



Australian
Human Rights
Commission

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

Submission to the Department of Social Services

7 October 2021

ABN 47 996 232 602
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

1	Introduction	3
2	Summary	4
3	Recommendations.....	5
4	Amendments to the NDIS Act 2013 (Cth).....	8
4.1	<i>Background</i>	8
5	National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021	9
5.1	<i>Participant Service Guarantee – Schedule 1</i>	10
5.2	<i>Flexibility Measures – Schedule 2</i>	11
5.3	<i>Full Scheme Amendments – Schedule 3</i>	14
6	Amendments to Rules made under the NDIS Act.....	15
6.1	<i>National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021.....</i>	15
6.2	<i>National Disability Insurance Scheme (Plan Administration) Rules 2021</i>	16
6.3	<i>National Disability Insurance Scheme (Plan Management) Rules 2021 ...</i>	19
6.4	<i>National Disability Insurance Scheme (Becoming a Participant) Rules 2021</i>	19
6.5	<i>National Disability Insurance Scheme (Nominees) Rules 2021</i>	22
7	Conclusion	23

1 Introduction

1. The National Disability Insurance Scheme (NDIS) is an iconic social policy in Australia, which has been referred to approvingly by the Committee on the Rights of Persons with Disabilities.¹ However, it also supports individuals who may live in some of the most challenging circumstances in Australia. Any changes to the National Disability Insurance Scheme Act 2013 (NDIS Act) and National Disability Insurance Scheme Rules (NDIS Rules) therefore need to be carefully considered. Unintended consequences for individuals and their families can be devastating, with the potential effects including long-term physical, financial, social, economic and psychological harm.
2. The Australian Human Rights Commission (Commission) makes this submission to the Department of Social Services (DSS) in relation to the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (NDIS Bill) and accompanying new and amended NDIS Rules released by the Australian Government for comment.² It is intended that this submission is read concurrently with the proposed NDIS Bill and amended NDIS Rules and accompanying explanatory materials.³
3. The Commission is Australia's National Human Rights Institution. The Disability Discrimination Commissioner at the Commission,⁴ Dr Ben Gauntlett, also sits as the Expert Adviser to the Independent Advisory Council of the National Disability Insurance Agency (NDIA) and has done so since on or about June 2019.⁵
4. In providing feedback, the Commission acknowledges the difficulty faced by DSS and the NDIA in delivering a unique person-centred disability support scheme across Australia during the COVID-19 pandemic. Many of the proposed minor changes will assist in improving the participant experience and the improved drafting of both the NDIS Act and NDIS Rules will make it easier for participants to understand the operation of the NDIS.
5. However, any reforms to the NDIS must be balanced with the need to allow people with disability to have sufficient time to consider and comment upon substantive amendments to the NDIS Act and NDIS Rules. Flexibility in decision-making powers needs to be balanced with safeguards to prevent unintended negative consequences for participants. Clear notice requirements, procedural fairness, monitoring of the use of powers by the NDIS CEO that may undermine the principles governing the NDIS and review and appeal rights are critically important.

6. The Commission has provided comment on key amendments to the NDIS Act and NDIS Rules within the limited timeframe available, noting that it was not possible to determine the potential consequences of all proposed changes through consultation with people with disability or individuals or organisations who work with people with disability. The Commission recommends that further consultation be undertaken with people with disability and the disability community to ensure that the implementation of the changes to the NDIS Act and NDIS Rules will not result in negative outcomes for present or future NDIS participants.

2 Summary

7. 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.
8. The Commission's main concerns with the NDIS Bill and amended NDIS Rules can be summarised into the following five categories:
9. First, the four-week timeframe for consultation is insufficient to ensure the meaningful engagement of people with disability, particularly given the reliance upon legislative instruments to effect change rather than changes to the NDIS Act. The changes to the NDIS Act and NDIS Rules are extensive and complicated and may be especially challenging for individuals with a cognitive or intellectual disability to understand.
10. Secondly, 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.
11. Thirdly, the reporting obligations concerning the Commonwealth Ombudsman, NDIA Board and Disability Ministers should be expanded to ensure transparency in both decision-making and the use of the CEO powers under the NDIS Act. Additionally, the Commonwealth Ombudsman should

also be funded appropriately to meet the obligations under s 204(A) of the NDIS Bill and any additional reporting or consultation obligations.

12. Fourthly, s 6 of the NDIS (Participant Service Guarantee) Rules 2021 requires that participants comply with strict engagement principles and service standards. However, these requirements may be difficult or prohibitive for some participants who experience social disadvantage or have complex support needs which make engagement with the NDIA challenging.
13. Fifthly, the proposed eligibility criteria within the NDIS (Becoming a Participant) Rules 2021 require further clarification on how decisions will be made about eligibility for the NDIS. Some legal tests are dependent on participants or prospective participants having a sophisticated understanding of treatment options pertaining to their underlying condition.
14. The Commission recommends:
 - (a) the specific recommendations detailed in this submission be adopted in any revised NDIS Bill and NDIS Rules released for consultation and consideration
 - (b) the consultation and consideration time period be extended by a minimum of eight weeks
15. Should the time period for consultation and consideration not be able to be extended by eight weeks, the Commission recommends the Full Scheme Amendments contained in Schedule 3 of the NDIS Bill be passed but other amendments be paused for more detailed consideration. Many of the amendments in Schedule 1 and 2 of the NDIS Bill are dependent on the terms of the accompanying NDIS Rules. Therefore, it may be that both the remaining aspects of the NDIS Bill and proposed NDIS Rules have to be considered together.

3 Recommendations

16. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the consultation period for the NDIS Bill be extended by a minimum of eight weeks to allow the disability community to provide meaningful feedback on the proposed NDIS reforms, in particular in relation to any unintended consequences for people with disability and their families.

Recommendation 2

The Commission recommends that s 47A and s 48 of the amended NDIS Act should: (a) define a variation and reassessment under the NDIS Act; (b) provide clear limitations on CEO-initiated variations and reassessments; (c) require there to be increased reporting on the use and nature of CEO-initiated variations and reassessments.

Recommendation 3

The Commission recommends that s 204A of the NDIS Act be amended to require: (a) the Commonwealth Ombudsman to consult with people with disability; (b) the use of certain powers by the NDIA or NDIA CEO be reported periodically to the Commonwealth Ombudsman; (c) the Commonwealth Ombudsman be required to make an accessible version of its report to Parliament publicly available.

Recommendation 4

The Commission recommends that s 4(9A) of the NDIS Act be amended to clarify the circumstances where co-design will be used and the principles that will guide the co-design with people with disability.

Recommendation 5

The Commission recommends that s 9(A) of the NDIS Act should require: (a) that forms approved by the NDIA CEO for use by participants are accessible; (b) that the NDIA adopt a 'no wrong door' approach for participants.

Recommendation 6

The Commission recommends that the amendments to the NDIS Act or NDIS Rules include a comprehensive reporting framework concerning the distribution of funds to persons or entities for specific purposes under s 14 of the NDIS Act.

Recommendation 7

The Commission recommends that, to the fullest extent possible, the required amendments to the NDIS Act and NDIS Rules be undertaken through substantive amendments to the NDIS Act, rather than the NDIS Rules.

Recommendation 8

The Commission recommends that the reference to 'lived experience of disability' in s 127(2) of the NDIS Act be clarified in a manner consistent with the Convention on the Rights of Persons with Disabilities (CRPD) or that the term 'person with disability' be explicitly used.

Recommendation 9

The Commission recommends the term 'financial sustainability' be defined in s 4(17) of the NDIS Act in a manner consistent with its role as a social insurance scheme.

Recommendation 10

The Commission recommends that the engagement principles for participants or prospective participants in s 6 of the National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021 include a requirement of reasonableness and materiality.

Recommendation 11

The Commission recommends the reporting to the Ministerial Council under s 174(1) of the NDIS Act should include detailed analysis of CEO-initiated variations and reassessments under ss 47A and 48 of the NDIS Act, internal reviews of those decisions and the progression and nature of cases before the Administrative Appeals Tribunal (AAT).

Recommendation 12

The Commission recommends the National Disability Insurance Scheme (Plan Administration) Rules 2021 be amended to make clear provision for respecting a participant's choice as to how they would prefer to pay their service providers in the absence of a compelling reason not to do so.

Recommendation 13

The Commission recommends that: (a) clear definitions of plan variation and reassessment be adopted in s 47 and s 48 of the NDIS Act and National Disability Insurance Scheme (Plan Administration Rules) 2021 and greater certainty be given to participants in seeking a plan variation or reassessment (including notice requirements of any decision and obligations to provide reasons for a decision); (b) the National Disability Insurance Scheme (Plan Administration) Rules 2021 include whether there has been alleged fraud, natural disaster, public health issue or assistive technology failure, as factors to be considered by the CEO in deciding whether to grant a plan variation or reassessment.

Recommendation 14

The Commission recommends that a detailed reporting framework be established to monitor the NDIA's intervention in the market or regulation of participant's ability to exercise choice and control under the National Disability Insurance Scheme (Plan Management) Rules 2021.

Recommendation 15

The Commission recommends the National Disability Insurance Scheme (Becoming a Participant) Rules 2021 be re-drafted to: (a) expressly take into consideration cultural or racial, socio-economic, gender, geographic or other type of disadvantage in applying tests for whether a person is eligible to become an NDIS participant; (b) provide clarification on the definition and application of tools referred to in the Rules.

Recommendation 16

The Commission recommends any assessment tool prescribed by the CEO under s 209(2A) of the NDIS Act must be fair, accurate, consistent, equitable and transparent in its operation.

Recommendation 17

The Commission recommends the use of examples in the definition of 'conflict of interest' in s 7 of the National Disability Insurance Scheme (Nominees) Rules 2021 be expanded and that conflicts of interest should be declared in writing.

Recommendation 18

The Commission recommends that if the CEO or their delegate utilises their power under the National Disability Insurance Scheme (Nominee) Rules 2021 to cancel or suspend a nominee appointment, they are obligated to assess if a referral to the NDIS Quality and Safeguards Commission is required to ensure the safety of a participant.

4 Amendments to the NDIS Act 2013 (Cth)

4.1 Background

17. On 9 September 2021, the Minister for the National Disability Insurance Scheme, Senator the Hon Linda Reynolds CSC, announced the release of the NDIS Bill for public comment with a consultation period of four weeks, ending 7 October 2021.⁶

18. This included the release of the NDIS Bill and proposed amendments to the NDIS Rules, each accompanied by an Explanatory Document available on the DSS consultation website.⁷

19. The changes to the NDIS Act and NDIS Rules are suggested to have been informed by three reviews or reports.⁸ First, the 2019 independent review of the NDIS legislation undertaken by Mr David Tune AO (Tune Review).⁹ Second,

the Independent Review of the NDIS Act (December 2015) undertaken by Ernst & Young (EY Report).¹⁰ Third, the Joint Standing Committee on the NDIS interim report: NDIS Planning (Planning Interim Report).¹¹ Each of these reports was undertaken with considerable input from the disability community.

20. Whilst this was an important aspect of ensuring those reports reflected the reviews of the disability community at the time, the disability community have not been asked to agree to the final recommendations made in the reports.
21. While the disability community has provided insight into the challenges associated with the NDIS for a considerable time period to different inquiries and associated forums, how to solve these problems is very difficult. The release of the NDIS Act and NDIS Bill for comment is a very positive first step. However, the NDIS Act and NDIS Bill were developed without the insight of people with disability.
22. The complexity of the NDIS Bill and proposed amendments to the NDIS Rules is clear. The four weeks consultation period is insufficient time for people with disability and their formal and informal support networks to consider, understand and respond to the proposed changes. Without robust consideration of the changes proposed by the NDIS Bill and associated NDIS Rules, there is a serious risk that the proposed amendments will negatively impact the ability of present and future participants to achieve their goals and aspirations.

Recommendation 1

The Commission recommends that the consultation period for the NDIS Bill be extended by a minimum of eight weeks to allow the disability community to provide meaningful feedback on the proposed NDIS reforms, in particular in relation to any unintended consequences for people with disability and their families.

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

23. The NDIS Bill is divided into three schedules: Schedule 1 relates to the Participant Service Guarantee; Schedule 2 relates to Flexibility Measures; and Schedule 3 relates to Full Scheme Amendments. Some of the amendments in the NDIS Bill are consequential or administrative in nature, or reflect a more

modern understanding of disability and how people with disability should be described. This is a positive development. The NDIA and DSS should be positively acknowledged for the clear effort they have shown to modernise the NDIS Act.

24. However, the NDIA is also given increased flexibility relating to time limits, by enabling the use of legislative instruments to deal with particular issues – for example, the variation or cancellation of plan nominees.¹² Where possible, it is better if obligations on the NDIA are contained within primary legislation.

5.1 Participant Service Guarantee – Schedule 1

25. The NDIS Bill introduces the right for participants to request a variation to their plans (s 47A(2)) and the right for the CEO to vary plans (s 47A) or reassess a plan (s 48).¹³ The term ‘review’ has been removed from the NDIS Act and replaced with the terms ‘variation’ and ‘reassessment’.¹⁴ This differentiation between variation and reassessment was foreshadowed in the Tune Review and is, on its face, justified for administrative reasons.

26. Under the proposed new s 47A, the CEO may vary a participant’s plan (except the participant’s statement of goals and aspirations). If the participant requests to vary the plan, the CEO may decide the plan needs to be varied, not to vary or reassess the plan, or to reassess rather than vary the plan. The default position, if the CEO does not make a decision to vary a plan within the relevant time period, is that the CEO will be taken to have decided to reassess the plan under s 48(1) instead.¹⁵

27. The new s 47A(2), also provides the CEO with the power to vary a participant’s plan (excluding the participant’s statement of goals and aspirations) on their own initiative without requiring a request from a participant. While the *Explanation of the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* provides the example of technical instances where this may be appropriate,¹⁶ there are no limitations on the decision-making authority of the CEO in varying a participant’s plan on the CEO’s own initiative – provided the CEO considers certain matters prescribed in the NDIS Rules.

28. The matters to which the CEO must have regard, in deciding whether to vary a plan, may be provided for in NDIS Rules and the timing for that decision to take effect is also provided for in NDIS Rules (taking into account s 50 of the NDIS Act). These NDIS Rules are discussed [below](#).

29. The authority of the CEO to undertake a plan reassessment, either of their own initiative or on request of the participant, is established in s 48 of the NDIS Act. A similar approach to plan variations is adopted in s 10(2) of the NDIS (Plan Administration) Rules concerning the matters that must be considered by the CEO.

Recommendation 2

The Commission recommends that s 47A and s 48 of the amended NDIS Act should: (a) define a 'variation' and 'reassessment' under the NDIS Act; (b) provide clear limitations on CEO-initiated variations and reassessments; (c) require there to be increased reporting on the use and nature of CEO-initiated variations and reassessments.

30. The addition of s 204(A) in the NDIS Act provides the Commonwealth Ombudsman with oversight of the NDIA's performance with matters prescribed by the NDIS Rules and, specifically, the service standards established by the Participant Service Guarantee.¹⁷ This role is critical as the Participant Service Guarantee does not create an enforceable legal right for participants to insist on compliance with the terms of the Participant Service Guarantee. Rather, what is created is a reporting framework.

31. The Commonwealth Ombudsman is required to report to the Minister as soon as practicable after the end of each financial year and a copy of that report is to be provided to Parliament.¹⁸ In undertaking this reporting and oversight role, it is important the Commonwealth Ombudsman is fully funded and well resourced, with specific funding to ensure that the Ombudsman uses processes that are accessible for people with disability and consults with people with disability.

Recommendation 3

The Commission recommends s 204A of the NDIS Act be amended to require: (a) the Commonwealth Ombudsman to consult with people with disability; (b) the use of certain powers by the NDIA or NDIA CEO be reported periodically to the Commonwealth Ombudsman; (c) the Commonwealth Ombudsman be required to make an accessible version of its report to Parliament publicly available.

5.2 Flexibility Measures – Schedule 2

32. The flexibility measures refer to the centrality of people with disability in the NDIS and their need to be included in a co-design capacity. Although it is important that the role of people with disability in the NDIS is clearly

recognised, the term 'co-design capacity' is undefined and is capable of a wide variety of descriptions.¹⁹

33. The acknowledgment of the importance of principles underpinning 'co-design' is consistent with the CRPD and is a positive development. However, greater clarity is needed as to what is meant by 'co-design capacity' and how and when such principles will be applied.

Recommendation 4

The Commission recommends that s 4(9A) of the NDIS Act be amended to clarify the circumstances where co-design will be used and the principles that will guide the co-design with people with disability.

34. The NDIS Bill provides the CEO with the power to approve forms for the purposes of the NDIS Act through the amendment of s 9A which also requires approved forms to be published on the NDIA website.²⁰
35. This power should be balanced with a need to ensure the forms created are accessible and usable by people with disability. The use of the wrong form should not exclude a person with disability from exercising their rights under the NDIS Act (i.e. a 'no wrong door' approach). Although aspects of the Disability Discrimination Act 1992 (Cth) may be relied upon by participants to regulate services offered by the NDIA, it is better if the Rules clearly note that forms should be accessible. Similarly, while the engagement principle of "transparency" in s 5 of the NDIS (Participant Service Guarantee) Rules 2021 refers to accessible formats, these rules are not enforceable. There is a need for a clear obligation of accessibility to be imposed.

Recommendation 5

The Commission recommends that s 9(A) of the NDIS Act should require: (a) that forms approved by the NDIA CEO for use by participants are accessible; (b) that the NDIA adopt a 'no wrong door' approach for participants.

36. The proposed amendment to s 14 of the NDIS Act relate to the provision of funds to persons or entities for specific purposes, including the distribution of Information, Linkages and Capacity Building funding and general supports for people with disability. The expansion and clarification of when the NDIA may provide funding to persons or entities in s 14 is potentially necessary, but must be balanced with the retention of the personalised nature of NDIS funding.
37. To ensure the use of s 14 of the NDIS Act does not diminish the personalised nature of the NDIS, clear reporting obligations to either the Board of the NDIA

or the Disability Ministers should be created on the extent and use of s 14 of the NDIS Act.

Recommendation 6

The Commission recommends that the amendments to the NDIS Act or NDIS Rules include a comprehensive reporting framework concerning the distribution of funds to persons or entities for specific purposes under s 14 of the NDIS Act.

38. The proposed amendments to the NDIS Act rely on the use of NDIS Rules to enable the operation of the NDIS in a number of places. A prime example of this are the amendments in s 24–27 of the NDIS Act, relying upon NDIS Rules created under s 27(2) of the Act. These amendments concern clarifying the operation of the NDIS Act regarding psychosocial disability and whether a person’s disability is permanent or likely to be permanent or substantially reduce a person’s functional capacity by relying upon NDIS Rules created under s 27(2) of the Act. The potential effect of the rules made under s 27(2), being the National Disability Insurance Scheme (Becoming a Participant) Rules 2021, is outlined below at [6.4](#).

39. The extensive reliance upon disallowable legislative instruments under the Legislation Act 2003, in relation to technical legislative provisions concerning becoming a participant, raises significant concerns about transparency. To disallow a legislative instrument such as the NDIS Rules, a motion of disallowance is needed to be moved and passed within 15 sitting days of laying the instrument before a House of Parliament.

Recommendation 7

The Commission recommends that, to the fullest extent possible, the required amendments to the NDIS Act and NDIS Rules be undertaken through substantive amendments to the NDIS Act, rather than the NDIS Rules.

40. The amendment of the eligibility criteria for NDIA Board Membership through s 127(2), to introduce ‘lived experience of disability’²¹ as a consideration for appointment recognises the value and expertise of people with disability. However, no guidance is provided as to what is meant by ‘lived experience of disability’. This phrase is subject to multiple interpretations and may be understood as a person with disability or an individual who provides support to a person with disability.

41. In the CRPD, Article 1 provides that persons with disabilities includes ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective

participation in society on an equal basis with others'.²² This interpretation excludes people who do not themselves have a disability but who have a person with disability in their family or who have caring responsibilities.

42. The CRPD recognises that people with disability have the agency and right to participate in decisions across all areas which impact them.²³ It is important that this right is clearly reflected in the NDIS Act through a clearer definition of 'lived experience of disability' which is specific to people with disability.

Recommendation 8

The Commission recommends that the reference to 'lived experience of disability' in s 127(2) of the NDIS Act be clarified in a manner consistently with the CRPD to refer to a person with disability or that the term 'person with disability' be explicitly used.

5.3 Full Scheme Amendments – Schedule 3

43. The NDIS Bill includes administrative changes to the NDIS Act to reflect the end of the transition arrangements with state and territory governments and the completed national roll-out of the NDIS. These include repealing paragraphs that have become redundant and clarification on the role of the NDIA following the introduction of the NDIS Quality and Safeguards Commission.
44. The NDIS Bill repeals the previous s 4(17) of the NDIS Act, which referred to the progressive implementation of the NDIS. What is left is reference for the Ministerial Council, the Minister, the Board, the CEO, the Commissioner and any other person or body to have regard to the principles in s 4 of the NDIS Act and the financial sustainability of the NDIS.²⁴
45. However, 'financial sustainability', while referred to repeatedly in the NDIA Act, is not defined. This lack of definition means there can be a focus on the cost of a service without the assessment of corresponding benefit or lack of guidance on the evidence required to demonstrate cost challenges. As the NDIS is a social insurance scheme²⁵, there are no premiums paid by actual or prospective participants.
46. A definition of financial sustainability that is consistent with the broader role of the NDIS would assist in clarifying the operation of the NDIS Act and any NDIS Rules.

Recommendation 9

The Commission recommends the term ‘financial sustainability’ be defined in the NDIS Act in a manner consistent with its role as a social insurance scheme.

6 Amendments to Rules made under the NDIS Act

6.1 National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021

47. These Rules sets out engagement principles and service standards for the NDIA, the CEO and a responsible person, which includes an Agency Officer, a consultant or contractor and a person provided funding under s 14(1) of the NDIS Act for the purposes of enabling the person to partner with the NDIA in the community.²⁶
48. Part 2 of the Rule is enlivened by the amendment of s 209(2A) of the NDIS Act to include new subsections (2) and (3), concerning engagement principles and service standards.
49. The engagement principles and service standards for the NDIA, CEO and other responsible persons contained at s 5 include: transparency, responsiveness, respect, empowerment and connectedness.²⁷ The principles and service standards, while a useful addition to the NDIS Act, do not seem to create clear enforceable legal rights for participants. For example, if the NDIA do not comply with their own service standards, an NDIS participant does not acquire any rights to insist on a certain standard of service. They may make a complaint however that right is quite different. On occasion, the NDIA should consider whether principles and service standards should be elevated into primary legislation to safeguard participants in their interactions with the NDIA.
50. For participants or prospective participants, the engagement principle is that participants or prospective participants help responsible persons deliver the best possible experience of the NDIS and provide accurate and up-to-date information to support effective decision-making by responsible persons, inform applicable responsible persons of any significant change to a participant or prospective participant’s circumstances, needs or goals and aspirations and provide constructive feedback.²⁸ These are written in absolute terms. Given the life circumstances of people with disability, the obligations

on participants should be understanding of the potential challenges that may exist in compliance. A requirement of reasonableness and materiality should therefore be included as participants may be dealing with systemic disadvantage. This requirement would recognise that some participants are not able to engage with the NDIA to the extent outlined in the Rule and ensure that they are not adversely impacted as a result.

Recommendation 10

The Commission recommends that the engagement principles for participants or prospective participants in s 6 the National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021 include a requirement of reasonableness and materiality.

51. Part 3 of the Rule considers the timeframes and related obligations pertaining to particular decisions of the CEO of the NDIA or the NDIA itself. Although clear timeframes are of critical importance to participants, it is important that when the CEO or NDIA decide to reassess or vary a participant's plan, that decisions made provide enough time for a participant to re-organise their affairs and/or to request a review of the variation or reassessment. The necessary time is probably related to the extent of change in a participant's plan and when notice is given to a participant in a form they can understand.

52. Part 4 of the Rule considers reporting to the Ministerial Council under s 174(1) of the NDIS Act. The transparency of the reporting is critical to ensuring faith in the NDIS by participants. Two important areas of reporting include: variations under s 47A(1) of the NDIS Act and for applications to the AAT under s 103 of the NDIS Act.²⁹ However, the nature of reporting to the Ministerial Council needs to take into consideration who requested plan variations or reassessments and the progression of cases before the AAT (including the outcome of any applicable internal reviews under s 100 of the NDIS Act).

Recommendation 11

The Commission recommends the reporting to the Ministerial Council under s 174(1) of the NDIS Act should include detailed analysis of CEO-initiated variations and reassessments under ss 47A and 48 of the NDIS Act, internal reviews of those decisions and the progression and nature of cases before the Administrative Appeals Tribunal (AAT).

6.2 National Disability Insurance Scheme (Plan Administration) Rules 2021

53. This Rule considers the matters the NDIS should have regard to in deciding whether to fund persons or entities under s 14 of the NDIS Act and the extension of grace periods to remain overseas. The payment and acquittal of NDIS funds is also considered.

54. The amendment of s 45 of the NDIS Act to enable the CEO to determine who is paid an amount payable under a participant's plan will allow the NDIA to pay a provider directly on behalf of a participant in accordance with the revised Rules.³⁰ While this is intended to benefit the participant by reducing their administrative burden, it is important that payments are directed by the participant to uphold the principle of choice and control, which underpins the NDIS. Many actual or future participants may find digital processes exclusionary and inaccessible. Until complete accessibility and universal design of NDIS payment systems can be demonstrated, it is critical that the method of paying providers under a plan is reflective of a participant's wishes.

Recommendation 12

The Commission recommends the National Disability Insurance Scheme (Plan Administration) Rules 2021 be amended to make clear provision for respecting a participant's choice as to how they would prefer to pay their service providers in the absence of a compelling reason not to do so.

55. The matters the CEO must consider in exercising the CEO's power to vary a participant's plan, on the CEO's own initiative under s 47A(2) of the new NDIS Act, is provided for in s 10 of the Rules. Section 47A(6)(a) provides that NDIS Rules may set out which matters the CEO must have regard to in deciding whether to vary a participant's plan. These matters include whether the variation is minor or technical, whether the variation increases the total funding for the supports and whether the variation mitigates an immediate risk of harm to the participant or another person.³¹ Given the potential misuse of the variation power or unintended consequences to take place, it is important there is clarity on what constitutes a variation and a reassessment. There is additional need to consider whether there has been alleged fraud, natural disaster, public health issue or assistive technology failure in deciding whether to grant a variation.

56. When the variation of a participant's plan is made at the participant's request, under s 47A(3) of the new NDIS Act the CEO must agree to vary the plan, not vary the plan and instead undertake a reassessment, or not vary the plan and

not undertake a reassessment. The wide nature of powers conferred on the CEO of the NDIA is capable of deterring a participant from seeking variations and of being used in a manner that could be difficult for a participant to contest.

57. The proposed amendments do not seem to require the NDIA CEO or their delegate to inform a participant of their intent to undertake a plan variation or reassessment of their own initiative or consult with the participant while this occurs. As such, participants are at risk of being excluded from decisions made regarding their NDIS plan.
58. The introduction of s 100(1B) in the Act would allow a participant to request the reason for decision when the CEO makes a reviewable decision (such as a plan variation or reassessment)³² however this will not be provided as routine. The requirement for a participant to request the reasons for decision may be contrary to the NDIA's commitment to transparency and accountability in s 5 of the Rules.
59. Additionally, the power of the CEO to undertake a plan variation or reassessment without initially consulting with the participant conflicts with the principles of the NDIS Act and specifically the right of participants to exercise choice and control in the planning and delivery of their supports.³³
60. Processes within the AAT are challenging for participants and any potential advocate engaged on their behalf. As a result of this complexity, it is important that variation and reassessment provisions do not lead to an increase in potential disputes before the AAT or heavy reliance on internal reviews.³⁴ Simplification and clarity about what is a variation and/or reassessment under the new NDIS Act and the associated notice requirements and limitations on power of the CEO of the NDIS or their delegates is important to ensure participants are not materially disadvantaged.

Recommendation 13

The Commission recommends that: (a) clear definitions of plan variation and reassessment be adopted in the NDIS Act and NDIS Rules and greater certainty be given to participants in seeking a plan variation or reassessment (including notice requirements for any decision and obligations to provide reasons for a decision); (b) the National Disability Insurance Scheme (Plan Administration) Rules 2021 include whether there has been alleged fraud, natural disaster, public health issue or assistive technology failure as factors to be considered by the CEO in deciding whether to grant a plan variation or reassessment.

6.3 National Disability Insurance Scheme (Plan Management) Rules 2021

61. This Rule considers the funding and provision of supports included in participant's plan and what are unreasonable risks to participants. The Rule repeals National Disability Insurance Scheme (Plan Management) Rules 2013.
62. In terms of the funding and provision of supports included in a participant's plans, the most significant issue of concern is the regulation of the power contained in s 6(5) of the Rule relating to market intervention and the specification that particular supports are provided in a specified manner, by a specified person or provider or by a person or class of providers.³⁵ Section 6(6) of the Rule contains the limitation on the exercise of power and it is noted that reasons for market intervention be included in s 7 of the Rules.
63. The converse to s 6(5) of the Rules is contained in s 8 of the Rules, which gives the CEO the ability not to provide supports by particular providers.³⁶
64. Given the exercise of this power by the CEO or their delegate is contrary to principles of choice and control by an NDIS participant, the number of times this power is exercised and the manner in which it is exercised should be reported to the NDIA Board.

Recommendation 14

The Commission recommends that a detailed reporting framework be established to monitor the NDIA's intervention in the market or regulation of participant's ability to exercise choice and control under the National Disability Insurance Scheme (Plan Management) Rules 2021.

6.4 National Disability Insurance Scheme (Becoming a Participant) Rules 2021

65. These Rules repeal the National Disability Insurance Scheme (Becoming a Participant) Rules 2016.
66. The justification for the repeal is suggested to be to implement recommendations 8 and 27 of the Tune Review.³⁷ These recommendations concern the need to provide clearer guidance on psychosocial disability and eligibility and to amend the NDIS Act to remove trial and transition provisions, reflect agreed recommendations arising from the EY Review and best drafting practice.

67. The operation of the Rule must be read concurrently with the amended s 27(2) of the new NDIS Act, which will facilitate the Rules. The proposed amendments are intended to provide guidance as to whether an impairment is permanent or likely to be permanent. Express consideration has been given to the nature of psychosocial disabilities and the potentially fluctuating and episodic nature of these disabilities.³⁸
68. The new Rules have the potential for varied implementation given their reliance on such terms as ‘appropriate treatment’, ‘substantial improvement’, ‘available and appropriate evidence-based clinical medical or other treatments’ and ‘substantial improvements in the person’s functional capacity’ and may require participants or the NDIA to have access to clinical professionals to make judgments on such issues.
69. The changes in the new Rules relating to the fluctuating and episodic of psychosocial disabilities and the focus upon whether a person is able to find substantial improvement to their condition through appropriate treatments, or whether there are appropriate treatments available to manage the condition is capable of a variety of interpretations. Although the *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021* refers to the subjective experience of a prospective participant in receiving treatment, it is unclear how the new Rules accommodate the subjective experience of a participant or determine what is an appropriate treatment.³⁹ Similarly, it is not clear what is a ‘substantial improvement’ in a person’s functional capacity.
70. Section 27(3) of the new NDIS Act provides the NDIS Rules may specify what requirements need to be satisfied for there to be deemed a substantial reduced functional capacity. The addition of ss 9.2(b) is subtly different to similar provisions in the previous NDIS Rule and suggests that s 27(1)(b) of the Act is only satisfied where ‘there are no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to lead to the impairment or impairments no longer having that result’.⁴⁰ Previously, the focus of the rule was on remedying the impairment. Now the focus is on the result of the impairment.
71. In assessing early intervention requirements under Part 3 of the new NDIS Rule, the permanency of the impairment, for disabilities other than psychosocial disabilities, is again only established if there are no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment.⁴¹

72. In assessing early intervention requirements, where a person has a psychosocial disability under s 12, there is a requirement that an individual must be undergoing or have undergone appropriate treatment for the purpose of managing the person's condition and that after a reasonable period of time the treatment has not led to a substantial improvement in the person's functional capacity.⁴² Alternatively, it must be established no appropriate treatment for managing the person's condition is reasonably available to the person.⁴³

73. These amendments have the effect of medicalising disability, which is inconsistent with the CRPD and social model of disability.⁴⁴ The burden is placed on the prospective participant to demonstrate that their disability cannot be treated before they are able to access supports through the NDIS. The judgement of when a participant is considered to have met this threshold will be left to the NDIA or delegate of the NDIA CEO who may not have the clinical expertise to assess the effectiveness of medical treatments.

Recommendation 15

The Commission recommends the National Disability Insurance Scheme (Becoming a Participant) Rules 2021 be re-drafted to: (a) expressly take into consideration cultural or racial, socio-economic, gender, geographic or other type of disadvantage in applying tests for whether a person is eligible to become an NDIS participant; (b) provide clarification on the definition and application of tools referred to in the Rules.

74. For s 15, under s 209(2A) of the NDIS Act, the CEO may create rules that specify assessment tools and the circumstances in which the CEO is to use the tools. The new NDIS Rule refers to the need for any assessment tool to be consistent, equitable and transparent in its assessment of a person's functional capacity but omits the term 'fair', which was used in the previous rules.

75. Given the potential widespread effect of assessment tools, it is important that they be accurate and fair. These terms focus upon the outcome of the assessment. The assessments should be consistent, equitable and transparent, but without reference to accurate and fair the assessment tools may consistently underestimate the needs of the individual being assessed.

Recommendation 16

The Commission recommends any assessment tool prescribed by the CEO under s 209(2A) of the NDIS Act must be fair, accurate, consistent, equitable and transparent in its operation.

6.5 National Disability Insurance Scheme (Nominees) Rules 2021

76. These Rules repeal the National Disability Insurance Scheme (Nominees) Rules 2013 and are made pursuant to s 80, 88 and 93 of the NDIS Act.

77. The new Rules, like all the amended or replaced Rules, have been restructured for reasons of ease of navigation, provide an expanded definition of 'conflict of interest', regarding nominees and outlines considerations the CEO must have regard to in making certain decisions to cancel or suspend nominee appointments.⁴⁵

78. The definition of 'conflict of interest' has been expanded in the new Rules, which is important in safeguarding the interests of potentially vulnerable participants.⁴⁶ However, while the expanded definition is helpful, there is a need to give examples of what is a conflict of interest and to indicate explicitly that, on occasion, it may not be appropriate for an individual to act as nominee or continue acting as a nominee. Additionally, conflicts of interest should be declared in writing.

Recommendation 17

The Commission recommends the use of examples in the definition of 'conflict of interest' in the National Disability Insurance Scheme (Nominees) Rules 2021 be expanded and that conflicts of interest should be declared in writing.

79. The expansion of the matters to which the CEO must have regard in making certain decisions to cancel or suspend nominee appointments is welcomed. However, the CEO should also be required to potentially report the number of cancellations or suspensions to the NDIS Board and expressly consider whether any issues exist that should be reported to the NDIS Quality and Safeguards Commission or have been reported to the NDIS Quality and Safeguards Commission.

Recommendation 18

The Commission recommends that if the CEO or their delegate utilises their power under the National Disability Insurance Scheme (Nominee) Rules 2021 to cancel or suspend a nominee appointment, they are obligated to assess if a referral to the NDIS Quality and Safeguards Commission is required to ensure the safety of a participant.

7 Conclusion

80. The Commission acknowledges and appreciates the efforts of DSS to undertake consultation on the NDIS Bill and NDIS Rules. The Commission is aware of a number of instances where staff from DSS have undertaken consultation in a respectful manner with people with disability and listened to the concerns in a way that has encouraged fair and open debate.

81. Although the complexity of what is suggested in the NDIS Bill and accompanying NDIS Rules means more time is required to undertake consultations, the initial efforts to consult with people with disability provide an important foundation for consultation in the future.

Endnotes

- ¹ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO/2-3 (15 October 2019) [4]
- ² National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021; National Disability Insurance Scheme (Plan Administration) Rules 2021; National Disability Insurance Scheme (Plan Management) Rules 2021; National Disability Insurance Scheme (Becoming a Participant) Rules 2021; National Disability Insurance Scheme (Children) Rules 2021; National Disability Insurance Scheme (Nominees) Rules 2021; National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020. A list of what is changing may be found at: https://engage.dss.gov.au/proposed-ndis-legislative-improvements-and-the-participant-service-guarantee/#_How_to_have.
- ³ For example, the Explanation of the proposed amendments to the National Disability Insurance Scheme Act 2013 released by DSS (<https://engage.dss.gov.au/wp-content/uploads/2021/09/bill-explanatory-material-update-47a-change.pdf>). It should be noted that the Commission has followed the example of the explanatory documents in using the term 'section' to refer to clauses within the NDIS Bill and NDIS Rules.
- ⁴ The Disability Discrimination Commissioner is appointed by the Governor-General in accordance with s 113 of the *Disability Discrimination Act 1992* (Cth).
- ⁵ Independent Advisory Council to the NDIS, *Membership*, Accessed 1 October 2021 <https://www.ndis-iac.com.au/membership>.
- ⁶ Department of Social Services, *Consultation opens on National Disability Insurance Scheme (NDIS) legislation reforms*, 9 September 2021 <https://ministers.dss.gov.au/media-releases/7566>.
- ⁷ Department of Social Services, *Proposed NDIS legislative improvements and the Participant Service Guarantee*, September 9 2021 <https://engage.dss.gov.au/proposed-ndis-legislative-improvements-and-the-participant-service-guarantee/>.
- ⁸ Department of Social Services, *Consultation opens on National Disability Insurance Scheme (NDIS) legislation reforms*, 9 September 2021 <https://ministers.dss.gov.au/media-releases/7566>
- ⁹ The 2019 Review of the NDIS Act considered opportunities to amend the NDIS Act to remove process impediments, increase efficiency of the scheme's administration and implement an NDIS Participant Service Guarantee. The Tune Review provided 29 recommendations to improve the experience of NDIS Participants including 19 suggested amendments to the NDIS Act. Other recommendations relate to the work of DSS, the NDIA and the Disability Reform Ministers.
David Tune, *Review of the National Disability Insurance Scheme Act 2013*, December 2019 https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf.
- ¹⁰ The 2015 Independent Review of the NDIS Act was undertaken by Ernst & Young in accordance with s 208 of the NDIS Act. The EY Review considered how the NDIS Act could be amended to better reflect government policy and improve effectiveness including recognising the lived experience of people with disability.
Ernst & Young, *Independent review of the NDIS Act*, December 2015, p 3 https://www.dss.gov.au/sites/default/files/documents/04_2016/independent_review_of_the_ndis_act.pdf.

-
- ¹¹ In 2019, the Joint Standing Committee on the National Disability Insurance Scheme undertook an inquiry into NDIS planning processes with an Interim Report released in December 2019. The Interim Report provided 14 recommendations to improve the operation of the planning process and the NDIS more generally. This included several suggested amendments to the NDIS Act. Joint Standing Committee on the National Disability Insurance Scheme, *NDIS Planning Interim Report*, December 2019
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDISPlanning/Interim_Report.
- ¹² National Disability Insurance Scheme (Nominee) Rules 2021, proposed s 21.
- ¹³ National Disability Insurance Scheme Act, proposed s 47A, s 47A(2), s 48.
- ¹⁴ Explanation of the proposed amendments to the National Disability Insurance Scheme Act 2013, p 11.
- ¹⁵ Explanation of the proposed amendments to the National Disability Insurance Scheme Act 2013, p 13.
- ¹⁶ Explanation of the proposed amendments to the National Disability Insurance Scheme Act 2013, p 13.
- ¹⁷ National Disability Insurance Scheme Act, proposed s 204A.
- ¹⁸ National Disability Insurance Scheme Act, proposed s 204A.
- ¹⁹ National Disability Insurance Scheme Act, proposed s 4(9A).
- ²⁰ National Disability Insurance Scheme Act, proposed s 9A.
- ²¹ National Disability Insurance Scheme Act, proposed s 127(2).
- ²² Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1.
- ²³ Janet Lord, 'Preamble' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the rights of Persons with Disability: A Commentary*, 2018 p 23-24.
- ²⁴ National Disability Insurance Scheme Act, proposed s 4(17).
- ²⁵ David Tune, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, p 23
https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf.
- ²⁶ National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021, proposed s 4.
- ²⁷ National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021, proposed s 5.
- ²⁸ National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021, proposed s 6.
- ²⁹ National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021, proposed s 15.
- ³⁰ National Disability Insurance Scheme Act, proposed s 45.
- ³¹ National Disability Insurance Scheme (Plan Administration) Rules 2021, proposed s 10.
- ³² National Disability Insurance Scheme Act, proposed s 100(1B).
- ³³ National Disability Insurance Scheme Act, s 3(1)(e)
- ³⁴ Certain decisions regarding variations will be reviewable decisions under proposed National Disability Insurance Scheme Act, s 99(1) (table item 6).
- ³⁵ National Disability Insurance Scheme (Plan Management) Rules 2021, proposed s 6(5).
- ³⁶ National Disability Insurance Scheme (Plan Management) Rules 2021, proposed s 8.
- ³⁷ Explanation of the National Disability Insurance Scheme Amendment (Becoming a Participant) Rules 2021, p 4.
- ³⁸ National Disability Insurance Scheme Act, proposed s 25 (1A).

³⁹ Explanation of the National Disability Insurance Scheme Amendment (Becoming a Participant) Rules 2021, p 13.

⁴⁰ National Disability Insurance Scheme (Becoming a Participant) Rules 2021, proposed s 7.

⁴¹ National Disability Insurance Scheme (Becoming a Participant) Rules 2021, proposed s 7(2).

⁴² National Disability Insurance Scheme (Becoming a Participant) Rules 2021, proposed s 12(2)(a)(ii).

⁴³ National Disability Insurance Scheme (Becoming a Participant) Rules 2021, proposed s 12(2)(a)(iii).

⁴⁴ United Nations, *Convention on the Rights of Persons with Disabilities*, Accessed 6 October 2021 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁴⁵ Explanation of the National Disability Insurance Scheme Amendment (Nominees) Rules 2021, p 4.

⁴⁶ National Disability Insurance Scheme (Nominees) Rules 2021, proposed s 7.