



people with
disabilities
western
australia

Submission

Proposed NDIS legislative improvements and the Participant Service Guarantee

Australian Government – Department of Social Services

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People With disabilities WA (PWdWA)

Since 1981 PWdWA has been the lead member-based disability advocacy organisation representing the rights, needs, and equity of all Western Australians with a physical, intellectual, neurological, psychosocial, or sensory disability, via individual and systemic advocacy. We provide access to information, and independent individual and systemic advocacy with a focus on those who are most vulnerable.

PWdWA is run by and for people with disabilities and aims to empower the voices of all people with disabilities in Western Australia.

Introduction

People with Disabilities (WA) Inc. (PWdWA) would like to thank the Department of Social Services (DSS) for the opportunity to provide comment for their consultation on Proposed NDIS legislative improvements and the Participant Service Guarantee. PWdWA receives both state and federal funding to provide advocacy around issues experienced by the community concerning the National Disability Insurance Scheme (NDIS). We are funded by the DSS to provide support with NDIS Appeals. Our response to this consultation is based on the experience of people accessing our Individual Advocacy service as well as our collaborations across the disability sector. We are pleased to see several positive steps forward as part of the suit of amendments being proposed. This includes:

- No changes to “reasonable and necessary supports”
- The timeframes inserted for decision making
- Clarifying the language around different types of “reviews”
- Adding co-design with people with disabilities to the NDIS principles
- Introducing the Participant Service Guarantee into legislation
- Conferring oversight powers to the Commonwealth Ombudsman to monitor and report on performance against the Participant Service Guarantee

Outlined below are several areas where we believe the amendments, while heading in the right direction, need further revisions. We have outlined in key areas potential

consequences of the proposed changes and highlighted where there are opportunities for improvement.

As highlighted below, the timeframe for this consultation was very limited. As such we have not had the opportunity to engage directly with our members and community about this submission. The timeframe for response also means this submission should not be taken to be a thorough and exhaustive list of our recommendations.

Summary of Recommendations

Recommendation 1

Any future legislative or policy changes must have a minimum eight-week consultation period. Consultation resources must be in formats that as many people with disabilities as possible can understand without the need for support.

Recommendation 2

Revise the proposed amendments to ensure that significant changes to the way NDIS operates are included in the principal legislation.

Revise the proposed amendments to ensure the degree of CEO discretion granted is in line with the recommendations made in the Tune Review.

Recommendation 3

The CEO should not have the power to initiate the variation of a plan without a participant knowledge or consent, except in exceptional circumstances.

Recommendation 4

Section 47A (3)(c) be changed to a decision to prepare a new plan with the participant in accordance with Division 2 and approve, under subsection 33(2), the statement of participant supports in the new plan.

Complex circumstances leading to a longer decision-making timeframes for plan variations must be clearly defined to ensure transparency, consistency and to prevent unnecessary delays.

Recommendations 5

If CEO decides not to vary or reassess under S47A (3)(b), a review under s100 should be taken to be a review of the decision for which a person was seeking the variation e.g., a review of the decision to approve the statement of supports.

If the CEO decides to vary a plan under S47A (3)(a), a review under s100 should be taken to be a review of what was, and was not, varied in the plan.

This will ensure that red tape is minimised, and the AAT has appropriate jurisdiction.

Recommendation 6

Revise the drafting of S45 to include clarification of how it is intended to operate.

Recommendation 7

The proposed amendment be revised to require that all reviewable decisions, and decision made under S100(6), must be accompanied by a statement outlining the reason for a decision.

Recommendation 8

Include Note 2 of S8 of the Rules as a Note in S7.

Create materials to guide the interpretation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021. This should be through a co-design process with people with disabilities and their representative organisations to ensure interpretation respects the right to choose and control.

Recommendation 9

Revise the amendments to allow the AAT to consider all matters pertaining to a person's plan on appeal.

Recommendation 10

Remove the statement "so far as reasonable in the circumstances" from Section 17A(1) to ensure consistency within the legislation in giving effect to Article 12 of the UNCRPD.

Recommendation 11

Revise the wording of the amendment to make it clear that eligibility for appointment to the Board is based on lived experience of disability i.e., having a disability, rather than carer status.

Amend S127(6) to include “lived experience of disability” to ensure that the Board must have a minimum of 50% of its membership with a disability.

Key Issues

Consultation Process

PWdWA would like to highlight the challenges posed by the consultation process which has been implemented. The DSS Engage Website states that the consultation process will help the Government understand whether people with disabilities think the legislation:

- Aligns with the Tune Review recommendations, and
- Clearly reflects the Government’s intentions, and
- Will have unintended consequences.

The timeframe to provide feedback on the Act amendments was limited to four weeks. We believe this timeframe is inadequate. The information covering all the proposed changes is across no less than eight pieces of draft legislation and corresponding explanatory documents. This information is complex and technical. The Plain and Easy English summaries lack detail on the changes, meaning it would be difficult for a person with a disability to provide considered feedback about the amendments. This includes insight into unintended consequences which those participating in the scheme are best placed to advise on. Additionally, in 2021 the NDIS Independent Advisory Council (IAC) has already recommended a full eight weeks for the consideration of any legislation brought forward.

The DSS Engage website encourage people with disabilities, their families, and carers to work with advocates and other services “so they can best understand what

the legislation does and what the changes mean.”¹ Most advocacy organisations are not funded for systemic advocacy, and the Government would be aware that they are already struggling to meet demand. It is unreasonable to suggest that Disability Representative and Advocacy Organization would have the capacity to:

1. Review the legislation, including navigating the complex legal material and mapping responses against the Tune Review recommendations, and
2. Create content to help people with disabilities understand the changes, and
3. Gather information from people on their views of the changes or support individuals to write submissions, and
4. Collate information into a comprehensive response

While there are some positive steps forward in the legislation, these do not justify rushing amendments through without enough time to really consider where improvements can be made, and what unintended consequences could arise. People with disabilities have the right to have their say, and parliamentary and committee process cannot provide as thorough consideration as those who are participating in the scheme.

Recommendation 1

Any future legislative or policy changes must have a minimum eight-week consultation period. Consultation resources must be in formats that as many people with disabilities as possible can understand without the need for support.

Rules and Discretionary Power to make decisions

PWdWA are concerned about the number of significant amendments that are being introduced as Rules. Rules do not need to be debated and passed in Parliament, nor require consultation with people with disabilities and their advocates. Rules are also more easily changed than legislation. Given the importance of the NDIS, and these amendments, we believe there should be greater emphasis on including

¹ [Proposed NDIS legislative improvements and the Participant Service Guarantee | engage.dss.gov.au](https://engage.dss.gov.au)

amendments in the primary legislation which must go through a more rigorous parliamentary process.

Alongside this issue is the increased discretionary power of the CEO to make various decisions, including increases beyond what was recommended in the Tune Review. This lack of constraint may result in arbitrary and subjective decisions being made by the CEO, potentially resulting in inequitable participant outcomes.

For example, Rules 10 and 11 of the new Plan Administration Rules outlines a list of matters the CEO must consider when deciding to vary or reassess a plan on their own initiative. This list is both vague, non-exhaustive and is open to interpretation by the CEO or their delegate.

Recommendation 2

Revise the proposed amendments to ensure that significant changes to the way NDIS operates are included in the principal legislation.

Revise the proposed amendments to ensure the degree of CEO discretion granted is in line with the recommendations made in the Tune Review.

Plan Variation and Assessment

In principle we support changes that allow plans to be amended or corrected where changes are not significant. This includes fixing technical errors and changes to supports and funding that are minor. We do not however, support them in their current format.

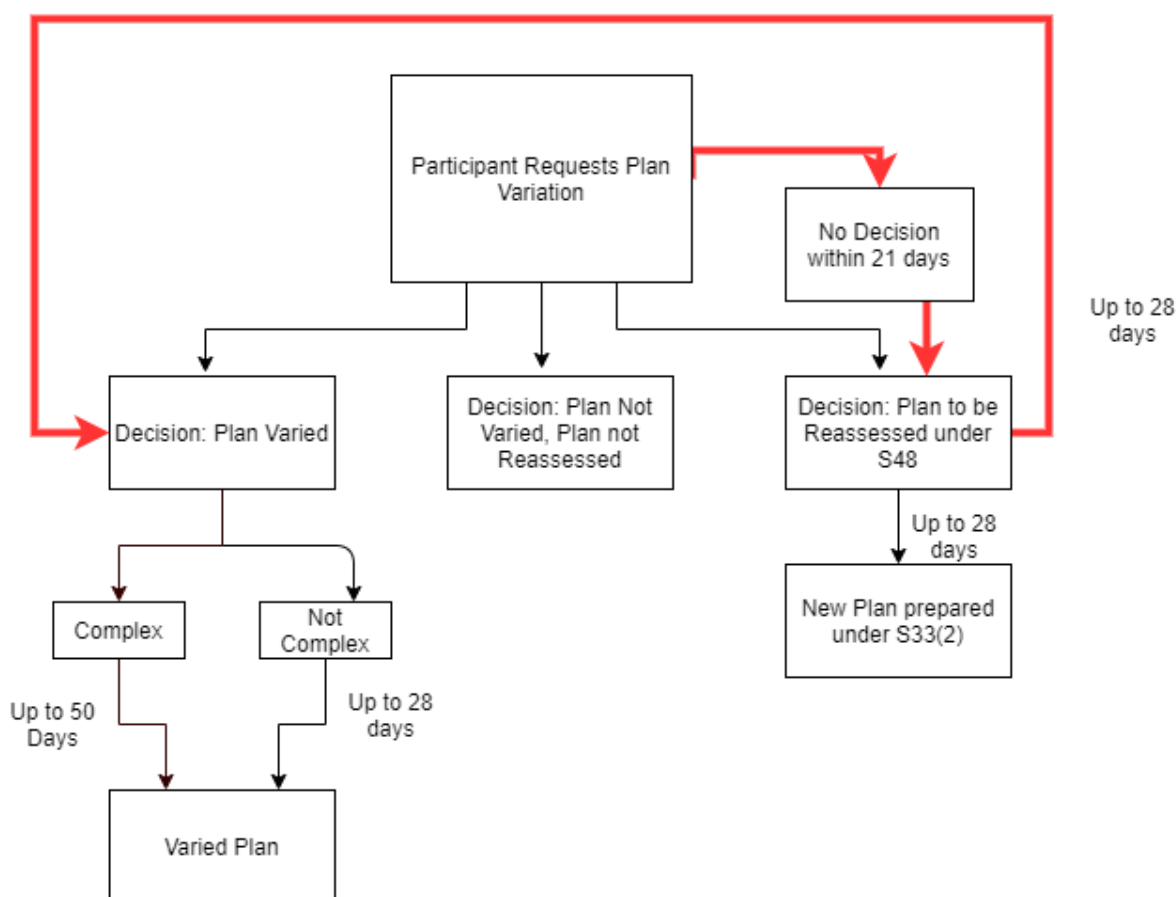
We note that Section 47A of the new amendments allow the CEO to initiate a variation of a person's plan without the participant's request, consent, or consultation. As noted above there are little constraints placed on the CEO's power to decide whether they should initiate a variation. Given the CEO has the power to conduct a reassessment, we see no reason why the NDIA should be able to vary a person's plan without consultation or consent of the participant. We do not believe this is in keeping with the General Principles of the Act which states that people with

disabilities should be engaged “as equal partners in decisions that will affect their lives.”²

Recommendation 3

The CEO should not have the power to initiate the variation of a plan without a participant knowledge or consent, except in exceptional circumstances.

In addition to the concerns we have noted regarding the CEO’s discretionary powers, we are concerned about the way Section 47A and Section 48 potentially interact with each other.



The red pathway highlighted in the above diagram show how the current format of S47A and S48 may result in unnecessary delays to plan variations.

² NDIS Act 2013, Part 2, 4(8)

If a participant requests a plan variation and no decision is made within 21 days, then the legislation states that this is deemed a decision to reassess the person's plan. This allows the NDIA a further 28 days to determine if they will do a new plan or opt to vary the persons plan. We are concerned that plans which only require variation will unnecessarily wait up to an additional 28 days for a decision to vary their plan due to a legislative technicality. This then followed by another 28-50 days to have the variation actioned depending on how “complex” the circumstances. There is no clear definition of what is complex, potentially leading to further delays. It has the potential to become a way of “buying time” when NDIA cannot keep up with the number of variation request.

Recommendation 4

Section 47A (3)(c) be changed to a decision to prepare a new plan with the participant in accordance with Division 2 and approve, under subsection 33(2), the statement of participant supports in the new plan.

Complex circumstances leading to a longer decision-making timeframes for plan variations must be clearly defined to ensure transparency, consistency and to prevent unnecessary delays.

We also note that the legislation does not adequately address the issue of review rights where the CEO decides not to vary or reassess a plan. This decision as it stands is purely about whether a variation or reassessment occurs or not. In requesting a review of an S47A decision under s100 the crux of the issue, i.e., the original decision the person wants varied, will not be reviewable.

This means to have the NDIA to agree to vary or reassess the plan, a person must go through an S100, and potentially the AAT. As outlined below there are still jurisdiction issues which the current amendments do not address, which prevent the AAT from looking at the original decision, forcing them to decide only whether NDIA should vary or reassess the plan. They would not be able to make decisions on the content of the variation or new plan. Then if the participant is unhappy with the outcome of the variation or reassessment they need to go through the review and

appeals process again. It is not in line with the purpose of the amendments, which includes reducing red tape.

Additionally, it is not clear in the legislation if the S100 review right for an S47A(3)(a) decision relates to the decision to vary (as opposed to reassessment) or if it encompasses any changes made as part of the variation.

Recommendations 5

If CEO decides not to vary or reassess under S47A (3)(b), a review under s100 should be taken to be a review of the decision for which a person was seeking the variation e.g., a review of the decision to approve the statement of supports.

If the CEO decides to vary a plan under S47A (3)(a), a review under s100 should be taken to be a review of what was, and was not, varied in the plan.

This will ensure that red tape is minimised, and the AAT has appropriate jurisdiction.

Plan Management and Payment of Supports

The proposed amendments of S45 state that payment is to be made “to the person determined by the CEO”. While the Government has provided reassurances that this change is not intended to impact on people who are self-managed, it remains unclear in its current format.

Recommendation 6

Revise the drafting of S45 to include clarification of how it is intended to operate.

Explanation of Decision

We are happy to see a move towards transparency with the proposed addition of Subsection 100(1B) and (1C). Being able to understand the reason for a decision is critical to people being able to exercise their right to review. We do not however, support this amendment in its current format.

We note that under the current proposal the onus is on the participant to request the reason for a decision. We also note that there is no corresponding requirement for

reasons to be provided for any decisions made under s100(6). Given that reasons behind decision making inform the review and AAT appeals process, including the collection and provision of evidence, this information should be provided as a matter of course. Expecting an individual to request this information just adds to the layers of bureaucracy and red tape which the amendments are supposed to be addressing.

The design of this proposed addition seems to be akin to the current Centrelink process. People who have their Disability Support Pension (DSP) application declined are not provided with a reason for the decision and must instead officially request one. Based on our experience supporting people to navigate the DSP system, vulnerable people will ultimately be excluded from accessing this information. This includes those who may not have access, supports or capacity to make these kinds of requests.

Reasons for decisions should already be recorded by NDIA to ensure consistency, accountability and to enable review of decisions. We do not expect it would be too much additional effort to provide a reason for decision to an individual as part of standard, everyday processes.

Recommendation 7

The proposed amendment be revised to require that all reviewable decisions, and decision made under S100(6), must be accompanied by a statement outlining the reason for a decision.

Becoming a Participant

We are concerned with several of the terminologies used in the proposed National Disability Insurance Scheme (Becoming a Participant) Rules 2021. There is a lack of definition for several of the terms in the new requirements including:

- “Appropriate treatment”.
- “Managing” conditions.
- “Substantial improvement”.
- Whether appropriate treatment is “available”.
- “other treatment”.

Without definition or guidelines on how to interpret these terms they are open to subjective interpretation by the CEO, or their delegate. Not only will this result in inconsistency of decision making, but we are also concerned that it will result in issues like those found in the DSP space.

PWdWA co-authored a submission with AFDO to the Senate Inquiry into The Purpose, Intent and Adequacy of the Disability Support Pension. In the submission we outline the poor decision making, and ultimately harm and neglect, that occurs because of the use of ill-defined, subjective terminology.³ Essentially the lack of definitions has led to decisions that restrict bodily autonomy, recommend treatment beyond the decision makers expertise, and are values-based judgements.

For example, we are not sure what non-clinical, non-medical treatments a person would need to undergo? Will “appropriate treatment” consider individual risk appetite and bodily autonomy?

Additionally Note 2 in S8 of the Rules specifically states that impairments attributable to psychosocial disabilities that are episodic, or fluctuating may be taken to be permanent. We do not see why this has been only noted in S8 and not in S7 as well. Many impairments not attributable to psychosocial disabilities are episodic or fluctuating including Epilepsy and Chronic Pain and Fatigue conditions.

Recommendation 8

Include Note 2 of S8 of the Rules as a Note in S7.

Create materials to guide the interpretation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021. This should be through a co-design process with people with disabilities and their representative organisations to ensure interpretation respects the right to “choice and control”.

³ AFDO Submission 118, in particular pages 53-55
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/DisabilitySupportPension/Submissions

Interaction of Act with AAT Appeals

The changes to Section 103 of the Act, which enables the AAT to continue with an appeal where a plan has been varied or replaced, are welcome. They will go a long way towards fixing known jurisdictional issues with the AAT which are the cause of much stress and contention.

However, there is a missed opportunity to fix a further technical issue that creates significant bureaucratic red tape, and adverse outcomes. Based on the proposed amendments we believe the AAT still does not have the jurisdiction to consider additional supports requested by the applicant during the AAT process, but which were not initially raised at the internal review stage. Basically, the AAT cannot consider the participant's full plan. This means that a person at the AAT must go through a plan variation or reassessment to request supports not part of the initial internal review. If the participant is not happy with the outcome they will then go through the internal review and AAT processes all over again. Technically a person could have multiple separate matters before the AAT.

PWdWA has supported several people who have had to navigate both an internal review and an AAT appeal at the same time. It is an exhausting, debilitating process that leaves people feeling helpless. We believe fixing this issue would be consistent with the goal of the amendments to remove red tape for participants and streamline processes.

Recommendation 9

Revise the amendments to allow the AAT to consider all matters pertaining to a person's plan on appeal.

Removal of Qualifiers of Capacity

The removal of qualifiers of capacity in Section 4 is a great step forward in recognising the right of people with disabilities to exercise legal capacity as outlined

in Article 12 of the UNCRPD.⁴ This is consistent with recommendations we have made in our recent submission to the Supported Decision-Making consultation. However, we note that qualifiers of capacity still exist in Section 17A(1). We do not believe that there is any need to include qualifiers of capacity in this section.

Recommendation 10

Remove the statement “so far as reasonable in the circumstances” from Section 17A(1) to ensure consistency within the legislation in giving effect to Article 12 of the UNCRPD.

Representation on NDIA Board

Changes to Subsection 127(2) to include lived experience with disability as a criterion for eligibility for appointment on the NDIA Board is a positive step towards including people with disabilities in positions of decision-making power.

The use of the word “*with*” does not make it clear whether this specifically refers to people who have a disability, or also includes carers of people with disabilities. We also note that there is no associated requirement for a person with lived experience with disability to be appointed on the Board. Subsection 127(6) legislates a requirement for a balance of skills etc but lived experience with disability has not been included in this section.

Recommendation 11

Revise the wording of the amendment to make it clear that eligibility for appointment to the Board is based on lived experience of disability i.e., having a disability, rather than carer status.

Amend S127(6) to include “lived experience of disability” to ensure that the Board must have a minimum of 50% of its membership with a disability.

⁴ Article 12 Equal Recognition before the Law: grants people with a disability inalienable right to legal capacity on an equal basis with others. Under Article 12 a person’s mental capacity cannot be used as a means to deny legal capacity.