



7th October 2021

To: Department of Social Services

E-mail: NDISConsultations@dss.gov.au

Submission in response to NDIS processes and the Participant Service Guarantee – proposed legislative improvements

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Who we are

Touching Base developed out of the need to assist people with disability and sex workers to connect with each other, focusing on access, discrimination, human rights and legal issues and attitudinal barriers. Touching Base has brought the disability sector and the sex industry together in respectful and meaningful ways, through education, policy development and training workshops for disability workers and sex workers

Consultation Conduct

The consultation process has presented a number of barriers to deny full participation by people with disability and their representative organisations.

Barriers have included:

- Consultation timeframe is too short to fully investigate and review the extensive and complex legal material.
- Lack of resourcing within Touching Base to review and respond to the submission
- Lack of resourcing within Touching Base to support members to review, understand and participate meaningfully in the consultation process
- No Easy Read version of the guide has been produced to support organisations and individuals to support the preparation of a submission

Positive aspects

We are pleased to see, as promised, the Government has abandoned:

- Proposed changes relating to independent assessments
- Changes to 'reasonable and necessary supports'

Reasons for decisions

We support proposed changes to sections 100(1B) and (1C) of the Act, which allows participants to request reasons for decisions made by the Agency, prior to any internal review application.

This is a positive change toward inclusion and transparency as it facilitates understanding of decisions made about them, for individuals at the initial stage – for example, initial decisions about access or participant plans.

Recommendations:

- 1) The proposal be expanded to include provision of reasons for decisions to be made for all participants who are subject to a decision being made about them.
- 2) A provision be inserted to make this a legislated requirement. Such a provision would ensure that every decision made by an NDIA reviewer must be accompanied by a statement of reasons.

Specific areas of concern in the proposed amendments

Plan variation without consultation

We disagree with proposed changes to Section 47A if it allows plans to be varied on the CEO's own initiative, without request, consultation, or consent from the participant.

We are also very concerned that the CEO's power to vary plans is not constrained (refer Rule 10 of the new Plan Administration Rules).

Recommendation:

3) Extension of CEO powers be omitted; they are sufficient in their current form.

Changes to the 'Becoming a Participant' Rules

New requirements for determining whether a person applying to become a *participant* has a 'permanent' impairment or 'substantially reduced functional capacity' are unclear in their definition.

Recommendation:

4) After appropriate consultation with people with disability and their representative organisations, provide agreed upon definitions of all terms to ensure objective decision making.

Increase in discretionary powers of the CEO

The CEO's discretionary power to make various decisions and changes has been increased beyond what was recommended in the Tune Review (e.g., No. 40, subsection 101).

This lack of constraint may result in arbitrary and subjective decisions being made by the CEO, potentially resulting in inequitable participant outcomes.

Recommendation:

5) The proposed changes be revised to reflect the recommendations of the Tune Review regarding the degree of CEO discretion granted in line with the recommendations made in the review.

Changes to Plan Management and Payment of Supports

We are concerned about proposed changes to section 45 of the Act that may well result in the inability for self-managed participants to opt out of this system and pay for their own supports first, or to mix-and-match their preferred payment method.

The drafting of new section 45 states that payment is to be made 'to the person determined by the CEO'. While the Government has clarified that this change is not intended to remove the ability for self-managed participants to continue their existing payment method, the drafting does not make this clear.

Recommendation:

6) We would recommend a clarification to the drafting of section 45, ensure that self-managed participants can opt out of this system and pay for their own supports first, or mix-and-match their preferred payment method. This would allow the choice and control over payment methods to stay with the participants.

Continued expansion of the NDIS Rules and the Minister's rule-making powers

With the proposed changes the NDIS framework remains extremely complex, and this package of changes only adds to the complexity, with new rules and principles in disparate locations. Many of these rules overlap and are not entirely consistent. This is unwieldy and makes it impossible for participants to navigate and follow the process.

We are very concerned that these changes give the Minister and the NDIA more capacity to define and redefine the scope of their own power.

Touching Base has already informed the Minister of our concern in relation to the Minister creating a 'policy' to ban use of NDIS funds to access *paid sex work or a support that uses a device for a similar purpose*. This 'policy' has the intent of overriding section 209 of the Act¹, which requires rules to ban types of supports to be unanimously agreed to by the State and Territories through the Disability Reform Council. The Disability Reform Council has not accepted prior Ministers' attempts to create such a rule.

¹ *S.35(1)(b) of the Act, ... enables rules to be made prescribing reasonable and necessary supports that will not be funded under the National Disability Insurance Scheme. Such rules need to have the unanimous agreement of the host jurisdictions, therefore including the States and the Commonwealth, all of which contribute funds to pay for the Scheme. The requirement for unanimity arises from s.209 of the Act.*" (at para 43, [7]), FEDERAL COURT OF AUSTRALIA, National Disability Insurance Agency v WRMF [2020] FCAFC 79

We attached a copy of our recent correspondence as evidence:

- Touching Base letter to Minister Linda Reynolds, 10th August 2021
- Reply from the Minister, 23rd August 2021

Recommendation:

7) Extension of Ministers and CEO powers be omitted; they are sufficient in their current form.

Additional Recommendations

Touching Base strongly recommends the following:

8) Referral of proposed amendments to the *NDIS ACT* be reviewed by a Senate sub-committee

9) A substantial percentage of people with disability on the Board and that the Chair be a delegated position for a person with disability. That suitable supports and reasonable adjustments be made to support this structure.

10) Define the term *co-design* being inserted into principles so that it requires full consultation at all stages of development, with people with disability and their representative organisation

11) Ensure that the AAT has the authority to consider all matters concerning a participant's plan on appeal.

Acknowledgment

In this submission Touching Base has heavily drawn upon information provided by PIAC
Explainer: *What are the proposed changes to the NDIS Act?*