



**NSW Council for
Intellectual Disability**

Participants or just policed?

Guide to the role of the National Disability Insurance Scheme
with people with intellectual disability
who have contact with the criminal justice system

SUMMARY OF THE GUIDE

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PREVALENCE AND CHARACTERISTICS

Prevalence in the justice system

Various studies indicate that people with intellectual disability are highly represented in the criminal justice system and this is particularly clear in the juvenile justice system

Characteristics and backgrounds

Offenders with intellectual disability tend to have backgrounds of

- unstable, inappropriate accommodation placements,
- problematic family background,
- high support needs arising from factors such as drug use,
- history of poor educational experience and achievement, and
- unresolved behavioural problems.

In a major data linkage study, Baldry and others (2012) studied the profiles and pathways of a large sample of adult prisoners in NSW with cognitive disability and mental health disorders.

The study concluded:

Having a cognitive impairment predisposes persons who also experience other disadvantageous social circumstances to a greater enmeshment with the CJS [criminal justice system] early in life and persons with cognitive impairment and other disability such as mental health and AOD disorders (complex needs) are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events. The cognitive and complex needs groups in the study have experienced low rates of disability support as children, young people and adults with Indigenous members of the cohort having the lowest levels of service and support. It is evident that those who are afforded [disability services] support do better, with less

involvement in the CJS after they become clients compared with those with cognitive disability who do not receive [disability] services.

Of the overall group studied, 25% identified as Indigenous Australians, consistent with their extreme overrepresentation in the prison population.

Underlying factors for Indigenous Australians

Key factors for Indigenous people with cognitive disability and criminal justice involvement include:

- Indigenous conceptions of cognitive disability are different from Western definitions.
- Disability issues are always secondary to cultural identity. This factor and a history of poor relationships with white agencies means that many Indigenous people are very uncomfortable with mainstream disability services.
- The education system is failing all Indigenous young people. This is especially the case for Indigenous young people with cognitive disabilities or mental health problems.

Types of crimes committed

Offenders with intellectual disability tend to commit either relatively minor, but repeated offences, or a major, violent or sexual crime. The offences for which people with cognitive disability are imprisoned are overwhelmingly in the lowest severity categories

Life challenges for people with mild intellectual disability

The particular characteristics and backgrounds of offenders with intellectual disability can valuably be viewed within the context of the general day to day life challenges facing people with mild and borderline intellectual disabilities, for example:

- Difficulties in understanding and retaining complex ideas, interacting with others and engaging in everyday problem-solving.
- Low levels of income and related difficulties in accessing affordable housing.
- More at risk of exploitation - physical, financial, emotional and sexual.
- Susceptibility to chronic health conditions including mental illness and substance use problems but difficulty accessing appropriate health services.
- People desire to avoid the additional stigma of a 'disability' service system, but lack the skills necessary to enter a generic system (if one exists).

What people with intellectual disability told NSW CID

Five individuals with mild intellectual disability who have been in contact with the criminal justice system were interviewed. All of the individuals interviewed lacked access to early intervention services, had problems at school and had issues with maintaining long-term employment. All had instability in their home lives, and, at a young age, experienced homelessness. It was during these periods of homelessness that they had contact with the criminal justice system. Lack of access to support services was a common issue for all participants.

Three of the individuals are no longer in any trouble with the law. For them, the ability to overcome challenges was only possible once they were supported by specific disability services designed to support people with intellectual disability who have been in contact with the criminal justice system.

EXISTING SERVICES – AN OVERVIEW

Section 2 of this Guide focuses on what support services are currently available around Australia to people with intellectual disability and criminal justice system involvement. The section includes:

- **Services in each State/Territory** – information provided by the government disability agency in early 2013.
- **Advocacy: its role and perspective** – including the results from a survey of public advocates/guardians and key community advocacy groups who were asked about their experiences supporting people to access services.
- **The legal framework** – a brief overview of legislative and court diversion approaches around Australia in 2013.

What emerges from this section is that, while there has been significant development in disability services for people with criminal justice involvement and other complex needs, these programs are limited in scope so that a high proportion of people are not getting the assistance they need. Further, it is very difficult for people with intellectual disability and criminal justice system involvement to access mental health and drug services. Finally, the need for advocacy greatly exceeds the availability of it.

GOOD PRACTICE GUIDE FOR THE NDIS

Section 3 of this Guide aims to provide practical information for staff in the NDIA (National Disability Insurance Agency) and disability services and for advocate/agencies trying to help a person with intellectual disability and criminal justice involvement to access the NDIS. Section 4 provides more detailed information on meeting some key needs.

Engagement with the person

People with intellectual disability and criminal justice involvement are unlikely to seek out the NDIS. Because of the interplay of their intellectual disability and their life histories, they will tend to be reluctant to identify as having a disability and seek out or trust disability services.

A skilled and ongoing process of engagement with the person will often be needed to support the person to see that their life can be more positive and that disability support services can assist with this. Often, each player in the NDIS process will need to take time to engage with the person. The Guide lists many practical strategies for engagement.

Ways the NDIS can help a person

Most of the Guide is about how a person can become a 'participant' in the NDIS and then get a funded support plan. However, there are a number of other ways that the NDIS can assist people with disability who:

- do not meet the access requirements for the scheme or
- have not yet done so or
- do not need a high level of support.

The more general roles of the NDIS may be very relevant to people with intellectual disability and criminal justice system involvement:

- Some people will need very urgent crisis support while their eligibility to become a participant and development of their participant plan are worked through
- Some people may not need a full participant plan but need active advice and referral and coordination of mainstream support.

So far, the NDIS is providing support to non-participants with disabilities through 'local area coordinators' or, in NSW, 'ability linkers'.

Linking a person to the NDIS

For people with intellectual disability and criminal justice involvement to get linked to the NDIS will require either active outreach and engagement by scheme staff such as local area coordinators and/or active linkage by people who are involved with the person already, for example a lawyer, advocate or justice system worker. Court diversion and early intervention schemes may have key roles.

Who makes decisions about getting assistance from the NDIS?

The driving philosophy behind the NDIS is about people with disability being in control of their own lives. However, the NDIS Act also includes two major qualifications on people with disability being in control in their dealings with the scheme:

- Decisions for children being made by a person with parental responsibility.
- The NDIA appointing nominees for adults in some circumstances.

Children

For young people with intellectual disability and juvenile justice involvement, there will often be challenges in working out who makes decisions about accessing the NDIS. The young person is likely to want to make their own decisions but may be ill-equipped to do so. There may be no one with parental responsibility who is well-placed to make decisions for the person. In some cases, the NDIA or other agencies will need to pursue alternative decision-making arrangements for a young person.

Nominees

The NDIA may appoint a person as 'plan nominee' for a participant in the NDIS. This can be on request of the participant or on the initiative of the agency. A plan nominee will represent the participant in dealings about the participant plan and the management of funding. Nominees have to consider the wishes of the participant and act in a way that promotes the personal and social well-being of the participant.

Whether to seek a nominee for a person with intellectual disability and criminal justice involvement will often be a difficult decision. Such individuals are usually well able to express their point of view and would usually be strongly opposed to someone else making decisions for them. On the other hand, the combination of their intellectual disability and life history will often leave the person ill-equipped to make decisions about seeking support services.

The other difficult question will be who should be the nominee. If a person has a guardian appointed under State or Territory law, the guardian would ordinarily be appointed as nominee. The NDIA can also appoint another person as nominee, even including a service provider.

Becoming a participant

If a person needs funding from the NDIS, the first step is to apply to be a participant. This is called an 'access request'. The NDIA will approve the person as a participant if, basically,

- The person is aged under 65.
- The person resides in one of the NDIS trial areas.
- The person meets the 'disability requirement' or the 'early intervention requirement'.

Meeting the disability requirement

A person meets the disability requirement if:

- a) The person has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to impairments from a psychiatric condition.
- b) The impairments are likely to be permanent.
- c) The impairments result in substantially reduced functional capacity or psychosocial functioning in one or more of communication, social interaction, learning, mobility, self-care and self-management.
- d) The impairments affect a person's capacity for social and economic participation.
- e) The person's support needs are likely to continue for the person's lifetime.

The Productivity Commission emphasised the importance of self-management needs of people with intellectual disability who are capable in other activities such as self-care. The Commission saw self-management as covering skills such as control of your behaviour, insight, memory and decision-making. Difficulties with self-management will often be central to NDIS eligibility for a person with intellectual disability and criminal justice involvement.

The NDIA has planners who will work with people who seek to become participants. This staff member will use an NDIS assessment tool which is focused on the impact of disability on a person's functional capacity. This tool is intended to confirm that the person meets the disability requirement and find out what areas of functioning the person needs support in.

It will be vital that assessors/planners working with people with criminal justice involvement have strong interpersonal skills and experience working with this population. The assessor also may need to speak to others who know the person well to get other perspectives on the person's functioning.

As well as assessing the person's functioning, the NDIA will want evidence of diagnosis of the person's intellectual impairment. However, the NDIA appears to be clear that the main issue is functional capacity and that there will be flexibility in relation to IQ scores.

In many cases, there will be existing assessments that can feed into the NDIA assessment. The person can obtain these or ask the NDIA to obtain them. If disability is unclear, the planner may seek a professional assessment, for example from a psychologist.

There is a major question about whether the NDIA assessment tool will be adequate for people with intellectual disability and criminal justice involvement.

Another factor is that the ongoing reduced functioning of many people with criminal justice involvement may arise not just from their intellectual impairment but also from a psychiatric condition or other impairment. Therefore, it may be important to have professional evidence of these other impairments, that they are likely to be permanent and of their impact on the person's functioning.

Preparing a participant's plan

Once a person becomes a participant in the NDIS, the agency has to work with the person to prepare a participant's plan. The plan includes:

- the participant's statement of goals and aspirations including their current environmental and personal context and
- a statement of participant supports prepared with the participant and approved by the agency.

Preparing the person's statement of goals and aspirations

Due to the interplay of their disabilities and impoverished backgrounds, people with intellectual disability in contact with the criminal justice system will tend not to have clear and positive goals and aspirations.

People with criminal justice system involvement will generally need considerable and skilled support to develop a positive statement of goals and aspirations.

Children and young people in the justice system often come from chaotic family backgrounds. Preparation of a participant's goals and aspirations may be best achieved by a case conference involving a range of involved people.

The Good Lives Model is one valuable tool for assisting a person with criminal justice involvement towards positive goals and aspirations. The Good Lives Model is about assisting a person to develop a life plan where pro-social strategies for achieving basic needs replace antisocial ones.

Preparing the statement of participant supports

The NDIA planner prepares this statement with the participant. The statement has to specify:

- Any general supports that will be provided to the participant. General supports include supporting a person's access to mainstream services and community resources. NDIA local area coordinators can assist with this and coordination of different supports.
- Any 'reasonable and necessary supports' that will be funded by the NDIS - these may be specifically identified or described in general terms.
- When the plan will be reviewed.
- How the plan and any funding will be managed

Needs assessment

The NDIA needs assessment tool may not be adequate for a person with criminal justice involvement.

An adequate assessment of a person with criminal justice involvement may often require:

- a combination of tools covering issues including intelligence, communication, adaptive functioning, mental health, needs and risk assessments, or at a minimum,

- the least inappropriate tool to be complemented by input from the person and other informants plus professional judgement by an assessor with specific skills and experience with people with intellectual disability and criminal justice involvement.

Tools that are currently used in particular contexts include the *Strengths, needs, risks and goals profile* (SNRG) of the Community Justice Program (CJP) in NSW disability services.

Supports to be provided

People with intellectual disability and criminal justice involvement will often have volatile and fast changing support needs. Therefore, it will often be important for their NDIS supports to be described in general terms so that service providers can react flexibly and quickly to changes in circumstances. Funding will also need to make allowance for a person's volatility in support needs. For many people, a particular crisis may mean that their support needs escalate dramatically in the short term.

Necessary supports will often include

- Accommodation – ranging from support to obtain and maintain a tenancy through to a group home.
- Staff supports - ranging from ad hoc support when needed to deal with crises through to 24-hour supervision and support.
- Communication – assessing and addressing communication impairments.
- Behaviour support - ranging from strategies to assist a person avoid and deal with occasional crises through to an extremely detailed and multifactorial behaviour intervention and support plan.
- Support with the criminal justice system – ranging from support to deal with a police officer who lack skills in communicating with a person with intellectual disability through to support to understand and comply with conditions on bail or a bond.
- Family issues and existing relationships - ranging from occasional support with problems through to ongoing intensive support to rebuild relationships or address risks of abuse.
- Day activities - ranging from linking the person to activities relevant to goals through to intensive support to engage in normal community activities.
- Employment – ranging from support to do voluntary work through to support to develop and sustain the skills needed for full paid employment

- Financial - ranging from occasional support with complex transactions through to a high level of day-to-day support with budgeting, bill paying and spending decisions.
- Social - ranging from linking the person to desired social activities through to intensive support so that the person can participate in activities.
- Religion - support to participate in the person's religion.
- Culture - for example, supporting an Indigenous person to maintain or enhance their links with their community and heritage
- Physical health – supporting a healthy lifestyle, to access healthcare (including an annual Medicare health assessment) and to understand and act on the health professional's advice.
- Mental health - supporting the person to access appropriate mental health assessment and treatment.
- Alcohol and other drugs - supporting avoidance of risky use of alcohol and other drugs and, when needed, support to access and work with a drug and alcohol counsellor.
- Skill building - development of skills to lead a positive and fulfilling lifestyle.

Some of these supports will only be available through funding from the NDIS. Others may be available from mainstream agencies, but the person may still need disability support to access the mainstream service, ensure it meets the person's needs and coordinate a range of services.

Services from mainstream agencies

The NDIS (Support for participants) Rules spell out how the agency should decide whether particular kinds of supports should be funded through the NDIS rather than a mainstream agency. Operational Guidelines spell this out further. For example:

Health (excluding mental health) – The NDIS will not be responsible for diagnosis and clinical treatment of health conditions. However, it will be responsible for 'supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living' including where they need to be delivered by health practitioners.

Mental health – The NDIS will not be responsible for clinical mental health services and mental health early interventions including clinical support for child and adolescent developmental needs.

Housing – The NDIS will be responsible for supports to maintain a tenancy and for behaviour management.

Justice – For people who are in trouble with the law but not in custody, the NDIS will provide supports on the same basis as usual. This includes support to meet court imposed conditions, for example the conditions on a bond or parole.

For people who are in custody, the NDIS will provide transition supports and may provide some other support.

With some supports, the NDIA will look at their purpose in deciding whether the NDIS or the justice system is the more appropriate provider:

- Behavioural support and development of life skills – The justice system should be responsible for supports ‘specific to offending behaviours such as programs that aim to reduce specific criminal behaviours’. The NDIS will provide supports that build the person’s abilities such as social relationships, communication and behaviour management.
- Group living to assist with activities of daily living and supervision to address behaviours of concern – The NDIS will be responsible if the primary purpose of support is activities of daily living rather than community protection or clinical treatment. The justice system should be responsible if ‘the setting is designed specifically to protect the community, prevent offending or deliver clinical services’.

The distinctions drawn in the above two dot points are cloudy and questionable. They need further consideration.

None of the rules and guidelines should prevent the NDIA from funding support that people with disabilities need to enable them to access mainstream services. For example, if a person needs drug counselling, disability support may be required to locate a counsellor and get the person to the appointment, support communication between the counsellor and the person and then support the person to remember and implement what came out of the counselling session.

Managing a participant's funding

Management of a participant's funding includes receiving the funding from the NDIS, purchasing the supports identified in the plan and acquitting the funding to the agency. The funding can be managed by the participant, a plan nominee, a registered plan management provider or the agency. The NDIA has final say on who manages the funding.

Setting a review date

The participant's plan has to set a date by which the plan will be reviewed. In view of the often fast changing lives and goals of people with criminal justice involvement, regular reviews usually will be very important. In any case, the plan can be reviewed early where needs be.

Challenging decisions of the NDIA

If a participant or their nominee is not happy with some major decisions of the NDIA, the participant may seek a review of the decision by a reviewer in the agency. If they are still unhappy with the decision, they can seek a review by the Administrative Appeals Tribunal.

IMPLICATIONS FOR NDIS DESIGN AND DEVELOPMENT

Consideration of how the NDIS will meet the needs of people with intellectual disability and criminal justice involvement raises a range of issues, as discussed in Section 5 of the Guide.

Indigenous Australians

Despite all its obvious positive features, the NDIS is a new arm of government bureaucracy and so it faces major challenges if it is to successfully engage with Indigenous communities and provide appropriate support to Indigenous Australians with disability.

Proactive outreach and engagement

If people with intellectual disability and criminal justice involvement are to have equitable access to the NDIS, the agency will need to pursue a very active process of outreach and engagement with this group and those already involved in their lives.

The importance of advocacy, and police/court support

Community advocacy groups are often the only disability organisations with whom people with criminal justice contact are involved. The further development of funding of advocacy

groups is vital if people with criminal justice contact (and others alienated from bureaucratic systems) are to have equitable access to the NDIS.

There also needs to be a systematic national approach to provision of support in police interviews and court through advocacy organisations.

Preventing and responding to crises

People with intellectual disability and criminal justice involvement tend to come to the notice of disability agencies at times of sudden and great crisis. The NDIS needs to be able to respond very quickly to these situations including by providing crisis support while the process of becoming a participant is worked through.

For people with intellectual disability and criminal justice involvement, the basic support that they often do want is help with week to week challenges such as understanding correspondence, an overdue electricity bill, a problem with neighbours or with a public housing authority. If the NDIS can work out a way to have support for these needs available on tap from an 'earthy' local agency, the escalation of week to week challenges into crises, including crises involving offending, may often be avoided.

Nominees, and decision makers for children

People with criminal justice involvement will often lack a suitable person involved in their lives if they need a nominee under the NDIS. Similarly, young people may not have a suitable adult available to make decisions on their behalf. The agency needs to work through approaches that address these gaps.

Assessment tools

A generic assessment tool is unlikely to adequately identify the functional impairments and support needs of people with intellectual disability and criminal justice involvement.

Developing goals and aspirations

People with intellectual disability and criminal justice involvement generally will not find it easy to identify goals and aspirations that will lead them towards more positive and lawful lifestyles. The NDIS planning process needs to accommodate this difficulty.

Flexibility in plans

People with intellectual disability and criminal justice involvement tend to lead chaotic and fast changing lives with sudden crises. Participant's plans need to be flexible to accommodate this.

Workforce and service provider skills and support

Working with people with intellectual disability and criminal justice involvement requires skills, experience and/or professional expertise that is not widely available in the current service system. The NDIS needs to engage in a strong workforce and service development programme in relation to both its own staff and disability service providers and funds managers.

In Ageing, Disability and Home Care NSW (ADHC), there are specialist sections doing significant work to develop the skills and aptitude of disability workers generally to work with offenders and to develop and support the capacity of some NGOs to work with people with criminal justice involvement and complex needs. Specialist roles like those in ADHC need to be built into the NDIS structure around Australia. This will require considerable developmental work in some States and Territories.

Structures to meet very complex needs

Various States/Territories around Australia have developed specialist systems to meet the needs of some people with disability and very complex and challenging needs. In some States, there are specific programmes for offenders with intellectual disability and very challenging needs.

The NDIA will need to squarely and carefully consider how these sorts of programs are to be transitioned into the NDIS.

Collaboration with mainstream services

While mainstream health services have clear responsibility to provide for clinical health needs, people with intellectual disability and criminal justice involvement will often need disability support to access and work with health services. The recent Council of Australian Governments *Principles to determine the responsibilities of the NDIS and other service systems* states, 'The NDIS launch sites provide governments with an opportunity to review interactions between the NDIS and other service systems and consider any lessons arising out of a launch.'

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The NDIS will need to have robust processes for engagement with health and other mainstream agencies in launch areas both at a systemic level and in relation to individuals.

Collaborative action will also be very important in relation to prevention of criminal justice contact and early intervention before offending patterns become entrenched. Collaboration with school education, juvenile justice and child protection agencies will be very important here.

Interaction with community protection and corrections systems

The NDIS and disability services have roles that are in some ways complementary with those of adult corrections and juvenile justice workers. A co-operative approach is vital here but disability agencies need to be very conscious that their role is not community protection but a focus on the rights, goals and aspirations of the person with disability.

This interaction is complicated by legislation in some parts of Australia, for example the Disability Act Victoria, which incorporates a community protection function into disability services.