Australian Guardianship and Administration Council
Heads of Tribunal meeting

Guardianship, financial management and the NDIS: NCAT's experience
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INTRODUCTION

1. The National Disability Insurance Scheme (NDIS or the Scheme) is administered by the National Disability Insurance Agency (NDIA). After three years of trial, from 1 July 2016, the NDIS commenced transition to full scheme across New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory, and the Northern Territory on a geographical or age basis. Western Australia will have a nationally consistent but state-run Scheme (https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf). Once it is fully established, the number of people with disability receiving government-funded support is expected to increase to 460,000.

2. The Scheme has been developed on the basis of recognising the full legal capacity of people with disabilities (in accordance with article 12 of the UN Convention on the Rights of Persons with Disabilities). People with disability are assumed under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act), 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 (s 17A(1)). There is recognition within the Scheme and the legislation that underlies it that there will be a cohort of people who may need someone to act on their behalf to *access* the scheme and undertake the development and management of their plan. The nominee scheme created by the NDIS Act also recognises this and is a form of substitute decision-making in itself.

3. The principles and objects of the NDIS are clearly directed at "enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports". But for those people who are unable to *exercise choice and control*, even with support, an understanding of the interaction between NDIS and state-based substitute decision-making schemes (and here I can only speak from the perspective of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT)) is becoming clearer as NCAT hears more cases in relation to applications made for the appointment of guardians and financial managers under the *Guardianship Act 1987* (NSW) (Guardianship Act).

4. I note here the potential irony that arises in creating a national scheme which has at its core the principles set out in the UN Convention, supported decision-making, and *choice and control*, but which actually has the potential to increase the number of people who may become subject to state-based *substitute decision-making* schemes in order that they may gain the benefit, on the same basis of others without significant cognitive disability.

5. In this paper, I propose to:

- Outline some of the practical steps taken by the Guardianship Division of NCAT to manage the workload created by the introduction of the NDIS

- Discuss some of the cases decided by the Guardianship Division of NCAT in relation to two critical aspects of the NDIS: access to the Scheme and plan management once a person is a participant in the Scheme

- Draw together and summarise from this discussion some of the issues arising in the decided cases and making some observations as the lessons that may be learnt so far.

6. Hopefully, the following comments will be of some interest and assistance to other Boards and Tribunals who, depending on the stage of the roll out of the NDIS in each

jurisdiction, may currently or in the near future be dealing with similar applications for the equivalent of guardianship and financial management orders.

7. In the Appendix I also provide an overview of relevant provisions in the NDIS Act, NDIS Rules and Operational Guidelines of the NDIA as hopefully a useful reference when discussing some of the issues in this paper.

NCAT AND THE NDIS ROLL OUT IN NEW SOUTH WALES

8. Since 2014 when the NDIS trial site in the Hunter region of NSW commenced, NCAT has heard a number of applications for guardianship and/or financial management that have been prompted by the introduction of the Scheme. Since the commencement of the full roll out in NSW in July 2016, NCAT has taken a number of measures, which I shall shortly outline, to manage these matters.

9. An understanding of the NSW context in relation to roll out of the NDIS is useful in order to understand the basis for the steps taken by NCAT to date.

10. The effect of the roll out in each Australian state and territory is of course different. In NSW, 36,655 existing clients of disability services in NSW are due to transition into the NDIS in 2016-17 and a further 35,570 in 2017-18 (*Bilateral Agreement between the Commonwealth and NSW – Transition to a National Disability Insurance Scheme* at http://www.ndis.nsw.gov.au/other-documents/).

11. NSW is also unique in that by 1 July 2018, the NSW Government will have transferred all of its disability services to successful tenderers in the non-government sector. By this date, therefore, the Department of Ageing, Disability and Homecare (ADHC) (within the NSW Department of Family and Community Services) will be no more (http://www.adhc.nsw.gov.au/__data/assets/file/0020/371810/Specialist_Disability_Services_Information_Release.pdf). We understand that this is one of the reasons why the number of people anticipated to enter the NDIS in NSW up until 1 July 2018 is so significantly higher than the other jurisdictions.

12. Given these factors, NCAT has taken a proactive approach to the way we are managing these applications – from recording applications that have been identified as being prompted by the NDIS, managing them within the Registry, listing and deciding on the constitution of the three-member panels hearing these cases and then closely monitoring the developing case law and publishing decisions on-line so that they are accessible and explain some of the likely outcomes if applications for guardianship or financial management are made.

13. On two occasions so far (in the matters of KCG [2014] NSWCATGD 7 and LBL [2016] NSWCATGD 22), senior representatives of the NDIA were invited to participate in the hearings so that evidence could be elicited about particular aspects of the Scheme.

14. Between the date of the full roll out in NSW in July 2016 and March 2017, NCAT has listed approximately 100 matters for hearing that have been clearly identified as being prompted by the introduction of the NDIS. The Guardianship Division did this by amending its application forms prior to the roll out so that the applicant could tick a box to indicate that the application was being made because of the NDIS. This figure does not, however, capture the many cases that the Guardianship Division has heard that were not prompted by the NDIS but which nevertheless dealt with issues concerning the person's entitlements under the Scheme.

15. Those 100 matters represent approximately 17 full hearing days consisting of usually five matters before three Tribunal members. Most of those full hearing days have taken place in our Sydney registry. Other full day hearing days have occurred in some our busier Sydney metropolitan and regional areas – Blacktown, Liverpool, Newcastle, the Central Coast. The remainder of the matters are listed on hearing days in regional areas that are not necessarily dealing only with applications prompted by the NDIS.

16. The Guardianship Division has continued to take its usual approach, consistent with s 4 of the Guardianship Act, to attempt to list original applications in venues close to where the person who is the subject of the application lives. This is done so as to

create the best opportunity for the person to participate in the hearing and provide their views, if possible, to the Tribunal determining these issues that are fundamental to the person's life.

17. We have also ensured that in regional venues at least one, and sometimes two, members who have had experience sitting on the full day NDIS days in Sydney, travel to the regional venue so that they can share their expertise with the other members in that area. This also assists in creating consistency in approach and decision making.

DISCUSSION

18. I wish to focus on two decision making points of the Scheme: access and plan management.

Access to the scheme

19. In NSW, applications for the appointment of a guardian and financial manager have been made which were prompted by the perceived need for such decision makers to be appointed in order for a person to gain access to the NDIS.

20. This perceived need quite legitimately arose from the provisions of the NDIS Act, NDIS Rules, and Operational Guidelines. The relevant provisions are set out in full in the Appendix but for ease of reference I draw attention to the following.

21. Section 18 of the NDIS Act provides that a person may make an 'access request' to the NDIA to become a participant in the NDIS launch.

22. Section 19(1) of the NDIS Act provides that an access request must be in the approved form, include the requisite information or attachments and be certified according to any requirements prescribed by the CEO of the NDIA.

23. There are no provisions in the NDIS Act relating to who may make an access request on behalf of a person who does not have the capacity to do so for themselves.

24. The NDIS (Becoming a Participant) Rules 2016 (Cth) (20 February 2017) state that 'A person, or someone who is able to act on their behalf, may make a request under the NDIS Act to become a participant in the NDIS (an access request)', (rule 2.1).

25. Note also that the NDIS Operational Guideline - Gateway - Making an Access Request has recently been updated.

26. Up until the September 2016 version of the Operational Guideline, the December 2013 version stated as follows:

> A third party, on behalf of the prospective participant, may submit an access request form. However, the request will only be complete once the prospective participant or their representative has given certification. If a representative has signed the form, the NDIA officer must check that the person has authority to sign. That is, the person meets the requirements as the person's guardian, has otherwise been appointed as the person's representative, has parental responsibility for a prospective participation who is a child or is acting as an agent (with the approval) of the participant.

27. I outline this earlier version of the Operational Guidelines as it was directly referred to in a number of cases decided by NCAT to which I refer shortly.

28. The September 2016 amendments remove the references to the need for a person signing an access request form on the participant's behalf to be a guardian or to be otherwise appointed as the person's representative. It states as follows:

> 4.3 Who can make an access request?
>
> A person, or someone who is able to act on their behalf, may make an access request to the NDIA to become a participant in the NDIS (section 18).
>
> 4.6 What constitutes a valid access request?
>
> A valid access request *must*:
> - have been received by the NDIA;
> - be in the form approved by the NDIA (if a specific form has been approved for use) and contain the information required by the form (section 19(1)(a));
> - include any additional information or documents required by the NDIA (section 19(1)(b)); and

- be certified by the person, or their representative with legal authority, to include all the information and supporting documents which are in the possession or control of the person (section 19(1)(c)).

29. After a person makes a valid access request, a person becomes a 'prospective participant' under the NDIS Act (s 9).

30. Note that the final criterion in 4.6 requires that a *valid* access request must be "certified by the person or their representative with legal authority" to include relevant information to support the request.

31. In one of the first cases NCAT dealt with involving the NDIS (KCG [2014] NSWCATGD 7), the issue of access to the Scheme was specifically addressed.

32. Miss KCG was a 64-year-old-single woman who lived in a group home managed by ADHC. She lived in the Hunter region which was a trial site in NSW from July 2013. The application for guardianship was made by the Team Leader of the group home where Miss KCG lived. Miss KCG has a "moderate intellectual disability, depression and anxiety" ([13]). She had been the subject of a financial management order since 1995. She had also been the subject of guardianship orders in the past but not since 2012.

33. The application stated that:

- Miss KCG's group home will be transitioning under the NDIS and there will be significant staff changes due to the privatisation of ADHC services

- Miss KCG will need to be assessed and decisions will need to be made about her accommodation

- Miss KCG's brother has advised that he no longer has time available to be Miss KCG's person responsible or advocate for her in relation to decisions

- Miss KCG is a vulnerable person who has been targeted by two other residents in the group home, who have challenging behaviours and who intimidate her

- The group home does its best to manage these behaviours but Miss KCG has expressed a wish to live somewhere else

- There are external pressures from other parents of clients in the group home who would like the group home to remain as it is

- A guardian is required to assist Miss KCG with NDIS-related decisions

34. Given that this application was one of the first NCAT received raising these issues, it was treated as an opportunity to try and obtain clarification about the operation of the scheme and its interaction with the Guardianship Act. The NDIA was invited to participate in the hearing and was represented by Special Counsel at the hearing. A separate representative was also appointed for Miss KCG. The Public Guardian was a statutory party, and a representative participated in the hearing. The NSW Trustee and Guardian was not a statutory party but requested to be joined to the proceedings and the Tribunal did so. The hearing occurred over two days approximately two months apart. The first day of the hearing took place in the Newcastle area to allow Miss KCG to participate in person and for the Tribunal to obtain her views in relation to the application. The second hearing was held in Sydney.

35. In relation to the issue of access to the Scheme and bearing in mind what had been stated in the relevant Operational Guideline in the form in which it existed at that time (i.e. *NDIS Operational Guideline - Gateway - Making an Access Request* (19 December 2013)), it is interesting to note the submission by Special Counsel for the NDIA (at [34]) as recorded in the Tribunal's Reasons for Decision that:

> …the NDIA uses service providers to distribute access request forms and that, generally, anyone can sign an access request form on behalf of the prospective

> participant. The Special Counsel stated that the prospective participant's capacity to make an access request is generally not assessed at this stage of the process. In his written submissions the Special Counsel for the NDIA stated that the NDIA would not usually consider making an application for an order appointing a substitute decision maker under state-based legislation if it was identified that a prospective participant did not have any authorised representative to make the access request on his or her behalf.

36. In relation to Miss KCG's access to the scheme, it appears from the reasons that although not known to the applicant at the time of making the application, and not known by any of the parties until after the first hearing day, Miss KCG was already a participant in the scheme. The application had actually been made by a staff member of the group home where she lived ([31]). The reasons note (at [39]):

> It was not clear to the Tribunal under what authority the staff member signed an access request on behalf of Miss KCG. However, it was clear in the evidence that, contrary to the NDIA operational guideline, Miss KCG's access request had been accepted, the CEO had determined that she met the relevant access criteria and she is now a participant in the NDIS.

37. I will return to the KCG case later.

38. In another decision, LBL [2016] NSWCATGD 22, the Tribunal returned to the issue of the access requirements of the Scheme.

39. Ms LBL is a 44-year-old woman with intellectual disability who lives in a group home in northwest Sydney run by ADHC. She has a very close relationship with her twin sister who also lives in the group home. Ms LBL has no other involved family. The reasons note (at [4]) that Ms LBL is currently transitioning from her accommodation and support being funded by ADHC to funding being provided by the NDIS. There is also a parallel process of ADHC tendering out its services to the non-government sector. Ms LBL's group home support worker applied for guardianship and financial management orders.

40. It was noted by the Tribunal in LBL (at [13]) that following the KCG decision, another decision (HKO [2016] NSWCATGD 14), and in a number of unreported decisions

> …the Tribunal has been getting inconsistent evidence in relation to whether or not the NDIA seeks a guardian for a person with major decision-making disability and who does not have an involved family member or advocate to support the person through the NDIS processes.

41. Arrangements were therefore made for a representative of the NDIA to participate in the hearing for LBL. In relation to the issue of access to the scheme, the reasons note as follows (at [14]-[15]):

> The Tribunal received a submission headed *Representation mechanisms for participants with significant cognitive impairment* and Ms Lee Davids, Director Advisory Team NDIA, attended the hearing.
>
> The written submission said that the NDIS access request form ("ARF") did not limit who could request access on behalf of a prospective NDIS participant and "the agency applies a common-sense test to an ARF and processes the request if it appears to be provided by a person with the prospective participant's best interests in mind". In the hearing, Ms Davids said that an access request from a group home staff member would not be appropriate but a request from a senior officer of the service provider organisation would be acceptable.

42. It therefore seemed from the evidence given by representatives of the NDIA in two cases (*KCG* and *LBL*) that despite the *NDIS Operational Guideline - Gateway - Making an Access Request* (19 December 2013), it was not actually the case that someone with this degree of legal authority was required in order to make an access request on behalf of another person to gain access to the scheme. Rather, according to evidence given by the NDIA representative at the hearing in LBL (heard on 29 September 2016), the agency applies a common-sense test to request and processes the request if it appears to be provided by a person with the prospective participant's best interests in mind.

43. Nevertheless, it is evident from a review of the decisions made by NCAT that applications have continued to be made because the applicant belives that in order for the subject person to *access* the scheme, a substitute decision-maker is required (see, for example, *SPQ* [2016] NSWCATGD 42 at [12]). According to the evidence given to the Tribunal in some matters, this belief has arisen as a result of information

provided by a representative of the NDIA (see, for example, BDQ [2016] NSWCATGD 45 at [5]).

44. The Tribunal's decisions in KCG, LBL and subsequent cases confirm that a guardian is not needed in order to access the NDIS, although there may well be other reasons for making an order, for example, in relation to the need for advocacy through the NDIS planning processes.

Plan management

Who will manage the plan?

45. The relevant provisions in relation to plan management are set out in more detail in the Appendix but again, for ease of reference, I note the following.

46. The NDIS Act requires that the CEO of the NDIA must facilitate the preparation of a plan in accordance with the NDIS Rules for each participant in the NDIS (s 32, NDIS Act). The plan must include a statement of the participant's goals and aspirations and a statement of participant supports (s 33, NDIS Act).

47. Section 31 contains the principles relating to plans, which include (amongst others):

- The plan be individualised and directed by the participant
- Where relevant, consider the role of family, carers, and other significant persons
- Be underpinned by the right of the participant to exercise choice and control

48. A participant's plan must also specify the reasonable and necessary supports (if any) that will be funded under the NDIS (s 33(2)(b), NDIS Act) and the management for the funding for supports under the plan (s 33(2)(d), NDIS Act).

49. What does "managing the funding for supports" mean?

50. Section 42(1) of the NDIS Act explains that that this means:

- Purchasing the supports identified in the plan
- Receiving and managing any funding provided by the NDIA, and
- Acquitting any funding provided by the NDIA

51. In specifying the management of the funding for supports mentioned in s 33(2)(d), the plan must (under s 42(2)) specify whether it will be managed, wholly or to a specific extent, by:

i. The participant

ii. A registered plan management provider

iii. The Agency

iv. A plan nominee

52. How have these provisions been utilised in practice in relation to those participants in the scheme who do not have the capacity to make the decisions required under the NDIS Act in relation to plan management and have no authorised representative?

53. This was the position of Miss KCG who you will recall did not have a family member or other person involved in her life who was in a position to advocate on her behalf in relation to NDIS issues or more broadly (the facts were that she was also vulnerable more generally in the group home where she lived and had expressed a wish to live somewhere else). She did have a financial manager appointed but it appears to have been accepted that the types of decisions that needed to be made on Miss KCG's behalf related to matters concerning her accommodation, services

and advocacy, falling outside the scope of the financial management order that was already in place ([66]).

54. The separate representative in that case submitted that a guardianship order should be made for Miss KCG with the Public Guardian appointed. The separate representative also submitted that Miss KCG would require a nominee to be appointed by the CEO of the NDIA ([55]).

55. The Public Guardian submitted that if appointed as guardian, it would likely consent to being appointed as Miss KCG's nominee for the NDIS ([57]). The Public Guardian also noted that if funding from the NDIS was to be provided directly to Miss KCG, then the NSW Trustee should be appointed jointly as nominee with the Public Guardian. However if the funding was to be provided to service providers, then the NSW Trustee and Guardian did not need to be appointed as a joint nominee ([57]).

56. The NSW Trustee and Guardian made submissions consistent with those made by the Public Guardian with regard to the relationship between the duties of a nominee and the role of financial manager and guardian. The NSW Trustee and Guardian was of the view that there was no impediment to the NSW Trustee and Guardian consenting to being appointed as nominee for Miss KCG, provided that the appointment was limited to activities that corresponded with the NSW Trustee and Guardian's statutory functions. Section 86(3) of the NDIS Act provides that the appointment of a nominee may limit the matters to which the person is the plan nominee of a participant ([58]).

57. Of particular interest, I think, was the submission made by Special Counsel for the NDIA as follows:

> 60 In written submissions dated 1 April 2014, Special Counsel for the NDIA evidenced that, where a participant does not have the capacity to make the decisions required under the Act in relation to plan management and has no authorised representative, the NDIA would inquire as to the wishes of the participant, identify any informal supports available to prospective participants and then make a decision itself by taking into account all of the facts. The Tribunal understood these submissions to mean that in most

circumstances where a participant was unable to self-manage, it was likely that plan management would be undertaken by the NDIA itself pursuant to s 42(2)(c) of the NDIS Act.

61 The Special Counsel for the NDIA submitted that there have been no appointments of a nominee for any participant in NSW or Victoria. He submitted that there have been some nominees appointed in Tasmania involving the Tasmanian Office of the Public Guardian. He stated that in Victoria, the Office of the Public Advocate has provided some supported decision making resources to participants. However, this system is not based on the Public Advocate having been appointed formally as the participant's guardian under the state-based legislation nor as a nominee under the NDIS Act. Special Counsel further submitted that:

> The NDIA would not formalise the role of a court appointed guardian or equivalent where (i) they are acting as a support, and (ii) have not been made nominee, and (iii) the arrangement suits all parties.
>
> Such a body or person would be dealt with by the agency in the same way as any other person. The agency would take their views into account if they appear a significant party.

62 The Special Counsel for the NDIA submitted at the hearing that this approach was consistent with the principles and objects of the NDIS and rule 3.4 of the *NDIS (Nominees) Rules*, which states:

> 3.4 It is only in rare and exceptional cases that the CEO will find it necessary to appoint a nominee for a participant who has not requested that an appointment be made. In appointing a nominee in such circumstances, the CEO will have regard to the participant's wishes and the participant's circumstances (including their formal and informal support networks).

58. In that case, the Tribunal (at [63]) noted that it needed to consider whether there was

> any need for a guardianship order to facilitate plan management for Miss KCG under the NDIS, given the evidence of the Special Counsel for the NDIA in relation to the general practice of the NDIA managing plans on behalf of participants who could not self-manage and the evidence that there had been no appointments of nominees for participants in NSW since the commencement of the scheme.

59. The Tribunal determined that it was in Miss KCG's interests to appoint a guardian for her. In arriving at this decision it made the following findings:

- the next steps in the process of developing the plan, determining how funding and supports were to be provided and managing the plan would be decisions that would have a significant impact on Miss KCG's life ([64])

- the NDIS Act and Rules would allow the NDIA to continue to manage Miss KCG's NDIS plan on her behalf without the appointment of a nominee. It was clear to the Tribunal that the NSW Trustee and Guardian could be appointed as a nominee for Miss KCG to manage the financial and legal aspects of her plan under the NDIS, provided that the appointment was limited to the statutory functions of the NSW Trustee and Guardian. However, it is matter for the NSW Trustee and Guardian as to whether it will seek to be appointed as nominee for Miss KCG, as her plan could be managed by the NDIA or another nominee ([65])

- there were some decisions required to be made under the NDIS that were in the nature of personal and lifestyle decisions, falling outside of the scope of the financial management order. The evidence was that these decisions could be made by the NDIA or by a nominee, if a nominee were appointed for Miss KCG ([66])

- the Tribunal's view was that where important lifestyle and financial decisions are required to be made on behalf of a person who lacks the requisite decision making capacity (and cannot be supported to make decisions for themselves), such as Miss KCG, it is appropriate that an independent substitute decision maker such as guardian or financial manager (depending on the nature of the decision) is appointed to undertake that responsibility ([67])

60. Of particular significance in that case are the comments made by the Tribunal as to the reasons why it did not regard it as in Miss KCG's interests to leave the responsibility for plan management to the NDIA without a guardian being appointed for her:

> 68 The Tribunal considers that any substitute decision making regime must include appropriate safeguards to ensure that the rights of the person with the disability are not infringed and that the arrangements are regularly reviewed to ensure that, firstly, the appointed decision maker is acting in the person's best interests and, secondly, to vary or revoke the arrangements where they are no longer needed. The Guardianship Act contains provisions to ensure that a guardian's authority is limited to the specific functions or areas of decision making where there is a current need for substitute decision making, orders are only in place for the shortest time possible and that they are subject to regular review by the Tribunal.
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> 69 Comparatively, it is arguable that, where the NDIA is making decisions on behalf of a participant and the participant has diminished or no capacity to express a view or be supported to participate in the process, in addition to having no private support network to advocate on their behalf or any person to initiate a review of a decision by the NDIA, then there may be a lack of appropriate safeguards in place. Accordingly, there may be limitations to Miss KCG's NDIS plan being managed by the NDIA without independent scrutiny. The irony in reaching this conclusion is that a state based appointment is required for a person in Miss KCG's circumstances to ensure that her interests in relation to a Commonwealth scheme are protected, as it seems there is no Commonwealth equivalent of a Public Guardian, a Public Advocate or other independent body who could be appointed as a nominee on her behalf.

61. The Tribunal concluded that the Public Guardian should be appointed for Miss KCG with an advocacy function that (at [72])

> will assist to ensure that the guardian has the authority to request to be consulted and to receive information from the NDIA in relation to its decisions. Even if the appointed guardian does not seek to be appointed as a nominee under the NDIS, the guardian may have standing to seek a review of any decision made by the NDIA on behalf of Miss KCG under the provisions in Part 6 of Chapter of the NDIS Act. Without a formal guardianship order appointing a guardian for her, Miss KCG may be left without independent support and scrutiny of decisions made by the NDIA on her behalf.

62. In addition (at [73]),

> Miss KCG is likely to require decisions to be made under the NDIS that relate to her personal and lifestyle needs, specifically her accommodation and services. The Tribunal has made a finding that Miss KCG does not have the capacity to make these decisions for herself. The Tribunal determined that the accommodation and services decisions cannot be made informally on Miss KCG's behalf and that there is no friend or relative available to advocate for Miss KCG on an informal basis. It is not possible for these decisions to be made without a guardianship order. Accordingly, the Tribunal determined that on the basis of all of the evidence that a guardianship order should be made with the functions of accommodation, advocacy and services.

63. In a subsequent decision, HKO [2016] NSWCAT GD 14, evidence was provided by a representative of the Public Guardian about the value of having a guardian appointed for those people without family or advocates (at [20]):

> Mr Z from the Public Guardian correctly said that it was important to always look at whether there were more informal approaches available than guardianship. However, he said that there was a concern here that, without advocacy from family or elsewhere, Mr HKO may not get his maximum entitlement from the NDIS. As part of this, the appropriateness of Mr HKO's current accommodation should be considered. Mr Z's experience was that people under guardianship tended to get better plans.

64. In HKO, the Tribunal emphasised the importance of Mr HKO, who had a severe intellectual disability and was non-verbal, having an independent person to safeguard his interests through at least the first and second NDIS plan processes and the parallel current process of ADHC tendering out its services to the non-government sector ([16]). The Tribunal specifically noted that

> Mr HKO's first and second plans will be crucial to his ongoing interests and inclusion in the community. The first plan may be focussed on what a person needs "right now" and giving the person time to think about longer term needs and goals before the plan is reviewed in a year. (*Developing your NDIS plan* at http://www.myplace.ndis.gov.au/ndisstorefront/html/sites/default/files/Fact%20sheet%20-%20Developing%20your%20NDIS%20plan.pdf)

65. The Tribunal also referred (at [21]) to the scale of the transition underway in NSW and (at [22]) to the transfer by June 2018 of all NSW Government disability services to successful tenderers from the non-government sector.

66. These matters reinforced for the Tribunal the the need for a person like Mr HKO to have someone advocating for him in the transition (at [21]).

67. The Tribunal also noted (at [14]) that in the absence of an involved family member or friend, there would presumably have been no one for the NDIA to appoint as nominee for Mr HKO even if the NDIA had pursued this course.

68. The outcome in the case of Miss KCG and Mr HKO may be compared with the outcome in the decision of *KTT* [2014] NSWCATGD 6, also one of NCAT's earlier decisions involving a person living in the Hunter trial site in NSW.

69. At the time of the hearing in February 2014, Mr KTT lived in a group home at the North Coast of NSW run by Service Provider A. He had recently turned 18 years of age. Mr KTT has autism spectrum disorder and an intellectual disability. Until mid-2013, Mr KTT was living with his mother. However, his behaviour had become extremely challenging and Mr KTT then spent a period with Service Provider B before moving into the current service later in the year. This occurred with funding under the NDIS. Mr KTT's mother had a range of concerns about decisions that had been made in the later part of 2013 and applied for a guardianship order. She was keen to be appointed as her son's guardian and to be appointed as her sons plan nominee under the NDIS.

70. The evidence before the Tribunal was that Mr KTT's mother had, throughout his childhood, managed all of his care needs and believed that it was in his best interests for this arrangement to continue (at [6]). Mr KTT's mother (at [6])

> spelt out wide ranging concerns in relation to the decision-making process that occurred in the latter part of 2013 when her son was coming under the NDIS and in the early part of his time in supported accommodation with the Service Provider A. The National Disability Insurance Agency (NDIA) processes had been confusing and she had had no real choice. An unduly quick transition had occurred from the Service Provider B to the Service Provider A group home and this had a negative impact on her son's behaviour. Service Provider A did not adequately consult with her and her access to her son was inappropriately restricted. She wanted to be guardian so that she could keep her son safe and happy.

71. By the time of the hearing, Mr KTT's mother indicated that her relationship with Service Provider A had improved. She spoke positively about her son's placement and she now supported it being an ongoing one. She is invited to meetings in relation to her son and can speak up at those meetings. She deals with the Service Provider A casework manager in relation to visits with her son and finds this a satisfactory way to make decisions about this issue ([7]).

72. The Tribunal noted (at [16]) the contents of Mr KTT's NDIS plan which started in December 2013. The plan was based on objectives for Mr KTT to transition from Service Provider B to long-term accommodation, to continue transition from school to a day program, to continue to have social outings with his family and to be able to manage his emotions. The funding allocation was included in the plan and the plan was to be reviewed in May 2014.

73. The Tribunal ultimately decided against making a guardianship order for Mr KTT despite his mother's keenness to be appointed as guardian. The Tribunal stated that it

> 29 …was cautious about pre-empting the NDIA processes by making a guardianship order so that Mrs LBU was all the more likely to be appointed nominee by the NDIA. In the event that the NDIA appoints a different person as nominee, a seemingly very unlikely prospect, Mrs LBU could seek a review of that decision by the NDIA and, if necessary, by the Administrative Appeals Tribunal.
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> 30 Assuming Mrs LBU becomes her son's plan nominee, it will be this role and not that of guardian that allows her to act on her son's behalf in dealings with the NDIA. If she was unhappy with a participant's plan approved by the NDIA, she could seek review of the plan.
>
> 31 The Tribunal saw it as practicable for services to be provided to Mr KTT without the need for a guardianship order. In Mr KTT's context, the Tribunal saw this finding as very significant to whether to make an order.

74. It is interesting to note the comments made by the Tribunal that presumably the NDIA will appoint a plan nominee to represent Mr KTT (at [11]) and therefore predicated its reasoning on the basis that Mr KTT's mother's application to be the guardian should not be used as a vehicle for making more likely her appointment as a plan nominee for her son.

75. This matter was heard and decided between the first and second hearing day in KCG. It was only at the second hearing day of KCG that the Tribunal had the written and oral submissions of Special Counsel for the NDIA which, as I have outlined, made clear that the general approach of the NDIA is not to appoint plan nominees.

76. You will recall that in the more recent case of *LBL* [2016] NSWCATGD 22, at the invitation of the Registrar of the Tribunal, the NDIA provided written submissions and a senior representative participated in the hearing.

77. In relation to this issue of the approach taken by the NDIA to the nominee scheme and related issues of guardianship, the Tribunal noted the NDIA's submissions as follows ([16]-[19]:

> 16 The submission went on that, where a participant appeared unable to understand issues central to the development of a participant's plan of supports, the NDIA would first consider whether the person could be supported to understand the situation and express their wishes. If that was unsuccessful, the NDIA would not generally expect a guardian to be appointed for a person who lacked capacity. The NDIA would rely on the participant's informal support network, which Ms Davids said comprised people like family or close friends. The NDIA relies on service providers to say who is in the person's informal support network.
>
> 17 The submission said that as last resort the NDIA may appoint a nominee in preference to considering guardianship. Ms Davids said that the NDIA seldom appointed nominees and did not appoint service providers as nominees due to their conflict of interest.
>
> 18 The submission said that planners often encounter support persons who have a possible conflict of interest. These support persons are not excluded from a planning discussion but planners are required to focus on the needs of the participant. Ms Davids said that the planning process can be tricky where a person has no informal supports and only paid service providers. However, people like group home staff can make suggestions in relation to extra supports a person needs.
>
> 19 Ms Davids said that a person like Ms LBL would be allocated a support coordinator in her participant plan unless an informal support person wanted to take on this additional role. The NDIA's preference is for support coordinators to be independent from other service provision but the limited current availability of independent support coordinators has meant that the NDIA has to allow some existing service providers to fill this role.

78. As I previously noted, Miss LBL had a close relationship with her twin sister who also lived in the group home but had no involved family. The evidence was, however, that she had one "unpaid support", Mrs NAH, who "is a long-time advocate for another resident of the group home and who has also advocated for all of the residents from time to time. [Mrs NAH] is a regular visitor to the home. [Mrs NAH] was willing to

support [Ms LBL] through the NDIS processes and the ADHC tender out of its services."

79. Ms Davids on behalf of the NDIA submitted that (at [23])

> she did not see the need for a guardian to be appointed for Ms LBL. Ms LBL showed that she was able to express a view about issues like where she should live. Also, Mrs NAH could support Ms LBL in the NDIS planning processes and any review application, as a friend and informal support person.

80. Ultimately the Tribunal agreed with this. The Tribunal made a finding (at [24]) that Ms LBL needed "a person independent from service providers to work with her to safeguard her interests through the NDIS planning processes and the ADHC tender out of its services" and that Mrs NAH was willing and able to do so.

81. Given this, the Tribunal concluded that (at [31]-[32]):

> 31 In view of the NDIA's practices in relation to access requests and development of participant plans, and in view of the availability of Mrs NAH to informally support Ms LBL with the NDIS and ADHC and to act as person responsible for her, the Tribunal saw it as practicable for services to be provided to Ms LBL without a guardianship order.
>
> 32 In these circumstances, even assuming Ms LBL is unable to make some important life decisions, guardianship would have been an unnecessary intrusion. The Tribunal dismissed the application.

82. The Tribunal did, however, make a financial management order for Miss LBL and appointed the NSW Trustee and Guardian as her financial manager. The Tribunal was satisfied of each of the statutory requirements set out in s 25G of the Guardianship Act. The Tribunal made particular reference to the evidence that staff of Miss LBL's group home signed bank transactions for her and looked after her money (at [37]), and that given the amount of Miss LBL's savings (approximately $75,000) and "with a change of service provider looming", it was in Miss LBL's best interests to have a financial management order.

83. Given the evidence provided on behalf of the NDIA in KCG in 2014 and in LBL in 2016, I suspect that if decided now, the outcome of the KTT case would be the same,

that is, dismissal of the application for a guardianship order, but the basis for that dismissal is likely to be different. We now know from the NDIA's submissions on those two occasions that the NDIA is reluctant to utilise the nominee scheme and, instead, relies on the participant's informal support network, such as family or close friends, to assist in the development of a person's plan of supports. Someone who has this degree of support around them does not, in the NDIA's view, need a guardian or a nominee to be appointed. In KTT, therefore, it may be that the application for guardianship, if decided now, would be dismissed not on the basis of the Tribunal's caution against appointing a guardian as a way of making more likely the appointment of that person as a nominee under the NDIS Act (given that it seems that nominees are rarely appointed), but on the basis that Mr KTT's mother can be involved in the discussions and development of her son's plan without needing to be appointed as his guardian. It would be the NDIA that would be identified as managing the plan under s 42(2)(c) of the NDIS Act.

84. However, having made this observation, in a number of more recent cases decided by NCAT, the Tribunal has been informed by, usually, a family member that they are their family member's nominee under the NDIS. It is difficult to know from the Reasons for Decision whether these are actually formal appointments under the NDIS Act resulting in a formal instrument of appointment (pursuant to s 88(5) of the Act). See, for example, *ODK* [2017] NSWCATGD 2; *KVI* [2017] NSWCATGD 3; *LNS* [2016] NSWCATGD 52.

85. My reason for noting this is that it is very difficult to know the extent to which nominees are being formally appointed under the NDIS Act. In the preparation of this paper, I have had great difficulty in finding any publicly available material that provides this information. The NDIS website contains a wealth of information about the operation and roll out of the Scheme (https://www.ndis.gov.au). This includes the reports prepared by the NDIA each quarter for the Council of Australian Governments Disability Reform Council as required by s 174 of the NDIS Act (https://www.ndis.gov.au/about-us/information-publications-and-reports/quarterly-reports.html). Despite these sources, I have not been successful in locating any

references to the number of nominee appointments that have been made but would be very happy to be pointed in the right direction!

Funding decisions and the NDIS – relationship to financial management

86. As outlined earlier in this paper, plan management under the NDIA Act includes managing the funding of supports identified in the plan (ss 33(2)(d) and 42(1)). This includes receiving and managing any funding provided by the NDIA. The plan must specify whether it will be managed, and to what extent, by the participant, a registered plan management provider, the NDIA or a plan nominee (s 42(2)).

87. The criteria that the NDIA is required to have regard to when determining whether self-management of the plan would present an unreasonable risk to the participant is set out in Rule 3.8 of the NDIS (Plan Management) Rules (set out in full in the Appendix). One of these factors is the capacity of the participant to manage finances and whether a court or tribunal has made an order under which the person's property or affairs are to be managed by another person.

88. A determination by the NDIA that a participant should not self-manage the funding for their supports does not mean, however, that a financial manager, or administrator, is necessary.

89. For the same reasons as set out in relation to the guardianship issues that have been dealt with in some detail in the cases and outlined above, if all that requires management is the funding for supports under the NDIS and a person has involved family or other significant person in their life who can advocate on the person's behalf, then it is likely that, based on the views expressed on behalf of the NDIA in the decided cases, that the NDIA will manage the funding for supports. Again, it does not seem that the NDIA takes the view that a nominee needs to be appointed to undertake this task. Nor does it seem likely that a financial management order is needed for the person.

90. It is likely to also be the case that in circumstances in which the person does not have involved family or others in their life, but a guardian has been appointed in relation to important lifestyle aspects of the plan, it still may not be necessary for a financial manager to be appointed. This is because presumably the NDIA will manage the funding for supports once decisions have been made about those supports following appropriate advocacy and substitute decision making carried out by the appointed guardian.

91. However, some of the NDIS cases heard by NCAT have raised for consideration whether financial management orders are needed for other reasons related to the impact of the NDIS separate to management of the funding of supports. This has been primarily in relation to applications made in relation to people who live in group homes currently operated by ADHC.

92. The evidence in some cases has revealed that a number of people who have lived in in group homes, some for many years, have accrued significant savings. For those people without involved family or other similar support, the evidence in these cases indicates that the person's income and savings have been managed by staff of the group home who are presumably doing so in accordance with practices and procedures regulated by NSW Government policy. However, in a number of cases, concerns have been raised about whether this approach is sustainable and in the person's best interests given the value of their estate and the imminent transfer of NSW government disability services to the non-government sector.

93. In the case of QNC [2016] NSWCATGD 48, for example, the evidence was that Mr QNC is a 46-year-old man living in an ADHC operated group home in a Sydney suburb. Mr QNC has a moderately severe intellectual disability and whilst he had low support needs in a range of areas, the evidence was that he routinely needs support with things like problem solving and planning ([4]). An ADHC representative made an application for guardianship and financial management in light of the implementation of the NDIS and because Mr QNC does not have any family members involved in his life. The Tribunal appointed a guardian for Mr QNC (at [5]).

94. In relation to financial management, the Tribunal also noted the evidence that Mr QNC had approximately $85,000 in savings and that "house staff have been signatories on [his] accounts". The Tribunal determined that as a result of his intellectual disability, Mr QNC was incapable of managing his financial affairs and needed someone else to do so and that given his considerable savings, it was in his best interests that a financial management order was made (at [13]). The NSW Trustee and Guardian was appointed.

95. This outcome may be contrasted with another case (BSE [2016] NSWCATGD 50) which concerned a 40-year-old man who had been a long term resident of an ADHC group home in Sydney. The also made a guardianship order for Mr BSE but adjourned the application for a financial management order. The evidence provided to the Tribunal was that Mr BSE had a cheque account containing about $4,500 and a term deposit account containing $5000. The evidence was that these accounts are in Mr BSE's names with two staff members to sign on them. Evidence was also provided by the group home team leader (at [15]) that she "was concerned to find that sometimes blank cheques are signed when a staff member will be on holidays and said that she would fix the situation by having a third signatory on the account. She also said that as team leader she checks [his] petty cash balances and reconciles his money against the monthly bank statements. [The group home team leader] felt that the current system was working satisfactorily but the application had been made because of the uncertainty surrounding transfer of the service to a non-government provider".

96. The Tribunal decided that it was premature to decide whether to make a financial management order when Mr BSE "had quite modest savings and there is no evidence that a non-government provider will not be able to maintain satisfactorily informal systems" (at [16]).

97. See other examples of cases involving related issues: LBX [2016] NSWCATGD 49; TQU [2016] NSWCATGD 54.

98. It remains to be seen what form of regulation, if any, will govern the management of the finances of residents of ADHC operated group homes and other forms of residential care once responsibility for management and service provision is transferred to non-government organisations by 1 July 2018. Until this is clearer, we are also uncertain as to the extent to which this significant change will have on potential applications made to NCAT for financial management orders.

99. I also note that to the extent also that one of the supports that may be funded under the NDIS is specialist disability accommodation, not just in NSW but across the country, further consideration may need to be given as to how such supports may be provided if an NDIS participant does not have the capacity to enter into any necessary legal arrangements to facilitate the provision of the supports. At least in relation to the issue of service agreements between the NDIS participant and the provider of the accommodation, the recently issued NDIS (Specialist Disability Accommodation) Rules 2016 (signed on 2 March 2017) appear to provide a mechanism for this occur without a written service agreement needing to be entered into between the registered provider and the participant or anyone acting on the participant's behalf (see 7.12-7.14)).

CONCLUSION – WHAT HAVE WE LEARNT?

Access to the NDIS

100. In relation to access to the NDIS, a recent amendment to the NDIS Operational Guidelines has removed the stated need for a guardian or appointed representative in order to access the Scheme (*NDIS Operational Guideline - Gateway - Making an Access Request* (13 September 2016). This provides as follows:

> 4.3 Who can make an access request?
>
> A person, or someone who is able to act on their behalf, may make an access request to the NDIA to become a participant in the NDIS (section 18).
>
> 4.6 What constitutes a valid access request?
>
> A valid access request *must*:

- have been received by the NDIA;
- be in the form approved by the NDIA (if a specific form has been approved for use) and contain the information required by the form (section 19(1)(a));
- include any additional information or documents required by the NDIA (section 19(1)(b)); and
- be certified by the person, or their representative with legal authority, to include all the information and supporting documents which are in the possession or control of the person (section 19(1)(c)).

101. However, we know that despite the stated requirement in the earlier iteration of the Guideline (*NDIS Operational Guideline - Gateway - Making an Access Request* (19 December 2013) for a guardian or appointed representative to certify an access request on behalf of a person who could not do so themselves, it was not actually the case that someone with that degree of legal authority was required in order to make an access request on behalf of another person to gain access to the Scheme. Rather, according to evidence given by the NDIA representative at the hearing in LBL, the NDIA applied a common-sense test to such requests and processed the request if it appeared to be provided by a person with the prospective participant's best interests in mind.

102. Nevertheless, applications are still being made to NCAT seeking the appointment of substitute decision-makers for a person because the applicant believes that such an appointment is necessary in order for the person to access the Scheme.

103. The evidence heard by NCAT suggests that this belief arises for a number of reasons including, it seems, because of information provided by representatives of the NDIA.

104. However, it is clear from the decided cases and now the 2016 amendment to the relevant Operational Guideline that a person does not need a guardian or financial manager to access the NDIS.

105. It remains a decision for another day the practical impact, if any, of the requirement set out in the *NDIS Operational Guideline - Gateway - Making an Access Request* (13

September 2016) that in order for an access request to be validly made, certification that the request includes all the information and supporting documents which are in the possession or control of the person must be provided by "the person, or their representative with legal authority".

Plan management – involved family, friends or advocate

106. In relation to the development of a plan and its management, including the management of the funding for supports, if a participant has involved family, friends or someone willing to advocate on their behalf (as in the case of KTT and LBL) then it seems that they are able to engage with the NDIS on the person's behalf without needing to be appointed as guardian or financial manager. Nor does it seem from the evidence provided on behalf of the NDIA in KCG in 2014 and in LBL in 2016 that the nominee scheme will regularly be invoked. Rather, the Agency will manage the person's plan.

107. There may, of course, be other reasons why a guardianship order is needed. However, if the only evidence relating to need concerns plan management under the NDIS, then it is unlikely that a guardian is needed. See also, for other examples, KKC [2016] NSWCATGD 46, SAQ [2016] NSWCATGD 47, NFC [2016] NSWCATGD 51, LFR [2016] NSWCATGD 53, NKM [2016] NSWCATGD 55 and KAX [2016] NSWCATGD 44**.**

108. Having noted what was said on behalf of the NDIA in KCG and LBL, we are aware of other cases in which a family member was stated to be the plan nominee under the Scheme (see, for example, ODK [2017] NSWCATGD 2 and KVI [2017] NSWCATGD 3). It is difficult to know from the Reasons for Decision whether formal appointments had in fact occurred with instruments of appointment being issued (pursuant to s 88(5) of the NDIS Act). As I have previously noted, there does not appear to be any easily accessible publicly available information about the numbers of nominees appointed under the Scheme. The two cases I have referenced above, ODK and KVI, are also of interest as despite what the Tribunal was told about the recognition of family members in both cases as nominees, the Tribunal appointed those same

family members as guardians due to evidence that the family member/nominee needed additional authority in order to effectively advocate on the person's behalf.

Plan management – no involved family, friends or advocate

109. If, however, a participant does not have involved family, friends or someone willing to advocate on their behalf (as in the cases of KCG and HKO), then it may well be in their interests to have a guardian appointed. As noted in KCG (at [69]):

> where the NDIA is making decisions on behalf of a participant and the participant has diminished or no capacity to express a view or be supported to participate in the process, in addition to having no private support network to advocate on their behalf or any person to initiate a review of a decision by the NDIA, then there may be a lack of appropriate safeguards in place. Accordingly, there may be limitations to Miss KCG's NDIS plan being managed by the NDIA without independent scrutiny.

110. In the case of HKO [2016] NSWCAT GD 14, evidence was provided by a representative of the Public Guardian about the value of having a guardian appointed for those people without involved family or advocates (at [20]):

> Mr Z from the Public Guardian correctly said that it was important to always look at whether there were more informal approaches available than guardianship. However, he said that there was a concern here that, without advocacy from family or elsewhere, Mr HKO may not get his maximum entitlement from the NDIS. As part of this, the appropriateness of Mr HKO's current accommodation should be considered. Mr Z's experience was that people under guardianship tended to get better plans.

111. See also, TQX [2016] NSWCATGD 56.

112. If a guardian is appointed in these circumstances, it is not clear that an appointment of a financial manager will be needed if all that requires management is the funding of the supports under the plan. This is because, as previously noted, it is likely that the NDIA will manage the funding for supports once decisions have been made about those supports following appropriate advocacy and substitute decision making carried out by the appointed guardian. However, each fact situation will need to be considered carefully on its own merits.

113. However, if the facts of a case bring to light evidence of a need for the financial management apart from funds provided under the NDIS, then careful consideration will of course need to be given as to whether such an order can and should be made.

Length of guardianship orders

114. Under the Guardianship Act, an initial guardianship order can be made for a period of up to 12 months from the date on which it was made. However, an order of up to three years can be made, if the person the subject of the order has permanent disabilities, is unlikely to become capable of managing his or her person and there is the need for an order longer than one year (Guardianship Act, s 18).

115. A review of the outcomes of the 100 or so cases heard so far by NCAT since August 2016 shows that of the cases in which a guardianship order is made, the initial order has been made in a majority of cases for no less than 18 months and sometimes up to two and three years.

116. The reasons for doing so include taking account of the length of the first and second NDIS planning processes and also taking account of transfer of the NSW Government's specialist disability services to the non-government sector (see, for example, HKO [2016] NSWCAT GD 14; UTW [2016] NSWCATGD 43).

Other issues

117. It has proved challenging to track all of the applications to NCAT which may involve a person's involvement with the NDIS. For example, a statutory review of a guardianship order may not explicitly raise the fact that the person has, since the original hearing, become a participant in the NDIS, or perhaps has a basis on which to seek to access the Scheme. Anecdotally, NCAT has heard review matters in which the appointed Public Guardian has recommended the lapsing of an order on the basis that there was no further need for a guardian to be appointed. It has only been as a result of questioning by the Tribunal member, as part of the inquisitorial function exercised by the Tribunal, that it became evident that the person needed

advocacy in relation to their potential entitlements under the NDIS and without involved family or friends, it was likely that the only body able to perform that role was the Public Guardian.

118. In conclusion, I hope that the experience to date of the Guardianship Division of NCAT as outlined in this paper is of interest and may be of assistance to other Boards and Tribunals in the context of the continuing roll out of the NDIS.

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APPENDIX

Principles and objects of the NDIS

2. The objects of the NDIS are contained in s 3 of the NDIS Act and include:

    - supporting the independence and social and economic participation of people with disability
    - providing reasonable and necessary supports for participants
    - enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports, and
    - giving effect to various international Covenants and Conventions, including the Convention on the Rights of Persons with Disabilities.

3. Section 4 contains a number of general principles to guide actions under the NDIS Act, which identify the rights of people with disability and ensure that people with disability are supported to exercise choice and control in their interactions with the NDIS.

4. In addition, s 5 contains separate principles that apply to people who may do acts or things on behalf of others under the NDIS Act. These include:

    (a) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves;

    (b) people with disability should be encouraged to engage in the life of the community;

    (c) the judgments and decisions that people with disability would have made for themselves should be taken into account;

    (d) the cultural and linguistic circumstances, and the gender, of people with disability should be taken into account;

    (e) the supportive relationships, friendships and connections with others of people with disability should be recognised.

5. People with disability are assumed under the NDIS Act, 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 (s 17A(1)). People with disability will be supported in their dealings and communications with the NDIA so that their capacity to exercise choice and control is maximised (s 17A(2)). The NDIS is to:

    (a) respect the interests of people with disability in exercising choice and control about matters that affect them; and

    (b) enable people with disability to make decisions that will affect their lives, to the extent of their capacity; and

    (c) support people with disability to participate in, and contribute to, social and economic life, to the extent of their ability (s 17A(3)).

6. The NDIA, which is responsible for delivering the NDIS, has an obligation to provide support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under the NDIS (s 6, NDIS Act).

Access to the NDIS - becoming a participant

7. Section 18 of the NDIS Act provides that a person may make an 'access request' to the NDIA to become a participant in the NDIS launch.

8. Section 19(1) of the NDIS Act provides that an access request must be in the approved form, include the requisite information or attachments and be certified according to any requirements prescribed by the CEO of the NDIA.

9. There are no provisions in the NDIS Act relating to who may make an access request on behalf of a person who does not have the capacity to do so for themselves.

10. The NDIS (Becoming a Participant) Rules 2016 (Cth) (20 February 2017) state that 'A person, or someone who is able to act on their behalf, may make a request under the NDIS Act to become a participant in the NDIS (an access request)', (rule 2.1).

11. Note also that the *NDIS Operational Guideline - Gateway - Making an Access Request* has recently been updated.

12. Up until the September 2016 version of the Operational Guideline, the December 2013 version stated as follows:

> A third party, on behalf of the prospective participant, may submit an access request form. However, the request will only be complete once the prospective participant or their representative has given certification. If a representative has signed the form, the NDIA officer must check that the person has authority to sign. That is, the person meets the requirements as the person's guardian, has otherwise been appointed as the person's representative, has parental responsibility for a prospective participation who is a child or is acting as an agent (with the approval) of the participant.

13. The September 2016 amendments remove the references to the need for a person signing an access request form on the participant's behalf to be a guardian or to be otherwise appointed as the person's representative. It states as follows:

> 4.3 Who can make an access request?
> A person, or someone who is able to act on their behalf, may make an access request to the NDIA to become a participant in the NDIS (section 18).
>
> 4.6 What constitutes a valid access request?
> A valid access request *must*:
>
> - have been received by the NDIA;
> - be in the form approved by the NDIA (if a specific form has been approved for use) and contain the information required by the form (section 19(1)(a));
> - include any additional information or documents required by the NDIA (section 19(1)(b)); and
> - be certified by the person, or their representative with legal authority, to include all the information and supporting documents which are in the possession or control of the person (section 19(1)(c)).

14. After a person makes a valid access request, a person becomes a 'prospective participant' under the NDIS Act (s 9).

15. Note that the final criterion in 4.6 requires that a *valid* access request must be "certified by the person or their representative with legal authority" to include relevant information to support the request.

Plan management

16. The NDIS Act requires that the CEO of the NDIA must facilitate the preparation of a plan in accordance with the NDIS Rules for each participant in the NDIS (s 32, NDIS Act). The plan must include a statement of the participant's goals and aspirations and a statement of participant supports (s 33, NDIS Act).

17. Section 31 contains the principles relating to plans, which include (amongst others):

- The plan be individualised and directed by the participant
- Where relevant, consider the role of family, carers, and other significant persons
- Be underpinned by the right of the participant to exercise choice and control

18. A participant's plan must also specify the reasonable and necessary supports (if any) that will be funded under the NDIS (s 33(2)(b), NDIS Act) and the management for the funding for supports under the plan (s 33(2)(d), NDIS Act).

19. What does "managing the funding for supports" mean?

20. Section 42(1) of the NDIS Act explains that that this means:

- Purchasing the supports identified in the plan
- Receiving and managing any funding provided by the NDIA, and
- Acquitting any funding provided by the NDIA

21. In specifying the management of the funding for supports mentioned in s 33(2)(d), the plan must (under s 42(2)) specify whether it will be managed, wholly or to a specific extent, by:

    i. The participant

    ii. A registered plan management provider

    iii. The Agency

    iv. A plan nominee

22. The NDIS Act also sets out the circumstances in which a participant in the NDIS will be prevented from managing the funding for his or her supports including if the CEO of the NDIA is satisfied that the management of the plan by the participant would "present an unreasonable risk to the participant" (s 44(2)(a), NDIS Act).

23. The *NDIS (Plan Management) Rules* 2013 (Cth) set out (at Rule 3.8) criteria that the CEO is to apply and matters to which the CEO is to have regard in considering whether there is such an unreasonable risk to the participant as follows:

- whether material harm, including material financial harm, to the participant could result if the participant were to manage the funding for supports to the extent proposed, taking into account the nature of the supports identified in the plan;

- the vulnerability of the participant to:

    1. physical, mental or financial harm; or

    2. exploitation; or

    3. undue influence;

- the ability of the participant to make decisions;

- the capacity of the participant to manage finances;

- whether a court or a tribunal has made an order under Commonwealth, State or Territory law under which the participant's property (including finances) or affairs are to be managed, wholly or partly, by another person;

- whether, and the extent to which, any risks could be mitigated by:

    (i) the participant's informal support network; or

    (ii) any safeguards or strategies the Agency could put in place through the participant's plan.

Nominees

24. For the purposes of the NDIS Act, the CEO may appoint a plan nominee for a participant, either on the initiative of the CEO or at the request of the participant (s 86(1), NDIS Act). The CEO must not appoint a nominee without the consent of the nominee and must take into account the wishes (if any) of the participant regarding the appointment (s 88(2), NDIS Act).

25. The CEO must have regard to whether there is a person who, under a law of the Commonwealth or a State or Territory:

    i. has guardianship of the participant; or

    ii. is a person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee (s 88(4), NDIS Act).

26. In addition to a plan nominee, a correspondence nominee may be appointed (s 87, NDIS Act). A correspondence nominee may do a range of acts on behalf of the participant, such as making requests to the NDIA for information and receiving notices on behalf of the participant (ss 81 and 82 of the NDIS Act). However, a correspondence nominee may not do any act relating to plan management (rule 3.9, NDIS (Nominees) Rules). A person may be appointed as both a correspondence and a plan nominee (s 88(1), NDIS Act).

27. The rules may prescribe criteria the CEO is to apply or matters to which the CEO is to have regard in considering the appointment of a nominee (s 88(6)).

28. Rule 3.14 of the NDIS (Nominees) Rules provides that, when deciding whether to appoint a nominee without a request from the participant, the CEO is to:

i. consult with the participant; and

ii. have regard to the following:

1. whether the participant would be able to participate effectively in the NDIS without having a nominee appointed;

2. the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards;

3. whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker;

4. whether the participant has supportive relationships, friendships or connections with others that could be: (A) relied on or strengthened to assist the participant to make their own decisions; or (B) improved by the appointment of an appropriate person as nominee;

5. any relevant views of: (A) the participant; and (B) any person (including a carer) who assist the participant to manage their day-to-day activities and make decisions; and (C) any court-appointed decision-maker or participant-appointed decision-maker.

29. The NDIS (Nominees) Rules also state that it will only be in rare and exceptional circumstances that the NDIA will find it necessary to appoint a nominee for a participant who has not requested one. If appointing a nominee in such circumstances, the NDIA will have regard to the participant's wishes and the participant's circumstances, including their formal and informal support networks (Rule 3.4).

30. An example of a circumstance in which a nominee might be appointed without a request from a participant is where the NDIA considers that the participant needs a nominee, but is unable to request one themselves, even with support. In such circumstances, the request might come from a carer or other person who offers to be the participant's nominee (Rule 3.15).

31. A plan nominee may do any act that may be done by a participant that relates to the preparation, review or replacement of a participant's plan or the management of the funding for supports under the plan (s 78(1), NDIS Act). A nominee is only to do an act if the nominee considers that the participant is not capable of, or not capable of being supported to do, the act (s 78(5), NDIS Act). More than one plan nominee may be appointed (s 86(6), NDIS Act).

32. The nominee has duties to the participant under s 80 of the NDIS Act to:

- ascertain the wishes of the participant in relation to any act
- ensure that any act done by the nominee promotes the personal and social well-being of the participant

33. Additional duties are prescribed in the NDIS (Nominees) Rules including:

- to consult with any court-appointed decision maker or any personally appointed decision-maker and any other person who assists the participant to manage their day-to-day activities (rule 5.8)

- to consult with any other nominee appointed under the NDIS (rule 5.9)

- to apply their best endeavours to develop the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary (rule 5.10)

- to avoid or manage conflicts of interest (rule 5.12)

- a nominee has a duty to apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary.

34. The instrument of nominee appointment must be given to the nominee (s 88(5)(a) and (ii)) and the participant (s 88(5)(b)).