

EVERYTHING YOU NEED TO KNOW ABOUT SERVICE AGREEMENTS

From Disability Services Consulting

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Our Support Coordination Workshops are often dominated by discussions about what needs to be included in a NDIS service agreement, who needs to have one and who needs to sign one. Many service agreements are unnecessarily complicated but when we talk to providers about simplifying, there is reluctance for fear of non-compliance. Yet in a scheme built on choice and control and the presumption of capacity, perhaps the reverse might actually be true.

WHAT SHOULD A SERVICE AGREEMENT CONTAIN?

This is the multi-million dollar question. The NDIA detail some things that *might* be included in a service agreement on their website as does the Price Guide.^[1] However the NDIS Practice Standards provide a more definitive checklist for registered providers certified against the core module with the intended outcome that **each participant has a clear understanding of the supports they have chosen and how they will be provided** and the following indicators:

*Collaboration occurs with each participant to develop a service agreement which establishes **expectations, explains the supports to be delivered, and specifies any conditions** attached to the delivery of supports, **including why** these conditions are attached.*

*Each participant is supported to understand their service agreement and conditions using the **language, mode of communication and terms** that the **participant is most likely to understand**.*

*Where the service agreement is created in writing, each participant **receives a copy of their agreement signed by the participant and the provider**. Where this is not practicable, or the **participant chooses not to have an agreement, a record is made** of the circumstances under which the participant did not receive a copy of their agreement.*

We are talking general here, there are additional requirements relating to service agreements established for Supported Independent Living (SIL) providers and Specialist Disability Accommodation (SDA) which we will explore in our Quality and Safeguarding Newsletter soon.

DO I NEED A SIGNED SERVICE AGREEMENT TO COMMENCE SERVICE?

No. We understand why this is confusing, much of the National Disability Insurance Agency's (NDIA) own language is inconsistent around this requirement but it is not mandatory that a service agreement be signed in order for services to commence.^[2] Sometimes a signed service agreement is a Participant's best protection, it is also a good way to establish which services are agreed and any terms and conditions. But of course, that is only useful if a person can understand it.

WHAT ABOUT GST?

The [NDIS Model Service Agreement](#) refers to a specific clause that must be included in a service agreement, claiming it is required under tax law for the purposes of a GST exemption. However the Australian Tax Office (ATO) states that *as long as you have written evidence of a legally binding obligation for you to make the supply to the NDIS participant and that it is a reasonable and necessary support as specified in the participant's NDIS plan, the requirement for a written agreement is satisfied.*^[3] The ATO provide a couple of case studies that demonstrate how the GST requirements can be satisfied through other measures such as email correspondence.

WHO CAN SIGN A SERVICE AGREEMENT?

This is another complex and widely misunderstood area. In most instances a service agreement should be established between the Participant and the service provider in a format that the Participant will most likely understand. However, there are a number of variables including the content of the service agreement and any alternative decision makers appointed (and for which matters).

Informal Supports

The [NDIA](#) states that Service Agreements can be made between the Participant and the provider, or between another person (like a family member or friend) and the provider.^[4] In a recent report, the Victorian Office of the Public Advocate (OPA) rejected this view. The OPA stating that *as a legal contract, a service agreement can only be signed with legal authority by the participant, or an appointed substitute decision maker with relevant powers, who has understood and accepted the contract's terms. Potential substitute decision makers are a plan nominee, guardian, administrator (also known as financial manager in some jurisdictions) or an attorney, if the terms of the service agreement are within the scope of their legal authority.*^[5]

People without formal authorisation to act on behalf of the Participant, such as a supporter or an advocate, are not authorised to enter into a service agreement on behalf of the Participant but they can support a person to understand the conditions and terms of the agreement.[6]

Guardians

Depending on the scope of the authority, an appointed guardian may be able to determine what services are suitable for an NDIS Participant but they may not have authority to manage financial matters. So while a guardian may make a decision about a person's accommodation or services, they might be unable to sign a tenancy agreement that bounds a person to pay rent or damages for example. Personal responsibilities that are outside the control of the guardian might also be better negotiated directly with the Participant such as treating staff with courtesy and respect.[7] The Queensland Public Guardian states a position that whilst it may consent to the delivery of some NDIS services, it will not generally sign a service agreement on behalf of adults. Instead service providers are encouraged to work with Participants directly, allowing them choice and control over how their services will be provided.[8]

As the OPA has identified that many NDIS service agreements contain matters that go beyond the scope of their decision making authority, they have developed model [Deeds](#) that relate to support services and include matters that are within the authority of the guardian to agree to on behalf of the represented person.[9]

Administrators

A financial administrator/trustee can only sign those parts of a service agreement that have an impact on the Participant's financial affairs.[10] A financial administrator is generally appointed to manage a person's personal assets and funds (as opposed to NDIS funding).[11] [12]

Attorneys

An attorney can only sign a service agreement where they have relevant decision-making authority (they may have powers in relation to financial matters or personal matters, or both).[13]

Plan Nominees

The authority of a plan nominee is limited to the conditions set out by the NDIS in its appointment. The NDIA states that usually, a plan nominee is able to do any act that may be done by a Participant under, or for the purposes of, the NDIS Act, that relates to:

- the preparation, review or replacement of the Participant's plan; or
- the management of funding for supports under the Participant's plan.[14]

So they may be able to sign a service agreement, however, the OPA questions whether the nominee's authority extends to agreeing to conditions that are personal to the Participant and which the Participant has sole control.[15]

THIS REALLY IS A COMPLEX AREA, ISN'T IT?

It is generally accepted that a person could have capacity to make some decisions and not others and that it is unusual for a person to lack capacity to make all decisions.^[16] So in order to maximise opportunities to exercise agency, perhaps we need to start thinking exactly what we need agreement on and the least restrictive way for this to occur. If we are to capture accurate consent when multiple decision makers are involved, we need to consider the appropriateness of lumping supports and services, personal responsibilities and financial liabilities in to one service agreement. Furthermore, if a person cannot understand their service agreement perhaps there needs to be a concerted effort in addressing communication barriers and simplifying information, particularly if we go back to that expected outcome of a service agreement.

“Each participant has a clear understanding of the supports they have chosen and how they will be provided.”^[17]

INAPPROPRIATE SERVICE AGREEMENTS

The OPA's report includes concerns about NDIS Agreements that include onerous and unfair terms. They group their concerns into the following categories:

Anti-competitive matters – Exclusion clauses that attempt to limit a Participant from engaging an employee of the service provider in the future. These clauses seek to control access to employees of the service provider beyond the conclusion of the service agreement.

Assignment - Clauses that allow the service provider to sub-contract services to a future unknown service provider.

Complaints – Inconsistent information being provided on how to complain, and who is able to resolve complaints.

Description of services - Lack of meaningful description and detail of proposed services contained within the schedule of supports. This is particularly important if a Participant seeks to rely on Australian consumer law for redress for poor performance.

Financial matters – As discussed earlier, OPA cannot enter into agreements that relate to the person's estate. Service agreements often contain clauses for which the authority of an administrator, plan manager or plan nominee is required.

Improper signing of agreements – Some service providers, once provided with an alternative Deed and explanation as to why the OPA is unable to sign a service agreement, still attempt to have the Participant sign the original service agreement (including terms deemed unfair or onerous).

Indemnity and liability - Clauses relating to liability for things such as property damage and behaviours of concern (including loss and personal damages). Such terms have been noted in agreements of organisations specifically funded to assist people with complex behaviours.

Negotiations – Contributions toward out of pocket expenses such as travel and community expenses. As financial negotiations they fall outside OPA decision making authority, but the OPA is concerned Participants may be disadvantaged should the provider have sole determination of reasonable contribution.

Personal responsibilities - Matters that are outside the control of an OPA guardian (and sometimes a plan nominee) are often included within service agreements under the heading 'your responsibilities'. As discussed earlier, these are responsibilities of a personal nature, generally within the Participant's sole control. It would be more appropriate for those matters to be agreed directly with the Participant whilst acknowledging any limitation on the person's capacity to understand or comply with obligations.[18]

IT IS JUST A FORMALITY, DOES IT REALLY MATTER?

The thing is, unfair terms may actually undermine a number of NDIS Practice Standards and the spirit of the NDIS more broadly. For example, the very first practice standard requires that ***each participant accesses supports that promote, uphold and respect their legal and human rights and is enabled to exercise informed choice and control. The provision of supports promotes, upholds and respects individual rights to freedom of expression, self-determination and decision-making.***

Many providers are quick to develop that human rights policy or shiny charter to meet standards like these. Yet if we can't even get the fundamentals of a fair deal right, on what authority do we declare our commitment to equal human rights? We've all seen those 57 page service agreements that you need a solicitor to interpret. They wrap an organisation up in bubble-wrap whilst stripping the more vulnerable party, the Participant, of all protections.

Nonsensically, even if these contract clauses were enforceable (that is a very big unlikely IF), it would be to the detriment of any organisation's reputation to pursue such recourse against the very people they claim to support. So perhaps at best, some of these clauses just leave a bad taste in everyone's mouth (if they've actually been read and understood) whilst reinforcing the message that the provider is in control. Having a fair and reasonable service agreement sets the most basic foundation for an ethical service relationship. We simply cannot champion people's equal human rights with any authenticity if we are actively diminishing safeguards.

ALTERNATIVES TO SERVICE AGREEMENTS

Where the Participant is unable to sign a service agreement and there is no legally authorised person who can sign the agreement on their behalf, a support coordinator might explore the possibility of the service being provided without the agreement being signed, provided there is no conflict or threat to a person's wellbeing for doing so.^[19] The OPA suggests that where a service booking is made without an agreement, a statement identifying the services to be delivered (including standard of service) should be provided to the person and relevant support people.^[20]

Being responsive to communication needs and making agreements with people in alternate formats is best practice just think about how you can evidence the agreement. For example you might develop an easy read or pictorial version, record a verbal agreement (with consent), summarise the agreement through emails, save service bookings, invoices paid etc. If a person chooses not to have an agreement or they are unable to sign, make sure you record the circumstances so you can show this at audit. Evidence is everything but it can take many forms beyond the (not so) humble 57 page service agreement.

WHERE TO NOW?

The NDIA has provided a response to the OPA's recommendations for service agreements and will use these in further developing its guidance material.^[21] You can find a full list of the OPA's recommendations and the NDIA's response in the [report](#). Service Providers do not need to wait for NDIA guidance though, start reviewing your service agreements now. Ensure agreements cover the relevant practice standards and review for unfair terms (would you be happy for your loved one to sign it?). Develop processes for recording alternatives to written service agreements (evidence is key) and understand who can consent to what (recognising this might be different for individuals). It is a complex system to navigate, yes, but ultimately this is what choice and control is all about.

[\[1\] NDIS Making a Support Agreement, 2019](#)

[\[2\] OPA Guide to NDIS Decision Making 2018](#)

[\[3\] ATO – NDIS Page, 2019](#)

[\[4\] NDIS Making a Support Agreement, 2019](#)

[\[5\] NDIS service agreements: making choice and control more real 2019](#)

[\[6\] OPA Guide to NDIS Decision Making 2018](#)

[\[7\] NDIS service agreements: making choice and control more real 2019](#)

[\[8\] The Public Guardian and the NDIS](#)

[\[9\] OPA NDIS Deeds](#)

- [10] OPA Guide to NDIS Decision Making 2018
- [11] The Public Trustee and the NDIS
- [12] State Trustees Victoria
- [13] OPA Guide to NDIS Decision Making 2018
- [14] NDIS Guardians and Nominees Explained 2019
- [15] OPA Guide to NDIS Decision Making 2018
- [16] Office of the Public Guardian, Understanding Capacity
- [17] NDIS Practice Standards 2018
- [18] NDIS service agreements: making choice and control more real 2019
- [19] OPA Guide to NDIS Decision Making 2018
- [20] OPA Guide to NDIS Decision Making 2018
- [21] NDIS service agreements: making choice and control more real 2019