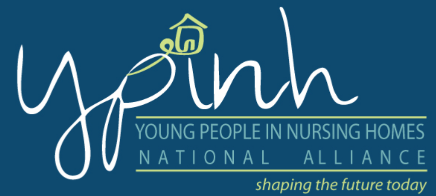

What's reasonable, what's necessary, what's legal?

The impact of cross billing arrangements on participants in RAC

Submission to the NDIS Review

Young People In Nursing Homes National Alliance

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Introduction

This submission highlights structural deficiencies in the way the National Disability Insurance Scheme (NDIS) funds its participants living in residential aged care (RAC). These funding arrangements impact negatively on both participants and aged care providers.

We also draw the review's attention to a legal anomaly in the cross billing arrangements the NDIS has entered into with the Department of Health and Aged Care (DoHAC).

Under these arrangements, the NDIS "reimburses" the Department of Health for the cost of care the residential aged care provider delivers to NDIS participants residing in their facilities, costs determined by the aged care AN-ACC funding classification model. The Alliance has sought legal advice on this matter from one of Australia's top tier legal firms and key elements of this advice are presented in this submission.

Because these cross billing payments are made to the DoHAC rather than to individual scheme participants or directly to the RAC/NDIS provider, the Alliance believes that, far from fulfilling its obligations to its participants living in RAC as required by the NDIS Act, the NDIS is, in fact, subsidising the aged care system and delegating decisions about reasonable and necessary funding for its participants living in residential aged care facilities, to another service system.

The Royal Commission into Aged Care Quality and Safety determined that the aged care system did not meet the needs of people with disability at any age. The NDIS similarly agrees that aged care is an inappropriate option for younger people and has committed to work to achieve the YPIRAC Target of no person under 65 involuntarily living in RAC by 2025. Yet NDIS participants over 65 living in RAC are as equally disadvantaged by the cross billing arrangement anomaly as younger participants in RAC are.

Under the NDIS Act, funding must be provided directly to any participant of the scheme, regardless of where they reside.

Because RAC providers supporting NDIS participants are now deemed to be registered NDIS providers, we recommend replacing the cross billing arrangements with direct payment of the individualised funding the NDIS participants in their care should receive, to these providers.

Cross billing arrangements between agencies

The NDIS cross billing arrangement with DoHAC was introduced as a way of reimbursing the DoHAC for the funding the DoHAC provides to its RAC providers delivering aged care supports to NDIS participants living in their facilities.

Always problematic, this arrangement has tried to bring two parallel schemes into a concordance that remains open to challenge. A disconnect between the systems is maintained because one, the NDIS, uses an individualised funding model where funding is paid directly to the participant to purchase the services they require. In contrast, the other,

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RAC, uses an aggregated model where funding is paid to the provider not the resident, and the total funding allocation for the service is "shared" across all residents in the facility for the provision of services to them.

Designed and funded to support frail, older people in the end stages of life, the aged care system was never intended to support younger Australians with disability. Through the aged care system's AN-ACC funding, for example, care services are delivered in large congregate settings where the staffing ratio is less than that found in disability accommodation. AN-ACC funding levels are also lower than NDIS funding levels, leaving many NDIS participants living in RAC underserviced and at risk.

The NDIS has systemically refused to address this shortfall, instead using S34(1(f) of the NDIS Act to argue that residential aged care is a mainstream service and as such, does not warrant additional or top up funding for NDIS participants living in RAC services.

This is despite the fact that the NDIS is the sole funder of the aged care services its participants in RAC receive; or that RAC providers with NDIS participants in their services are deemed to be NDIS providers subject to regulation by the NDIS Quality and Safeguards Commission as well as their continued regulation by the Aged Care Quality and Safety Commission.

Under pressure from participants and advocates, the NDIS has, however, developed an *Additional Personal Care Support* policy that is supposed to address this funding shortfall.

But the Alliance's experience is that this additional personal care funding

- is not routinely offered to NDIS participants living in RAC at their planning meetings;
- is included in plans only if the participant or their advocate knows about the policy and argues for it at planning meetings;
- prolonged argument at planning meetings is often needed for additional personal care funding to be included in plans; and
- this funding is not guaranteed and has to be fought for again at subsequent planning meetings.

There is therefore no certainty that the additional funding NDIS participants living in RAC require to meet the AN-ACC funding gap, is systemically available through the NDIA's *Additional Personal Care Support* policy.

The NDIS' unwillingness to accept that the AN-ACC funding is inadequate for people with disability in RAC, stands in stark contrast to that of other lifetime support schemes who use a reimbursement model for their participants who choose to live in RAC.

These schemes, such as Victoria's Transport Accident Commission, recognise that the aggregated funding model provided through the aged care AN-ACC, is insufficient to meet the needs of their participants living in RAC and provide appropriate top up funding on a routine basis.

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Instead, the NDIS has used S34(1(f) of the NDIS Act to argue that as a mainstream service, residential aged care does not warrant additional or top up funding for NDIS participants living in RAC services.

Cross billing…no legislative authority

The NDIS' direct reimbursement to the DoHAC rather than to the residential aged care provider for the aged care services the participant receives from that provider, means that the NDIS is delegating its S34 obligations to determine the participant's reasonable and necessary supports, to the aged care system. By using the cross billing approach, the Agency appears to be acting outside the mandate of the NDIS Act.

There is no provision in the NDIS Act or the NDIS Rules for the delegation of any function related to funding for participants, either directly or indirectly. The NDIS Act only authorises funding in plans for the direct provision of services to the individual participant.

While the cross billing amount reimbursed to the DoHAC sits in a participant's plan, it cannot be accessed by the participant; or accessed or negotiated with a RAC provider by that participant. What appears in the participant's plan is an average amount and may not even be the actual amount reimbursed to DoHAC by the NDIS. Such a funding abstraction in a participant's plan is inconsistent with the requirements of the scheme to fund reasonable and necessary supports.

A further inconsistency these arrangements have with the NDIA Act is that the payment by the NDIS is a reimbursement to DoHAC, not a payment to the RAC/NDIS provider. This continues to be the case even though RAC providers with NDIS participants as residents have been registered NDIS providers since 2020. The cross billing reimbursement to DoHAC appears to be an exception to section 34(1)(f) of the NDIS Act.

> Legally, however, it appears that the supports in question are being provided entirely within the aged care system. This is particularly significant because of the differences in how each scheme is funded. Aged care subsidies are calculated and paid on a capacity basis. That is, the provider receives funding that corresponds to the cohort of approved recipients to which it provides care. By contrast, the NDIS is very explicitly individualised.[1]

By supporting an aggregated funding and care model for its participants in RAC, the cross billing arrangement also appears to breach Section 31 of the NDIS Act.

Section 31 lists the principles for the "*preparation, variation, reassessment and replacement*" of participants' plans. The first principle states that plans should, so far as

[1] Legal advice provided to the Alliance regarding the NDIS cross billing arrangements with the Department of Health and Aged Care: 14.

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reasonably practicable, "*be individualised*". Another principle states that plans should "*support communities to respond to the individual goals and needs of participants*".[2]

The aggregated funding and care model in aged care also makes it difficult for RAC providers registered as NDIS providers to meet the requirements of the NDIS Code of Conduct that emphasises individualisation.

This also sees the Scheme overlooking the objectives in Section 3 of the NDIS Act that concern "*support[ing] the independence and social and economic participation of people with disability*", and "*enable[ing] people with disability to exercise choice and control in pursuit of their goals and the planning and delivery of their supports*".[3]

No benefit in dual regulation

Aged care providers supporting NDIS participants in their services were deemed to be registered NDIS providers in December 2020. This compulsory change in status saw these providers immediately subject to regulation by two regulatory bodies: the Aged Care Quality and Safety Commission and the NDIS Quality and Safeguards Commission.

As a result of this change and despite being subject to regulation by the NDIS Quality and Safeguards Commission, aged care providers became the only group of NDIS registered providers who are not paid directly for the support they provide to NDIS participants.

Their compulsory registration as NDIS providers by the NDIS Quality and Safeguards Commission has dramatically increased the regulatory burden RAC providers carry, but without any compensatory capacity from the NDIS. Although the NDIS requires certain kinds of support providers to be registered, residential aged care providers who provide non-Designated Supports, or supports to NDIS participants whose plans are not NDIA-managed do not appear to be included. Despite their automatic registration under the NDIS Quality Transitional Rules there is, therefore, no requirement for them to remain registered.[4]

While registering residential aged care providers as NDIS providers may have been an attempt to bridge the gap between these two very different systems, it has not been successful. Instead, it has dramatically increased RAC providers' regulatory burden with little demonstrable benefit to them or to the NDIS participants in their care.

With new aged care legislation being drafted and the NDIS Review being undertaken, the regulatory status of RAC providers supporting NDIS participants in their services remains uncertain.

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[2] The National Disability Insurance Scheme Act 2013 (Cth) s31
[3] The National Disability Insurance Scheme Act 2013 (Cth) S3
[4] Legal advice provided to the Alliance regarding the NDIS cross billing arrangements with the Department of Health and Aged Care: 16.

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Conclusion

The cross billing arrangements this submission has discussed have been variously described as an attempt to strengthen the protections for NDIS participants living in RAC, or a pragmatic solution to simplify the administration of the NDIS in bridging two very different systems.

In practice, though, the cross-billing arrangement appears to be no more than the NDIA accepting only partial responsibility for the financial cost of providing care to its participants in RAC whose support would otherwise be fully funded by the NDIS if they were living in the community.

As well as being outside the scope of the NDIS Act and Rules, the cross billing arrangement exacerbates the disparity in the nature and quality of care participants receive in RAC compared to NDIS funded disability accommodation. Despite the aged care system being ill-equipped to deliver the type and quality of care to which the NDIS entitles its participants, under the cross billing arrangement, the NDIS is paying for aged care – and aged care is exactly what NDIS participants in RAC receive.

The fact that the NDIS leaves its participants in RAC to receive only aged care services while at the same time publicly supporting the need to get participants out of RAC because of its inappropriateness is, at best, an irreconcilable double standard. At worst, the arrangement makes no demands for either quality or structure of care and means that NDIS participants might as well not be members of the disability scheme at all.

The cross billing arrangement that has enabled this is inconsistent with the legislation and instruments that govern the NDIS, while the care provided to NDIS participants through the aged care system facilitated by these arrangements, is manifestly inadequate and falls well short of the NDIS' standards and the expectations of its participants.

To resolve this legal anomaly, the cross billing arrangements should be abandoned and residential aged care providers supporting NDIS participants allowed to operate as normal NDIS providers, claiming and receiving payments directly from the NDIS for the care they provide to these participants.

This would be more consistent with the *NDIS Act* and *Rules* and would give the NDIS greater oversight of the levels, quality and nature of care being provided to its participants living in RAC. It would also give providers the resources necessary to provide the reasonable and necessary supports that would enable a participant living in RAC to achieve their goals and aspirations.

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Recommendations

- End the cross billing arrangement. Instead, the NDIA should assess the reasonable and necessary supports of its participants living in RAC on an individual basis and directly fund RAC providers who are NDIS providers to deliver participants' care.

- The NDIA and DoHAC work to find an alternative administrative solution to cross billing that enables beds in RAC facilities to be recategorised or "seconded" as private beds while they are occupied by NDIS participants.

- The system of dual regulation whereby RAC providers supporting NDIS participants in their services are regulated by both the Aged Care Quality and Safety Commission and the NDIS Quality and Safeguards Commission, be further harmonised to ensure that RAC/NDIS providers are subject to a single compliance regime only.

Further contact

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