

# Position statement

Protecting the human rights of adults with decision-making disabilities

## **Role of the Public Advocate as guardian of last resort with authority to make decisions about services: NDIS**

The *Guardianship and Administration Act 1990* (the Act) recognises that people who are not capable of making reasoned decisions for themselves may need additional support and assistance not only to ensure their quality of life is maintained, but also to protect them from the risk of neglect, exploitation and abuse. Under the Act, the State Administrative Tribunal (the Tribunal) may appoint a guardian for a person with a decision-making disability.

Guardians are substitute decision-makers who make personal, lifestyle and treatment decisions in the best interests of people who are not capable of making reasoned decisions for themselves due to conditions such as dementia, intellectual disability, mental illness or an acquired brain injury.

The Tribunal can appoint the Public Advocate as guardian of last resort only when there is no one else suitable, willing and available to act as the person's guardian. The decision-making authority of the Public Advocate may be limited to specific areas such as treatment and services (limited order) or it may apply to all areas of the person's life (plenary order). When appointed guardian of last resort with the authority to make decisions about services, the Public Advocate is responsible for making decisions about any services the represented person should access.

This position statement is limited to the Public Advocate's role in relation to decisions about the represented person's access to National Disability Insurance Scheme (NDIS) services.

National Disability Insurance Scheme (NDIS) individualised funding packages are set out in NDIS plans and are designed to build a person's capacity to spend time with friends and family, have greater independence, access new skills (including through work or volunteering) and have an improved quality of life.

The Public Advocate as guardian makes decisions about NDIS services to enable represented persons to gain the most from their NDIS plan, while protecting them from the risk of neglect, exploitation, and abuse.

Guardians are required to ensure that NDIS services decisions conform with NDIS plan budgets.

## The Public Advocate as guardian:

- **Requests NDIS Access:** works with other services systems to gather evidence of disability to support NDIS access requests made on behalf of represented persons.
- **Supports NDIS Planning:** provides advocacy, in consideration of the represented person's wishes, preferences and any cultural and/or intersectional needs, to the National Disability Insurance Agency (NDIA) to inform the NDIA's planning decision. This includes advocacy to support plan duration; plan build and gathering and submitting evidence for consideration by a home and living panel where relevant.
- **Engages NDIS service providers:** chooses support coordinators who will provide the guardian with recommendations in relation to service providers who can fulfill the requirements of the NDIS plan. Guardians seek to engage service providers who are committed to building the represented person's capacity to live as independently as possible while supporting the represented person's ongoing personal growth and skill development. When selecting a service provider in the best interests of the represented person, the guardian will gather and balance all available information as follows:
  - Consider the views and wishes of the represented person as expressed, in whatever manner, or as gathered from the person's previous actions.
  - Consider the cultural and intersectional needs of the represented person and make decisions to facilitate a culturally safe and responsive NDIS plan.
  - Consider the views of family members and persons with a significant relationship with the represented person where appropriate and possible.
  - Consider the overall service design of NDIS supports and the professional opinion of relevant allied health professionals and service providers.
  - Consider the registration status of the proposed NDIS service provider. Where possible the services of registered service providers will be engaged enabling the represented person to have full access to the safeguards and protections of the national regulator (NDIS Quality and Safeguards Commission).
- **Signs OPA Service Agreements:** to make it clear what the Office of the Public Advocate (OPA) guardian and the service provider have agreed. OPA has developed its own system of service agreements that fall within the scope of the Public Advocate's authority and comply with NDIA's policies and procedures relating to delivery of NDIS services.
  - An executed OPA service agreement informs the NDIA and the Plan Manager of funding allocated from the plan for provider payment. An OPA service agreement can support provider conversations with the NDIA or Plan Manager about payment of invoices.
- **Signs documents:** when a decision related to the delivery of an NDIS service is required to be made on behalf of the represented person, such as but not limited to, providing consent to share information with a third party.
- **Applies for reviews:** if a guardian is not satisfied with a reviewable decision of the NDIA and it is in the best interests of the represented person to appeal the decision, OPA can make an application for a review of the decision. An application for an internal review of the decision (new decision to be made by an NDIA delegate independent of the original decision) will be made in the first instance. If not satisfied with the outcome of the internal review, an application may be made for an external review of the decision to the Administrative Review Tribunal.

- **Requests plan reassessments:** when a represented person's situation changes to the extent that their NDIS plan no longer meets their needs, a guardian may, when required, request that NDIA conduct a plan reassessment.

#### The guardian will not:

- **Pay funding shortfalls:** where funding is required beyond what is provided for in the NDIS plan, a guardian is unable to make a commitment for any person or entity to pay the funding shortfall. Where appropriate, the guardian can consent to the service, but the service provider will need to seek certainty of funding to cover the shortfall elsewhere, for example through a private income source and the OPA service agreement will reflect the NDIS funding component.
- **Authorise for NDIS funds to be overspent:** the guardian does not have authority to authorise overspending of NDIS funds. In some situations, a guardian may authorise flexible use of NDIS funding or draw down on irregular supports (where available) to support a short-term increase in support needs. Flexible use of funding will need to be recouped through delivery of reduced support later in the plan cycle if not provided for through irregular supports. If additional funding is required, this must be approved and funded by the NDIA.
- **Authorise payment of invoices:** guardians do not have oversight of day-to-day service delivery and are therefore unable to confirm that services have been delivered and payment is to be released. A guardian can confirm that they have consented to the service and, where relevant, that information which is available indicates that the support described in the invoice was delivered. Guardians may revert to the support coordinator to confirm that the invoices are appropriate to the overall plan budgets and support design. Service providers are encouraged to submit their invoices regularly to the NDIA or plan manager for timely payment.
- **Sign documents providing service delivery information:** guardians do not have a case management role and are not responsible for day-to-day service delivery. Service delivery information will be acknowledged.

The following forms are generally considered for information only:

- Client Intake Form
- Client Support Plan
- Client Risk Assessment
- Client Emergency Plan
- Missing Person Protocol
- Medication Management Plan
- Participant Money and Property Handling (may be appropriate for an administrator to sign if an administration order is in place).

A guardian's role does not include case management, and a guardian is not responsible for day-to-day service delivery matters. A guardian would usually only require detailed service delivery information where a decision was required.

## General information about guardianship and NDIS services

**Guardians' decisions and the views of service providers (NDIS):** guardians act in the best interests of a represented person to make personal, lifestyle and treatment decisions according to the authorities contained within the guardianship order. Guardians seek to obtain the views of the represented person and where possible and appropriate, seek the views of family and important people in the represented person's life. The views of NDIS service providers may also routinely be sought. In some circumstances, a service provider's view may need to be balanced by the guardian in view of the valuable insight they can offer into the day-to-day life of the participant, against a possible conflict of interest because the service provider may have a commercial interest in the decision outcome.

On occasion, an NDIS service provider may have a substantially different view or opinion than the guardian<sup>1</sup>. The represented person's support environment may breakdown if the NDIS service provider does not accept a decision of the guardian and is unable to fulfill their relevant contractual obligations set out in the OPA service agreement. In these circumstances the guardian, or the NDIS service provider, may terminate the services as per the termination clauses set out in the OPA service agreement.

OPA service agreements require that NDIS services are delivered to the represented person/participant in such a way as to give effect to the personal and lifestyle decisions made by the guardian on behalf of the represented person.

**NDIS quality audits:** NDIS service providers are required to undergo an audit against Practice Standards and Quality Indicators as set out by the NDIS, to apply for or renew registration with the NDIS Quality and Safeguards Commission. Where a provider invites a represented person to participate in the provider's quality audit and the represented person can communicate to the guardian their wish to participate, the guardian may consent to the represented person's participation. If the represented person does not wish to participate in the audit or their wishes are unclear, the guardian may choose to decline participation in the audit. These decisions can be made by a guardian under the services authority contained within the guardianship order.

## The Public Advocate publishes position statements on:

- Decisions about treatment.
- Restrictive Practices (Restraint).
- The role of the Public Advocate as guardian of last resort with authority to make accommodation decisions.
- The role of the Public Advocate as guardian of last resort with authority to make treatment decisions.
- The role of the Public Advocate as guardian of last resort with authority to make contact decisions.
- The role of the Public Advocate as guardian of last resort with authority to make treatment decisions: palliative care.
- Decisions about medical research.

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<sup>1</sup> Further information about how to provide feedback to OPA can be found at [About the Office of the Public Advocate \(www.wa.gov.au\)](http://www.wa.gov.au)

- The role of the Public Advocate as guardian of last resort with authority to make decisions about restrictive practices.
- **Role of the Public Advocate as guardian of last resort with authority to make decisions about services: NDIS.**

## For further information contact

### Office of the Public Advocate

PO Box 6293, EAST PERTH WA 6892

Telephone: 1300 858 455

Email: [opa@justice.wa.gov.au](mailto:opa@justice.wa.gov.au)

Web: [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au)

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