



Senator the Hon Linda Reynolds CSC
Minister for Government Services
Minister for the National Disability Insurance Scheme
Parliament House
CANBERRA ACT 2600

7 October 2021

Re: National Disability Insurance Scheme (NDIS) Amendment (Participant Service Guarantee and Other Measures) Bill 2021 exposure draft

Dear Minister,

I am writing regarding the proposed changes to the *National Disability Insurance Scheme Act 2013* (NDIS Act) as set out in the Department of Social Services website.

On behalf of Inclusion Australia, I would like to acknowledge you for addressing the concerns of the disability community and not proceeding with some of the previously proposed changes to the NDIS in the present legislation. We were pleased to see your commitment not to introduce independent assessments, no changes to Section 34 (the criteria for 'reasonable and necessary') and no new debt recovery powers.

Inclusion Australia appreciates the Australian Government's commitment in this proposed legislation to important recommendations from the 2019 independent review conducted by Mr David Tune AO PSM (the Tune Review). As you are aware, many recommendations from the Tune Review are based on feedback from people with disability, their families, carers, supporters, and others in the community. It is significant that those voices have been heard.

Having reviewed the proposed changes, Inclusion Australia has identified concerns about the Amendments and the operational implications of these changes. Given the limited time to respond to this consultation – a significant issue in itself - we have summarised these concerns in the attached document. We would also like to acknowledge and support the submission prepared in response to the proposed NDIS legislative changes by the Public Interest Advocacy Centre (PIAC) dated 7 October 2021. We believe the PIAC submission reflects the key issues of concern to the sector.

We appreciate your time and thoughtful consideration of our concerns.

Kind regards,



Catherine McAlpine
Chief Executive Officer

Inclusion Australia

About Inclusion Australia

Inclusion Australia is the national Disability Representative Organisation (DRO) representing the rights and interests of Australians with an intellectual disability and their families.

We have state members in New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia:

- Council for Intellectual Disability (CID), NSW
- Parent to Parent (P2P), QLD
- South Australian Council on Intellectual Disability (SACID)
- Speak Out Association of Tasmania (Speak Out)
- Victorian Advocacy League for Individuals with Disability (VALID), and
- Developmental Disability WA (DDWA).

Key issues

Accessibility of the consultation

The four-week consultation period has been challenging for Inclusion Australia as a representative organisation. Although raised by several organisations, requests for a time extension were rejected.

One of our key strengths is our capacity to connect with and seek the views and experiences of people with an intellectual disability, their families, and other supporters. However, the government released 16 complex documents as part of this consultation that have taken considerable time to read and understand. An Easy Read overview of the Amendments was provided, but unfortunately it did not cover many of the key points and lacked important detail. Much of the content needed to be further translated into Easy Read and plain language to make the information accessible. As a result, there was not enough time in this consultation to support the participation of people with an intellectual disability.

Despite advance requests for a longer consultation period to engage meaningfully with the disability community, the short time period, dense consultation materials and rejection of the joint sector time extension request have prevented the effective and full participation of people with disability. This runs contrary to Article 29 of the United Nations Convention on the Rights of Persons with Disability around the right to participation in political and public life.

We understand there has been considerable consultation over independent assessments and other proposed changes, however this is not a substitute for consultation on the legislation itself. Our community is wary of possible issues in the legislation and potential implications for people with intellectual disability that we haven't had time to adequately consider. As a result, our response is limited, and our concerns are described in general terms.

The NDIS Act is hugely significant to the lives of people with disability, their families and supporters. We would appreciate a longer, more accessible consultation for future changes to the Act and relevant policy/legislation, in addition to an improvement to the accessibility of the legislation itself

Tune Review Recommendations

We commend the Australian Government for listening to the voices of the community through the Tune review and making some of the recommended changes, in particular:

- **Inserting timeframes** (Schedule 1; Part 3 s1-10 of the Participants Service Guarantee Rules)

Whilst providing clarity around timeframes is important, this should not impact on the quality of plans or put pressure on LACs and planners to rush people with disabilities and families to meet these timelines.

Recommendation: We suggest that guidance is developed for LACs and planners to support participant choice and control within the set timeframes

- **Clarification of the language around 'reviews'**

We strongly support ensuring that words in the legislation have a unique meaning that are clear to the community. The word 'Review' had at least three meanings in the original Act, so this clarification is strongly supported.

- **Addition of co-design to the NDIS principles**

We welcome this addition and look forward to supporting the NDIA to better understand co-design with people with an intellectual disability and families.

- **Addition of 'lived experience of disability' as a criterion for board members**

We welcome the intention of this change and its inclusion in the legislation. It puts an important value on lived experience and will ensure that the Board has a legislated mandate to preference potential board members on this basis alone.

As the national representative organization for people with an intellectual disabilities and families, we would like to see greater articulation of 'lived experience' so that both disabled people (including people with intellectual disability) and family members of people with disabilities are referenced. In saying this, family members should not be preferenced over, or take the place of people with disabilities, but that the Board recognizes and has room in addition.

Recommendation: greater articulation of 'lived experience' so that both disabled people (including people with intellectual disability) and family members of people with disabilities are represented at Board level.

Plan Management

Plan Management is important for many NDIS participants with an intellectual disability and families. It is critical that the current flexibility of plan management be maintained.

This includes capacity for people to use non-registered providers be maintained in the Scheme. We believe it is important to maintain the option to use unregistered providers as this is an area where some genuine innovation is taking place. It is often an opportunity rather than a risk.

The Tune Review advocated that the '*NDIS Act is amended so a participant who requests to 'plan manage' their NDIS funding be subject to the same considerations that apply when a participant seeks to 'self-manage'.* (Recommendation 19). Inclusion Australia suggests that the risk assessment for plan

management may not need to be identical to the risk assessment for self-management. This is partly because the Plan Managers themselves must be registered providers.

We have concerns that the risk assessment process might be used to justify decisions which disempower participants and families.

Clearly a balance needs to be struck between maintaining genuine choice and control and safeguarding against sharp practice. Greater transparency is needed so people and families can make informed decisions when weighing up the risks.

Recommendation: further detail be provided on the risk assessment criteria, ensuring that they do not unduly disempower participants and concentrate decision making by the NDIA

Direct payments to providers

The introduction of direct payments to providers, including the introduction of an app-based payment system, is welcome as another way to increase choice for people and families. It is supported on the basis that existing alternative systems are maintained. We would have concerns about accessibility, the digital divide, and confusion for people with an intellectual disability, ageing parents and carers if the app were offered as the only option.

Plan Reviews

Plan variation (section 47a)

We continue to have concerns about the powers of the NDIA to vary plans on their own initiative, without informing or seeking input from participants. Further we have concerns that such variations might not fall under the category of decisions which can be reviewed.

Under the new Amendments, the CEO and NDIA power to vary plans is not constrained (Rules 10 & 11). It is also not clear which decisions are classified as small variations and which are reviews (see comments below under language).

We believe that safeguards are needed around this and recommend that further guidelines and clarity be issued.

Recommendation:

More detail be provided on the NDIA's scope of powers for plan variation.

Plan variation must be a reviewable decision with notification prior to implementation so the participant has sufficient time to exercise their right to apply for an internal review before the variation takes effect.

Reassessment vs. variation vs. review

We strongly support the Government's focus on use of the term 'Review' for multiple process in the NDIS. This has caused confusion and created ambiguity for people and families.

However, we caution against the use of 'reassessment' as a replacement. We do not believe this is the best choice of word given the difficult recent conversations around assessments in the NDIS.

Our understanding is broadly, that ‘variation’ is used to describe minor changes and ‘reassessment’ for major changes. However, we note that both variation and reassessment have the same criteria in the proposed wording. This raises concerns about how the NDIA will decide which type of ‘review’ a participant will get. Some clearer explanation is required.

Recommendation:

We recommend further specific conversation with the disability community on appropriate language around the different types of review processes. Whichever words are identified, they should be clearly articulated and explained in context in future guidance.

Reasons for decisions

We strongly support the proposed amendments around provision of reasons for decisions as set out in s100 (1b) and (1c). Allowing participants to access reasons for decisions is a welcome change which will lead to increased accountability and transparency around decisions made by the NDIA.

As noted above, we support and endorse the PIAC submission to the proposed amendments. On this matter, PIAC have identified improvements that we support and echo, specifically:

Provision of reasons should not be on request by the participant, but should be given automatically as a matter of course. (PIAC also notes this is consistent with Tune 3.59)

Inclusion Australia believes this is especially important for people with an intellectual disability as they may not be able or willing to make a request for further information.

PIAC also highlight that ‘*there should also be reasons for review decisions*’ noting there is no requirement for reasons to be provided once a review of the reviewable decision has been made under s 100(6). We would also like to see this addressed to maximise clarity around all decisions.

Recommendation: accessible reasons for decisions should be offered in all circumstances rather than available on request.

Becoming a Participant rule

As also noted by PIAC, we are concerned about the introduction of the requirement that a person must be undergoing or have undergone ‘appropriate treatment’ for the purposes of ‘managing’ their condition, and that the treatment has not led to a ‘substantial improvement’ in their functional capacity after a reasonable time. These words have the potential for misinterpretation and ambiguity and should be defined more clearly.

Recommendation: that the terms ‘appropriate treatment’, ‘managing a condition’ ‘substantial improvement’ and ‘reasonable time’ be defined.

CEO Powers

We have some concerns about an apparent increase in power assigned to the CEO of the National Disability Insurance Agency as set out in the Amendments.

We acknowledge that the CEO needs to have the powers and flexibility to respond to and manage emerging events without the need for legislative change. However, as the recent debate around

Independent Assessments shows, the current system can support and withstand robust debate. We would not want to see any changes that would limit that debate or room for discussion.

Rules

We note that many of the significant changes and details seem to reside in the Rules, rather than the Act itself. We recognise that there needs to be a balance between the legislation and the rules used to implement the legislation. However, it is important that the legislation clearly sets the parameters for operations so there is less ambiguity.

We understand that Rules have their place and will be important as the Agency sets policy and operational guidelines in accordance with the Amendments. However as noted by PIAC, the overuse of Rules adds to the complexity of the NDIS legislation. The Rules come under several different areas of the NDIS including SDA and the Participant Service Guarantee which makes it harder for participants to understand and how the rules interact with each other, especially as some Rules overlap. This issue is even more pronounced for people with intellectual disability who cannot access the bulk of the NDIS legislation in the first place.

Recommendation: We recommend that the government include as much detail to the Act as possible so that parliament has an opportunity to engage with it and so there is greater consistency across the different sets of rules that flow from it.

Missed opportunities

Simplification of legislation

Although we welcome the essence of the proposed changes, we believe that an opportunity has been missed to further simplify the NDIS legislation. If anything, it has become more complex. We recommend that the Government commit to further simplification and explanation of the legislation and rules so participants and families can better understand and engage with the Scheme.

Recommendation: that the Australian Government commit to simplifying the legislation around the NDIS where possible to maximise transparency and flexibility for participants.

Draft Plans

We believe that an opportunity has been missed to simplify the process for releasing draft plans to participants. We recognise this has been considered in the Participant Service Guarantee Rules s 5 (4a) as an 'Engagement principle':

“empower participants to request to see a draft plan in advance of (i) final planning discussions; and (ii) the approval of the statement of participant supports to be included in the plan;”

However, we believe that participants should not need to request a draft, this should be automatic.

This is especially a risk for people with an intellectual disability who may not be able to ask for the draft or understand that they need to do so. We believe there is benefit in including into the legislation that all participants will be shown a draft and have its contents explained to them. This is also an example of something that should be in the Act, not the Rules.

Recommendation: Processes be put in place, so participants are provided with draft plans automatically