

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

Submission to the Senate Standing Committee on
Community Affairs Legislation Committee

5 November 2021

Contents

Who we are.....	4
Introduction	5
Variation of participant’s plan by CEO	5
Continuing lack of clarity regarding eligibility criteria for permanency	7
Conclusion.....	9

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide this submission to the Senate Standing Committee on Community Affairs Legislation Committee ('the Committee') regarding the National Disability Insurance Scheme Amendment (Participant Guarantee and other Measures) Bill 2021 ('the Bill').

Variation of participant's plan by CEO

2. The Bill proposes to insert section 47A, entitled "Variation of participant's plan by CEO etc.". Under the proposed section 47A:

(1) The CEO may, in writing, vary a participant's plan (except the participant's statement of goals and aspirations) if the variation is:

(a) a change to the statement of participant supports in the circumstances prescribed by the National Disability Insurance Scheme rules; or

(b) a correction of a minor or technical error; or

(c) of a kind prescribed by the National Disability Insurance Scheme rules.

Each variation must be prepared with the participant.

Variation on request of participant or CEO's own initiative

- (2) The CEO may vary the participant's plan on request of the participant or on the CEO's own initiative.

Requirements of CEO

- (3) In varying the participant's plan in relation to the statement of participant supports, the CEO must:

(a) have regard to the participant's statement of goals and aspirations; and

(b) have regard to relevant assessments conducted in relation to the participant; and

- (c) be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided; and
- (d) apply the National Disability Insurance Scheme rules (if any) made for the purposes of section 35; and
- (e) have regard to the principle that a participant should manage the participant's plan to the extent that the participant wishes to do so; and
- (f) have regard to the operation and effectiveness of any previous plans of the participant.

.....

Matters to which the CEO must have regard

- (6) The National Disability Insurance Scheme rules may set out matters to which the CEO must have regard:
 - (a) in deciding whether to vary a participant's plan on the CEO's own initiative; or
 - (b) in doing a thing under subsection (4).
3. The ALA is concerned that the proposed section allows participant plans to be varied on the CEO's own initiative, without request, consultation, or consent from the participant. The ALA notes that this appears to be broader than the Tune recommendations, namely Recommendations 20 and 21.
 4. The ALA submits that the NDIA should not have a general discretion to vary plans without consultation or consent by the participant. Any variation to a participant's plan however initiated should require consultation and consent. The ALA submits that the NDIA should only have discretion to vary plans without consultation or consent by the participant in rare cases of urgency where the participant cannot be consulted within a reasonable period of time.
 5. The ALA submits that the CEO already has power to conduct reassessments on his/her own initiative. If a participant declines to have their plan varied, the CEO can still undertake a full reassessment, if that is needed. As such, the discretion afforded to the CEO in the proposed section 47A is an unnecessary and concerning expansion of the CEO's powers

6. The ALA is also concerned that the proposed power for the CEO to vary plans is not constrained. Rule 10 of the proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* sets out a non-exhaustive list of matters the CEO must consider when deciding to vary a plan on his/her own initiative. However, the matters detailed in Rule 10 do not limit the CEO's power. This leaves it open for the CEO to vary a participant's plan on matters such as changes to funding amounts or restrictions on how funding could be used. These variations could be made without consultation with or consent by the participants.
7. The ALA submits that if the Bill retains a power for the CEO to vary a participant's plan on his/her own initiative, that such an exercise of this power, insofar as it is exercised to approve or deny funding for supports in a particular case, should still be subject to the 'reasonable and necessary' criteria and that it must be a reviewable decision that enlivens the right to internal review and appeal to the Administrative Appeals Tribunal.

Continuing lack of clarity regarding eligibility criteria for permanency

8. The ALA notes that the stated purposes underpinning the proposed changes to eligibility criteria in the National Disability Insurance Scheme (Becoming a Participant) Rule 2016 will clarify when a person's impairments are, or likely to be permanent, for the purposes of the disability or early intervention access requirements. According to the Department of Social Services, the revised Rule will ensure people with psychosocial disabilities are supported to access and test their eligibility for individually funded supports under the NDIS, by recognising that some psychosocial conditions may be episodic and fluctuating in nature. The revised Rule will also reflect best practice drafting standards.²
9. The ALA submits that the provisions currently contained within the draft *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* ('the proposed Rule') may actually *reduce* clarity. Section 8(2) of the proposed Rule states:

- (2) The impairment may be considered permanent, or likely to be permanent, only if:

² <https://engage.dss.gov.au/proposed-ndis-legislative-improvements-and-the-participant-service-guarantee/changes-to-the-becoming-a-participant-rule/>

(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.

10. In relation to Section 8 the explanatory statement states (emphasis added):

These new rules broaden the eligibility criteria for permanency to focus on whether the person has been unable to find a substantial improvement to their condition through appropriate treatments, or whether there are no appropriate treatments available to the person to manage the condition. This places attention on the person's subjective experience of receiving treatment and provides flexibility for the wide variety psychosocial conditions.

11. The ALA submits that there needs to be clear definitions to the following key terms to provide guidance to decision-makers:

- **'... substantial improvement to their condition...'** – the proposed Rule should clarify how 'improvement' is measured, and what is meant by 'substantial';
- **'... appropriate treatments...'** – the proposed Rule should clarify that the decisions as to what is 'appropriate treatment' is to be made by an appropriately qualified medical professional. The proposed Rule should also clarify what evidence is required to justify the decision;
- **'... manage the condition...'** – the proposed Rule should clarify who decides whether appropriate treatments exist or are accessible for the application, in order for her/him to 'manage the condition'.

12. The ALA notes that for several conditions such as Huntington’s Disease, Parkinson’s Disease, Dementia, Muscular Dystrophy, Motor Neurone Disease (MND) and Multiple Sclerosis (MS), there are periods of fluctuations, stability and decline, making the concept of ‘permanency’ somewhat problematic. While this may result in the utilisation of funded supports changing over time, when the participant is not drawing down on the support it does not mean that the support is no longer needed and should not be funded, or that the person’s status as a participant should be revoked.

Conclusion

13. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Senate Standing Committee on Community Affairs Legislation Committee regarding the National Disability Insurance Scheme Amendment (Participant Guarantee and other Measures) Bill 2021 (‘the Bill’). The ALA is available to appear before the Committee to provide further details regarding the issues raised in this submission.

Graham Droppert SC

President

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