

# Submission: Proposed NDIS legislative improvements and the Participant Service Guarantee

## Schedule 1: Participant Service Guarantee

NDS supports the introduction of the Participant Service Guarantee. Establishing timeframes for decision-making, engagement principles and performance metrics, which were recommendations of the Tune Review, will improve the operation of the scheme for participants.

We take this opportunity, however, to highlight the substantial delays that are occurring in the provision of assistive technology; it is an area of the scheme that needs urgent attention (one organisation reports a backlog of more than 200 clients waiting for assistive technology approvals: 36% have been waiting for 3–6 months; 42% for 6–12 months; and 3% for more than a year). Better systems and processes are required, alongside a commitment to meeting timelines.

Of all the proposed amendments, the new section 47A (which empowers the CEO to vary a participant's plan—excluding the participant's statements of goals and aspirations) is the one that requires more information. NDS understands the intention of the Tune Review's recommendations on this matter and supports that intention. Where an error or oversight has been made in a participant's plan, it should be able to be corrected quickly and painlessly without the need for a reassessment (at present, this can only be done in some circumstances).

The relevant section in the proposed rule states:

### **10 Variation of participant's plan on CEO's own initiative**

(1) For the purposes of paragraph 47A(6)(a) of the Act, the CEO must have regard to the matters set out in subsection (2) of this section in deciding whether to vary a participant's plan on the CEO's own initiative.

(2) The matters are as follows:

- (a) whether the variation is minor or technical;
- (b) if the variation is to add a particular support to the statement of participant supports included in the participant's plan—both of the following:

- (i) how that support is to be delivered to the participant;
- (ii) the cost of that support;
- (c) whether the variation is of the reassessment date of the participant's plan;
- (d) whether the variation is to how a particular support covered by the statement of participant supports included in the participant's plan is to be delivered to the participant;
- (e) whether the variation relates to the cost of a particular support covered by the statement of participant supports included in the participant's plan;
- (f) whether the variation relates to compensation received, or to be received, by the participant;
- (g) whether the variation relates to the management of any aspect of the participant's plan, including the funding for supports under the plan;
- (h) whether the variation increases the total funding for supports under the participant's plan;
- (i) whether the variation mitigates an immediate risk of harm to the participant or another person.

Concern lies with the statement “the CEO must have regard to the matters set out in subsection (2)”. This statement does not impose any limitations on how the CEO may vary a plan. Can the CEO vary a plan without consulting the participant? Are there limits to the size of the variation? Can plan funding be reduced without consultation with the participant? As it stands, this element of the rule is too loosely prescribed. Limitations are needed.

**Recommendations:**

Establish clear limits to the ability of the CEO to vary a plan.

Require the CEO to consult with a participant before their plan is varied.

The granting of greater autonomy for the Commonwealth Ombudsman is welcome as it will allow for more transparency and increased accountability for the Agency. Their role is further boosted through the Explanatory Memorandum's clarification that the Ombudsman will be able to monitor complaints about the Agency to identify systemic issues and can conduct own motion investigations (including reviewing Agency practices and procedures).

The introduction of a section in the Act that requires the Commonwealth Ombudsman to provide the Minister with a written report at the end of each financial year is supported.

Many people trying to work within the scheme have sought clearer information about the use of the word 'review'. Multiple meanings of the word within the Act are confusing; the amendments proposed—retaining review for issues taken to the AAT and to use 'vary' or 'reassess' for other processes process will help remove confusion.

**Recommendation:**

Clear, easy English definitions must be provided for the terms ‘review’, ‘vary’ and ‘reassess’, including making it clear as to when they apply and how they differ.

NDS is pleased to see new subsections 100(1B) and (1C) that require the CEO to give an explanation, if requested, into why a decision about their plan has been made. This will improve transparency for participants. The work underway by the NDIA on supported decision is important here. Some people with intellectual disability will need assistance to request such an explanation (or have someone can make that request on their behalf) and to make decisions about who they would like to share that explanation with (and understanding the potential benefits or risks of sharing that information).

Another amendment supported is providing that NDIS rules may now require additional information to be included in the quarterly report on the Agency’s performance in delivering the Guarantee. The flexibility to add new information into the quarterly report has the potential to increase transparency.

The Tune Review recommended an amendment of the NDIS Act to clarify the Administrative Appeals Tribunal’s (AAT) jurisdiction, including the power for a plan to be amended while a matter is before the AAT. NDS is pleased to see this is proposed by inserting a new subsection 103(2).

While not a feature of the legislation amendments, NDS would welcome the opportunity to work with the Minister for the NDIS, Linda Reynolds, and the NDIA to determine something like a ‘provider service expectation’. Delays in decision-making, unilateral decisions by the Agency which impact on how providers can support participants, and sometimes significant outstanding payments—NDS has heard of a provider carrying \$800,000 in unpaid debts—should not be a feature of the scheme, not least because such transition problems should be a thing of the past.

Supported Independent Living (SIL) provides a good example of the need for an agreement on timeliness and processes for when a provider needs to engage with the NDIA. A provider may submit a Roster of Care for a participant but not hear back from the planner. Some time later it transpires that a failure of internal processes of the NDIA has resulted in the Roster of Care not being given to the planner. Delayed decision-making ensues, with the provider delivering ongoing support to the participant (which they have a duty of care to do) and for which they are not able to claim immediately. The time taken to resolve a Roster of Care, and especially the non-payment for SIL supports, can quickly result in a substantial debt. Receiving a payment for these delivered supports is rarely straightforward.

**Recommendation:**

Establish clear timeframes for core processes involving interactions between providers and the NDIA.

Prioritise work on establishing decision-making timeframes for participants with complex support needs.

## **Schedule 2: Flexibility Measures**

NDS supports the amendments to principles but requests one important addition: the important role that service providers have in delivering the supports purchased by participants should be acknowledged by including them as a partner in co-design activities undertaken by the NDIS.

Too often, provider implications are not considered in decisions and policies of the NDIA to the detriment of participant choice and the efficient and effective operation of the scheme. Including providers in co-design activities will deliver better outcomes for participants, families and carers, the NDIA as well as providers.

**Recommendation:**

List providers in the new subsection 4(9A) as an important contributor to co-design.

NDS supports the replacement of subsection 4(15) in the principles: from

“Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted”

to

“In exercising their right to choice and control, people with disability require access to a diverse and sustainable market for disability supports in which innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of those supports is promoted”

The need for a diverse and sustainable market for disability supports is critical to the functioning of the scheme but some areas, and some supports, are not receiving the attention they require. Market failure is occurring and without immediate attention is likely to grow.

NDS supports the amendments that recognise the importance of families and carers to participants under the section.

Amendments to section 14 improve the understanding of general supports that can be funded under the Act. It will allow funding to be provided to persons or entities to provide early intervention supports to assist families to start accessing approved early intervention supports prior to going through the planning process. NDS does not, however, support the notion that ECEI Partners should offer independent advice on suitable providers. A provider’s suitability should be managed through other processes such as those controlled by the NDIS Commission.

**Recommendation:**

Remove all references to ECEI Partners offering advice on the suitability of particular early intervention partners (in legislation and/or supporting documents).

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NDS supports increasing the purposes for which the Agency may provide funding to build the capacity of mainstream service and community programs to create connections between all people with disability and the communities in which they live. Many would agree that the impact of initiatives funded under the Information, Linkages and Capacity Building program have fallen short of expectations. NDS is aware this program is currently under review, the new Australian Disability Strategy is soon to be released, and the Independent Advisory Council has called for more funding to support 'tier 2'. There is widespread agreement that greater and more targeted investment is needed.

Since the scheme began, there has been a constant discussion about the definition of psychosocial disability and eligibility for people with psychosocial disability. The proposals contained in the exposure draft are a welcome and positive improvement. step forward as they better acknowledge the episodic and fluctuating nature of psychosocial disability. We support the inclusion of these improvements in the amendment bill to go before Parliament.

NDS requests, however, that work continues to be undertaken with the sector on some remaining difficult issues—such as 'undergoing or have undergone appropriate treatment'; how 'appropriate treatment' is defined; and how the prospective participant's subjective experience of accessing and receiving treatment is taken into consideration.

Guidance is needed for health professionals on the evidence required to support a prospective participant's application for the NDIS as well as on the Recovery-Oriented Framework for Psychosocial Disability (which is under development).

Plan management has been a support that has caused payment problems for providers. A source of difficulty has been the refusal of a participant to authorise the payment for supports received, with providers left carrying debt. There is also confusion over responsibilities to ensure there is sufficient funds to pay for supports provided. Plan management also allows a provider to use unregistered providers even though a risk assessment on their ability to manage those risks has not been undertaken.

NDS supports the proposal that participants who request to 'plan manage' their NDIS funding be subject to the same considerations that apply to when a participant seeks to 'self-manage'.

NDS also supports the amendment that will enable the Agency to pay service providers directly on behalf of participants, including self-managing participants, through a new payment platform.

### **Recommendation:**

The 2016 provider payment debacle, caused by the introduction of a new portal, must not be repeated. NDS urges the Agency to conduct rigorous testing of the new portal with providers before it 'goes live'.

In September 2020, the NDIA consulted on changes to support coordination; no findings of that consultation have yet been released.

In the Tune Review, support coordination was considered. In conclusion, the report states<sup>1</sup>:

Legislative amendments should not restrict, in any way, participants from having choice and control over their NDIS supports. On this basis, the legislation should not require support coordination to be independent from other service provision, but rather mitigate the risk of participants being exposed to inappropriate conflicts of interests. This could be achieved by requiring the NDIA to actively assess the risk to participants when supporting them through plan implementation. This would not be limited to participants receiving SIL, but would be of particular importance for this cohort.

NDS agrees with the Tune Review report and is, therefore, concerned that section 8 may be used to separate all support coordination from other service provision. Section 8 of the proposed Plan Management rules states:

### **8 Supports not to be provided by particular providers**

- (1) For the purposes of subsection 35(1) of the Act, the statement of participant supports included in a participant's plan may specify that a support must not be provided to the participant by a particular person if the CEO is satisfied, having regard to the matters specified in subsection (2) of this instrument, of one or more of the following:
  - (a) the provision of the support to the participant by that person is not likely to substantially improve outcomes for the participant or benefit the participant in the long term;
  - (b) both of the following:
    - (i) another person could provide the support to the participant;
    - (ii) that other person is likely to provide better outcomes for the participant than that person;
  - (c) both of the following:
    - (i) the participant has particular cultural safety needs;
    - (ii) the provision of the support to the participant by that person creates a risk to the participant's long-term wellbeing;
  - (d) the provision of the support to the participant by that person is likely to adversely affect the participant's:
    - (i) inclusion in the participant's community; or
    - (ii) ability to exercise choice and control in relation to the other supports specified in the statement of participant supports;
  - (e) there is a risk that that person may inappropriately influence the participant's choice of providers of other supports specified in the statement of participant supports;

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<sup>1</sup> See section 7.40 in the Tune Review report, which can be viewed at <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/review-of-the-ndis-act-report>

- (f) there is a risk that the provision of the support to the participant by that person may cause harm (including financial harm) to the participant;
- (g) that person will not:
  - (i) provide the support to the participant; or
  - (ii) provide the support to the participant in accordance with the participant's plan.

**Recommendations:**

Make it clear in the rules and supporting documentation that section 8 of the Plan Management rules will not be used to make a 'blanket' decision to separate all support coordination from the delivery of other supports.

That the NDIA release—as soon as possible—the findings from the review of the support coordination consultation and expectations on how the support is delivered into the future.

Since before the NDIS began, NDS has been arguing the need to strengthen some of the safeguarding measures to protect participants. An important change should be implemented in this Act amendment to require all workers engaged to support a participant in a risk assessed role to undergo an NDIS Worker Screening Check. There is no justifiable reason to not require this safeguarding measure for all relevant workers and not just those engaged by registered providers.

Similarly, it is time to restrict the delivery of some high risk supports to those providers that are registered. When the scheme began, all SIL funding was Agency-managed and thus only delivered by registered providers. SIL funding can now be managed by plan managers, meaning unregistered providers can be used. This loophole should be closed. All SIL, Short Term Accommodation and Medium Term Accommodations supports should only be delivered by registered providers.

**Recommendations:**

Require NDIS Worker Screening for all workers engaged in risk assessed roles.

Restrict the delivery of SIL, Short Term Accommodation and Medium Term Accommodation to registered providers.

The debate about the need for a Community Visitors Scheme to operate in every state and territory as a safeguarding measure for SIL is ongoing. Questioning by the Disability Royal Commission indicates that it is exploring this issue.

In his report into the death of Ann Marie Smith, the investigator recommended:

Consideration should be given to the Commission establishing its own equivalent to State and Territory based Community Visitor Schemes to provide for individual face-to-face contact with vulnerable NDIS participants. Such contact is also important in emphasising the personal values necessarily involved in providing services to individuals with disability. The NDIS Act

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should be amended to provide explicitly for this function. Until that happens, the Commission should continue to support the State and Territory Community Visitor Schemes and any doubt about State and Territory powers under those schemes in relation to NDIS participants should be resolved between the law officers of the Commonwealth and of these States and Territories.<sup>2</sup>

It is disappointing this consideration of this safeguarding measure has not received the attention it requires. No mention of it is made in the extensive documentation accompanying this consultation on amendments to the NDIS Act.

### **Schedule 3: Full scheme amendments**

NDS agrees with amendments to update the terminology in the NDIS Act.

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<sup>2</sup> See recommendation 4 at <https://www.ndiscommission.gov.au/sites/default/files/documents/2020-09/independent-review-report-commissioner-public-310820.pdf>



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**October 2021**

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**National Disability Services** is the peak industry body for non-government disability services. It represents service providers across Australia in their work to deliver high-quality supports and life opportunities for people with disability. Its Australia-wide membership includes more than 1200 non-government organisations which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.