



Submission – Proposed Reforms to the NDIS Act and Rules

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Introduction:

The Victorian Mental Illness Awareness Council (VMIAC) is the peak Victorian nongovernment organisation for people with lived experience of mental health or emotional distress. We provide advocacy, education, consultation, and information to promote the rights of people using, or wanting to use mental health services.

VMIAC has specialist experience advocating, at an individual and systemic level, for changes to the NDIS and the National Disability Insurance Agency (NDIA). At an individual level VMIAC provides:

- Specialised information for consumers on how to apply for the NDIS
- Advice and support to gather the evidence required for the NDIS
- Intensive support through the application process and planning meetings,
- Advocacy support for NDIS Reviews and Appeals

Underpinning this work is VMIAC's NDIS Critical Reference group, which provides ongoing input and advice into VMIAC service delivery and strategic advocacy. These opportunities give VMIAC a broad understanding of the issues faced by consumers and governments in implementing the original intention of the NDIS.

Thursday 7th of October 2021

VMIAC Submission - Proposed Reforms to the NDIS Act and Rules

We thank the Department of Social Services for the opportunity for VMIAC to provide feedback on the proposed amendments to the National Disability Insurance Scheme Act and Rules.

We believe that many of the proposed changes and amendments contained within the Draft NDIS Amendment Bill 2021 will benefit participants and provide clear directions and increased accountability for the National Disability Insurance Agency with regards to its administration of the Scheme.

VMIAC welcomes the actioning of many of the legislative changes recommended in the Tune Review of the NDIS and the introduction of the Participant Service Guarantee (PSG) within the amendments to the NDIS Act and Rules. VMIAC applauds the increased recognition of psychosocial disability within the proposed amendments of the NDIS Act and its Rules, but believes that this increased recognition does not currently go far enough in ensuring fairness and certainty for people with a psychosocial disability with regards to their participation in the NDIS.

Our submission highlights our concerns around a number of proposed amendments including:

- Poorly defined amendments to the NDIS (Becoming a Participant) Rules with respect to establishing permanency for people with a psychosocial disability
- The lack of clear benefit and protection offered to participants by the proposed sections 47A and 48 in the Draft Bill, relating to plan variations and reassessments, which grant unrestrained power to the CEO to amend plans, on their own initiative and without consultation.
- The need for assurance that participant choice and control will be protected and emphasised as a priority in CEO decision-making related to the new NDIS (Plan Management) Rules.
- The over-reliance on new and updated NDIS Rules to effect change within this reform process, bypassing the scrutiny and oversight afforded to legislation amendments that needs to pass through a full parliamentary process.

VMIAC wishes to acknowledge and thank members of the VMIAC NDIS Critical Reference Group for their input into this submission.

Changes to Psychosocial Disability Terminology and Access Requirements

Changes to the NDIS Act

VMIAC supports the inclusion of a new subsection of Section 24 Access Criteria that acknowledges that differences often exist between psychosocial disability and other forms of disability.

VMIAC welcomes the long-overdue acknowledgement by the NDIA that the NDIS Act and Rules have proved exclusionary towards people with a psychosocial disability.

It is clear that people with are psychosocial disability have been disadvantaged by limiting legislation and interpretation of NDIA Access Rules for Participants that fail to properly acknowledge and build understanding about the episodic and fluctuating nature of the psychosocial disability.

This is an important step in acknowledging the human rights of NDIS Participants who are substantially impacted by psychosocial disability.

Quarterly reporting by the NDIS continues to demonstrate that people with a psychosocial disability are up to twice as likely to face rejection than other disability types when seeking to access the Scheme. Amendments to the NDIS need to be able to address this inequity.

Psychosocial disability is hard to define and measure let alone predict and presents ongoing challenges to those that live with it. The experiences of mental illness and or mental health challenges are deeply personal and individual in nature and consequence and psychiatry and psychology remain inexact sciences that sometimes have only a small part to play in personal recovery.

It is already well documented that despite best efforts many people continue to experience poor or diminished outcomes from mental health treatment. This is a situation further compounded by social disadvantage and the lack of access or capacity for more individuals to be able to explore alternative and possibly more appropriate treatment options.

As there is no singular evidence-based way to determine the level of an individual's psychosocial disability the NDIA requires a set of criteria that can assist in gauging whether an individual's level of impairment requires life-long support under the NDIS.

As a consequence, the NDIS Access process for people with a psychosocial disability needs to be clear in its application yet sufficiently nuanced so as to be able to address any disparities that exist around individual experiences of disability.

Changes to the NDIS (Becoming a Participant) Rules

Whilst VMIAC welcomes the NDIA's recognition that determining whether a person with a psychosocial disability meets NDIS Access Criteria requires further clarification. We are concerned however whether the new amendments provide sufficient clarity on when a person's impairments are, or likely to be accepted as permanent.

VMIAC believes that the new amendments which are an attempt to acknowledge the episodic nature of psychosocial disability have been unfortunately diminished by a reliance on a set of poorly defined terms with uncertain application.

Specifically, VMIAC would like to draw attention to the ambiguity of terminology used in the Proposed changes to NDIS (Becoming a Participant) Rules, Part 2 (8) pg. 6, outlined below:

Part 2—Disability Requirements

8 When an impairment is permanent or likely to be permanent for the purposes of the disability requirements—psychosocial disabilities

(1) *This section sets out, for the purposes of paragraph 27(1)(a) and subsection 27(2) of the Act, a requirement that must be satisfied for a person's impairment to which a psychosocial disability is attributable to be considered permanent, or likely to be permanent, for the purposes of paragraph 24(1)(b) of the Act.*

(2) *The impairment may be considered permanent, or likely to be permanent, only if:*

(a) *both:*

(i) *the person is undergoing, or has undergone, **appropriate treatment** for the purpose of managing the person's mental, behavioural or emotional condition; and*

(ii) *the treatment has not led to a **substantial improvement in the person's functional capacity**, after a period of time **that is reasonable** considering the nature of the impairment (and in particular considering whether the impairment is episodic or fluctuates); or*

(b) ***no appropriate treatment** for the purpose of **managing** the person's mental, behavioural or emotional condition **is** reasonably available to the person*

It is VMIAC's view that there are too many poorly defined and ambiguous terms employed within Section 8 in its current form, which have the potential to lead to greater inconsistency in decision-making around NDIS Access and inadvertently may create further barriers to participants being able to access the NDIS in a timely way.

We would ask what defines 'Appropriate treatment' and what forms does 'management of mental, behavioural or emotional condition' need to take, as this currently is very unclear and open to interpretation.

Likewise, what is considered a 'reasonable period of time to undergo 'treatment' within the application of this rule? Surely this will greatly differ from individual to individual and should not be used to exclude people who are either treatment-resistant or who are adversely impacted by treatments.

It is VMIAC's position that 'appropriate treatment' requirements for NDIS access should not in any shape or form pressure people to undertake treatment not of their choice or inadvertently place people with psychosocial disability at risk of compromised bodily autonomy; iatrogenic harm; or increased exposure to involuntary treatment.

Plan Variations and Reassessments

VMIAC welcomes the introduction of plan variations which avoid the need for an entirely new plan to be issued for minor changes. However, these proposed amendments appear inconsistent with our understanding, that plan variations were intended to offer some protection to participants who were hesitant to request a plan review under the current legislation due to the risk that it would trigger a re-evaluation of their entire plan and potentially their access eligibility as well, and the possibility of the participant ending up worse-off overall.

Unfortunately, the amendments as proposed do not appear to offer any clear benefit or protection to participants, beyond simplifying things from an administrative standpoint. If a participant requests a plan variation under the proposed section 47A, the CEO may, at their discretion, decide to completely reassess the plan instead, without consultation of the participant. While it is understandable that depending on the nature and extent of the variations requested, a reassessment may be the more appropriate option, a participant should feel comfortable to request minor variations without risk to their entire plan (or even access). This issue could be partially resolved by granting the participant the ability to request a plan reassessment themselves, for more significant plan changes, under the proposed section 48 and removing the CEO's power to conduct a reassessment under section 47A.

It is also important to highlight that ability of the CEO to make a variation or reassessment on their own initiative, with no consultation with the participant and without clear criteria for when this may occur, places participants in an extremely vulnerable position. Participant's need to be able to rely on the statement of supports in their plan, and are denied this certainty if the CEO is granted this power, without appropriate qualifiers in place to limit it.

Additionally, while VMIAC welcomes a move away from the term 'plan review', which has caused significant confusion and difficulty when trying to differentiate it from an internal or external review, we are aware of some concerns that the replacement term, 'reassessment', may not be suitable. The term 'reassessment' is very broad and it is suggested that this implies to participants that it is not limited to evaluation of their current plan, but may extend to reassessment of their eligibility for access as well.

The prospect that a participant may be faced with losing access to the NDIS as a result of a plan variation request or an NDIA initiated reassessment is a cause of ongoing stress and uncertainty and we are aware of cases in which access eligibility has come under scrutiny in these circumstances. VMIAC recommends suitable restraints to be placed on the CEO's power in the context of plan variations and assessments. This includes, but is not limited to, outlining criteria in which a CEO initiated plan variation or reassessment may take place, including a participant consultation requirement. We would also suggest that explicit limitations are necessary around the circumstances in which access eligibility may be reassessed.

Finally, we would like to note some confusion around the interpretation and intention of the proposed subsection 48(7), mandating that the CEO conduct a reassessment under circumstances specified in the plan. We are seeking clarity around the types of circumstances specified in a plan that may trigger reassessment as well as whether such circumstances are to be determined by the participant, by the NDIA, or in consultation/collaboration, as the different interpretations have different implications for participants.

Timeframes for Decision Making

VMIAC welcomes the inclusion of timeframes for access and plan decisions as part of the Participant Service Guarantee. This establishes accountability for the NDIA to make such decisions in a timely manner and also provides much needed certainty for participants/ prospective participants as to how long they can expect to wait. We would however like to raise some points of concern that should be considered prior to implementation of the timeframe amendments and proposed rules.

Given that timely decision-making has been an ongoing issue within the NDIA, it is imperative that the Agency be sufficiently resourced, particularly in relation to appropriately skilled and trained staff, in order to ensure that these timeframes can be successfully met, without any consequential detriment to participants. For example, there are already concerns that decisions are often rushed, without sufficient consideration being given to supporting evidence. There is the risk that timeframes will only worsen this issue unless appropriate action is taken to remedy things first. Similarly, we have witnessed too many instances, particularly at internal review, where participants have expected to be contacted if the NDIA require further information/ evidence to inform their decision-making, but this has occurred either at very short-notice, or more commonly, not at all. With the power of the CEO to request further information/ evidence already being underutilised, the inclusion of timeframes could worsen this issue, having the effect of pushing more decisions to external review. This is not a desirable outcome for anyone, resulting in huge increases in the time and resources spent on a given decision, combined with avoidable delays, distress and potential trauma for participants/ prospective participants.

An additional point that warrants attention is ensuring that participants/ prospective participants have some level of control over the decision-making timeframes and it should be acknowledged that shorter timeframes are not always beneficial and may even be a barrier for some people. We would welcome clarification of the term "compliance day" outlined in the PSG Rules. Particularly, whether participants/ prospective participants are to be consulted regarding the deadline for additional information/ evidence. Participants also need an option to request extensions to timeframes and deadlines if necessary due to their personal circumstances. This is necessary to enable them to exert some control over the process and ensure they have sufficient opportunity to provide all the information/evidence they wish to, whether specifically requested or not.

Provision of Reasons

VMIAC welcomes the proposed changes to s100(1B) and (1C) which provide participants with the right to request reasons for reviewable decisions. However, the Tune Review recommended that the provision of reasons should be a routine operational process when making decisions of this nature.

Requiring a participant to request reasons is an unnecessary administrative barrier in an already red tape heavy process. Participants living with psychosocial disabilities often report that they suffer additional distress engaging with the review process. Providing reasons automatically and without request would be a welcome step in reducing both this distress and the administrative burden on participants.

The amendments notably do not include a requirement to provide reasons for decisions made as part of an internal review. Whilst general administrative law principles may provide a recourse for participants, it would be vastly preferable to include a clear obligation on the NDIA to provide reasons for every decision made as part of an internal review. Again, these reasons should be provided routinely without the requirement of a request on the part of the participant.

Changes to the NDIS (Plan Management) Rules

VMIAC acknowledges the positive intentions (outlined in the DSS Explanatory document) of the new NDIS (Plan Management) Rules, which includes provisions aimed at protecting participant preference, choice and control around supports, service providers and management of funds. However, based on our extensive work with participants, we would like to raise some legitimate concerns that individual choice and control will not be given the priority it deserves, when factoring in other considerations, and that the overall nature of the Rules remains excessively paternalistic.

We applaud the requirement in Rule 6 that any decision which has the effect of limiting a participant's choice and control must be expressly identified in the participant's plan, to better empower the participants to request review of the decision if they are unhappy with it.

Furthermore, it is heartening that Rule 6 includes requirements that the CEO consider participant preferences in due course when making decisions around reasonable and necessary supports and providers. However, VMIAC's key concern is that this is just one of many considerations in deciding the "most efficient and effective" way for supports to be provided, and it may be overshadowed by NDIA internal policy that prioritises, for example, value for money or using NDIS registered providers, over participant preference.

We would like to highlight, in regard to psychosocial disability in particular, that choice of support and provider can be a very personal and individual thing, and is often an essential element if the participant is to receive the intended benefit from the support. A type of support or specific provider may not be interchangeable to a person with psychosocial disability, with outcomes and benefits often being dependent on the rapport/ relationship built with the provider, or a personal interest and connection to a particular support.

For example, we are aware of a case where a participant had been denied support from a counsellor, with whom they have built an important, trusting relationship, because the NDIA considered that this role could be effectively substituted by a recovery coach. There was a failure to consult with the participant to identify their preferences or to acknowledge that the relationship was essential to the

benefit hoped to be achieved from the support. Building a therapeutic relationship is a huge investment of time, trust and vulnerability, and rapport can take years to build.

A further example relates to refusal of the NDIA to approve requests for specific supports that may be more obscure, such as equine therapy, but which may offer a far greater benefit to the individual than any comparable alternative.

In both these examples, the individual's choice and control over their supports has been disregarded, with the NDIA overlooking the nuance and personal nature of psychosocial disability and making inappropriate generalisations and assumptions. For this reason, any decision around type and provision of support will only accurately reflect what is "most efficient and effective" where the participant's voice is paramount. Denying supports that align with participant preferences, or placing unreasonable limitations on choice of provider is a poor long-term investment for the NDIA. It deprives the participant of the greatest possible benefit, creates barriers to measurable improvements in function and capacity and may even lead to decline. All factors which not only reduce the chance that support needs may lessen over time, but may even contribute to increased support needs.

The above sentiments are largely reiterated in relation to Rules 9 and 10, regarding unreasonable risks with fund management. While it may be necessary for the CEO to make risk assessments and decisions to protect a participant from fund mismanagement, our concern, from experience, is that a participant may be unfairly denied choice and control due to a risk assessment that has involved little or no consultation with the participant and has not considered all the relevant facts. For example, any participant with a history of plan mismanagement, even if this resulted from an honest misinterpretation of how their funds are set up, or from bad advice from a Support Coordinator, may be denied the ability to self-manage. We are also aware of a situation where this right was denied to a participant who disclosed a tendency to impulse shop, even though this has no bearing on their ability to manage NDIS funds.

We appreciate that the CEO is empowered to consider and put in place safeguards to mitigate risk against plan mismanagement whilst enabling the participant to exercise choice and control, however we are not reassured that this measure will be appropriately utilised based on current practice, or that it appropriately addresses the issues raised in relation to lack of participant consultation or having regard to relevant information prior to making a decision.

We wish to reiterate that we understand the good intentions behind the Plan Management Rules, namely, in providing protections for participants against provider conflicts of interest, unregulated providers and plan mismanagement. However, we implore caution to be practiced, with proper checks, balances and safeguards put in place, for any decision which would deny a participant their preference for support, provider or fund management. It is crucial that adequate regard is given to the right of participants to exercise choice and control, and that this be prioritised as a fundamental guiding principle in all NDIA decision-making. We would seek further clarity as to how this will be ensured under the current reforms.

Other Matters of Concern

Amendments in Primary Legislation

This package of reforms is effected primarily through amended or additional NDIS Rules. VMIAC appreciates that the NDIS Rules are a necessary mechanism needed to give effect to powers conferred by the Act. However, some of the suggested changes could have been made in the primary legislation rather than in the Rules.

Using new, amended and updated NDIS Rules to effect change to the NDIS means the scrutiny and oversight inherent in the process of passing a bill into law are removed. It is our view that the gains in flexibility are outweighed by the dangers of bypassing the full parliamentary process, particularly when dealing with provisions relating to critical issues such as access.

In particular, the amendments to the Becoming a Participant Rules could have significant implications for individuals seeking access to the NDIS. As such, these provisions should be comprehensively debated in Parliament.

AAT Jurisdiction

The amendments provided the opportunity to resolve a jurisdictional issue which has been causing unnecessary delays to AAT reviews. Currently there is a lack of clarity with respect to whether the Tribunal has the jurisdiction to consider supports which were not before the NDIA reviewer during an internal review.

Conflicting decisions have been made on this point of law by AAT members while the case of *QDKH* awaits a Federal Court decision. The inconsistency of decisions means advocates are unclear on the advice to provide to participants regarding the scope of supports which can validly be included in an AAT review.

The impact for participants can be significant. In some cases, much needed additional supports are not being included in an AAT review. Participants therefore have to attempt to secure these supports through a plan variation or reassessment. An adverse decision would leave the participant having to lodge internal and external reviews for a second time.

This is time-consuming, delays access to supports and, particularly in the case of participants with psychosocial disabilities, can significantly add to the trauma experienced by participants through this process. It is clearly not in the spirit of beneficial legislation aimed at supporting people with disabilities.

An amendment clarifying that the scope of an AAT review includes all supports a participant is requesting at the time of review would solve this ongoing issue.

SDA and proposed changes to rules

SDA is the NDIS housing and funding model that offers the highest level of wraparound support for participants who experience significant support needs. Where services act as a wraparound support, such as SDA, there is the greatest need for oversight, transparency and participant choice and control.

The right to exercise due diligence and clear standards of care are intrinsic parts of having choice and control over one's NDIS plan. The proposed NDIS Legislation changes are welcomed in some forms

but with regards to SDA, there has been little to no improvement with regards to the safeguards and choice and control that could be secured through legislation. There is no specific reference to mechanisms that act to protect SDA residents from issues such as the conflict of interest of providers, and standards of service. It is a missed opportunity in a space where people in vulnerable situations are most at risk of harm.

The complexity of rules defining the funding and running of an SDA, and how the rules intersect and overlap, prevents participants (and, at times, providers) from understanding participants' rights and service guarantees. The changes may simplify matters for the NDIA but not so for the participant. This has not been addressed in the changes.

There are several rules that relate to decisions being made as follows and reflects this complexity:

- the 'reasonable and necessary supports' rules under ss 33 and 34 of the Act;
- the principles which underlie decision-making in the Act, including under ss 4, 5, 17A and 31;
- the Participant Service Guarantee Rules;
- the Support for Participants Rules;
- the SDA Rules; and
- the NDIA's Operational Guidelines

The NDIA has not referenced which recommendations from the Tune Review are used to inform the proposed changes to SDA rules. This leaves interpretation of the recommendations open and changeable without recourse to the Tune recommendations. The changes do not represent any meaningful simplification or accessibility to NDIS processes but rather, the complex process that exists in other domains of decision making has merely been replicated for SDA.