

**Submission to the proposed legislative amendments to the *National Disability Insurance Scheme Act 2013* (NDIS Amendment (Participant Service Guarantee and other measures) Bill 2021).**

**About Disability Rights Advocacy Service Inc**

Disability Rights Advocacy Service is a community organisation that is run by our members and our Board, which is made up of people with a disability. We are part of the national network of disability advocacy organisations funded by the Australian Government through the Department of Social Services.

Our advocates listen to people with a disability and learn from them, so that we can work alongside them to promote and defend their human rights. It means helping people with disability to get a fair go. It means helping people with a disability to enjoy all the things they are entitled to – all the things a person who doesn't have a disability can access.

Disability Rights Advocacy Service has three office locations in South Australia, representing people who reside within greater metropolitan Adelaide, Mount Barker, Adelaide Hills and Murray Bridge, the South-East and Coorong region and the Riverland region.

We acknowledge that this submission was completed on Kurna land and we pay our respects to Elders past, present and emerging.

## Overview

1. We acknowledge the work of the Commonwealth Government and Department of Social Services in compiling the New Rules and Draft Amendments in response to the *2019 independent review of the NDIS legislation*, conducted by Mr David Tune AO PSM.
2. Our submission will address the proposals in Schedule 1 and 2. We will cover the proposed new Rules including:
  - a. The Participant Service Guarantee
  - b. The Plan Administration Rule
3. We will also cover the proposed amendments to the current Rules:
  - a. *National Disability Insurance Scheme (Plan Management) Rules 2013*
  - b. *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*

## Schedule 1 (Participant Service Guarantee)

### NDIS Participant Service Guarantee Rules (PSG) - Tune Recommendation 25

4. While we support having a PSG in principle, we recommend proactive and mandated training from the NDIA to all service providers to ensure they fully understand their rights and obligations under the new Rules.
5. We recommend that accessible information products be provided to NDIS participants to ensure they understand their rights and obligations under the PSG.

### Plan Administration Rule - Tune Recommendations 21-23

#### Plan variations

6. We note that new rules around plan variations will mean that plans can be varied with quick adjustments where needed without the requirement of a full plan reassessment under the proposed section 47A of the Exposure Draft for the *National Disability Insurance Scheme Amendment (Participant Services Guarantee and Other Measures) Bill 2021*. We note that under s 47A(1) and (2) a CEO may vary a participants plan on the initiative of the CEO or on request of the participant.
7. While we understand this may allow for more flexibility for participants, and remove the necessity and uncertainty around a full plan reassessment for small amendments to plans, we note with concern the discretion this may provide service providers (especially the CEO).
8. We recommend safeguards implemented to ensure that plans cannot be changed without the consent or knowledge of participants. While we note that this may not be the intention of the Bill, changes to plans (including cuts to services) by service providers without the consent or knowledge of participants is already an issue that occurs under the current set of rules.

9. We note the suggestion from the Department of Social Services that there will be no ability to cut funding universally and that participant's rights will be protected through a right to consultation.
10. However, we note with concern the discretion afforded to the CEO without meaningful constraint. Rule 10 of the proposed *Plan Administration Rule* sets out a non-exhaustive list of matters the CEO must consider when varying a plan on their own initiative. It appears, though, that Rule 10 does not limit the CEO's power to vary a participant's plan without their knowledge or consent.
11. We recommend the Rules should be strengthened to more explicitly require the seeking of consent from participants to protect their rights throughout the process of any amendments to NDIS plans – whether that is in consultation with service providers, the NDIA or the AAT.

#### Plan reassessments (formerly 'reviews')

12. We note that in the current NDIS Act section 48 provides for a participant's right to request a CEO to review their plan at any time. However, in the Exposure Draft for the *National Disability Insurance Scheme Amendment (Participant Services Guarantee and Other Measures) Bill 2021*, section 48 is noted as being repealed and substituted by a *Reassessment on CEO's own initiative*. We are deeply concerned that this takes away the rights for participants to request a reassessment/review of their plan. If this is not the intention of the Bill this must be amended.
13. We further recommend proactive and mandated training from the NDIA to ensure service providers fully understand the rights of participants and the obligations of providers in any plan variation process.

#### Reasons for decisions

14. We note that the proposed ss 100(1B) and (1C) of the NDIS Act allow participants to request reasons for decisions made by the NDIA, prior to any internal review application.
15. We recommend that rather than being available on request, reasons for decisions should be given automatically for all participants when a decision is made about them. While reasons for decisions are generally only available at request under the AAT, there should be a greater consideration of providing a more accessible process for people with disabilities.
16. We note this is in line with the Tune Review at 3.59:  
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. However, in the event this does not occur, the Participant Service Guarantee should empower the person with disability to require the NDIA provide this information in a manner that is accessible to them.
17. There is also no corresponding requirement for reasons to be provided once a review of a reviewable decision has been made under s 100(6).
18. We recommend that a provision should be inserted to automatically provide reasons for decisions made by an NDIA reviewer to all participants.

## **Schedule 2 (Flexibility Measures)**

### Amendments to *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*

#### Psychosocial disability – Tune recommendation 8

19. We note the longstanding issues that people with psychosocial disability have faced when attempting to access the NDIS, which have resulted from the requirement to provide evidence of permanency of disability, while psychosocial disability is often episodic and fluctuating.
20. We support the proposed changes clarifying that a psychosocial disability that is episodic or fluctuating may be accepted as permanent.
21. We note however there appears to be a lack of clarity of how exactly this will assist people with psychosocial disabilities in accessing the NDIS.
22. Importantly under Rule 8 of the *Becoming a Participant Rules* a person must be currently undergoing or have previously undergone ‘appropriate treatment’ to ‘manage’ their condition, and the treatment has not led to a ‘substantial improvement’ in their functional capacity. Otherwise, there must not be ‘appropriate treatment’ that is ‘reasonably available’. There are similar provisions under Rule 9 relating to non-psychosocial disabilities.
23. This raises concerns about how these terms will apply in practice, especially as the terms are not defined in the Rules. In everyday practice, the CEO or their delegate will interpret and apply what these terms mean, which may lead to very different outcomes for individual people.
24. We recommend that terms under Rules 8 and 9 such as ‘appropriate treatment’, ‘manage’, ‘substantial improvement’, ‘reasonably available’, or ‘other treatment’ be defined. This will provide guidance to service providers in decision-making processes and provide participants with the clarity they need when applying for the NDIS.

### Amendments to the *National Disability Insurance Scheme (Plan Management) Rules 2013*

#### Market intervention – Tune recommendation 17

25. We note the proposed ability for the NDIA to provide block funding for participants in remote and rural areas, or early intervention participants, where services are not available for the community or delays are occurring.
26. We note that while the intention of the Bill may not be to undermine individualised plans, we recommend that more explicit protections be provided for participants, so this does not occur.
27. We further recommend that a publicly-funded agency of last resort is provided to participants who cannot access support from private providers.

#### Choice of plan management – Tune recommendation 19

28. We note that the changes are intended to provide the same protections to participants who choose to be self-managed compared with participants who self-manage their plans.

29. However, we note with concern the extensive list of criteria for 'unreasonable risk' under s 10 of the proposed *Plan Management Rules*, which may cause difficulties for participants electing to be on a self-managed plan.
30. We recommend that there should be protections to ensure that the proposed changes do not become a barrier for people with disabilities to access the NDIS.
31. We note that many NDIS participants are unaware they can request to be self-managed rather than plan-managed. We recommend this ability is made clearer in the Operational Guidelines. Furthermore, the promotion of the right to nominate to self-manage an NDIS plan should be reflected in the everyday practice of the NDIA and service providers.