. skilled support in police and court processes; and
 6. support to meet court imposed conditions for non participants.
7. Develops systems to respond quickly where reasonable and necessary support will facilitate bail, diversion and non custodial options or where a person is unexpectedly released from custody.
8. Initiates post release planning and support 12 weeks prior to release including commencing services to develop relationships with the participant while still in custody. This includes people who have spent significant time in custody without entering the formal corrections system.
9. Negotiates rigorously with justice agencies in relation to their responsibilities under the NDS. This includes the development of protocols to ensure:
 - a. cognitive and other assessments necessary to establish the need for reasonable adjustment, participation in diversionary processes and access to disability support are universally available where appropriate.
 - b. people receive support to navigate the justice system and access support for which they are eligible including diversionary and prevention programs
 - c. people with disability who are not participants receive the support they need in police and court processes including support to meet court imposed conditions.

Introduction

The Intellectual Disability Reference Group (IDRG) was convened in 2015 to provide advice to the NDIS Independent Advisory Council (IAC; the Council) on best practice in enabling people with cognitive impairment to lead ordinary lives included in their community. The topic of *Equitable Access by People on the Margins* is one of the issues the IDRG identified as requiring attention.

The purpose of this paper is built on previous work in relation to people with cognitive impairment on the margins to identify enhancements to current NDIS policy and practice to maximize equitable access for individuals with cognitive impairment who are in touch with or at risk of contact with the criminal justice system.

Interface with justice systems

The revised Council of Australian Governments (COAG) Applied Principles clarify a number of issues in current practice and raise new concerns for people with cognitive impairment. The Operational Guideline *Planning and assessment – supports in the plan – interface with justice* will need to be revised in the light of the revised Interface Principles.

Current practice and experience

NDIS practice is informed by the Operational Guideline (OG) *Planning and assessment – supports in the plan – interface with justice* derived from the interpretation of the NDIS Act, 2013 and the Interface Principles. In November 2015, the Disability Reform Council of COAG adopted a revised set of Principles to determine responsibilities of the NDIS and other service systems (Applied Principles)

The NDIA uses principle based decision making to weigh up individual circumstances in relation to the application of the legislation. Determination of eligibility and the nature of support provided take multiple factors into account including any anticipated outcomes arising as a result of lack of support and the beneficial impact of early intervention.

People on the margins need to access and participate in mainstream services that often do not respond appropriately to their needs. Many will need disability support to access and participate in mainstream services.

Where the person is not in custody or a secure mental health facility, the NDIS has responsibility for reasonable and necessary supports required due to the impact of the person's impairment/s on their functional capacity. As such the NDIS would fund supports that place controls on the person for the purpose of managing risks to the individual or the community. (Applied Principle Justice, 4.) This includes for example responsibility for disability related support required to access and participate in programs aimed at addressing behaviours arising from substance abuse, mental health, anger management or any other court imposed condition.

People on remand in the community are eligible for supports provided to any other participant in the community. People remanded in custody are eligible for supports provided to any other participant in custody.

Welcome features of the revised applied principles include:

- The acknowledgement that the interface between the NDIS and justice system is complex and lessons learnt in the trial will assist governments in refining the interface responsibilities.
- More effective differentiation in responsibility to address behaviours of concern related to offending. The NDIS has responsibility for supports to address behaviours

of concern related to disability and the justice system, including more general interventions to reduce criminal behaviour:

- The NDIS has responsibility for “supports to address behaviours of concern (offence related causes) and reduce the risk of offending and reoffending (such as social, communication and self-regulation skills), where these are additional to the needs of the general population and are required due to the impact of the person’s impairment/s on their functional capacity and are additional to reasonable adjustment.”
- Justice agencies are responsible for “offence specific interventions which aim to reduce specific criminal behaviours” unless the behaviour is “clearly a direct consequence of the person’s disability”. It is inconsistent that a participant has to satisfy such a strict test to access NDIS support for offence specific interventions. In the justice system, these interventions are not commonly available to offenders generally and are seldom accessible to offenders with cognitive impairment.
- The NDIS’ responsibility for reasonable and necessary support including assistance with planning, decision making, scheduling, communication, self regulation and community living.
- The omission of paragraph 9.B.3 of the current Operational Guideline which differentiates responsibilities for support for daily living in group or shared living arrangements in terms of whether the accommodation is to support the participant, protect the community or for clinical treatment.
- The clarification that justice agencies have responsibility for pre-sentencing reports of cognitive ability, psychiatric conditions or other matters required to assess a person’s ability to plead in court or considerations prior to sentencing or diversion.
- The identification of an increased list of supports available to people subject to custodial orders.

Challenges

The first applied principle justice does not currently reflect practice on the ground

The principle indicates that “The criminal justice system (and relevant elements of the civil justice system) will continue to be responsible for meeting the needs of people with disability in line with the National Disability Strategy and existing legal obligations, including making reasonable adjustments in accordance with the Disability Discrimination Act 1992 (CTH), through:

- Ensuring its systems, supports and buildings are accessible for people with disability including appropriate communication and engagement mechanisms, adjustments to the physical environment, accessible legal assistance services and appropriate fee waivers;

- General programs for the wider population, including programs to prevent offending and minimise risks of offending and reoffending and the diversion of young people and adults from the criminal justice system; and
- The management of community corrections, including corrections-related supervision for offenders on community based orders.”

Nationally, criminal justice systems do not meet their obligations under the National Disability Strategy (NDS). General programs for the wider population are very limited and commonly not accessible to people with cognitive impairment.

1. Cognitive and other assessments to access diversionary processes or be recognised as unfit to be tried in courts are the responsibility of the justice system

Current practice

The NDIS does not require cognitive assessments to determine eligibility. Active steps are taken to gain information that will enable the Agency to make an eligibility determination based on whether the person has an impairment that is likely to be permanent and an assessment of the impact of the impairment using functional capacity indicators.

At least in NSW, courts very seldom seek cognitive assessments. The main exception relates to when a custodial sentence is likely. The main additional assessment requested by courts is a mental health screen.

It is usually Legal Aid defense lawyers who will want cognitive assessments, in particular to underpin applications for diversion from the justice system due to the impact of cognitive impairment on a person’s culpability. However, Legal Aid often lacks the resources to pay for assessments.

Historically, cognitive assessments have often been available since they were carried out by State disability agencies to determine eligibility for their services. However, given the functional nature of determination of eligibility for the NDIS, these assessments may not be available in the future leading to additional challenges in determining eligibility for diversionary measures.

The defense lawyer often also needs a support plan to show a court that their client has appropriate disability support and therefore is unlikely to reoffend. Support plans are usually developed by disability services. In Victoria, the court may itself seek such a report: Victoria has specific legislation for justice agencies to collaborate with disability services to develop a “justice plan” that can underpin a bond. In Barwon, a collaborative

arrangement has been established between the NDIA and justice agencies to assist prompt access to the NDIS and provision of disability supports that facilitate diversion under a justice plan. One important feature of this arrangement is that once a person has been ruled eligible for reasonable and necessary support, the initial NDIS plan is focused on using a support coordinator to engage with the person and develop a support plan that will meet the person's needs and be submitted to the court in support of the person being placed on a bond rather than a more severe sentence.

Challenge

'Proof' of cognitive impairment is important to access diversionary processes or to be recognised as unfit to be tried. The revised applied principles clearly establish assessment of cognitive ability, psychiatric conditions or other matters required to assess a person's ability in relation to justice matters is the responsibility of justice agencies. Justice agencies also have responsibility for early identification and primary prevention programs.

Justice personnel are not skilled in recognising signs that a person may have cognitive impairment. Even if a possible disability is recognised, obtaining a cognitive assessment is problematic. This means that many eligible people do not access appropriate adjustments, diversionary processes or disability support.

Across Australia justice systems reflect variable practice. They often provide cognitive and other assessments for people facing custodial orders but, at least in NSW, assessments are rarely available for other alleged offenders. Without appropriate documentation to determine disability, people with disability miss the gateway to opportunities for adjustment, support and diversion. Opportunities for early intervention are lost.

2. Support for people with disability to access and navigate the justice system is the responsibility of justice agencies

Current practice

Support for people with disability to access and navigate the justice system is routinely not available. This means that people with disability lack support to access advocacy, community visitors, legal support and guardianship. This includes people with disability who are offenders as well as those who are victims and witnesses of crime.

Challenge

People fail to gain access to resources for which they may be eligible. Opportunities for early intervention are lost.

3. The COAG Applied Principles are silent in relation to support in police and court processes and in relation to linking into disability support

Current practice

In the justice context, especially in relation to police and court processes, disability related support refers to support that enables the person to know their rights and understands the legal processes that they are involved in. Disability support often extends into disability advocacy when the support person, for example, explains to the police, lawyer or the court about the impact of disability and links the person with disability to legal aid and support services.

There are very limited police/court support services funded by State Governments. The most developed is provided in NSW by the Intellectual Disability Rights Service (IDRS) funded by NSW Department of Family and Community Services (Ageing Disability and Home Care). Volunteers provide support for alleged offenders and victims of crime. The volunteers are trained and coordinated by paid staff who also liaise with solicitors and support the person to access disability services.

It is essential that people providing police and court support are trained for this role. Otherwise, they will lack necessary skills leaving the person they support in danger of having their rights compromised.

It is the responsibility of justice agencies such as police and the courts to make reasonable adjustments to improve their response to people with cognitive impairment. Police rules make it clear however that it is not appropriate for police to explain to the person with cognitive impairment their right to silence etc. Support of this nature must be provided by a person who is on the side of the person with disability.

Challenge

Very few people with cognitive impairment receive support in police and court process as such services are currently scarce and when available poorly funded. This leads to major disadvantage in the justice system. For example without appropriate identification of disability, a person with cognitive impairment is likely to participate in a police interview without properly understanding the right to silence, the questions or their implications. A rushed Legal Aid lawyer may not realise their client has a disability.

The NDIS should accept responsibility for support in police and court processes, the need for which flow directly from cognitive impairment.

4. Supports to meet court imposed conditions for people with cognitive impairment who are not participants

For people with cognitive impairment, the support required to meet court ordered conditions includes support to understand and recall conditions and plan how to comply.

Current practice

The current OG (at A1) indicates that NDIS has responsibility for “support required by the participant as a result of their functional impairment to meet any court imposed conditions (e.g. transport assistance and assistance with personal care)”. People who are not participants miss out on this important support.

Challenge

In the revised applied principles, justice agencies have the responsibility for “management of offenders to ensure compliance with supervised orders or conditions”. Widespread experience demonstrates that community corrections officers do not provide this support and hence many people with cognitive impairment who are not participants will fail to meet court imposed conditions that they could have been supported to meet.

Post release support

Current practice

When disability is confirmed while a person with cognitive impairment is in custody, the NDIA allocates support coordination to assist the person to develop a plan that can include:

- aids and equipment
- allied health and other therapy directly related to a person’s disability, including for people with disability who have complex challenging behaviours
- disability specific capacity and skills building supports which relate to a person’s ability to live in the community post-release
- supports to enable people to successfully re-enter the community
- training for staff in custodial settings where this relates to an individual participant’s needs.
- ensuring funding is available for participants once they are released (if participant is remanded in custody).

Light touch support coordination is funded throughout the duration of the incarceration to maintain relationships to facilitate better integration into the community.

The NDIA develops a post release plan six weeks prior to either a parole hearing and/or release. Support coordination is a key part of the plan with extensive support immediately post release scaling back as appropriate to a lower level of Support Coordination.

Challenge

The six week time frame may be inadequate to put necessary services in place to enable and smooth transition into the community. Participants will not have the chance to even meet, let alone develop a relationship with staff who will be pivotal to their successful reintegration.

Research indicates that many people with cognitive impairment spend significant time on remand (Baldry et al 2013) and are often then discharged from custody with time served. It is critical that pathways are developed to ensure that such individuals who do not enter the formal corrections system have access to the same supports as if they had formally entered the corrections system.

For a range of reasons people are released from custody with no or very limited notice (for example: successful appeals or findings of not guilty).

1. Interplay between the NDIS and the secure forensic system

This paper does not address the interplay between the NDIS and legislation and services focused on people who are unfit to be tried or not guilty on the grounds of mental impairment, or detained in a secure disability facility instead of gaol. These issues need further consideration.

Recommendations: refer to page 3

Recommendations by NDIS systems

Service Delivery Operating Model

The IAC recommends that the NDIA:

1. Reviews the OG Planning and assessment – supports in the plan – interface with justice, taking into account the concerns raised in this report.
2. Initiates post release planning and support 12 weeks prior to release including commencing services to develop relationships with the participant while still in custody. This includes people who have spent significant time in custody without entering the formal Corrections system.

Interface and Scheme Practice Approach

The IAC recommends that the NDIA:

3. Learns from the model in place in Barwon (including the model's funding of an initial plan to allow a support coordinator to engage the person and develop a support plan that will assist with court diversion) and establish in other states and territories collaborative arrangements between the NDIA and justice agencies to ensure the prompt provision of disability support for people seeking diversionary or non-custodial outcomes from criminal charges.
4. Negotiates rigorously with justice agencies in relation to their responsibilities under the National Disability Strategy (NDS). This includes the development of protocols to ensure:
 - a. Cognitive and other assessments necessary to establish the need for reasonable adjustment, diversionary processes and disability support are universally available where appropriate
 - b. People receive support to navigate the justice system and access support for which they are eligible including diversionary and prevention programs
 - c. People with disability who are not participants receive the support they need in police and court processes including support to meet court imposed conditions.

Information, Linkage and Capacity Building (ILC)

The IAC recommends that the NDIA:

5. Ensures that ILC provides services experienced in outreach, capacity building and support for people on the margins including:
 - a. skilled support in police and court processes and
 - b. support to meet court imposed conditions for non participants.

Reasonable and necessary support

The IAC recommends that the NDIA:

6. Provides reasonable and necessary support for people with cognitive impairment to deal with police and court processes and to meet court imposed conditions. This includes ensuring that workers are appropriately skilled.
7. Ensures flexibility of plans responsive to rapidly changing circumstances including support to implement, monitor and provide ready access to plan review (where reasonable and necessary support will facilitate bail, diversion and non custodial options or where a person is unexpectedly released from custody).

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Appendix A: Members of working group

This report was written together with a small working group of the Intellectual Disability Working Group composed of:

Jim Simpson, Systemic Advocacy NSW Council on Intellectual Disability and member of IDRG

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