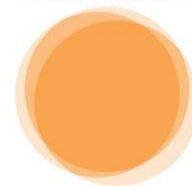


SUMMER  
FOUNDATION



# Amendments to the NDIS Act (2013)

## Response by the Summer Foundation

October 2021

# Introduction

The Summer Foundation welcomes the opportunity to contribute to the proposed National Disability Insurance Scheme's (NDIS) legislative changes. Improvements to the legislation, including the implementation of many of the recommendations from [the 2019 Tune review](#), are welcomed.

The introduction of the Participant Service Guarantee (PSG) Rules into the legislation provides participants with greater confidence and clarity around what they can expect throughout the planning process and lifecycle. The Summer Foundation makes the following recommendations to improve the legislative changes.

## Part 1 – Participant Service Guarantee Rules

The PSG has established a standard which participants can rely upon. The introduction of the PSG into legislation, as such the creation of the PSG Rules, provides enhanced confidence, transparency and assurance to participants. Entrenched service standards will reduce and standardise planning timeframes, increase transparency around National Disability Insurance Agency (NDIA) processes and go towards addressing long-held frustrations experienced by participants and their families.

### PSG Question 1:

*Do the Rules provide clarity to participants on the timeframes that will apply to NDIA decision-making?*

The PSG Rules clearly lay out timeframes for NDIA decision-making, yet further work is essential to significantly improve transparency of decision-making, communication and explanation of decisions.

**Recommendation 1:** PSG Rules *Section 5(1)(b)* must ensure that the NDIA provides easy-to-access and understandable information regarding specific timeframes for each part of their planning journey, as relevant to the individual, to both participants and their decision-supporters.

*"[We're] needing support with complex information – need basic step-by-step instructions so you can work through things sequentially."*

**Ashley\* – Participant**

Reporting on adherence to timeframes, timeframe 'actuals' and compliance must be made available to ensure transparency and build confidence in the NDIA. The NDIA must ensure that participants, close others and their decision-supporters have easy-to-access and understandable information regarding specific timeframes for each part of their planning journey.

**Recommendation 2:** The NDIA must report its adherence to timeframes as well as timeframe 'actuals'. These must be made publicly available and accessible in participants' preferred formats.

## PSG Question 2:

*Are the timeframes within which things must be done appropriate? Are they too long or too short?*

To date, timeframes committed to by the NDIA have been limited to a specific NDIA process, such as timeframes for decisions regarding access requests, and have not reflective of the full participant experience. Isolated timeframes relevant only to an internal process do not provide clarity or confidence for the participant around timeframes for outcome and plan availability.

The Home and Living Panel's current service level standard is quite responsive, set at 10 days. Yet this timeframe is only representative of the panel's process and does not include:

- a) the time from which the first application/request for home and living supports is submitted
- b) the time after the panel's decision is made and is communicated to the participant
- c) the time required for home and living supports to be included into a participant's plan for use.

Timeframes must include the full planning process as it is experienced by the participant.

If planning decisions for Specialist Disability Accommodation (SDA) and other associated supports can be made within the 10 days, as currently defined for the Home and Living panel, this confirms that decisions for SDA and associated supports are straightforward and therefore fit within the 28 day planning timeframe.

**Recommendation 3:** Timeframes outlined in PSG Rules Parts 4 and 5 must be activated at the point in which a request is submitted by a participant. It must be inclusive of the point in which the decision is communicated and a participant is able to commence utilising their funding. Monitoring and reporting of timeframes must be transparent and made publicly available.

Participants require access to plans which support their needs within 28 days. Where a participant needs to wait for approval of more complex funding line items, the majority of the plan should be made available within 28 days and the additional decision-making should occur as soon as practical thereafter.

Timeframes laid out for participants under 47A(3)(a)(i) that involve complex considerations that require 50 days should not hold up other parts of the planning process or access funds. For example, participants with complex needs, especially those requiring complex assistive technology or home modifications, should not have their plans delayed while more complex decisions are being made.

**Recommendation 4:** Participant Service Guarantee Rules Section 47A(3)(a)(i) timeframes with considerations around complex services or supports or that require funding approval from a delegate other than a planner, should not result in longer timeframes (i.e., 50 days per 47A(3)(a)(i)) for other supports.

### PSG Question 3:

*Are the proposed engagement principles and service standards appropriate?*

*Are additional types of consultation or engagement important to consider?*

The Summer Foundation is pleased to see that participants and prospective participants will have access to clear, accurate, consistent and up-to-date information about the NDIS, their plans, and funding allocation for their plans. Particularly that these are required to be presented in easy-to-understand and accessible formats, meeting the needs of participants.<sup>1</sup>

In addition, the Summer Foundation suggests that consultations and engagement should include:

- co-design of engagement and consultations materials and solutions
- participant-led [videos](#)
- peer-led information sessions to engage with participants, such as [these videos](#) provided by the [Housing Hub](#).

Participants and their families should have access to up-to-date information, made available in all formats. Ongoing public forums and smaller peer-led sessions are vital for engaging communication.

**Recommendation 5:** Information presented to participants under *Section 5(1)* of the PSG Rules must include participant-led videos and peer-led information sessions.



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<sup>1</sup> These include direct communication; preferred formats; provision of clear, consistent, accurate and accessible guidance on the evidence requirements for access decisions and making/varying/reassessing plans; who's qualified to provide evidence; and updates on progress of decisions.

## PSG Question 4:

*Do the Rules clearly explain how both of those reports will ensure the NDIS delivers on the promises of the Guarantee?*

The Summer Foundation believes that both the annual report provided by the Commonwealth Ombudsman and the NDIA's quarterly reports to Government will demonstrate how the NDIS is being delivered against the PSG. Both reports must be made publicly available in a timely manner to ensure transparency and accountability.

Participants, close others, carers and organisations within the disability sector should have an opportunity to engage with the Commonwealth Ombudsman to discuss their experiences.

Regular consultations between participants and the Commonwealth Ombudsman would form a proactive approach to seeking feedback and clarifying the level of service being received by participants. Information about how participants can contact, engage with and provide their feedback to the Commonwealth Ombudsman must be made available, and in ways that best support the communication needs of participants.

This should, in turn, inform any refinements required of the PSG Rules, including its implementation and the practices which it underpins.

Access to the Commonwealth Ombudsman by participants must be easy, approachable and available in a way which best supports the needs of each participant. Likewise, communication about and from the Commonwealth Ombudsman for participants must be available in easy-read formats, through participant-led forums and other accessible communication channels.

**Recommendation 6:** Complaints and feedback about the PSG Rules, directed either to the NDIA or Commonwealth Ombudsman, must directly contribute to participant-focused improvements to the implementation and processes which underpin the PSG Rules.

- a) Participants must be able to provide constructive feedback and lodge complaints
- b) Feedback and complaints must be incorporated into the regular review and continuous improvement of the PSG Rules and their implementation

**Recommendation 7:** The Commonwealth Ombudsman should provide reports and recommendations about the service level quality which enables continuous improvement and increased quality for participants.

## Part 2 – Plan Administration Rules

The new Plan Administration Rules present a much-needed change for participants needing to vary, review or start a new plan. This will be particularly useful for participants who need assistive technology or home modifications, as well as for participants with high and complex needs.

The Summer Foundation is pleased to see changes in line with *Recommendation 20* of the [Tune review](#) that set out when participants can initiate a plan review.

### Plan Admin question 1:

*Do the Plan Admin Rules clearly set out the circumstances in which a participant's plan can be varied, and the circumstances in which the NDIA would ordinarily first conduct a reassessment?*

Plan variations enable participants to change their existing plans to best suit their needs without a full plan review. Further clarification is needed on circumstances in which the NDIA can conduct a plan variation or reassessment with or without a participant's express consent, especially regarding changes to total funding for supports under the participant's plan. This may adversely affect participants and even providers unaware of funding changes.

Right of information, consultation and review must be included in the Plan Administration Rules to ensure the participant perspective is central to any variation, review or reassessment of plans. A participant centred approach must always be taken.

**Recommendation 8:** The Plan Administration Rules must ensure early consultation and engagement with participants throughout the planning process, assessment of support options, right of review, updating of goals and provision of evidence; particularly where this is initiated by the NDIA CEO or anyone other than the participant.

The Summer Foundation is concerned that the CEO can vary plans without participants' express consent. More specifically, *Section 47(A) Variation of participant's plan by CEO* and *Section 48 Reassessment of participant's plan* must ensure early consultation and engagement is sought with participants in planning, assessment of options, updating goals and provision of evidence, where this is initiated by the NDIA CEO or anyone other than the participant. Moreover, the CEO should be prevented from initiating any plan variation which is not for the direct benefit of the participant and where the direct consideration and agreement of the participant is not sought.

**Recommendation 9:** *Sections 47 and 48* must include a clause for consultation with, and endorsement by, participants prior to plan variation or reassessment.

Distrust exists currently within the disability community regarding outcomes for plan reassessments. Participants must feel that plans maximise choice and control by providing appropriate funding for supports and services. Needs and goals must underpin funding to enable plans to be fit-for-purpose for each participant. As a result of changes made by the NDIA over the past year, many participants worry that reassessments mean lessening of funding and supports and services without consultation.

## Plan Admin question 2:

*Do the Rules clearly explain the options a participant has to work with the NDIA to ensure their plan remains fit-for-purpose?*

Clear options exist for participants to work with the NDIA to ensure their plan is for purpose. However, there are barriers to participants engaging with their planners or being able to influence what is considered in the planning process. Resolving these barriers must be a priority for the NDIA.

The NDIA has stated that participants have a right to choose where they live and who they live with. This means that NDIS planning decisions must not force people into shared living arrangements with people or providers they have not chosen. This is consistent with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and with an ordinary life.

**Recommendation 10:** The Administration Rules Sections 10, 11, and 12 must include provisions of choice for housing and supports. Participants must be able to choose housing in accordance with where and with whom they wish to live in line with the UNCRPD.



### Plan Admin question 3:

*Does the proposed alternative commissioning power clearly set out the circumstances under which the NDIA could support a participant to maximise choice and control?*

Additional flexibility to facilitate greater access to services in circumstances where participant choice and control is limited in thin markets will ensure every participant is supported to maximise the benefits of their NDIS plan, regardless of the service system. Greater work should be done by the NDIA to actively manage thin markets and enable participants to exercise their choice and control.

**Recommendation 11:** The NDIA should actively manage thin markets to support the needs of participants to be met with choice and control and actively intervene where choice for the participant does not exist.

The NDIA would be well placed to do this through state governments and local councils in rural and remote areas, particularly for SDA and associated supports, for younger people in residential aged care (YPIRAC) (and those at risk of admission) and participants with complex support needs. The NDIA should work to commission the option enabling choice for the participants and leveraging provider networks in thin markets where a type of SDA or service is not readily available, such as robust SDA or choice of assistive technology provider.





## Part 3 – Plan Management Rules

The revised NDIS Plan Management Rules will provide critical clarification around conflicts of interest, such as separation of housing and supports.

### Plan Management question 1:

*Do the Rules clearly set out the things the NDIA will consider in protecting participants from provider conflicts of interest and help them maximise the benefits of their NDIS funding?*

The Summer Foundation believes that the amendments to the NDIS Act must mandate the complete separation of housing and supports as a condition of NDIS provider registration. This will provide proactive and wider reaching protection for participants.

Participants continue to share stories about the infringement of their right to exercise choice and control, showing the inadequacy of the regulatory framework in practice. Even when participants have options of other service providers, it can be very difficult to transition.

*How will NDIA transition away from how things are done now, when some providers are making so much money. E.g., providers are delivering all types of support – Support coordination, SIL, et.c etc. – how is choice and control achieved with these providers?*

*The average person can't do all the checks and balances regarding aspects of service delivery.*

*People don't feel like they have the power to go elsewhere. These providers have too much control.*

**Megan\* – Participant**

Legislative phrasing such as proof of better outcomes in *Section 8(1)(b)(ii)*<sup>2</sup> may be difficult for participants to demonstrate. Conflicts of interest are better addressed by requiring complete separation of housing and supports. This should take on similar provisions that are outlined in the NDIS (Plan Nominee) Rules where 'conflict of interest' is clearly defined.

**Recommendation 12:** *Section 10* of the Plan Management Rules must address the problem of conflict of interest by mandating the complete separation of housing and supports.

- a) The NDIA and NDIS Quality and Safeguarding Commission (NDIS Commission) must develop a strategy, in line with the legislative change, and set a deadline for complete separation.
- b) The legislation must require that NDIS providers establish separate contracts or agreements, with participants, for each support or housing type.

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<sup>2</sup> *Section 8(1)(b)(ii)*: "that other person is likely to provide better outcomes for the participant than that person

Section 6 provides for delegations for the provision of supports to participants by certain support providers, either excluding providers or specifying providers. This undermines the participant's right to choice and control by preventing a participant's decision in regards to the providers.

**Recommendation 13:** Section 6 must be updated to remove this delegation and instead ensure action by the NDIS Commission if a provider is perceived to cause conflict of interest or other harm to a participant/s.

## **Plan Management question 2:**

*The Rules set out the considerations taken into account when a participant or their representative request to self-manage their NDIS funding or use the support of a registered plan management provider. Is it clear how these considerations are designed to protect participants from unreasonable risk or harm?*

The draft legislation focuses upon disqualifying criteria and the participant needing to demonstrate their ability to self-manage rather than a focus on building the capacity of participants and their decision supporters to self manage.

Dignity of risk must be considered as furthering the capability of participants or their chosen plan managers to manage their funds. The NDIA should approach risk from a capabilities approach – e.g., empowering participants to make choices based upon their knowledge, skills and preferences. Considerations around unreasonable risk or harm must be based on clear evidence.

**Recommendation 14:** The Plan Management Rules should be changed to provide opportunity for the participant to decide who manages their plan and ensure that supports needed to enable this are provided.

- a) NDIA must ensure participants have the time, support and information required to participate in authentic decision-making and make informed choices about plans, funding use and supports
- b) The NDIA must provide funding for independent advocacy and decision-making supports. Participants must have access to high-quality independent advocacy to assist them with decisions
- c) Participants should have access to information in a format that is most useful for them and their decision-supporters

In conjunction with *Schedule 2 (Flexibility)*, participants should be in control of who receives their planning funding, whether it be themselves, a supporter, a provider or a combination of these. The decision being made by the NDIA takes choice, control and independence away from the participant.

**Recommendation 15:** *Schedule 2 of the Act Improvements to NDIS Processes* must allow participants to determine who receives funding through their plan.

# Part 4 – PSG and/or Flexible Measures

## PSG and/or Flexible Measures question 1

*Is participant experience significantly improved?*

Participant experience is significantly improved. However, further work needs to be done to ensure that participant feedback, both to the NDIA and to the Commonwealth Ombudsman, inform continuing refinements required of the PSG (see recommendation 6).

## PSG and/or Flexible Measures question 2

*What potential misinterpretation or unintended consequences do we envision?*

Potential for unintended consequences may be seen in Schedule 2 Section 45(1)<sup>3</sup>(a) which places control over funding in the hands of the NDIA CEO, rather than participants and their designated plan manager. Participants must have full control over funding.

**Recommendation 16:** *Schedule 2 Section 45(1)(a)* should read “to the manager of the plan as determined by the participant” rather than “to the person as determined by the CEO.”

As laid out in our **Recommendations 8 & 9** above, *Section 47(A) Variation of participant’s plan by CEO*, must ensure early consultation and engagement is sought with participants in planning, assessment of options, updating goals and provision of evidence, where this is initiated by the NDIA CEO or anyone other than the participant. Moreover, the NDIA CEO should be prevented from initiating any plan variation which is not for the direct benefit of the participant and where the direct consideration and agreement of the participant is not sought.

## Additional Comments

The ultimate test of the quality of this legislation will come down to how the NDIA and the NDIS Quality and Safeguarding Commission (NDIS Commission) implement and uphold the legislation. The interpretation and operationalisation of the proposed changes to the legislation are critical in ensuring a successful NDIS for all participants.

There has been no indication of how this will occur in the explanation documents provided alongside the draft legislation. This raises many questions of the changes which could emerge as a result of legislative amendments.

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<sup>3</sup> *Schedule 2 Section 45(1):* “An amount payable under the National Disability Insurance Scheme in respect of a participant’s plan is to be paid:”

## About the Summer Foundation

Established in 2006, the Summer Foundation works to change human service policies and practices related to younger people (18-64 years old) living in, or at risk of entering residential aged care facilities.

Our Vision is that younger people with disability and complex support needs live where and with whom they choose, with access to high quality housing and support options that enhance health, wellbeing and participation.

Our Mission is to create, lead, and demonstrate long-term sustainable systems change that stops young people from being forced to live in aged care because there is nowhere else for them.

The Summer Foundation has worked extensively with people with complex disability support needs to ensure they have access to all the NDIS supports essential to living the life they choose. A person-centred Home and Living Policy is critical to achieve the targets of the [Younger People in Residential Aged Care Action Plan \(2025\)](#).

