



Australian Government
Department of Social Services

Report on Public Consultation

Consultation on proposed changes to the National Disability Insurance Scheme contained in the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021, and associated National Disability Insurance Scheme Rules

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Introduction

This consultation report summarises feedback received during public consultation on proposed changes to the *National Disability Insurance Scheme Act 2013* (NDIS Act) to improve participant experience, contained in the National Disability Insurance Scheme Amendment (Participant Services Guarantee and Other Measures) Bill 2021 (the Bill), and associated amendments to the National Disability Insurance Scheme Rules (NDIS Rules). Feedback was received during briefings with disability and advocacy representative organisations, state and territory officials, and members of the public conducted by the Department of Social Services, and through written submissions. This report also draws out key issues identified through the consultation process and outlines the next steps, including the legislative and Parliamentary process.

Further information on proposed changes can be found on the DSS Engage site (engage.dss.gov.au).

Acknowledgements

The Department of Social Services would like to acknowledge and thank everyone who shared their perspectives on the proposed legislative amendments to the National Disability Insurance Scheme. The department would like to thank all respondents, whose effort, time, expertise, and lived experiences have provided invaluable feedback and insight.

The Department would also like to acknowledge people with disability for whom the NDIS was created.

Background

The Australian Government is committed to improving the experience of National Disability Insurance Scheme (NDIS) participants, their families and carers. To support this, in 2019, the Australian Government committed to delivering an NDIS Participant Service Guarantee (the Guarantee) to support positive participant experience by setting new standards for the time it takes for key steps in the NDIS process and to set service standards for the National Disability Insurance Agency (NDIA).

To develop the Guarantee, the Government commissioned a review of the *National Disability Insurance Scheme Act 2013* (NDIS Act) to identify opportunities to make NDIS processes simpler and more straight-forward, and remove legislative barriers to positive participant and provider experiences with the NDIS.

The review was undertaken by an independent expert, Mr David Tune AO PSM. The review is often referred to as the Tune Review. People with disability, family members, carers, advocates and providers from around Australia shared their experiences and ideas through community workshops, an online survey and by making submissions.

Mr Tune delivered the [review report](#) to Government in December 2019. It made 29 recommendations to improve the participant experience and support the delivery of the Participant Service Guarantee. The review report was published in January 2020.

The [Government response to the 2019 review of the NDIS Act](#) was released on 28 August 2020. The Government response supported, or supported in principle, all 29 recommendations made in the review report.

To implement the changes recommended by the Tune Review, including the Guarantee, the Government developed proposed changes to the NDIS Act contained in the Bill and the NDIS Rules, which include the creation of two new sets of rules:

- *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021 (new)*
- *National Disability Insurance Scheme (Plan Administration) Rules 2021 (new)*
- *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*
- *National Disability Insurance Scheme (Plan Management) Rules 2013*
- *National Disability Insurance Scheme (Children) Rules 2013*
- *National Disability Insurance Scheme (Nominees) Rules 2013*
- *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020*

The Bill and Rules were released for public consultation for a 4 week period from 9 September to 7 October 2021.

OVERVIEW OF THE CONSULTATION PROCESS

At the 13 August 2021 Disability Reform Ministers Meeting, Ministers noted the extensive national consultations that underpinned the Tune Review, and agreed to implement a number of Tune Review recommendations, including the Participant Service Guarantee and the ability to vary a plan without a full review.

Proposed amendments to the NDIS Act and NDIS Rules were developed along with a range of explanatory material, including an Easy-read explanation of the changes and Auslan video explaining the amendments. These amendments were then released for public consultation on the DSS Engage website (engage.dss.gov.au) for a period of 4 weeks (9 September to 7 October 2021).

To support the consultation process, the Department conducted a number of information sessions to explain the proposed changes with a broad range of stakeholders including state and territory officials, disability representative organisations and advocates, and members of the public. Information slides used for these sessions are available on the DSS Engage site.

Information sessions were provided to key stakeholders, including (but not limited to) the NDIA Board, the NDIS Independent Advisory Council, NDIA CEO Forum, National Disability Advocacy Program (NDAP) advocates, People with Disability Australia (PWDA) Board and PWDA advocates, the ACT Chief Minister's Disability Reference Group, the NSW Disability Advisory Council and the National Mental Health Consumer and Carer Forum (NMHCCF).

Public information sessions on the Bill and the submission process were conducted by the Department on 16, 20, 21 and 22 September 2021.

An overview of the numbers of information sessions and attendees is contained in the following table.

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Total number of open public information sessions	4
Attendance by individuals	160
Attendance by providers	257
Attendance by peak organisations / advocates	63
Attendance by government organisations / educational institutions	73
Public Information consultation attendees total	553
Total number of other stakeholder information sessions	16
Other stakeholder consultation attendees total	311
Total persons attending consultation fora	864

During the consultation period, people were invited to lodge submissions regarding the proposed changes either through the DSS Engage website or by emailing the DSS Consultations inbox. An overview of the submissions received is contained in the below table. Submissions that explicitly indicated agreement to be published are available on DSS Engage under the tab 'View Submissions'.

PUBLIC SUBMISSIONS

Total number of submissions received	313
Submissions from peak organisations	64
Submissions from individuals	132
Unknown / anonymous submissions	23
Submissions from Government	11
Submissions from Disability Representative Organisations (DROs) / Advocacy / Legal organisations	38
Submissions from providers	45

CO-DESIGN

There are elements of the Tune Review not considered in this legislative reform process, and some operational matters resulting from these consultations that will need more time and consideration as part of a co-design process. A way forward for co-design in the NDIS is under development by the NDIA, its Independent Advisory Council, Disability Representative and Advocacy Organisations and people with disability.

WHAT WE HEARD

Overview

Generally, feedback on the proposed amendments was positive. It was generally considered the amendments would improve the participant experience and the NDIS overall. It was also generally agreed the reforms would create greater certainty for participants and reduce red-tape, and go some way to improving the operation of the NDIA.

“The adoption of the NDIS Bill and accompanying new and amended NDIS Rules is likely to have a significant number of benefits for present and future participants of the NDIS. In particular, clear timeframes under the Participant Service Guarantee and the funding and engagement of the Commonwealth Ombudsman to report on the operation of the NDIS will likely have positive outcomes for participants.” - Anonymous submission

A number of submissions highlighted the proposed changes would make it easier for participants to access supports by providing greater clarity around eligibility. The feedback also showed support for the greater level of transparency created by the Guarantee, including increased annual reporting against the Guarantee.

While recognising that feedback is more likely to come from those who are dissatisfied, there was a clear message that people are unhappy about the way the NDIA interacts with participants. The NDIA’s decision-making processes were criticised as being unclear and confusing, particularly the review process.

Submissions expressed distrust about the way the NDIA may operationalise the legislative provisions which appeared to stem from the previously proposed changes in relation to independent assessments, as well as the experience of individuals and organisations dealing with the NDIA. Concerns also focused on whether there was sufficient definitions and limitations where the NDIA is being given new powers. In addition, many respondents sought greater clarity around new terms, in part due to concerns about how the NDIA may operationalise the changes.

“Overall, the proposed amendments appear to be very positive and needed and if implemented effectively will have the potential to improve the experience of all NDIS participants and service providers. A key factor to the success of all changes will be in the manner in which they are communicated and held accountable. Such changes are often hidden in fine print and participants frequently remain oblivious to their rights and the multitude of supports they have access to.” - Anonymous submission

Where submissions raised operational issues, this feedback will be passed on to the NDIA for consideration.

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The consultation also highlighted a number of areas where the proposed amendments could be improved to better clarify the changes and ensure the participant was at the centre of the reforms.

The issues raised about the measures proposed in the amendments are further outlined below.

Participant Service Guarantee

Implementing the Guarantee was the main aim of these changes to the NDIS. The Guarantee aims to improve participant experience and reduce red tape. The Guarantee will do this by:

- requiring the NDIA to make key decisions in the NDIS process within set timeframes to create certainty for participants and prospective participants;
- requiring the NDIA to meet specific service standards when working with people in the NDIS; and
- providing the Commonwealth Ombudsman powers to independently monitor and report to Government on how well the NDIA is meeting the timeframes and service standards.

What we heard

Feedback on the Guarantee was very positive. Submissions and feedback during webinars supported implementation of the Guarantee. Respondents indicated the changes are clearly set out and provide greater transparency regarding decision-making by the NDIA; however, there was a view that due to its importance more of the Guarantee could have been included in the Bill rather than in the NDIS Rules.

There was strong support for the introduction of timeframes to improve the timeliness of decision-making. There was also strong support for the implementation of service standards to improve the way the NDIA interacts with participants and prospective participants.

It is very positive to see timeframes for making decisions being given legislative backing. The Guarantee also includes subjective standards for the NDIA's interactions with participants, including increased transparency, responsiveness, respect, empowerment of participants and connectedness. While these reforms are welcome, it is unclear how the Agency is going to be held accountable to these principles. - Deafblind Australia

As with many of the measures, there was concern that although the Guarantee is positive and would support participants, it may not be implemented by the NDIA effectively and may therefore not achieve its aims.

Some submissions questioned whether the timeframes would actually be able to be met by the NDIA and indicated implementation of the Guarantee should be accompanied by additional NDIA resources to ensure compliance with the timeframes. Similarly, submissions questioned whether, if the NDIA was not properly resourced, the setting of timeframes would reduce the quality of decisions made by encouraging meeting the timeframes ahead of ensuring the quality of decisions. Implementation of the Guarantee in remote communities was also raised as an issue.

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DIA, in principle, supports the introduction of a Participant Service Guarantee, which will hopefully raise the standards and shorten the amount of time it takes the NDIA to make decisions around access to the scheme, approving or amending a plan, and seeking reviews of decisions... Ultimately, what remains to be seen is how the NDIA and the NDIS Quality and Safeguards Commission (NDIS Commission) will interpret and operationalise the proposed changes to the NDIS Act. - Disability Intermediaries Australia

The new oversight by the Commonwealth Ombudsman was well-received and respondents acknowledged the Commonwealth Ombudsman's report against the measures in the Guarantee would be reviewed by the Government, some respondents questioned whether this is strong enough enforcement to ensure compliance.

To improve transparency, respondents suggested the Commonwealth Ombudsman's report should be published and made easily accessible, and that the report should then directly lead to participant-focussed improvements to implementation and processes that underpin the legislative changes.

A number of respondents highlighted it was important to ensure the information to support the Guarantee is available in accessible formats including easy-read and videos.

Many respondents indicated monitoring how the Guarantee is implemented by the NDIA operationally and refining and improving the Guarantee over time is important to ensure it meets the aim of improving participant experience in the NDIS.

Market intervention powers

The Tune Review recommended that the NDIS Act needed to emphasise the importance of a diverse and sustainable NDIS market to ensure that people with disability can exercise their right to choice and control when obtaining supports.

In some instances the NDIA is unable to act quickly to fill service gaps and encourage positive market behaviour. This issue is exacerbated in rural and remote areas, where there are gaps between the supply and demand for services in 'thin markets'. This means some participants have specific supports and services in their plan, but are unable to access these services identified in their plan.

In addition, children under the age of 7 have waited long periods to access supports from when a positive access decision is made, and when a planning meeting occurs (subsequently enabling children to receive their funded supports). At present, the NDIA does not have the power to provide interim funding to children for immediate early intervention supports.

To address Tune Review Recommendation 17 (market intervention), the Bill and associated Plan Management Rules provided more defined powers to the NDIA to engage in market intervention to act quickly to fill service gaps and encourage positive market behaviour.

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To address Tune Review Recommendation 13 (flexibility for the NDIA to fund early intervention), Bill and associated Plan Management Rules also provided the NDIA with more flexibility to fund early intervention support for children under the age of seven years outside an NDIS plan, where the planning process would delay supports.

What we heard

Many submissions welcomed the NDIA powers on market intervention as outlined in the NDIS Plan Management Rules, with particular reference to the NDIA having the capacity to intervene in thin markets to ensure the provision of support.

“Council is pleased to see more defined powers to intervene in the market to act quickly to fill service gaps, to encourage positive market behaviour and to provide funding to some children under seven for immediate early intervention supports pending planning outcomes where the planning process would delay supports.” - Independent Advisory Council

Feedback was also heard in relation to market intervention practices and realities in small regional areas with thin markets.

A concern was raised that sections 6-8 in the Plan Management Rules, relating to market intervention, could have the potential to reduce choice and control and participant empowerment. Other submissions sought further detail as to how the proposed market intervention powers will be exercised and in what circumstances.

“Market intervention powers must be exercised with caution as they encroach upon the choice and control of participants, frequently heralded as one of the fundamental principles of the scheme.” - Queensland Advocacy Incorporated

Plan variations

The inability to amend a plan without creating a new plan or requiring a full plan reassessment was identified in the Tune Review as a frustration for participants. Currently, the only way to change a participant's plan is to replace the plan with a new one, following reconsideration of all the reasonable and necessary supports the person may require. This is cumbersome where only some parts of a plan need to be varied.

To address this, the proposed changes will allow participants to request, and the NDIA to make, quick changes to plans through a plan variation.

The NDIA will be given the power to vary a participant's plan either on the NDIA's own initiative or at the participant's request. In deciding whether to vary a participant's plan, the NDIA will be required to have regard to matters that are set out in the NDIS Rules.

The NDIA has to notify the participant that the plan has been varied. If the NDIA makes a decision to vary a plan upon the request of a participant, the NDIA will be required to vary the plan within the timeframe specified by the Rules.

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What we heard

Overall, submissions were supportive of plan variations, and appreciated the increased flexibility for smaller plan changes to be made without a participant having to undergo a full plan reassessment.

A large number of submissions raised issues with the NDIA's power to vary a participant's plan without the participant's prior consultation or consent. There is concern that the NDIA's power to vary plans as currently drafted has limited constraints. Respondents outlined that this could make participants fearful that their funding could be changed through a variation, without prior consultation.

Respondents also indicated the NDIA already has significant discretionary power, noting that whether or not a participant had requested a variation, the CEO could still undertake a reassessment of that participant's plan.

It was also raised that the definition of a 'variation' needed further clarity, as well as outlining the circumstances that trigger a plan variation.

There is no reason why the NDIA should be able to vary plans without consultation or consent by the participant, except in rare cases of urgency where the participant cannot be consulted within a reasonable time frame. - Deafblind Australia

"The introduction of plan variation and reassessments represent an opportunity to improve a participant's experience through removing the duplicate use of the term 'review' and facilitating plan flexibility. However, the proposed amendments to s 47A and 48 of the NDIS Act require further clarity relating to the powers of the CEO, timing of the effect of decisions and the notification responsibilities of the NDIA to ensure that participants are not disadvantaged" - Australian Human Rights Commission

Plan management changes

The Bill and the proposed Plan Management Rules include two key changes in policy. The aims behind these changes are:

- to protect the participant from risks to their wellbeing because of the provision of supports by an unsatisfactory provider; and
- to protect participants against potential risks involved in engaging unregistered providers through a registered plan manager.

The first change allows the NDIA to say in a participant's plan that a support cannot be provided by a particular provider. The Plan Management Rules set out certain things the NDIA must consider when making this decision.

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The second change requires the NDIA to consider whether the participant's request to self-manage their plan, or have their plan managed by a plan manager, will result in an unreasonable risk to the participant. Under this change, participants requesting to have their plan managed by a registered plan management provider will go through the same risk assessment as those requesting to self-manage their funding. The Plan Management Rules set out certain things the NDIA must consider when the participant requests to self-manage their plan or have their plan funding managed by a nominee, child representative or registered plan manager. If after considering those things, the NDIA believes the risk to the participant is unreasonable, the plan funding must be managed by the Agency.

What we heard

Particular providers not to provide supports

Overall, there was support for measures to protect participants from risks to their wellbeing and poor outcomes because of supports being provided by unsatisfactory providers. This support was strongest in the context of protecting participants from conflicts of interest arising where providers offer multiple types of supports such as support coordination or plan management, and other direct supports such as core, other capacity building supports and capital supports.

However, many submissions felt the Plan Management Rules did not clearly set out when a particular provider would be prevented from providing supports and were concerned these changes would limit a participant's ability to exercise choice and control over who would provide their supports.

"The extent of the CEO's power to prevent particular persons or providers from delivering a support to a participant needs to be clarified so that it is clear how this rule will be implemented in practice." - Office of the Public Advocate (SA)

"Section 8 prevents providers to offer services limits the participant's choice and control. It is not clear when this would be initiated." – Living My Way

This was a particular concern for people who only have access to limited providers, either because of an underdeveloped or thin market, which is particularly an issue in remote communities, or because they have highly specialised and complex needs.

"People with deafblindness require services and supports from those with whom they can communicate, which is often limited particularly for those who are Auslan users." - Deafblind Australia

Some submissions also raised concerns that the NDIA's power to prevent a particular provider from providing supports would be open to interpretation and not applied consistently.

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Risk assessments

Many submissions supported a framework to protect participants from unreasonable risk. However, submissions also demonstrated concern about what the change means, and in particular, whether the amendments would impact a participant's ability, through a plan manager, to choose unregistered providers.

“Changes to the risk assessment criteria for Plan Manager brings it into line with the same risk assessment criteria for Self-Management. This is a welcome change and limits the risk to participants who utilise the Plan Management option.” – Genetic Undiagnosed and Rare Disease Collaborative Australia

“DIA acknowledges and supports the inclusion of safeguards and or risk mitigation strategies in participants' plans to reduce the occurrence of 'unreasonable risk'.” – Disability Intermediaries Australia

Many submissions also raised concerns about what the risk assessment would include operationally and indicated that the Plan Management Rules were not clear about what would be deemed an 'unreasonable risk' and that this was open to interpretation. In particular, concerns were raised about including the possibility of the participant using unregistered providers in the risk assessment. Many submissions were concerned that this inclusion was an attempt to force people to use registered providers and would limit the participant's choice and control over who provided their supports.

“An unregistered NDIS provider could be reason for NDIS to determine there is an “unreasonable risk” and prevent a plan nominee or child representative from self-managing. This limits a person's choice and control, a key principle of the NDIS Act.” – Anonymous (sub 14113)

Some submissions also raised concerns that Partners in the Community and NDIA planners do not have the ability to determine a participant's ability to make decisions or that it is not appropriate for Partners in the Community and NDIA planners to make this decision as they do not know enough about the participant.

“Current NDIA process assumes that LACs and planners are both able and capable to provide support for and determine a participant's ability to undertake decision making. In DIA's view, this is often not fulfilled” – Disability Intermediaries Australia

Eligibility of people with psychosocial disability

Changes in the Bill and National Disability Insurance Scheme (Becoming a Participant) Rules 2021 contain a set of measures that address the eligibility and access criteria for people with a psychosocial condition.

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These were significant amendments built from recommendations 8a and 8b of the Tune Review which found, respectively, that ‘the NDIS Act is amended to remove references to ‘psychiatric conditions’ when determining eligibility and replace this with ‘psychosocial disability’ and ‘that the NDIS Act is amended to provide clearer guidance for the Agency in considering whether a psychosocial impairment is permanent, recognising that some conditions may be episodic or fluctuating’.

The language of ‘psychiatric conditions’ is proposed to be removed from the Act and replaced with ‘psychosocial disability’.

The recognition of episodic and fluctuating psychosocial conditions are proposed to be addressed through changes to the criteria through which a condition is considered permanent for the purposes of NDIS access, and the criteria through which the functional capacity of conditions is assessed.

Changes in the Bill enable independent consideration of psychosocial impairments as meeting the permanency requirements and allow the fluctuating and episodic nature of these impairments to be taken as permanent. The Bill also adds new heads of power that allow the NDIS Rules to specify requirements that must be satisfied for an impairment to be considered permanent and for an impairment to result in substantially reduced capacity.

The proposed changes to the Becoming a Participant Rules make significant changes to how permanency and functional capacity have been applied in the 2016 Rules in relation to psychosocial disability. Section 8 creates a new set of provisions for the permanency of psychosocial conditions, separate from the provisions applicable to the permanency of other types of conditions. Importantly, they broaden the eligibility criteria for permanency to focus on whether the person has been unable to find a substantial improvement to their condition through appropriate treatments, or whether there are no appropriate treatments available to the person to manage the condition. This places attention on the person’s subjective experience of receiving treatment and provides flexibility for the wide variety psychosocial conditions.

Section 10 of the proposed new rules creates a new set of provisions for the substantially reduced functional capacity of psychosocial conditions. This provides a varied set of factors enabling holistic consideration of the overall effect of a psychosocial impairment over a period of time that is reasonable, considering the nature of the impairment. A prospective participant is given a greater opportunity under these proposed rules to explain and demonstrate the broader impact on their functional capacity when going through the process of NDIS access.

What we heard

A significant number of submissions from both individuals and organisations discussed these changes and commented on their impact and most raised concerns as to how they would be applied in practice.

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Overall, the intent of these amendments and the delivery of Tune recommendations 8a and 8b have been positively received and respondents were satisfied that the proposed changes were making substantial amendments to the criteria which were unique to psychosocial disabilities. Some submissions noted, leading on from the points raised in the Tune Review, that there is value in taking a holistic approach when determining the effect of a psychosocial condition on a person as these conditions can effect functional capacity cumulatively.

It was noted repeatedly that the previous criteria lacked clarity in how it should be applied to psychosocial conditions and led to prospective participants being uncertain how they should represent their condition or its effects when applying to the scheme. A small number indicated that they saw these changes as ‘person-centred’ in their approach or ‘more straight-forward’ for participants accessing the scheme.

‘This change better reflects language commonly preferred by people with lived experience of psychosocial disability or caring for someone with psychosocial disability, and supports a focus on functional impact rather than diagnosis.’ – Mental Health Australia

‘EDQ welcomes most of the proposed changes to the NDIS Legislation and believes it is a step in the right direction in making the NDIS more inclusive, particularly for people with psychosocial needs.’ - Eating Disorders QLD

The majority of submissions which addressed the psychosocial amendments were concerned about how the eligibility criteria will be used or interpreted, and made recommendations on improving the amendments.

The most significant issue raised across all submissions was that respondents considered some terms in the new sections of the Becoming a Participant Rules were not adequately defined or gave too much discretion to the NDIA in their future application. Many respondents requested further clarity be provided and that definitions be contained in the NDIS Act rather than the NDIS Rules.

Notably, the definition of ‘appropriate treatment’ was consistently raised as a concern. Some respondents felt that by not clearly defining ‘treatment’ it had impacted the attempt to make psychosocial access more transparent and easier to understand. Further, that it had given participants an inadequate understanding of what they need to evidence in order to become a participant.

Questions were consistently raised as to how the NDIA would interpret this language in practice. Respondents wanted to know whether any forms of treatment would be considered *inappropriate*, and, if standards were set for interpreting these terms, whether they would be applied consistently and fairly. There were also questions as to the extent to which medical advice or evidence would be appreciated when these conditions were considered.

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'The APS proposes more guidance be provided regarding the interpretation of these terms to avoid inconsistent application. Such guidance must also consider the personal decisions and subjective thresholds surrounding treatment and improvement to ensure people with a disability retain choice and control' – Australian Psychological Society

Submissions also raised a list of factors which can complicate reliance on 'treatment' in this context, including: that treatment may be hard to access particularly in rural and remote communities; that people might have accessed treatment inconsistently across their lifetime; that people with psychosocial conditions may avoid receiving treatment out of fear or distrust; and that psychosocial conditions can be undiagnosed and therefore a person may be unaware they require treatment in the first place.

'Appropriate treatment' for instance, should take into account matters like a participant's risk appetite for treatments and personal choices over medical procedures.' – Deafblind Australia

In some instances the financial burden of accessing treatment was raised by respondents and that 'appropriate treatment' might not be accessible for everyone. The amendments to the NDIS Rules have attempted to appreciate this difficulty, particularly at subsections 8(2)(b) and 12(2)(b), where permanency may still be established if it can be shown that appropriate treatment is not reasonably available to the person. These provisions allow the applicant to signify if appropriate treatment is not available due to either financial reasons or for reasons of travel. However it is acknowledged that some respondents felt this was unclear, and some submissions further identified 'reasonably available' as requiring definition.

Similarly, a number of submissions suggested 'substantial improvement', as it appears at subsections at 8(2)(a)(ii) and 12(2)(ii), as requiring definition on the face of the legislation. Some respondents were concerned that improvements can be hard to accurately identify in psychosocial conditions and that the threshold for 'substantial' appeared arbitrary and discretionary.

Some respondents expressed that on the face of the legislation it was unclear what would be considered if the NDIA wanted to know if a 'substantial improvement' had occurred. In this regard 'substantial improvement' must be interpreted as reflecting a person's functional capacity, a concept upon which NDIS eligibility is based.

Section 24 of the Act lists six key activities which the NDIS uses to understand functional capacity: communication, social interaction, learning, mobility, self-care and self-management.

Other terms suggested that could benefit from definition included, 'periods of time', 'managing a condition', 'known treatment' and 'reasonably available'.

A number of respondents suggested the development of guidelines on how these changes will be implemented through a co-design process.

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Across the submissions a number of other suggestions were raised which preferred a less prescriptive model when determining access for psychosocial conditions, such as: completely removing permanency requirements for psychosocial conditions; removing the 'managing a condition' criteria; and ceasing consideration of assistive technology on psychosocial capacity.

Lastly, a suggestion that was proposed through a number of submissions was to apply the fluctuating or episodic concessions to all forms of disability under the NDIS, not just for psychosocial conditions. Submissions often provided examples of conditions such as arthritis and fibromyalgia for which pain and incapacity may come and go.

Direct payment to providers

Under existing arrangements, self-managing participants are required to pay for supports up-front and then seek reimbursement. For many others, plan managers make payments to providers from a participant's funds.

The proposed changes to section 45 in the Bill provide an additional way payments can be made to enable the NDIA to make direct payments to providers on behalf of participants. The proposed amendments would give further flexibility to the NDIA for payment of supports and services and could mean for some self-managing participants, they would no longer be required to pay for supports up-front and then seek reimbursement.

What we heard

While submissions were broadly supportive of measures that would increase flexibility, and were supportive of the increased flexibility direct payments would provide, there was concern that this approach may remove choice and control, as it may limit the providers participants can use. Respondents indicated it was important that participants have the ability to opt-in to the NDIA paying providers directly and it was important to retain the current system and to provide direct payments as an option for self-managing participants, rather than being the only way to pay for supports.

'Regarding direct payments to providers, should ensure that a combination of payment methods can be used under section 45 of the legislation if new technology for payment methods are introduced.' – Genetic Undiagnosed and Rare Disease (GUARD) Collaborative Australia

Some submissions expressed concern if the direct payment platform would only be available to registered providers, meaning participants who choose to use unregistered providers would miss out on using the new easier payment system, with a concern this could perhaps limit participants' choice and control.

A number of respondents were concerned that participants may not have access to technology to allow a tap-and-go type payment system and that it would be important to ensure accessibility for any new system. Respondents were also concerned about how this new technology could be accessed in remote communities.

Reasons for decision

The Tune Review recommended the Participant Service Guarantee should ensure the NDIA remains accountable for the way it engages and works with people with disability. Accordingly, it is being designed around the NDIA being required to meet certain service delivery standards or ‘engagement principles’.

This includes *empowering* participants to request reasons made by the CEO for a reviewable decision (those contained in section 99 of the NDIS Act). Once requested, the CEO must give the person the reasons within the period worked out in accordance with the NDIS Rules prescribed for the purposes of this paragraph or if there are no such rules—as soon as reasonably practicable.

What we heard

The overall sentiment toward the NDIA providing reasons for a reviewable decision was positive; however, there was very strong sentiment that the default position should be that reasons are provided when the participant is notified of the decision and the participant should not have to separately request reasons. This would reverse the proposed onus on participants to request reasons for reviewable decisions, and instead place the onus on the NDIA to provide reasons in every instance rather than the participants having to request reasons.

Respondents were also concerned that requiring participants to request reasons would disadvantage participants who may not have the capacity to request reasons or be unaware of their right to request decisions. Further, respondents considered it was important to ensure reasons for decisions and the ability to request reasons should be in accessible formats.

"We support proposed changes to sections 100(1B) and (1C) of the Act, which allows participants to request reasons for decisions made by the Agency, prior to any internal review application. This is a positive change toward inclusion and transparency as it facilitates understanding of decisions made about them, for individuals at the initial stage – for example, initial decisions about access or participant plans." – Touching Base

The Tune Review states that “people with disability have the right to understand the reasons why a particular decision was made. Failure on the part of the NDIA to provide an explanation of the basis for its decision disempowers participants and impedes their capacity to exercise informed choice and control.” Some respondents suggested requiring participants to request reasons for decisions, rather than the NDIA providing them automatically, is inconsistent with the engagement principles of ‘empowerment’ and ‘transparency’ and the Tune Review.

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"Rather than require participants to make a formal request in order to be informed about the reasons for NIDA decisions, section 100 should be amended so that the NDIA provides the reasons for their decisions to all participants. Many people with a disability and their family and carers experience significant barriers in navigating NDIS processes which are complex and time-consuming. Impairments due to disability, limited literacy and limited energy or time to engage with NDIA processes are common barriers to participation. The onus should therefore be on the NDIA to explain decisions to participants, their family and carers." - Mental Health Carers NSW.

Respondents also criticised the breadth of this amendment. A few submissions suggested that the provision should go further and apply to all decisions relating to a participant's plan, not just reviewable decisions under section 99 of the NDIS Act. Similarly, several submissions recommended the NDIA should be required to provide an explanation of decisions once a review has been made under section 100(6).

The appeals process and jurisdiction of the Administrative Appeals Tribunal

The Bill proposes made amendments to the NDIS Act which implement recommendation 23 of the Tune Review which found that 'the NDIS Act should be amended to clarify the Administrative Appeals Tribunal's (AAT) jurisdiction, including the power for a plan to be amended while a matter is before the AAT'. To do this, the Bill provides that if a matter is before the AAT regarding a statement of participant supports, and before a decision is reached by the AAT the NDIA varies or creates a new plan, then the application to the AAT is taken to include the terms of the variation or new plan. This addresses the narrow jurisdiction afforded to the AAT under section 103 which only allows consideration of a reviewable decision made at the time of lodgement, which has been shown to result in unnecessary appeals and red-tape.

What we heard

The majority of submissions which commented on the improved jurisdiction of the AAT supported these changes. Many respondents noted the benefit this will deliver to participants who are already subject to considerable red-tape and adversarial legal processes.

'(This will) ensure additional reasonable and necessary supports can be provided during the appeals process' - Speak Out Association of Tasmania

Some submissions expressed reservations about the changes and indicated that more information was required on how it would operate in practice. A small number of respondents specifically stated they would like to know in what circumstances the NDIA would make a change to the supports in a participants plan while the matter is before the AAT.

REPORT ON PUBLIC SUBMISSIONS

Consultation on proposed changes to the National Disability Insurance Scheme

A large number of submissions welcomed the expansion of AAT jurisdiction under the Bill but went on to raise an adjacent concern surrounding the consideration of additional supports when a case is brought before the Tribunal. This issue has arisen following a number of recent AAT decisions, primarily the case of QDKH and National Disability Insurance Agency [2021] AATA 922. The concern raised in these cases and by respondents is that it is unclear if the AAT holds jurisdiction to review additional supports which a participant may have raised with the NDIA after submitting an AAT review, but which have not yet been through an internal merits review process.

Many respondents correctly identified the technical difference between the improvement being made at subsection 103(2) which requires the Agency to have first approved changes to the plan, and this circumstance where the new supports have not yet been considered by the Agency. Some respondents expressed that these technicalities are difficult for participants to understand, and frustrating to manage alongside lengthy review processes.

A number of submissions raised the suggestion that all supports considered by participants throughout planning or review process should be allowed for assessment by the AAT.

'This will provide greater flexibility to participants, ensure their timely access to justice and provision of supports as their circumstances may change or new supports become available to them' - Spinal Cord Injuries Australia

Lived experience of disability

The disability sector has consistently highlighted the importance of having more individuals with lived experience of disability on the NDIA Board.

The closest the existing NDIS Act has to ensuring representation of people with disability is the criterion "the provision or use of disability services". This was indicated as something that needed change in the 2015 Review of the Act – recommendation 26.

Having lived experience of disability is proposed to be added to the list of criteria the Minister must take into consideration when deciding on Board appointments.

What we heard

Although the purpose of the amendment was well-received and supported; respondents indicated that the term 'lived experience with disability' could capture a broad range of people including family members and carers of people with disability and that the term should be narrowed to refer to people with disability.

REPORT ON PUBLIC SUBMISSIONS

Consultation on proposed changes to the National Disability Insurance Scheme

“The NMHCCF is concerned that there will continue to be a lack of ‘lived experience of disability;’ of NDIA Board members. While a criterion will now be included in Board selection regarding lived experience of disability, this ignores the fact the people with a disability are not a homogenous group and their needs are not represented by one or two people. Further, the lived experience of families/carers is also required to ensure that the Board has a truly representative view of the experience of participants and their families/carers”. - National Mental Health Consumer and Carer Forum (NMHCCF)

Use of the term ‘reassessment’

The word ‘review’ has multiple meanings in the Act. This has created confusion for participants, their families and carers, as well as Agency delegates as to what kind of review is being sought at any point in time.

Currently, participants can seek two types of review under the Act: a review of their plan (in accordance with section 48) and an internal review of a reviewable decision (in accordance with section 100). A third type of review is created when the participant appeals an internal review decision to the Administrative Appeals Tribunal (AAT).

The proposed amendments in the Bill will clarify the use of the word review consistent with the recommendation in the Tune Review. The proposed amendment would see ‘plan review’ changed to ‘plan reassessment.’

What we heard

The distinction between types of review was well received, however, there were concerns raised during both the public forums and received through written submissions, that the use of the term reassessment may be linked with the previously proposed changes to implement independent assessments, which are not proceeding.

We propose that the term “review” be substituted for the term “revision”. The term revision refers to reconsidering or amending something, in light of further evidence or to reflect a changed situation. We feel this conveys the same intention for the process of a plan review. - Anonymous

Legislative framework is too complex

Although this issue does not relate to specific amendments contained in the Bill, many of the submissions indicated that the legislative framework is overly complex. Respondents indicated that there is an unclear split about what is contained in the NDIS Act and the NDIS Rules.

There was also concern about the over-reliance on NDIS Rules, and particularly Category D Rules which only require consultation with the states and territories, and not agreement. Many submissions indicated that more content should be placed in the NDIS Act and not contained in the Rules.

Fraudulent behaviour by providers

The Bill does not include amendments to strengthen the NDIA's powers to monitor and investigate fraudulent and unscrupulous behaviour by providers and penalise offenders. While fraud and unscrupulous practices of some providers is of great concern and was raised during the consultation period, this remains under active consideration. As there has not been any significant engagement with the disability sector on whether amendments to the NDIS Act are required to address fraud, and funding misuse, the Government is taking more time to consider the issue in depth. There will be further consultation and opportunities for involvement of the disability sector on this issue in the future.

Four week consultation period is too short

Public consultation was undertaken over a four-week period as the proposed changes to the NDIS Act build on recommendations from the Tune Review. The Tune Review was underpinned by an extensive consultation process in 2019.

What we heard

A strong theme emerged during consultation and in public submissions, that the public consultation being undertaken over a four week period was not sufficient and did not allow adequate time for considered responses.

Submissions indicated the timeframe was insufficient as there was a significant amount of complex material to consider. Disability representative organisations indicated the timeframes were insufficient to allow them to consult with the people they represent.

WHAT WE ARE DOING

As a result of the feedback received from the public consultation process, a number of changes were made to the Bill, as follows:

- change to the commencement provisions so that provisions relating to the Participant Service Guarantee commence seven days after Royal Assent and the remainder of the Bill commences three months after Royal Assent or 1 April 2022 (whichever is later) to give the NDIA time to implement new procedures;
- variation and re-assessment of plans changes;
 - the Bill ensures a participant is involved in a variation, so it cannot happen without their knowledge;
 - in response to concern that participants were being punished if the NDIA did not meet the variation timeframe because this meant a complete plan reassessment, the Bill now includes that if the variation is not made in time, it lapses;
 - responding to concerns that there are no limits on what the NDIA might do through a variation, the provision in the Bill was amended and Plan Administration Rules will be redrafted to more closely align with the Tune Review recommendations and prescribe limits for variations;
- the Bill re-includes 21 days for the CEO to commence facilitating the preparation of the participant's plan under section 32 after the person becomes a participant;
- the Bill now requires the NDIA to provide reasons for reviewable decisions automatically, rather than a participant having to request this;
- the Bill removes remaining references to participants 'to the extent of their capacity' and 'to the extent of their ability' consistent with amendments to General Principles in section 4;
- changes to plan management arrangements under section 43 and 44;
 - the Bill clarifies for self-managing participants that even where an unreasonable risk is discovered, participants are not prohibited from self-managing a proportion of their plan where there is less risk;
 - the Government also proposes to refine the Plan Management Rules to better define the risks that will be assessed;
- removing amendments to subsection 46(1) on acquittals;
- removing amendments to section 55 of the Act which would have enabled the CEO to obtain information from other persons in relation to matters prescribed in subsection 55(2) of the Act; and
- including additional criteria for Board appointments, that the Board collectively must possess, by adding a person with disability or a person that has lived experience with disability.

NEXT STEPS

The Government will introduce the Bill into Parliament on 28 October 2021. The Bill has been referred to a Committee Inquiry process with the aim to have the Bill pass Parliament by the end of 2021.