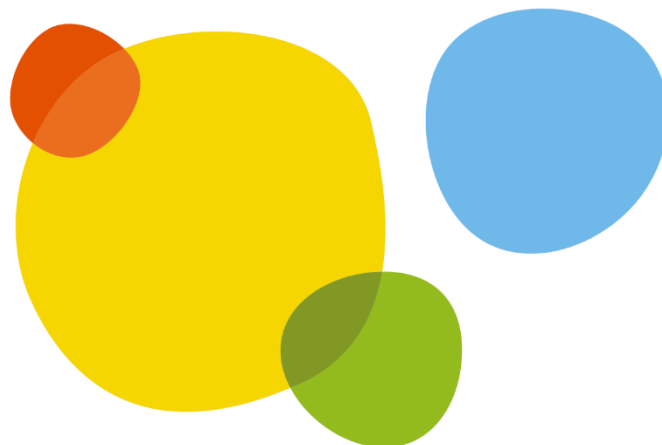


Youth Disability Advocacy Service Submission: Proposed NDIS legislative improvements

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Contents Page

.....	1
Youth Disability Advocacy Service Submission: Proposed NDIS legislative improvements and the Participant Service Guarantee.....	1
Contents Page.....	2
Executive Summary.....	3
Positive Changes.....	4
Accessing the Scheme - changes to the becoming a Participant' Rules.....	5
Plan administration.....	7
Reviewing supports - preserving access to justice.....	10

Executive Summary

This submission presents the Youth Disability Advocacy Service Victoria's views and recommendations on the proposed amendments to the *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021* ('2021 NDIS Bill').

About the Youth Disability Advocacy Service

The Youth Disability Advocacy Service (YDAS) is an agency of the Youth Affairs Council Victoria (YACVic). YDAS provide an individual advocacy service to disabled young people living in Victoria, (aged between 12 and 25) to ensure their human rights are protected. YDAS' advocacy work covers systemic issues which include (but are not limited to) accessing and navigating the NDIS. YDAS also undertakes systemic advocacy work as an active voice in the disability policy space, partnering with other key stakeholders to identify and address systemic issues and barriers facing disabled young people across Australia. All avenues of YDAS' work reflect the principles embedded in the human rights and social model of disability. With this ethos in mind, this submission seeks to represent the voice of young Victorians with disability and to identify the parts of the amending legislation which could undermine the decision-making capacity of young people involved with the NDIS. Where possible, this submission offers a recommendation or alternative to ensure that the 'choice and control' objective of the NDIS is preserved following these amendments.

Overview of this submission

While YDAS would usually consult directly with disabled young Victorians to hear their views and opinions on the 2021 NDIS Bill, given the short time frame for advocates to make submissions this has not been possible to execute. This submission looks at the parts of the Bill most relevant to young people and is structured in four parts:

- a. Positive Changes
- b. Changes to access
- c. Changes to planning
- d. Access to justice - merits review

Positive Changes

YDAS welcomes the following changes as beneficial to young people who are participants under the Scheme:

- i. First, YDAS strongly endorses the move to include more co-design with people with disability under the NDIS. This is a positive step and one that should be embedded into all aspects of NDIS law-making and policy. Disability-led design is best practice. It is particularly important that young people be involved in co-design of the NDIS because they are best placed to understand the challenges and change that occurs during that stage of life.
- ii. Second, YDAS welcomes the shift to use inclusive and gender-neutral language. This should be adopted across all NDIS and NDIA policy, guidelines and information.
- iii. Third, YDAS endorses proposed s100(1B) and (1C) in the amendments which enable participants to request reasons for decisions made by the NDIA *prior* to making any internal review application. This will improve access to justice and will empower participants under the scheme to be able to understand the decisions that are being made about their lives. While this provision is a positive step forward it could be improved by giving reasons ‘as of right’, rather than requiring the participant to *request* the reasons. The process of making a request can be burdensome, complex and time consuming and ultimately inefficient for both parties. Giving reasons ‘as of right’ would reduce this administrative burden and would promote transparency and confidence within the NDIS. It would also be more consistent with the Tune Review which stated that “...providing people with disability with an explanation of a decision should be a routine operational process for the NDIA when making access, planning and plan review decisions...”¹

¹ David Tune, Review of the National Disability Insurance Scheme Act 2013: ‘Reviewing and Amending a Plan’,

Accessing the Scheme – changes to the becoming a Participant’ Rules

YDAS understands that the amendments propose including new requirements for whether a person has a ‘permanent’ impairment or ‘substantially reduced functional capacity’ for the purposes of accessing the NDIS.

While YDAS welcomes clarification on what ‘psychosocial disability’ means under the Scheme, it remains to be seen how this classification will interact with the requirement and language of ‘permanence’ under the Act. YDAS considers that in light of the episodic and fluctuating experiences of psychosocial disabilities the use of ‘permanence’ as a measure of impairment and substantially reduced functional capacity is not appropriate. We recommend that the amendments re-examine the inclusion of ‘permanence’ in relation to psychosocial disabilities and instead include an acknowledgment of the fluctuating and varied nature of these disabilities. This is particularly relevant to young people with mental health conditions seeking to access the Scheme who have been recognised in the *NDIS: A Guide for Mental Health Professionals* as being less likely than older people to be eligible for the NDIS.² This is because psychosocial disability has proven to be very difficult to clear the evidence hurdles in the access process as a person is required to provide clear evidence that the mental illness severely impacts an individual's ability to work, attend school or engage with their community. For many young people with psychosocial disabilities who are attending school or work but are rely on support and care to do so, this high evidence standard has operated as a barrier to the NDIS. The amendments to the ‘Becoming a Participant – Rules’ should incorporate a human rights and social model understanding of psychosocial disability and move away from evidence of

² Psychosocial disability and mental illness, <https://www.yacvic.org.au/ydas/resources-and-training/ndis-guide/psychosocial-disability/>

'permanency' towards an understanding that disability can and will fluctuate and impact on a young person's life in varied ways.

Plan administration

YDAS understands that the amendments made to plan administration seek to reduce undue wait-times and overcome the complicated process of plan review which shapes the current legislation.³ YDAS welcomes the inclusion of new ‘variation’⁴ and ‘reassessment’⁵ powers on the basis that these reverse the blunt tool of plan review currently operating under section 48 of the *National Disability Insurance Scheme Act 2013* (Cth) (‘NDIS Act’) but stresses that these new powers must be redrafted to legislate the participant’s right to request a variation or reassessment of their plan.

47A Variation of participant’s plan by CEO etc.

As noted in the Tune review a key limitation under the current Act is that a participant’s plan cannot be varied unless a new plan is created under Division 4 of the NDIS Act.⁶ In practice this has meant that *any* change made to a young person’s plan - including a very minor administrative change (for example an error relating to the person’s contact details) resulted in the participant having to undergo a full plan review. During consultation feedback sessions with disabled young Victorians who are participants in the NDIS, many of the young people expressed significant frustration over this plan review process; noting that they had been left in [some](#) cases without supports and finding the process of advocating for a new plan to be approved by the NDIA to be complex and time-inducing.

YDAS understands that the proposed plan amendment power under the new section 47A will change the plan review process so that the participant’s plan continues on foot, but with the changes built into the plan. This amendment is similar to the ‘light touch’ plan review process that the NDIA implemented to

³ David Tune, Review of the National Disability Insurance Scheme Act 2013: ‘Reviewing and Amending a Plan’, p.136-138.

⁴ Exposure Draft, s 47A – Variation of participant’s plan by CEO etc.

⁵ Exposure Draft, s 48 – Reassessment of participant’s plan

⁶ David Tune, Review of the National Disability Insurance Scheme Act 2013: ‘Reviewing and Amending a Plan’, p.136.

respond to situations where only minor adjustments needed to be made to a participant's plan.⁷ YDAS recommends that the plan amendment powers be re-drafted so that they reflect the objective outlined under the Tune review, to "...provide participants with timely access to supports, providers with faster access to funding and reduce administrative burden on the NDIA, allowing more resources to be dedicated to supporting quality planning and plan implementation processes."⁸ Key to preserving these aims will be to ensure that access to justice, through merits review, is available for decisions made under the plan variation power. The primary concern YDAS have with the new s47A provision is that it allows for a participant's plan to effectively be varied without the consent of the participant. This hands control over a participant's life effectively to the agency and does not align with the CRPD principles on which the NDIS is built. For young people who are in a transitional period of life (i.e., transitioning from school to further education or employment, moving out of home or other housing arrangements) they need a timely and responsive process which directly involves and centres their will and preference when making changes to their plans.

In addition, YDAS is concerned that this s47A provision could be misused to make quick administrative decisions which impact negatively and seriously on the individual whose plan is being changed, but then that 'variation' is not able to be reviewed by a Tribunal because the variation is not deemed to be a reviewable decision under section 99 of the NDIS Act and for the purposes of section 100 of the NDIS Act. YDAS considers that access to justice through the right to merits review is essential and that any plan variation power must align with the spirit of the NDIS, to give disabled Australians choice and control over their lives.

Section 48 Reassessment of participant's plan

Under the amended legislation, Section 48(1) states that the CEO may, on the CEO's own initiative, conduct a reassessment of a participant's plan at any time. The subsections then proceed to outline certain things the CEO must

⁷ Ibid, p.137

⁸ Ibid, p.139.

take do when conducting a reassessment.⁹ Absent from section 48 is a provision empowering the *participant* to make a request for a reassessment to the CEO. This must be remedied, and a new subsection included under section 48 enabling a participant to make a request to the NDIA for a reassessment of their plan. Without a power enabling the participant to make the request the NDIA holds all power over reassessments of plans and this denies individuals their choice, control and decision-making capabilities. YDAS understands that making this change, to give the participant a power to request reassessment, would not disrupt the overall workings of section 48 because the CEO would still not be bound to follow the participant's request (i.e., the CEO would be free to reject the request).

⁹ Exposure draft, section s 48(1)-(7).

Reviewing supports – preserving access to justice

The QDKH rule

YDAS is aware that the question of what supports can be reviewed by a Tribunal (AAT) on merits review has come into dispute following the ruling in QDKH which concluded that new supports raised at a Tribunal could not be reviewed as part of the participant's plan.¹⁰ This outcome has since been followed in other AAT decisions and has resulted in negative outcomes for participants in the Scheme. Limiting the Tribunal so that they are only able to consider whether the supports listed in the plan submitted to the Agency are 'reasonable and necessary'¹¹ does not reflect or align with the practical experience of obtaining supports under NDIS plans – where a person's needs and supports can and do change. This includes changes to informal supports, which can then impact on the paid supports the person needs. This poses a particular risk for young people where, for example, their parents/guardians are no longer able to provide informal supports and consequently they needed their plan adjusted to include paid supports to fill this gap. Under the QDKH rule these new supports would not be able to be considered by the Tribunal at merits review, potentially putting the young person at risk of losing supports that they depend on and simultaneously placing pressure on parents/guardians to continue providing informal supports (using the outlined example).

Given that the proposed legislation amendments will change the merits review process in various ways, YDAS considers that the legislation should reflect the common understanding that the Tribunal should have full scope to look at whatever supports the person has going into the review. This preserves the right to safety for the applicant, as there is a risk that where a support is not

¹⁰ QDKH and National Disability Insurance Agency, Re [2021] AATA 992.

¹¹ NDIS Act, s 34.

able to be reviewed (but may well be essential to the applicant and if reviewed would have satisfied the s34 criteria) the applicant is then not able to access the service or support, potentially seriously impacting their health and wellbeing.

Conclusion

This submission has considered how the proposed NDIS legislative improvements will impact disabled young people in Australia. We have outlined changes we believe will positively impact on young people as well as highlighting areas of concern within access, planning and merits review. A common thread within the identified areas of concern under the new amendments is a departure from the principles of 'choice and control' underlying the NDIS and an expansion of power given to the Agency. These areas should be reviewed so that the power given to the NDIA is clearly defined and that the agency of the participants under the Scheme to make decisions about their lives are preserved.