Submission to Proposed changes to the *NDIS Act 2013*

Independent Advisory Council to the NDIS
Version 1.0 – October 2021

Table of Contents

1 General

In Council's advice to the NDIA Board and the Minister on Scheme reforms including independent assessments, Council recommended that the Minister provided a minimum of 8 weeks consultation to enable the disability community to meaningfully provide feedback and to enhance transparency.

Council is concerned that only 4 weeks has been provided for feedback on the current proposed amendments Council is aware that many in the disability community have been unable to provide the thoughtful advice required.

Council is pleased to hear that the Government will consider changes to the legislation and the rules sequentially, and that the Department of Social Services (DSS) intends to upload to its website a document that compares the new and existing rules. Council recommends that after the legislation is finalised and prior to being submitted to State and Territory Governments for consultation, the Government proactively seeks the advice of the disability sector and maximises transparency around the nature of feedback received given the abbreviated consultation period.

Council appreciates and notes the many positive areas of the proposed amendments. The submission however focuses primarily on issues where further clarification is required. To this end, Council suggests potential changes and enhancements that will enable the better operation of the NDIS and hence support people with disability to achieve positive outcomes.

2 Schedule 1 Participant Service Guarantee

2.1 Variation in plans

Current provision

- The term 'review' is used in the NDIS Act with multiple meanings, causing confusion
- The only mechanism for the amendment of a plan is to replace the plan or create a new plan after a review. This is required even when a participant seeks to make a small change or correct inadvertent errors.

Proposed amended provision

The proposed amendment provides 2 options for variation of a plan: the CEO can vary a plan, (without requiring a plan reassessment or a new plan created) or the CEO can require a reassessment of a participant's plan. The two options distinguish between changes required that are of a smaller scale or in response to an emergency (where it is anticipated that a plan variation will occur relatively quickly) and more substantial changes where a plan reassessment will require additional time.

The proposed amendments (under subsection 47A (6) and subsection 48(2)) authorise the Rules to set out matters the CEO must consider in deciding whether to vary a participant's plan or to conduct a reassessment of a participant's plan. The proposed Plan Administration Rules are identified as category D rules, requiring the Commonwealth to consult with all states and territories prior to making or amending the rules to provide jurisdictional oversight and flexibility.

Examples provided of plan variations include if a participant changes their goals and aspirations; the participant requires crisis/emergency funding as a result of a significant change to their supports; if a plan management type is changed after an appropriate risk assessment; for the purpose of applying or adjusting a compensation reduction amount; or, to implement an AAT decision.

Examples of a need for a plan reassessment under new section 48 include where a participant has undergone a significant change in circumstances, encounters a change in their needed level of support or requires additional funding to achieve a new goal.

Positive aspects

Council is pleased to see that the proposed amendments enable a plan to be varied facilitating timely access to supports and faster access to funding for providers.

Challenge

Council has identified four challenges:

1. **Under a new section 47A, the CEO will be able to vary a participant's plan on the CEO's own initiative, with clarification provided in the Plan Administration Rules at section 10 (2). (A participant plan can also be varied at the request of the participant.)**

   Council is concerned about giving the CEO authority to vary a participant's plan on his/her own initiative. Whilst the examples provided in the Explanatory Memoranda of a variation on the CEO's own initiative are benign (e.g., to correct a technical mistake by the Agency found after the plan had been agreed), Council is concerned that this provision also potentially authorises the CEO to implement systemic changes that have a detrimental impact on participants, e.g., to remove Support Coordination from a specified type of participant plans or to make meal preparation and delivery required to be a stated support for all plans. Further explanation is required to outline the necessity for such changes, the perceived benefits of doing so and the safeguards to address concerns that have been raised by the sector. Council believes the limitations of the current legislation need to be better articulated.

   Council sees it as important however that the CEO has the power to vary plans to mitigate 'immediate risk of harm to the participant or another person' (Plan Administration Rules at 10(2)(i)) so long as the use of the power is recorded and reported. Examples of 'immediate risk of harm to the participant' include in emergencies such as fire, flood, and the pandemic, when the participant has been subjected to fraud and left without funds for support or when a piece of equipment on which they rely breaks down and needs to be urgently replaced. If the CEO sees that varying a plan in response to the immediate risk of harm will require a plan reassessment at a future date, the participant must agree to a plan reassessment and a time frame for that reassessment should be set.

2. **Where the CEO fails to make a decision in relation to plan variation within the specified time frame (21 days), the CEO will be taken to have decided to reassess the plan rather than vary the plan.**

   Council is concerned that participants are penalised when the Agency is unable to meet the required timeframes.

3. **A participant request for a plan variation can trigger a full plan reassessment.**

   Council is aware of many situations in which participants have not sought a necessary piece of equipment for fear that the request for a variation will in fact result in a plan reassessment and a reduction in plan budget. Any plan reassessment triggered by a participant request for a plan variation, or a CEO initiated variation in response to an immediate risk of harm to the participant, must only take place with the agreement of the participant.

4. **A plan reassessment can lead to an immediate reduction in budget that places the participants at significant risk.**

   For a significant proportion of participants, a reduction in budget is not just about having a little less assistance in all areas or dropping one activity. A reduction in budget may require a reconfiguration of support to ensure the participant is able to continue to pursue his/ her goals in a safe way. Many participants need assistance to reconfigure their support and may require time to move toward the new support arrangement.

Solutions

Council recommends that

- the power of the CEO to vary plans on his / her own initiative is circumscribed to ensure its use only for minor technical matter or prescribed purposes such as to mitigate 'immediate risk of harm to the participant'.
- mandatory requirements for plan variations are specified to include when essential assistive technology is required or must be replaced, in circumstances of natural disasters such as fire, flood or the pandemic.
- each use of the power of the CEO to vary plans and the reasons for doing so, is recorded in quarterly reports to the Board (under section 15 of the Participant Service Guarantee Rules) and in reports to the Ombudsman.
- where the CEO does not make a decision in the specified time frame, the presumption is for a plan variation rather than a plan reassessment.
- a participant request for a plan variation can only be treated as a plan reassessment with the agreement of the participant.
- any reduction in plan budget is introduced over time and the participant is given assistance to adjust their support arrangements in relation to the plan budget.

2.2 Participant Service Guarantee puts onerous obligations on participants

Current provision

There is no provision in the NDIS to provide guarantees proposed.

Proposed amended provision

The amendments to the Act enshrine the Participant Service Guarantee and will legislate timeframes and engagement principles for how the National Disability Insurance Agency ('Agency') undertakes key administrative processes.

New section 50J empowers NDIS rules to prescribe the requirements the CEO must comply with when preparing a participant's plan or for participant plans that have come into effect. This may be used to prescribe timeframes for additional processes, such as the offer and holding of a meeting after the plan is approved to discuss how the participant and their family could implement it and begin to access their NDIS funding. The section also

empowers NDIS rules to prescribe requirements with which the CEO must comply to give effect to decisions of the Administration Appeals Tribunal.

Section 6 of the Participant Service Guarantee Rules set out engagement principles and service standards for how participants or prospective participants are to engage with the NDIA. Participants and their representative are required to:

- help the NDIA to deliver the best possible experience of the NDIS
- provide accurate and up-to-date information to support effective decision-making
- inform the NDIA of any significant changes to their circumstances, needs, or goals and aspirations; and
- provide constructive feedback on their experience of the NDIS in order to support the continued improvement of the NDIS.

Positive aspects

Council is pleased to see the proposed amendments legislate requirements of the Participant Service Guarantee, empower participants to request reasons for decisions and receive and discuss a draft plan before it is approved.

Challenge

The obligations on participants and their representatives established under section 6 Participant Service Guarantee Rules are onerous.

Solution

Council recommends that the obligations on participants in the Participant Service Guarantee Rules are qualified to account for what is reasonable to expect of participants and their representatives in their individual circumstances.

2.3 Reports to the Ombudsman

Current provision

The Ombudsman Act 1976 (Ombudsman Act) sets out the Commonwealth Ombudsman's functions, which include investigating the administrative actions of Australian Government departments/agencies, including the NDIA, and prescribed private sector organisations.

The Ombudsman Act also provides the Commonwealth Ombudsman with a range of powers which will facilitate the functions associated with the Guarantee. This includes the ability to investigate complaints, conduct own motion investigations and compel agencies to provide documentation or information.

Proposed amended provision

It is intended that the Commonwealth Ombudsman will have capacity to investigate individual complaints about the NDIA, based on the timeframes for decision-making set out

in the Guarantee. As a part of this function, the Commonwealth Ombudsman will also monitor complaints with a view to identifying systemic issues. This will be done through data analysis of the complaints received, outreach activity, engagement with other organisations and agencies (such as advocacy organisations) and a range of other activities in order to determine the nature of the issue.

The NDIS Act is therefore amended to clarify the Commonwealth Ombudsman's powers to monitor the NDIA's performance in delivering against the Participant Service Guarantee.

Proposed enhancement

Council appreciates the additional oversight of the Commonwealth Ombudsman and seeks ensure oversight that oversight is extended to oversight of the CEO's authority to initiate variations to a participant plan.

Solution

Council recommends that:

- data is collected, analysed and referred to the Commonwealth Ombudsman in relation to use of the CEO's authority to initiate variations to a participant plan.

3 Schedule 2 Flexibility Measures

3.1 Requirements for permanence in relation to psychosocial disability

Current provision

There is no provision for the fluctuating or episodic nature of a psychosocial disability.

Proposed amended provision

New subsection 27(2) allows the NDIS rules to specify requirements that must be met for an impairment to be considered permanent or likely to be permanent.

The effect of the amendments to section 27 is that the NDIS Rules may now prescribe requirements that must be met for impairments to be considered permanent. Prescribing definitive criteria in the NDIS Rules will provide more certainty in relation to satisfying the disability and early intervention requirements and allow for more consistent decision-making.

The Becoming a Participant Rules at section 8(2) outline that for a person with a psychosocial disability, the impairment is considered permanent or likely to be permanent, 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.

Positive aspects

Council is pleased to see amendments to terminology from 'psychiatric condition' to psychosocial disability, and clarification of the requirements for permanence with recognition of the episodic or fluctuating nature of a psychosocial disability.

Challenge

There are not yet clear and consistent understandings of 'impairment to which a psychosocial disability is attributable' or of the term psychosocial disability. This lack of clarity will require guidance so that mental health professionals can provide evidence required to enable participants to demonstrate they have met the disability requirements. Participants are concerned that without this clarification, including clarification of 'appropriate

treatment', people with psychosocial disability may be required to have undertaken treatments enabled under Mental Health Acts to meet disability requirements.

In addition, the determination of 'reasonably available to the person' implies geographical considerations but must be clarified to include where people are unable to access the treatment for considerations related to gender, race, religion or income.

Solution

Council recommends that:

- the Australian Government engages with the mental health sector to establish guidelines for interpretation of terms that are outlined in Rules.
- the Rules clarify that 'reasonably available' includes provisions related to geography, gender, race, religion or ability to pay.

3.2 Board members

Current provision

There is no provision related to disability.

Proposed amended provision

Subsection 127(2) inserts 'lived experience of disability' as an additional element of eligibility to consider when the Minister appoints a person as a Board Member.

Positive aspects

Council is pleased to see a legislative requirement to consider disability as a stand-alone criterion of eligibility for appointment as a Board Member and that the Principal Member of the Independent Advisory Council is required to be a member of the Board.

Challenge

The Board of the NDIS should include appropriately qualified persons with disability, not just persons with lived experience of disability.

Solution

Council recommends that:

- Lived experience is replaced by persons with disability.

3.3 Insertion of the principle of co-design

Current provision

There is no current provision for co-design.

Proposed amended provision

The proposal amends the general principles guiding actions under the Act inserting new subsection 4(9A) to reinforce that people with disability are central to the NDIS and should be included in a co-design capacity.

Proposed enhancement

Council is pleased to see the inclusion of co-design and seeks to strengthen this principle in rules that define co-design and outline the circumstances in which co-design is required.

Solution

Council recommends that:

- co-design is defined in NDIS Rules
- the circumstances in which co-design is required are articulated.

3.4 Market intervention to fill service gaps

Current provision

Section 14 of the Act empowers the Agency to provide funding to persons or entities for specified purposes and provides clarity about the general supports that can be funded.

Proposed amended provision

New Section 14(2) clarifies the Agency may provide funding to a person or entity, to a) assist one or more participants to access supports; and b) assist a participant who is a child under 7 to access support before the child's plan comes into effect in relation to the child's disability support needs.

Positive aspect

Council is pleased to see more defined powers to intervene in the market to act quickly to fill service gaps, to encourage positive market behaviour and to provide funding to some children under 7 for immediate early intervention supports pending planning outcomes where the planning process would delay supports.

Challenge

Council is pleased to see the NDIA have the capacity to intervene in thin markets to ensure the provision of support. Given the proposed intervention is to ensure identified participants receive support, it is the view of Council that the proposed intervention is co-designed with the affected participants.

Solution

Council recommends that:

- the Act include provision for the market intervention in thin markets to be co-designed with affected participants
- data on the identification of thin markets and the use of market intervention is collected, collated and reported in NDIS quarterly reports.

3.5 Plan management

Current provision

Restrictions on choice of plan management options relate to the choice of self-management.

Proposed amended provision

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'. This is in response to the perceived risk to participants from engaging with unregistered providers.

Section 9 (1) and (2) of the Plan Management Rules requires the CEO to have regard to whether a registered plan management provider or a nominee managing the funding for supports under the participant's plan is an unreasonable risk to a participant. The proposed amendment thereby requires a risk assessment for participants who choose plan management as is required for participants who choose self-management.

Section 10 of the Plan Management Rules concern risk of self-management for an adult participant.

Challenge

Council is concerned that the Plan Management Rules unnecessarily restrict participants' choice and control and have the potential to penalise participants in circumstances in which a specific provider may be acting inappropriately.

Section 6(2)(b) and 6(3)(b) of the Plan Management Rules require a participant to use a specific individual, provider, or class of supports. Whilst this provision is not new, Council is concerned that it is extremely restrictive to direct that a participant must use a specific provider. Hence Council proposes that the Rule enables the CEO to direct that the participant not to use a specific offending /problematic provider and only in limited circumstances of conflict has the ability to direct that a participant uses a specific provider. Such a requirement however must be time limited with a review to determine whether this restriction can be lifted.

Section 9 (2)(b) outlines the matters to which the CEO must have regard in considering whether the use of a plan management provider or a nominee would present an unreasonable risk to the participant. The inclusion of the ability to use services from

unregistered providers as one of those considerations effectively restricts participants to registered providers, eliminates the major motivation for use of plan management providers and confuses registration with quality and safeguards. Council wishes to draw attention to the fact that all providers, registered or unregistered, are bound by the Code of Conduct, thereby safeguarding participants by the ability for action to be taken for breaches of the code.

Restriction on the ability to use unregistered providers is a most serious restriction on choice and control and a barrier to the use of reasonable and necessary support for an ordinary life, rather than a life in disability services. Council sees the use of a plan management provider as a safeguard that assists participants unwilling or unable to self-manage to experience the benefits of increased flexibility and the use of non-registered providers. Council thereby recommends that an assessment undertaken to determine risks to participants using unregistered providers is undertaken in the context of the level of guidance and safeguard provided by the specific plan management provider identified or chosen by the participant. It is the view of Council that the choice of plan management by a participant does not of itself, constitute a risk of any significance.

Section 9 (2)(c) requires the CEO to have regard to whether a nominee misapplied funds from a participant's plan. The question of 'appropriate' use of participant funds is on occasion a matter for debate, especially where self-managed participants choose to use participant budgets in creative ways to meet outcomes in an ordinary life context. The purchase of technology provides a case in point where participants use self-managed budgets to purchase equipment that reduces / eliminates the need for recurrent support. Council is concerned that Section 9 (2)(c) has the potential to significantly reduce the flexibility to use plan funding creatively to achieve participant outcomes and recommends that this section be circumscribed. If the NDIA is concerned that participant's plan budget has been used fraudulently, then the clause should address that issue specifically such that plan management options should be restricted when a nominee is being investigated for fraudulent misuse of funds and permanently if the nominee is found guilty of fraud with NDIS funding.

S10(c) and (d) limit an adult participant's ability to manage funding for supports on the basis of capacity. These clauses reinstate clauses about 'to the extent of their ability' that are being removed from the S4 Principles and conflict with the support for decision making as a NDIA corporate priority. A person's ability to make decisions is dependent on their capability + the context/environment factors + the supports they receive. This is true for everyone and is the reason most people seek advice in relation to complex matters. These sections potentially rob participants of their legal right to make their own decisions and to have the support they need to assist them to make those decisions.

Solution

Council recommends that:

- Section 6(2)(b) and 6(3)(b) Plan Management Rules are amended to:

    - enable the CEO to direct that the participant not use a specific offending /problematic provider rather than require the participant to use a nominated provider
    - enable the CEO to require the use of a specific provider in tightly defined circumstances of conflict with a requirement that the direction is time limited with a review to determine whether this restriction can be lifted.
- Section 9 (2)(b) is amended to prevent the participant from using a specific plan management provider if the chosen plan management provider is not seen as sufficient safeguard.
- a risk assessment for the use of unregistered providers is undertaken in the context of the support provided by the specific plan management provider identified or chosen by the participant.
- Section 9 (2)(c) is circumscribed to relate to allegations or proof of fraudulent behaviour such that plan management options should be restricted when a nominee is being investigated for fraudulent misuse of funds and removed permanently if the nominee is found guilty of fraud with NDIS funding.
- Sections 10(c) and (d) is amended to be developmentally oriented to build participants' capacity.
- An additional risk mitigation consideration is added to Section 10(h) (iii): 'developing the participant's decision-making capability through decision making support'.

3.6 How payments can be made

Current provision

Section 45 of the NDIS Act enables payment in the manner (if any) prescribed by the Rules. Self-managing participants however are required to pay for supports up front and then seek reimbursement.

Proposed amended provision

Section 45 will be amended to enable the NDIA to pay claims directly to providers following approval of the participant or plan manager.

Positive aspects

Council is pleased to see the NDIA enabled to make direct payments to providers on behalf of participants.

Challenge

Council is concerned that the proposed change may potentially limit participant choice and control and has the potential to become a cashless debit card that is only able to be used in designated locations. Whilst the NDIA indicates the online payment system provides merely an additional mode of payment, many participants retain significant concerns that it will ultimately become the only mode and that the NDIA may use the data inappropriately including, by rejecting participant claims and issuing debts to participants.

Solution

Council recommends that:

- the Act indicates that participants will have a choice of payment options and
- any use of data collected for payment will be anonymised to the greatest extent possible

4 Matters of concern in relation to NDIS Rules that have not been discussed earlier

4.1 Participant Service Guarantee Rules

Current provision

There is no current provision.

Proposed amended provision

Section 5 Engagement Principles and Service Standards, item 1 related to transparency requires the NDIA to b) ensure that direct communication with a participant or prospective participant is in the participant's or prospective participant's preferred format to enable them to understand the information for themselves.

Challenge

It may be a challenge for the NDIA to meet this requirement as participants use a wide variety of tools for communication e.g., Makaton, hand over hand communication.

Solution

Council recommends that

- the service standard indicates that the NDIA ensures direct communication via typically accessible formats and language of choice.

4.2 Assessing mattes related to participant supports

Current provision

S36 of the NDIS Act 2013 makes provision for the participant to provide information for the purpose of preparing or approving a statement of participant support or undergoing an assessment or other examination in 'an approved form'.

Proposed amended provision

Section 15 of the Becoming a Participant Rules gives the CEO authority to specify assessment tools that may be used and requires tools to:

a) be designed to ensure the consistent, equitable and transparent assessment of a participant's support needs, including by taking into account: (i) the participant's individual circumstances; and (ii) the impact of environmental factors; and

b) have reference to areas of activity and participation (including social and economic participation) and environmental factors identified in the World Health Organisation International Classification of Functioning, Disability and Health as in force from time to time.

Challenge

Council is concerned that tools are not required to provide a 'fair' assessment of a participant's support needs, reflecting adequacy and level of fit for purpose.

Solution

Council recommends that:

- the word 'fair' be added to the requirements of assessment tools.

4.3 Whether a child is capable of making their own decisions

Current provision

In the 2013 Children Rules, when determining whether the child is capable of making decisions for themselves, the CEO was required to consult with the child and the child's representative.

Proposed enhancement

Section 8 of the 2021 Children Rules now clarifies that consultation must include a State or Territory Minister or the head of a Department of State of a State or Territory (however described) if they are a representative of the child.

Challenge

Without further clarification:

- this section raises ambiguity regarding what kinds of decisions children can make; and
- whether all children are afforded the same provisions in regard to making these decisions

Solution

- provide a definition of child in terms of age (eg ACYP define a child as birth to 12 years and use Young Person for 13-year-olds and older)
- make clearer which categories of children are being referred to

4.4 Whether subsection 74(1) and (2) of the Act do not apply to a child

Current provision

Subsection 74(1) of the Act provides that if the Act requires or permits a thing to be done in relation to a child, the thing is to be done to or in relation to the persons who have parental responsibility for the child, or if the CEO is satisfied this is inappropriate, a person determined in writing.

While the 2013 Children Rules did not explicitly require the CEO to consider the relative suitability of a person in these circumstances, these changes do not reflect a change in the policy intent. Rather, these changes strengthen the existing principle that where acts or things are done on behalf of a child, the best interests of the child are paramount.

Proposed amendment

Section 7 of the 2021 Children Rules requires the CEO to consider whether a person is the most suitable person to be the child's representative and section 10 requires the CEO to consider whether a person is more suitable than the child's guardian to have parental responsibility. This is in addition to a range of other matters that were also included in the 2013 Children Rules.

Challenge

- Section 7 appears to give the CEO authority to question and make alternative determinations regarding individuals who have already been deemed as the child's representative thereby over riding existing arrangements
- This section also refers to the concept of parental responsibility without a definition or reference to the existing definition. Since the boundaries of parental responsibility are being debated by families and the NDIA this issue is particularly sensitive and under scrutiny. In particular, it is not clear how this section may have implications on implementation of Section 34 of the Act regarding Reasonable and Necessary which may expand the expectations of parental responsibility.

Solution

- Provide greater clarification regarding Section 7 and the apparent ability of the CEO to override existing child representative arrangements
- Provide definition of parental responsibility or reference to existing definition
- Provide clarification regarding connection with Section 34 and assurance that this change will not expand the role of parental responsibility with regard to Section 34.