



National Disability Insurance Scheme Amendment
(Participant Service Guarantee and Other Measures) Bill 2021

Submission by the Physical Disability Council of NSW (PDCN)

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Who is the Physical Disability Council of NSW?

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW.

Our core function is to influence and advocate for the achievement of systemic change to ensure the rights of all people with a physical disability are improved and upheld.

The objectives of PDCN are:

- To educate, inform and assist people with physical disabilities in NSW about the range of services, structure, and programs available that enable their full participation, equality of opportunity and equality of citizenship.
- To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (i.e. self-advocate).
- To educate and inform stakeholders (i.e.: about the needs of people with a physical disability) so that they can achieve and maintain full participation, equality of opportunity and equality of citizenship.

Recommendations

Recommendation 1:

The NDIA, in the interest of genuine community engagement, allow all reasonable requests for extensions to submit to this public consultation.

Recommendation 2:

That the scope of matters to be considered by the CEO or their delegate when deciding whether to vary or reassess a plan be limited, and greater instruction provided regarding the appropriate option across different circumstances.

Recommendation 3:

That the range of matters prescribed in Rule 10 of the Plan Administration Rules be relocated into the Act itself.

Recommendation 4:

That s. 47A(3)(c) be removed.

Recommendation 5:

That participants be granted the right to request a reassessment of a plan under s.48.

Recommendation 6:

Include provisions in ss. 47A and 48 that a participant must be notified of a decision, on the CEO's own initiative, to vary or reassess a plan. We would suggest that as much notice as possible be provided.

Recommendation 7:

A decision to reassess a participants plan by the CEO under their own initiative under s. 48 should be expressly provided in the list of reviewable decisions (s. 99).

Recommendation 8:

That the CEO be obligated to provide reasons for decision making for all reviewable decisions, regardless of whether a request for reasons has been sought by the person affected by the decision or not.

Recommendation 9:

There should be an express requirement for reasons to be provided when there is a review of a reviewable decision under s. 100(6).

Recommendation 10:

That the range of factors to be considered when the CEO exercises powers under s. 47(A)(6) and s. 48(2) are both clearly prescribed and limited in the body of the Act.

Recommendation 11:

That rules made for the purposes of ss. 47(A)(6) and 48(2) be classed as Category A rules, requiring the agreement of each host jurisdiction.

Recommendation 12:

That the flexibility relating to episodic or fluctuating impairments for psychosocial disabilities be extended to include episodic or fluctuating impairments relating to physical disability and/or chronic illness/disease.

Recommendation 13:

That the NDIA commits to codesign and consultation with the disability community in determining the mechanisms for establishing whether an individual has experienced ‘substantial improvement’ in functional capacity, and whether a person has an impairment that is ‘permanent or likely to be permanent’.

Recommendation 14:

That prescription on the sorts of factors to be considered when defining ‘appropriate treatment’ ‘reasonably available’ and ‘substantial improvement’ are developed in consultation with the disability and health communities and are then articulated in the Becoming a Participant Rules.

Recommendation 15:

That prescription on the sorts of factors to be considered when defining whether a person has experienced ‘substantial improvement’ in functional capacity and who is suitably qualified to provide evidence towards making such an assessment are provided in the Becoming a Participant Rules.

Recommendation 16:

That the NDIA provide clarity in terms of the sorts of specific requirements an individual may be required to demonstrate to show that their condition is permanent or likely to be permanent in the Becoming a Participant Rules.

Recommendation 17:

That the NDIA provide clarification in terms of ‘unreasonable risk’ as provided under ss. 44(1), (2) and (2A).

Introduction

As the peak body for people with physical disability across NSW, PDCN considers it to be imperative to comment on the proposed changes to the NDIS Act.

Plans by the Federal Government to introduce Independent Assessments, along with changes to reasonable and necessary supports and debt powers have substantially undermined sector and community confidence in the Ministry, the NDIA and the NDIS.

Whilst these plans have been ‘shelved’ and do not appear in the proposed changes to the NDIS Act, there has been a substantial erosion of community trust – it is critical that the NDIA actively works to regain this trust through genuine consultation, transparency, and co-design with people with disability.

On that note, PDCN seeks to point out that the disability community has been given 4 weeks to review and assess some 16 legislative changes. This is an exceptionally tight timeframe, particularly in view of the ongoing need to commit sector advocacy efforts towards mitigating the impacts of the Covid19 pandemic on the disability community.

We are concerned that the limited consultation timeframe will substantially reduce the capacity for the disability sector to review, analyse and assess the proposed changes.

Therefore, our first recommendation would be that the NDIA, in the interest of genuine community engagement, allow all reasonable requests for extensions to submit to this public consultation.

Recommendation 1:

The NDIA, in the interest of genuine community engagement, allow all reasonable requests for extensions to submit to this public consultation.

Overall, we anticipate that most proposed amendments will enhance the effective operation of the NDIS and improve participant experiences, providing appropriate checks and balances are applied.

The inclusion of timeframes around decision-making and efforts to streamline administrative processes are welcomed by our membership, as is an acknowledgement that people with disability should be involved in a codesign capacity.

We support changes which provide the NDIS with enhanced scope to monitor the disability support market and appreciate efforts to improve on the language used across the legislation and welcome oversight by the Commonwealth Ombudsman to review the NDIA’s performance against the Participant Service Guarantee and participant experiences.

We also welcome changes that allow the Administrative Appeals Tribunal to review plans which have been varied or replaced by new plans over the course of an appeal.

We are concerned, however, that the CEO or their delegate will have broad discretion on decision making. There is insufficient prescription on the scope of the CEO or their delegate around powers to vary, reassess or review participants’ plans – both in terms of when it is appropriate to apply each of these options and whether the decision of the CEO to take these actions is in and of itself reviewable.

We are also mindful that the bulk of changes have been reflected in delegated legislation – which limits the capacity for parliamentary debate and oversight. We consider that several the changes, particularly those relating to becoming a participant and variations to plans, as significant areas of policy, would be more appropriately placed within the Act itself.

For the purposes of reviewing the proposed changes, PDCN will consider the following key themes:

- Changes to plan variations and reasons for decisions
- Expansion of CEO's powers to vary or reassess plans
- Changes to the Becoming a Participant Rules
- Changes to plan management and payment of supports

Changes to plan variations and reasons for decisions

We are generally satisfied with the changes which now allow for plans to be varied without triggering a complete reassessment. This will greatly enhance the capacity for participants to modify their plans to suit changes in supports and services needed.

We also see great benefit in the new provisions allowing for variations which occur to a plan whilst the plan is under review to be considered under the scope of the review, as opposed to a participant having to request a new review. This provides much greater capacity for participants to make necessary adjustments to their plans, which in turn facilitates greater choice and control.

We are concerned about the scope of decision-making vested in the CEO or their delegate to initiate a plan variation or reassessment. There are several improvements that should be made to better align these provisions with natural justice principles.

Powers of the CEO to vary, or reassess plans – ss. 47A and 48

Sections 47A and 48 need refinement. Our comments regarding these sections are as follows:

Concerns regarding the scope powers given to the CEO to vary or reassess a plan on their own initiative

The powers of the CEO to review, vary or reassess a participant's plan are very significant. It is important that there are strong statutory safeguards around the types of matters a CEO might consider when determining whether to exercise these powers.

We are particularly concerned that the current list of non-exhaustive matters to be considered when deciding to vary or reassess a plan under Rule 10 of the Plan Administration Rules, could potentially allow the CEO, or their delegate, to vary funding amounts under a plan without the participant's consultation or consent.

The scope of matters for consideration under Rule 10, should be limited and greater guidance provided on when it might be appropriate to decide to take either action. We also consider that it is more appropriate for the scope of matters to sit within the Act itself, not within delegated legislation.

Recommendation 2:

That the scope of matters to be considered by the CEO or their delegate when deciding whether to vary or reassess a plan be limited, and greater instruction provided regarding the appropriate option across different circumstances.

Recommendation 3:

That the range of matters prescribed in Rule 10 of the Plan Administration Rules be relocated into the Act itself.

The CEO should not be able to reassess a plan under s. 47A(3)(c)

We do not support the introduction of s. 47A(3)(c). We are uncomfortable that a request for minor variation to a plan could trigger a reassessment without the request or consent of the participant. This may act as a deterrent for participants to exercise choice and control through plan variations.

If a participant requests a variation of a plan the CEO should be limited to either deciding that a variation should be made as per the participant's request, (see s. 47A(3)(a)), or that a variation should not be made (s. 47A(3)(b).)

Recommendation 4:

That s. 47A(3)(c) be removed.

Participants should be able to seek a reassessment under s. 48

The current draft bill provides that the CEO can conduct a reassessment of a participant's plan on their own initiative under s. 48. There is no complimentary right for a participant to request a plan reassessment.

It is important that participants are provided with the opportunity to request a reassessment of their plan, and we can contemplate several instances where this might be appropriate, for example, if they the participant experiences a significant variation in functional capacity or a major change in living circumstances.

It would make sense for s. 48 to provide an option for the participant to request a plan reassessment in line with the right for the participant to request a plan variation as seen in s. 47(A)(2), with the added advantage that plan variation and reassessment would remain distinct concepts.

Recommendation 5:

That participants be granted the right to request a reassessment of a plan under s. 48.

Participants need to be notified of decisions to vary or reassess their plans.

Currently it would be possible for the CEO to decide either to vary or reassess a plan, and for the participant to be unaware until 7 days after the variation has taken effect or a new plan is about to be prepared.

It is vitally important that participants are notified of an intention to vary or reassess their plan and given a reasonable timeframe in which to adjust to the variation or reassessment.

Firstly, it is necessary that a participant is aware of the intention to vary or reassess a plan so that they can seek a review of the decision if they believe that the decision is incorrect.

Secondly, notification of the intention to change aspects of a participant's plan is necessary for the participant to adjust to the changes - if supports are being withdrawn, for instance, the participant may be contractually obligated to provide notice to service providers or may need to make alternative arrangements for the support or funding.

Recommendation 6:

Include provisions in ss. 47A and 48 that a participant must be notified of a decision, on the CEO's own initiative, to vary or reassess a plan. We would suggest that as much notice as possible be provided.

All decisions made by the CEO should be clearly appealable

On our original reading of the draft Bill, it was not immediately clear that a decision by a CEO to reassess a plan by their own initiative under s. 48 was appealable – it is only when reading that any decisions made under s. 48 must subsequently result in variations under s. 47(A) or a new plan under s. 33(2) - which are expressly provided in s.99 as appealable decisions – that we could see that a decision under s. 48 was potentially reviewable.

An issue still arises as to whether the decision to reassess a participant's plan at any time (s. 48) is **itself** reviewable as opposed to only **the resulting variation of the plan or the development of a new plan**.

We can see that it may be possible that the **original decision to reassess a plan** is covered - at least where a variation occurs – through the inclusion of the new note at the end of s. 103 – see s. 103 (2)(d) which states:

(d) if subparagraph (c)(i) applies – the application is also taken to be an application for review of the decision to make the variation covered by that subparagraph.

But it is still not clear if a decision is made to make a new plan under s. 33(2):

(e) If subparagraph (c)(ii) applies – the application is also taken to be an application for review of the decision to approve the statement of participant supports in the new plan.

All decisions by the CEO to vary or reassess a plan should be appealable.

We would recommend that a decision by the CEO under their own initiative, to reassess a participant's plan under s. 48, should be expressly provided in the list of reviewable decisions in s. 99.

Recommendation 7:

A decision to reassess a participants plan by the CEO under their own initiative under s. 48 should be expressly provided in the list of reviewable decisions (s. 99)

Reasons should be provided for any reviewable decisions as standard

Section 100 (1B) should be amended to provide that a participant is given the reasons for any reviewable decision irrespective of whether the participant expressly requests reasons or not.

In addition, there should be an express requirement for reasons to be provided once a review of a reviewable decision has been made under s. 100(6) – again, this should be given as a matter of practice, rather than by request.

Providing reasons for all reviewable decisions is in line with the Tune report recommendations 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.'

Recommendation 8:

That the CEO be obligated to provide reasons for decision making for all reviewable decisions, regardless of whether a request for reasons has been sought by the person affected by the decision or not.

Recommendation 9:

There should be an express requirement for reasons to be provided when there is a review of a reviewable decision under s. 100(6).

Concerns regarding the scope of the Minister's powers

We note that Rules made for the purposes of s. 47A (6):

(6) The National Disability Insurance Scheme Rules may set out matters to which the CEO must have regard:

(a) in deciding whether to vary a participant's plan on the CEO's own initiative;
or

(b) in making a decision under paragraph (3)(a), (b) or (c)

And s. 48 (2):

(2) the National Disability Insurance Scheme Rules may set out the matters to which the CEO must have regard in deciding whether to conduct a reassessment of a participants' plan

have been identified as Category D rules. This means that while the Commonwealth is obligated to consult with the States and Territories, there is no need for the Minister to gain each state or territory's consent, or even to gain majority consent. Likewise, there is no definition of consultation.

We are very concerned that the States and Territories will have no capacity to have direct input into rules made in relation to the power of the CEO to vary or reassess a participant's plan, especially in instances where the CEO acts on their own initiative. This is particularly worrisome given the fact that the list of factors to be considered by the CEO under Rule 10 of the Plan Management Rules is non-exhaustive **and** that the Rules could be theoretically amended within 30 days without parliamentary debate.

There would be greater participant confidence if rules made under ss. 47(A)(6) and 48(2) were included under Category A, which would require the agreement of each host jurisdiction. If not, at the

very least, it is vitally important that the scope of the powers anticipated under s. 47(A)(6) and s. 48(2) are clearly prescribed in the Act and are limited in scope.

Recommendation 10:

That the range of factors to be considered when the CEO exercises powers under s. 47(A)(6) and s. 48(2) are both clearly prescribed and limited in the body of the Act.

Recommendation 11:

That rules made for the purposes of ss. 47(A)(6) and 48(2) be classed as Category A rules, requiring the agreement of each host jurisdiction.

Changes to the Becoming a Participant Rules

We support changes to the Becoming a Participant Rules which enhance the capacity for people with psychosocial disabilities who experience impairments that are episodic or fluctuating to access the Scheme. We also support the inclusion of s. 31(c)(ca) which recognises the importance of the relationship between participants, their families, and carers.

Expand the flexibility for episodic or fluctuating impairments to persons with physical disability and or chronic illnesses/diseases.

The flexibility being introduced for psychosocial disabilities should be expanded to people with physical disabilities and those with chronic illnesses/ diseases where impairments can similarly be episodic and/or fluctuating, for example, persons with arthritis.

Recommendation 12:

That the flexibility relating to episodic or fluctuating impairments for psychosocial disabilities be extended to include episodic or fluctuating impairments relating to physical disability and/or chronic illness/disease.

Provide more clarity on key terms

Rule 8 of the Becoming a Participant Rules states that, to access the NDIS, a person must be undergoing or have undergone ‘appropriate treatment’ for the purposes of ‘managing’ their condition, and that the treatment has not led to a ‘substantial improvement’ in their functional capacity after a reasonable period of time or that no ‘appropriate treatment’ is ‘reasonably available’ to the person.

It is important that prescription is provided around what will be covered under ‘appropriate treatment’ and that ‘managing’, ‘substantial improvement’ and ‘reasonably available’ should be defined.

It is particularly important when defining ‘appropriate treatment’ to allow people with disability to choose how best to manage their own condition from as broad a range of evidence-based treatment options as possible. People with disability should have the right to personal choice around what treatments work for them.

Likewise, when determining whether a treatment is ‘reasonably available’, the CEO or their delegate should consider a range of factors including where a person lives, the effort involved in accessing treatment, the capacity of the individual to afford the treatment etc.

People seeking to access the NDIS also need to understand what is meant by ‘*substantial improvement*’ and how long they would be expected to have sought appropriate treatment before they would be eligible for the NDIS.

While we appreciate that there will always be an element of subjectivity in determining whether a treatment has ‘substantially improved’ an individual’s functional capacity, we would expect that the NDIA would commit to co-design with the disability community in establishing the class of persons who would be qualified to make such an assessment and the range of tools they might use to do so.

Applicants also need to understand what sorts of specific requirements might be required to satisfy the NDIA that an impairment is permanent or likely to be permanent, e.g., whether it is sufficient to provide documentation from their treating health professional, whether the NDIA might require an independent health professional to assess them, whether they may need to undergo an assessment – again, we would expect to see a genuine commitment to broad consultation and co-design in relation to determining who would be the most appropriate person/or persons to make such a judgement and what evidence they would use to support their view.

Recommendation 13:

That the NDIA commits to codesign and consultation with the disability community in determining the mechanisms for establishing whether an individual has experienced ‘substantial improvement’ in functional capacity, and whether a person has an impairment that is ‘permanent or likely to be permanent’.

Recommendation 14:

That prescription on the sorts of factors to be considered when defining ‘appropriate treatment’ ‘reasonably available’ and ‘substantial improvement’ are developed in consultation with the disability and health communities and are then articulated in the Becoming a Participant Rules.

Recommendation 15:

That prescription on the sorts of factors to be considered when defining whether a person has experienced ‘substantial improvement’ in functional capacity and who is suitably qualified to provide evidence towards making such an assessment are provided in the Becoming a Participant Rules.

Recommendation 16:

That the NDIA provide clarity in terms of the sorts of specific requirements an individual may be required to demonstrate to show that their condition is permanent or likely to be permanent in the Becoming a Participant Rules.

Changes to plan management and payment of supports

We appreciate that the NDIA is accountable to ensure that participants who seek to self-manage or appoint nominees to manage their plans are fit to do so. Checks and balances are important to ensure that vulnerable participants receive the maximum benefit from their plans and that they are not subject to financial abuse or exploitation.

The balance to this is that participants should be able to exercise choice and control in the supports and services they utilise and the capacity to self-manage or appoint a nominee is a fundamental aspect to this. It is important that transparency is provided on what the NDIA would consider to be ‘unreasonable risk’ to a participant.

Recommendation 17:

That the NDIA provide clarification in terms of ‘unreasonable risk’ as provided under s. 44(1), (2) and (2A).

Changes to payment methods

We understand that the NDIA is planning to make changes to the payment system to make it easier for self-managing participants to claim via a ‘tap and go’ type system. We are broadly in support of this, but would make the following comments for the NDIA’s consideration:

- Not all NDIS participants will be able to use/or be familiar with smart technology. Whatever method is used must be accessible.
- The NDIA should consult with people with disability to determine whether there is appetite for this change
- If there is a transition to a new payment scheme, user testing will be critical
- There should always be an option for participants to pay for services through non-electronic means and seek reimbursement – this is critical in ensuring that participants are not left without supports in the case that systems ‘go down’.
- Any movement towards a different payment system should not impact on the choice and control of participants to use the suppliers that work best for them.

Final comments

As we have stated, PDCN feel that our capacity to review, analyse and comment on the proposed changes to the NDIA Act have been limited by the strict time restraints around the period for consultation. Whilst we welcome changes to enhance the effectiveness of the scheme and improve participant experiences, we need safeguards that increased powers will be constrained to an explicit purpose and not utilised to fulfil an alternative agenda in the future.

We also note that some of the changes such as the amendments to the Becoming a Participant Rules will require the development of frameworks for establishing whether an individual has experienced ‘substantial improvement’ in functional capacity, whether a person has an impairment that is ‘permanent or likely to be permanent’ as well as what constitutes ‘appropriate treatment’ that is ‘reasonably available’.

Linking back to proposed s. 4(9A) – *people with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity* – PDCN see an opportunity here for the NDIA to begin the process of restoring public confidence by working in co-design with the disability community to clarify these terms and develop an appropriate framework to determine NDIS eligibility moving forwards.