

7 October 2021

Sen. The Hon. Linda Reynolds CSC
Minister for the National Disability Insurance Scheme
GPO Box 9820
CANBERRA ACT 2610

Via email: NDISConsultations@dss.gov.au

**RE: Submission to the Government's proposed NDIS
legislative changes and Participant Service Guarantee**

Dear Senator Reynolds

People with Disability Australia (PWDA) welcomes the opportunity to provide this submission responding to the Government's proposed changes to the National Disability Insurance Scheme (NDIS).

PWDA is a leading disability rights advocacy and representative organisation and the only national cross-disability organisation representing the interests of people with all kinds of disability. We are a not-for-profit and non-government organisation, and our membership is comprised of people with disability and organisations primarily constituted by people with disability.

PWDA is funded both as a national peak disability representative organisation and as the NSW peak body to undertake systemic advocacy. We have extensive experience in providing advocacy and outreach to people with disability, including people living in closed or hard to reach settings and deliver advocacy support through the National Disability Advocacy Program across New South Wales and parts of Queensland.

We commend the Government for consulting with the disability community and including us in the co-design of the NDIS. We are pleased that the Government is implementing many

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important recommendations from the Tune Review in reforming the NDIS Act. We particularly commend the following measures:

- Inserting timeframes into the legislation and rules
- Including a requirement to report annually to the Commonwealth Ombudsman's Office on the NDIA's performance against the Participant Service Guarantee (PSG), and
- Bringing the NDIS principles into closer alignment with the Convention on the Rights of Persons with Disabilities (CRPD) by including co-design with people with disability and their representative organisations.

However, we remain concerned about the overall governance of the NDIS and have specific concerns regarding:

- the proposed changes to plan management
- plan variation without consent
- plan administration
- the proposed changes to improve access to the Scheme for those with psychosocial disability,
- market interventions, and
- the proposed changes to reasons for decisions.

Therefore, our submission will be limited to addressing the following instruments:

- the proposed *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (Cth) (the Bill)
- the proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* (Cth) (Plan Administration Rules)
- the proposed *National Disability Insurance Scheme (Plan Management) Rules 2021* (Cth) (Plan Management Rules), and
- the proposed *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* (Cth) (Becoming A Participant Rules).

We also wish to highlight that the proposed changes to the NDIS miss a key opportunity to clarify the jurisdiction of the Administrative Appeals Tribunal (AAT), and to simplify the experience for people with disability looking to review plans and seek appeal at the AAT. Therefore, our submission will lastly make some brief comments on the need to address this in the Bill introduced to the Parliament.



Overall governance concerns

Board Members

PWDA commends the Government for including people with disability on the Board (subsection 127(2)). The Scheme was lobbied for and in part developed by people with disability. Additionally, in accordance with the CRPD, genuine representation is essential to ensuring the rights and voices of people with disability are upheld.

However, we note the term “lived experience of disability” can be interpreted very broadly and does not necessarily denote a person with disability.

We recommend that this term be changed to “person with disability”. This gives a clear indication that a person with disability with the requisite skills and experience is appointed to the Board. We would also like to note that gender equity needs to be addressed, to date the NDIS has not implemented a gender equity strategy. This is an opportune time to do so.

Over-reliance on Rules

PWDA is keenly aware of the scope and complexity of administering a Scheme such as the NDIS. It is a vast undertaking and as the Tune Review clearly identified, there is a lot of “red tape” to navigate for participants, NDIA staff and advocates.

The NDIS is the most significant social program that Australia has undertaken in half a century. It is a very important scheme, as it not only upholds Australia’s commitment to the CRPD, but it ensures that people with disability in Australia have access to the services and supports they need to live full lives as citizens.

However, creating a Scheme that is heavily reliant on Rules, in particular Category D Rules, diminishes the legality of the NDIS, by giving the Minister very broad reaching discretionary powers.

The use of such powers over a participant’s plan as to what can be purchased with allocated funding dilutes any semblance of “choice and control” that the participant had and to which the scheme was technically founded upon.



There is a need therefore, to ensure that many of the current amendments which are Rules, are in fact embedded in the legislation.

Plan management and payment of supports: sections 43-45

PWDA acknowledges that proposed changes to plan management, under the proposed amendments to sections 43 and 44 of the NDIS Act and the Plan Management Rules, nominally reflect the Tune Review recommendation 19. We do, however, hold some concerns about the use and application of the term ‘unreasonable risk’ in this section.

The criteria for ‘unreasonable risk’ set out at in section 10 of the proposed Plan Management Rules allows for a very broad discretion on the part of the agency. The definition and criteria for ‘unreasonable risk’ need more solid clarity, to ensure people with disability do not lose their autonomy to manage their supports.

In addition to plan management, we have concerns regarding the proposed changes to section 45 of the NDIS Act, relating to the way in which supports are paid by the NDIA.

While these changes appear to facilitate a more streamlined approach to payments, by using a ‘tap and go’ system on a smartphone app with their service provider, we understand some people may be concerned by the inability for self-managed participants to opt out of this system and pay for their own supports first, or to mix-and-match their preferred payment method.

Case study 1 – Reba

Reba is a woman with disability and a parent of a child with a disability. Reba was told by her NDIS planner that her child does not require more funding for supports because she, as the parent, ought to provide more informal supports. Reba is moving from self-management to plan management due to barriers she is facing with meeting her caring responsibilities. Using the “unreasonable risk” criteria could place further strain on Reba, impacting both her and her child with disability.



Our advocates note that often, the provision of informal supports is a gendered issue. Additionally, our advocates note that loose definitions and terms used by the NDIS can result in value judgments over people's lives and choices, resulting in reduced supports, poor personal outcomes and a depletion of "choice and control" over their lives.

Lastly, it should also be noted that while devices such as smart phones and tablets may appear to be widely available, not all people with disability have access to such technology on a regular basis.

Case study 2 – Theo

Theo is a young man with disability who lives in poverty. Theo does not own a computer or a phone. Theo's only accessible device is the public Telstra phone on his street corner. Theo would not be able to make use of the "tap and go" payment option.

Case study 3 - Thuy

Thuy is a young person with intellectual disability, is non-verbal, lives in a group home and attends a day program. Thuy previously had a service provider who exploited her disability by claiming invoices for services not delivered. Thuy has a smart phone that her support worker helps her with, but she would have concerns that the "tap and go" smartphone app could lead to Thuy once again being exploited, resulting in her funds being drained by fraudulent works and providers.

Plan administration: sections 47A and 48

PWDA has some serious reservations regarding the proposed new section 47A in the Plan Administration Rules, which allows plans to be varied on the NDIA CEO's own initiative, without request, consultation, or consent from the participant.



This power of variation appears to be significantly broader than the Tune recommendation. We note that the Tune Review recommendation regarding plan variation was intended to apply to very specific cases.

While we understand that implementing this kind of CEO discretion allow plans to be amended or fixed where the plan changes are not significant, and when requested by the participant (such as where there are technical mistakes, changes to a participant's goals and aspirations, or changes following an AAT decision), plan changes must always be consulted with, and consented to, by a participant.

PWDA can see no clear purpose as to why the NDIA should be able to vary plans without consultation or consent by the participant. This is especially so because the CEO already has existing power to conduct reassessments on their own initiative

Additionally, the CEO's power to vary plans is not constrained. Whereas section 10 of the new Plan Administration Rules sets out a non-exhaustive list of matters the CEO must consider when deciding to vary a plan on their own initiative; these matters do not limit nor constrain the CEO's power. Limits to the power should be set out in section 47A of the Bill, rather than in delegated legislation.

The precise purpose of the CEO powers needs further clarity and the specific situations in which this power may be enacted needs to be clearly articulated. There is a risk that to allow a reassessment could mean a participant who wants a small change to fix something could have all their supports thrown up for reassessment. Clarity and specific situations in which the power could be exercised would assist.

If clarity around the proposed plan variation power is provided as we suggest, then section 48 of the proposed Plan Administration Rules will need to allow for participants to request plan reassessments. This change would retain the CEO's power to reassess on their own initiative but will also require some forms of procedural fairness such as notification periods and information about what reassessment will look at, which we would welcome.

Lastly, both sections (s48A and s48) allow Category D rules to be made. Such rules can be made by the Minister without agreement by the states and territories, which we do not welcome and are concerned about.

It would be far more transparent, and our strong recommendation that the powers contained in these sections be subject to Category A rules, requiring unanimous



agreement by all states and territories. This will also be consistent with the current section 48 (unscheduled plan reviews) which is a Category A rule.

Ensuring equity of access for people with psychosocial disability

PWDA welcomes the Government's acknowledgement of the need of people with psychosocial disability to have improved access to the Scheme. We would however like to raise the issue of language regarding psychosocial disability. It must be noted that psychosocial disability can be an extremely complex experience and, for many people, is a lifelong impairment.

We note that the proposed Becoming a Participant Rules acknowledges that there can be fluctuations in the experience of psychosocial disability, however, the measure of "substantial improvement" can be difficult to ascertain depending on the nature and extent of the impairment. We note also that this assessment of eligibility may not take into account the future likelihood of psychosocial disability and need for supports at those times. We recommend that the Rules should be amended to provide guidance of the definition of this term.

It is imperative that all people with disability, including people with psychosocial disability, have access to the Scheme, to ensure supports promote wellbeing and freedom from harm.

The NDIS is part of the Government's commitment to the implementation of the CRPD. We refer to a report prepared by Gooding and West from the University of Melbourne for PWDA in regard to Australia's obligations to the CRPD and the NDIS:

The very first object of the NDIS Act is to 'give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities'.¹ Other stated aims and purposes of the NDIS Act also convey the values and objectives of the CRPD, promoting dignity and respect for disabled people.²

One key objective of the NDIS Act is to 'protect and prevent people with disability from experiencing harm arising from poor

¹ NDIS Act 2013 (Cth) s.3(1)(a)

² See NDIS Act, ss 3-5.



quality or unsafe supports or services provided under the National Disability Insurance Scheme'.³

The NDIS Act therefore requires that the operation of the NDIS, including how people are assessed for eligibility, should protect and prevent against harm and conform with Australia's obligations under the CRPD.

How a person is deemed eligible for the NDIS, therefore, is a crucial human rights issue. Eligibility assessments can serve as a portal for persons with disabilities to access the resources needed to exercise the full range of their human rights.

Access to the NDIS for people with psychosocial disability has been an extremely vexed and arduous issue. In some cases, it has taken years to access appropriate supports, often time with periods of unstable income and homelessness. Getting access to the NDIS for people who experience the cyclical nature of some mental health conditions is a matter of grave importance and should not be impeded by a nominal value judgment on the nature, scale and impact of their psychosocial disability.

Reasons for decisions should be automatic

We welcome that insertion of sections 100(1B) and (1C) to the NDIS Act, which allow participants to request reasons for reviewable decisions. However, we believe such reasons should be provided automatically, rather than on request.

In addition, Sections 100(1B) and (1C) of the NDIS Act should be amended to also require the NDIA to provide reasons for internal reviews automatically. We understand that this often, but not always, happens in practice.

These recommendations are consistent with good administrative decision-making principles and are consistent with the Tune Review, which said (at [3.59]):

Providing people with disability with an explanation of a decision should be a routine operational process for the NDIA when making access, planning and plan review decisions.

³ NDIS Act s.1(1)(ga).



However, in the event this does not occur, the Participant Service Guarantee should empower the person with disability to require the NDIA provide this information in a manner that is accessible to them.

Case study 4 - Anneka

Anneka had her review of a reviewable decision rejected. She does not know why it was rejected but she wishes to progress the rejection to the AAT for an appeal. However, Anneka cannot progress her case, as she does not know what specifically she will be appealing against. Anneka's case is not unusual. Our advocates note that many clients are waiting for a reason/s on their review to progress an AAT appeal, creating an unnecessary backlog and creating unnecessary stress to people like Anneka and her advocates and supporters.

Market intervention powers

We commend the Government for implementing Recommendation 17 of the Tune Review, which states that the NDIS rules should be amended to give the NDIA 'more defined powers to undertake market intervention on behalf of participants. We are, however, concerned about the use of the term 'urgency' in Rule 5(a).

This term needs further clarification as it is open to wide interpretation. Arguably, if a support is 'reasonable and necessary', then it is urgent. People with disability should not be going without their supports due to market failure.

We particularly commend Rule 5(b) of the Plan Administration Rules, which obliges the NDIA to have regard to the participant's ability to exercise choice and control in sourcing supports when deciding whether to exercise its market intervention power.

We also support Rule 5(d), which requires the NDIA to consider whether the proposed funding recipient employs best-practice approaches to assisting participants with diverse cultural backgrounds.



However, we believe a similar provision should be added in relation to LGBTQIA+ participants. There is a concerning lack of services that provide safe and inclusive services and supports to LGBTQIA+ people with disability, even in metropolitan areas. The Rule amendments provide an important opportunity to address this.

Case study 5 - Kylee

Kylee is a woman with disability who lives in remote Queensland. There is only one service provider in her area that offers the supports she requires. Kylee has had bad experiences with this provider but has no choice or control over her supports given the provider's monopoly. Kylee's case highlights issues with a single provider offering multiple services can result in higher reliance on the single provider, limiting provider diversity and market choice. This is especially true for people with disability living in congregate settings.

Clarify the AAT's jurisdiction and simplify reviews and appeals

Our NDIS Appeal advocates are currently operating at maximum capacity, with significant waiting lists. A major contributing factor to the high workload of advocates is the backlog of cases at the AAT.

The AAT's backlog is partially due to a jurisdictional matter in the NDIS legislation. Specifically, it is unclear whether the AAT has jurisdiction to consider additional supports requested by the applicant during the AAT process that were not initially raised at internal review.

The case of *QDKH*⁴ illustrates this issue and is now awaiting hearing at the Federal Court. In the five months since *QDKH* was decided, there have been eleven further AAT decisions which have considered this jurisdictional point.

This is a technical problem about what the AAT can and cannot decide about a participant's plan on appeal, and the inconsistency of the decisions causes very real

⁴ *QDKH and National Disability Insurance Agency* [2021] AATA 922 (16 April 2021)



negative impacts for participants such as causing undue stress, confusion and lengthy delays to plan finalisation.

In effect, if the AAT does not have jurisdiction to consider a participant's full plan, the support requests that are not considered by the AAT will need to go back to the NDIA for a plan variation or reassessment. If the participant is still unhappy with it, they will need to go through an NDIA internal review and the AAT all over again.

Resolving this issue would be consistent with the overall goals of the Tune Review in 'removing red tape'. The easiest way to resolve this is through a legislative amendment that ensures that the AAT can consider *all* matters concerning a participant's plan on appeal. The failure to do so ties up participants, as well as the AAT, NDIA, and legal and advocacy resources in costly jurisdictional disputes that leave participants worse off.

This proposed legislative package contains large and important changes to the NDIS. However, we wish to emphasise that the consultation time on this Bill was extremely short. Additionally, we did not have adequate time to translate the document into Plain English or Easy English. This made the consultation process inaccessible to many people with disability. We also note that written submissions, and no other format, were accepted during the consultation process, limiting the ability of people with disability to have their voices heard.

We wish to make clear that Article 21 of the CRPD states that people with disability have a right to freedom of expression, opinion and access to information. Unfortunately, in this instance people with disability did not have adequate time and opportunity to engage with the proposed changes.

Should you wish to discuss this submission further, please contact my Senior Manager of Policy, Giancarlo de Vera, on 0413 135 731 or at giancarlo@pwd.org.au. We thank you again for the opportunity to provide feedback on the proposed changes to the NDIS.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sebastian Zagarella', written in a cursive style.

Sebastian Zagarella
Chief Executive Officer