

NDIS Act Review Consultations
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Thursday 7 October 2021

Dear NDIA and DSS colleagues

Re: Proposed NDIS legislative improvements and the Participant Service Guarantee Consultation

We write in response to the consultation currently underway, in relation to proposed reforms to the National Disability Insurance Scheme ACT 2013, and the NDIS Rules. We appreciate and thank the Minister for the decision not to proceed with the earlier proposed model of independent assessments, and the decision also to leave the reasonable and necessary section of the ACT as it currently stands. Given we are responding during the COVID emergency, a time when systemic advocacy is much needed (and writing from lockdown in Canberra, a lockdown which has extended over the entirety of this consultation period) - we would have preferred to have had more than four weeks to analyse all the papers (16 complex documents and all the surrounding reports) and to respond. We are, however, in good faith providing whatever feedback that we can within the constraints we are experiencing.

About ADACAS

ADACAS is a disability advocacy service providing individual advocacy to and working with people with disability of all ages (and people who experience mental ill health), to older people and to (informal/family) carers. We have been operating in the ACT for 30 years and more recently commenced working with people living with disability in specific parts of NSW. As an advocacy service, ADACAS is frequently working with people who are “falling through the cracks” in the current service systems and facing barriers to their rights being upheld. We advocate to support people to access services and supports across a variety of domains of life and society.

In terms of the NDIS - ADACAS staff have considerable experience in working together with NDIS participants or prospective participants with regards to access requests, plan reviews (annual reviews, internal reviews, change of circumstance), complaints, and NDIS external appeals. Separately from the individual and systemic advocacy arms of our organisation - ADACAS has a team of staff who work as support coordinators, working with NDIS participants, many of whom are in challenging circumstances. Finally - ADACAS also has engaged systemically on NDIS related topics over many years.

ADACAS is a member of both the Disability Advocacy Network of Australia and the Older Persons Advocacy Network, both of which represent organisations working with people with disability across all areas of Australia.

ADACAS acknowledges the language groups and traditional custodians of the lands on which we work, including the Ngunnawal people (Canberra), and the Dharawal and Yuin peoples (NSW South Coast) and pay our respects to their Elders, and to all Aboriginal and Torres Strait Islander people in our communities. Always was, always will be Aboriginal land: Sovereignty was never ceded.

ADACAS Response

To commence, we advise that ADACAS endorses the topics raised in the submissions:

- at an ACT level, the submission by Advocacy for Inclusion, and
- at a national level, by the Public Interest Advocacy Centre.

Whilst we do not propose to reiterate all topics highlighted in those submissions, we will however highlight some key points.

Positive changes:

ADACAS welcomes the following proposals:

- Introduction of timeframes/Participant Service Guarantee:** The early introduction of the timeframes and Participant Service Guarantee, as had been recommended in the Tune review, has already brought desired improvements in response times. We welcome its inclusion into the NDIS Act.
- AAT Jurisdiction:** As an advocacy service working in the NDIS appeals space, ADACAS also welcomed efforts to clarify the boundaries of the work that the AAT can engage with, in recognition of the fact that plans frequently need to change during the time which an appeal is in progress.
- Psychosocial disability:** ADACAS welcomes efforts towards making NDIS entry and the NDIS more accessible to people with psychosocial disability.
- Inclusion:** ADACAS welcomes changes which make the principles more inclusive, including those updates to language to better include people with diverse sex, gender and/or sexual identities or intersex status.
- Co-design:** ADACAS also welcomes the introduction of a principle around co-design with people with disability, in the principles of the NDIS ACT.
- Commonwealth Ombudsman:** We were pleased also to see the additional oversight/reporting requirements via involvement of the Commonwealth Ombudsman's office.
- Improving terminology:** we appreciate efforts to reduce the number of different ways the word review is used in NDIS contexts, however, will comment in more detail about the proposed terms later in this response.

Additional Feedback:

In our view however, there are additional changes needed to ensure that the legislative changes are indeed improvements in terms of how the NDIS is experienced by NDIS participants and informal carers/families.

A. NDIS legislation, rules, and governance

The NDIS is vitally important legislation for people with disability, their families and for the entire community. People with disability, families/carers etc need to be able to rely on the NDIS, without fear of significant change at short notice over which they have no control. When change is being considered, there needs to be organised processes of consultation and co-design with people with disability, carers and families, disability advocacy and representative bodies, and (if appropriate) service providers.

The current proposed changes to legislation and rules also categorise what is included in the primary legislation, as opposed to what is included in rules. Some of the rules are in categories where there is limited additional oversight. This could mean that very significant change around topics such as eligibility/access to the scheme/ level of funding etc could happen very quickly, without time for adequate engagement, consideration of impacts and oversight.

Whilst rules can allow for flexibility, we urge very careful consideration of the impacts of decisions about what powers belong in legislation versus those that belong in rules.

B. Plan Variation without consultation

ADACAS objects to the proposal outlined in the proposed NDIS ACT section 47A. Whilst we can appreciate that plan variations can be helpful (and are needed) to correct planner errors, or make small adjustments, in our view these plan variations should be only at the request or with the consent of the participant (unless there are very significant compelling or other extenuating circumstances in which the participant would usually agree but is temporarily unable to).

Whilst we acknowledge that the NDIA CEO already has the power to arrange a review of a plan, the NDIA CEO should not have the power to vary plans unilaterally whenever they wish. Whilst Rule 10 of the new Plan Administration Rules outlines factors the CEO should consider, these appear to be a guide, and it is imperative that additional safeguards are built into the wording to protect a participant from having their plan varied without their consent, or in ways that are against their wishes or interests.

C. NDIA and Market Intervention

As an advocacy service working across both metropolitan (Canberra) and rural/regional (South Coast NSW) areas, ADACAS is attuned to the impacts of thin markets in different areas. Whilst changes are clearly needed to enable all NDIS participants to equitably access services and supports, we are conscious that the way that any added powers are designed and implemented could have very significant ramifications. At present, in our view, the criteria outlined in the Plan Administration rules, section 5 (Funding to persons or entities) and in Plan Management rules (part 2), do not yet adequately take account of all the factors that need to be considered. ADACAS emphasises the need for powers to be able to be implemented differently in different contexts, such that they can meet the needs of individuals and communities in different localities and settings. ADACAS also highlights the need to co-design (with individual people with disability about their needs, and (if needed/appropriate) with communities and whilst also hearing from service providers about possible solutions) not solely the nature of the powers, but also how they are implemented in different situations and settings. ADACAS emphasises the need for flexibility, such that solutions can be found to meet needs in individual circumstances. ADACAS notes our expectation that all people with intersectional need, will value flexible approaches that can be tailored to individual/community circumstances, including those from culturally, ethnically, or linguistically diverse backgrounds, also LGBTQIA+ etc. ADACAS also notes the need for culturally safe approaches, especially in working with First Nations NDIS participants, Aboriginal communities, and Aboriginal controlled community organisations.

D. Efforts to improve access for people with psychosocial disability

Over recent years, ADACAS has had people with psychosocial disability unable to go through the NDIS entry and appeals processes (even with extensive support) due to the impacts of the various processes on their mental health being too profoundly negative. Given this, ADACAS strongly endorses the need to improve the NDIS access experience for people with psychosocial disability and welcomes the additional focus on seeking to increase opportunities for access.

We concur with the submissions of Advocacy for Inclusion and others – that the pathways for entry to the scheme should be included in the primary legislation (not the rules). We also agree that additional clarity and definitions are needed around key terms and emphasise the need for additional consultation and co-design with mental health consumers, people with psychosocial

disability, carers/family, and disability and mental health representative organisations to further progress this area of work.

E. NDIA board:

ADACAS welcomes the news that people with lived experience of disability will be additionally eligible to join the NDIS board. We note that the disability community more broadly is suggesting that wording be further refined such that people with disability themselves are prioritized over those with other types of lived experience of disability (i.e. carers).

F. Changes to risk assessments for participants wanting to use registered plan management providers

Whilst sharing the strong desire to avoid situations where participants are exploited, we write to query the decision outlined in the Plan Management Rules, part 3 to impose the same risk management approaches to participants engaging with a registered plan manager, as would be applied for a person seeking to self-manage.

Given the significant difference in skill set that can be involved in self managing versus having a plan manager managing your NDIS finances – we ask whether the risk management tool will be fit for purpose. If the criteria and settings are incorrect and the tool is too risk averse for participants engaging with a plan manager, this could lead to unintended consequences – too many participants being unduly prevented from using plan managers (and thus unable to access the full range of service providers), which reduces choice and control and potentially also negatively impacts on satisfaction/or the potential positive impacts of the NDIS plan.

If there are concerns with the actions of plan managers themselves, in our view, the NDIA should be addressing this through alternative methods such as plan management registration, audit and other regulatory processes. If the NDIA has concerns about particular non-registered providers, we would encourage the NDIA to also work with people with disability, families/carers and representative organisations to explore proactive actions to seek to safeguard participants rights in this arena.

G. Improving terminology:

- a. Whilst plan variation as a term is relatively innocuous, we would strongly suggest an alternative to plan re-assessments (this terminology is too reminiscent of the phrase “independent assessments”, which currently has a very negative associations for many people with disability). We suggest perhaps keeping it very simple – instead of plan re-assessments – what about just “NDIS planning”. Others may have alternative or better suggestions for this term.
- b. We also enquire as to whether the definition for Indigenous listed in the Participant Service Guarantee rules is the preferred definition of Aboriginal and Torres Strait Islander communities. We would recommend consulting with First Nations representative organisations on this point, if this has not already occurred.

H. Children’s Rules, Rights and Supported decision-making

In relation to the Children’s rules, especially section 8. ADACAS highlights the need to include within the rule a responsibility of the NDIS to ensure that children with disability of ages such that their capacity is being assessed, have independent advocacy support available to them to assist them with the process of assessment as to whether a child can make their own decisions.

With regards to Clause 8 (v) – ADACAS requests this clause be reframed to include reference that the NDIA can provide funding/connections to assist with supported decision-making if

required, to align with responsibilities under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) which outline the rights of people with disability to supported decision-making assistance if this is required.

I. Implementation of the Participant Service Guarantee

The success of the Participant Service Guarantee initiative requires both good legislation and good implementation. The NDIA (and partners) need to be adequately staffed (and staff need to be adequately trained) to ensure that the responses to applicants and participants are accurate, considered and communicated clearly.

In conclusion

Whilst many of the aims of the proposed changes are laudable – whether they are successful will rely on decisions about how the NDIS legislation and rules are finalised, and detail of how they are implemented.

We welcome the continued advice that future changes to the NDIS assessments and funding approaches will be co-designed with people with disability, families, and disability representatives. We welcome opportunities to continue to work with you with the goal of ensuring that NDIS participants receive reasonable and necessary supports to live a life of dignity which includes choice and control.

We look forward to continuing to work with you conduct proper consultation and co-design with people with disability, families/carers, and the relevant disability representative organisations such that **better solutions and reforms can be developed.**

Sincerely



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This submission is in relation to Department of Social Services and National Disability Insurance Agency consultation published at: <https://engage.dss.gov.au/proposed-ndis-legislative-improvements-and-the-participant-service-guarantee/> during September/October 2021.

ADACAS thanks the Public Interest Advocacy Centre for their NDIS legislative reform explainer and cite this document as a key reference accordingly. It was of great assistance in understanding the changes, and as we developed our response to this consultation.