



Senate Standing Committees on Community Affairs

**Submission on the National Disability Insurance Scheme
Amendment (Participant Service Guarantee and Other
Measures) Bill 2021**

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The Physical Disability Council of NSW (PDCN) is the peak body representing over 1 million people with physical disabilities across New South Wales, including those with sensory disabilities and physical disabilities in consequence of chronic illness or disease.

PDCN provided a submission to the original draft Bill on 7 October. At that time, we raised several concerns regarding both the Bill and consultation process. These concerns have either been addressed insufficiently or apparently ignored.

We again raise issue with the lack of genuine community engagement

We are gravely disappointed, once again, at what we can only perceive as a blatant disregard of the views of the disability community and their representatives.

We note that the Bill was tabled on 28 October, three weeks after the closing date for submissions, and that the current consultation period is 7 working days. This is appalling form and severely limits the capacity for genuine community participation.

On that point, we note the provisions of the proposed change to Schedule 2, 4(9A):

'People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.'

Recommendation:

The NDIA and Ministry should work towards genuine engagement with the disability community, extending to proper consideration of submissions, and sufficient timeframes for the community to provide comment.

The range of matters that the CEO can consider when deciding to vary a plan remain unconstrained and open to broad interpretation

We note that s. 47A of the Bill now provides that variations must be prepared with the participant – we would have expected this to be the case, even if it were not expressly provided – but the CEO can still decide to vary a participant's plan without the participant's consent or providing any basis for the decision.

We are glad to see the inclusion of the range of matters that the CEO must consider when deciding to vary a participant's plan included within the Bill itself (s. 47(A)(3)).

We note however, that the list of matters which the CEO should have regard to is not limited and that several of the matters for consideration are drafted loosely. We also find the term "have regard to" vague and unhelpful.

There is no hierarchy in terms of which matters should be given the greatest consideration, or any prescription on what "having regard to" might mean in practice.

We could anticipate situations where certain aspects of a plan – e.g. cost of services, are weighted more highly than a patient's goals and aspirations or assessments.

Recommendation:

Greater prescription must be provided in terms of the weighting to be given across the different matters that the CEO should have regard to.

Recommendation:

The list of matters should be expressly limited and contained within the Act.

The capacity for the CEO to decide to reassess a plan when a participant has only sought a variation remains highly problematic

We had previously sought removal of the provision which allows the CEO to decide to reassess the participant's plan under s. 48 in response to a request by the participant to vary their plan.

We are now also seeing the addition of a new provision –s. 47(A)(9) allowing the CEO to make variations that are different to those requested by the participant, and s 48(3)(a) which allows a CEO to decide to vary a plan, rather than reassess it, when a participant explicitly asks for a reassessment.

We are concerned from a procedural fairness perspective, that the current drafting allows the CEO to do something entirely different to what has been formally requested – especially if this decision can be made without the consent of the participant.

We also note, more practically in the case of variations to plans, that participants invest substantial time and effort in working with the NDIS to create plans that best reflect their needs. It is a complicated, often time-consuming process.

Having a request for variation potentially give the CEO the ability to reassess a plan altogether will make participants hesitant to request variations in the first instance, and potentially result in supports and services not being used, or being unsuitable.

This is inherently different to the plan flexibility envisaged in the Tune Review, which was expected to improve participant experiences:

Flexibility is key to positive participant experiences and the current implementation of the NDIS is impacted by excessive complexity. While this complexity is largely driven by NDIA operational procedures, there are some areas of the NDIS Act that are unnecessarily rigid or do not incentivise flexibility. The inability to amend a plan is one of the key frustrations for participants and one of the biggest weaknesses of the NDIS Act.

Allowing a plan to be amended, in appropriate circumstances, would be one of the most effective levers to improve the participant experience. This would allow small changes to plans to be made quickly with a low administrative burden, such as adding capital or equipment supports after obtaining quotes, fixing obvious errors or enabling a fast response in crises. It would also help to resolve

Recommendation:

Sections 47(A)(4)(c), 47(A)(9) and 48(3)(A) should be removed.

Section 48(5) does not provide sufficient prescription of the matters to be considered

Section 48(5), in contrast to s. 47(A)(3), does not set out the range of matters which need to be considered when deciding to reassess a plan. It is our view that the reassessment of a plan is significantly more concerning than a variation – since it could result in sizable changes to supports and funding, or even potentially in a decision that the participant is no longer eligible for the Scheme.

Recommendation:

The matters that the CEO should consider under s. 48(5) are expressly provided within the Act and prescription given in terms of the weighting to be given across the different matters.

Recommendation:

Decisions to reassess a participants' plan by the CEO under their own initiative remain left out of the table of reviewable decisions

In our previous submission, we called for a decision of the CEO to reassess a participant's plan without their consent be expressly provided in the list of reviewable decisions.

This type of decision is, by far, most likely to have significant impact on a participant, and would be the type of decision that participants would most likely seek to challenge.

In the interests of procedural fairness, it is necessary for participants to be able to challenge the necessity of a plan reassessment and the results of such action. Part of such a process would involve an assessment of whether the CEO had had regard to all prescribed matters when making the determination.

Recommendation:

Section 48(2) should be expressly provided as a reviewable decision in s. 99(1)

We remain gravely concerned at the capacity of the CEO to create Rules relating to decisions to vary or reassess participants' plans without consent of the States and Territories

We note that the capacity to make rules around plans and supports remain Category D rules. We previously called for rules relating to modifying participant plans and supports to be Category A rules, since Category D rules do not require agreement from the States or Territories.

¹ Tune, D, *Review of the National Disability Insurance Scheme Act 2013, Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019 <NDIS Act Review - final - with accessibility and prepared for publishing1 (dss.gov.au)> accessed 8 November 2021.

Rules relating to participant plans have the capacity to directly impact States and Territories, particularly if changes result in a participant having to rely on state-based services.

These types of rules also have the potential to significantly alter the nature of the NDIS and how it supports people with disabilities. Checks and balances must be put in place.

Recommendation:

Any rules relating to the CEO's decision-making around planning and supports for NDIS participants (or potential participants) should be Category A rules.

Applicants with episodic or fluctuating impairments relating to physical disability and/or chronic illness/disease should receive the same flexibility as those with episodic and fluctuating psychosocial disabilities

There is no practical difference between someone who experiences episodic or fluctuating flare ups relating to a physical condition, for instance, arthritis, and someone who experiences episodic and fluctuating episodes relating to a psychosocial disability.

Given this, we are disappointed that the Committee has not extended flexibility in terms of access to the NDIS to people who experience episodic or fluctuating physical disabilities or chronic disease. It is important that the NDIA considers all applicants equitably.

Recommendation:

Flexibility in terms of access to the NDIS should be provided to applicants with episodic or fluctuating impairments relating to physical disability and/or chronic illness/disease.

Concluding comments

We reiterate that it is very difficult to be able to understand and comment on the changes to the Bill within the narrow time-period we have been given. The disregard that continues to be shown for genuine community engagement is damaging to the reputation of NDIS, and only reinforces community concern and distrust.

Whilst we see some improvements for our membership in this iteration of the Bill, such as the acknowledgement that participants should be involved in the preparation of variations to their plans and that participants are given the express right to request plan reassessments, significant concerns, such as the broad range of powers accorded to the CEO and the Federal Government to vary or reassess participant's plans have not been addressed.

The scope for parliamentary or State and Territory oversight across rule-making that could have the potential to significantly alter the scope and functioning of the NDIS is worryingly constrained, such that any positive impacts from the new Participant Service Guarantee are overshadowed.