

NOVEMBER 2021

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

SUBMISSION FROM
THE MELBOURNE DISABILITY INSTITUTE



Melbourne
Disability
Institute

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

Recommendation 1: The NDIS Amendment Bill 2021 should be rejected in its current form, because it is not in the best interest of people with disability, their families or the Australian community.

Recommendation 2: Taken together, the proposal to make the rules in sections 14, 47A(6) and 48(5) Category D rules gives the Commonwealth Minister almost complete control of the NDIS. It therefore completely undermines the shared governance of the NDIS. The rules in relation to sections 14, 47A(6) and 48(5) should be Category A Rules.¹

Most significantly, the Category D rules in Section 47A(6) could be used to fundamentally reshape or cut participant packages.

Recommendation 3: Sections 47A and 48 should be separated and so the only outcomes from a participant seeking a plan variation should be acceptance or rejection by the CEO.

Recommendation 4: Legislative provision must be made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO. This is essential to ensure transparency and fairness and is consistent with accepted principles of natural justice.

Recommendation 5: If the rules in sections 14, 47A(6) and 48(5) are reclassified as Category A rules; sections 47A and 48 are separated; provision is made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO, and all of the relevant rules are released and subject to consultation with people with disability, their families and their representative organisations then the NDIS Amendment Bill 2021 should be supported.

¹ We understand that some submissions to the review of the draft NDIS Amendment Bill (2021) have recommended that the rules in section 47A(2) should not be rules and placed in the legislation. This is also an acceptable outcome.

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

The Melbourne Disability Institute (MDI) is an interdisciplinary research Institute at the University of Melbourne. We welcome the Inquiry by the Senate Standing Committee on Social Affairs Legislative Committee into the National Disability Insurance Scheme (Participant Service Guarantee and Other Measures) Bill 2021 (NDIS Amendment Bill 2021).

The NDIS Amendment Bill 2021 should be rejected in its current form, because it is not in the best interest of people with disability, their families or the Australian community.

The advantages of the NDIS Amendment Bill 2021, while welcome, are, at best, marginal. The principal improvements are:

1. Sections 47A and 48 establish the rights of both participants and the CEO to seek either a plan variation or a plan amendment, replacing the previous single option of a plan review. This change was recommended by the Tune Review. In particular it provides for small changes to be made to a plan without the need for a full review. However the draft does not contain the protections built into the Tune Review which recommended that the variation powers should be set in legislation. Further, under current planning processes, it has always been open to the NDIA to offer participants “light touch” reviews. As a result, the changes in their current form appear to offer little practical benefit – particularly when set against the risks outlined below.
2. Some of the performance standards recommended by the Tune review have been incorporated in the new Act. But as these standards are currently being implemented by the NDIA, the changes are again of limited practical benefit. Further, because the Participant Service Guarantee (PSG) is framed solely on the basis of time periods in which the NDIA must respond or act, there is actually a significant risk that NDIS participants and their families will not be well served by the PSG if all that happens is the NDIA makes poorly considered and ill-informed decisions quickly.
3. The NDIS Amendment Bill 2021 also establishes a legislative basis for the NDIA to commission services through revisions to Section 14. But given that the NDIA can already take these actions through its Operational Guidelines, these changes are again of limited practical benefit.

These marginal benefits come at an unacceptable cost due to the introduction of Category D rules in Sections 14, 47A(6) and 48(5).

Most significantly, the Category D rules in Section 47A(6) could be used to fundamentally reshape or cut participant packages.

Rules in Sections 14, 47A(6) and 48(5)

Section 209(8) provides for NDIS Rules to be categorised into Categories A to D. This section of the Act is critical to the national governance of the NDIS, because it provides for rules to be approved either with the unanimous support of all jurisdictions, a majority of jurisdictions or by the Minister after consulting with jurisdictions.

In the NDIS Amendment Bill 2021 there are a large number of changes to the NDIS Rules and their categorisation. Many of the proposed changes reflect the introduction of the PSG. The PSG will be enabled by Category C rules, requiring support from a majority of jurisdictions. However very significant rule changes are also foreshadowed in sections 14, 47A(6) and 48(5). In contrast to the PSG, it is proposed that the rules in these sections will be Category D Rules. **This means they will be able to be set by the Commonwealth Minister only after “consulting” with other jurisdictions.** Given that the consultation condition is satisfied once the Commonwealth Minister has written to jurisdictions to advise them of the changes, Category D in effect provides for the Commonwealth Minister to have full control of these rules and the resulting operations of the scheme.

There are currently no rules in section 14 in the NDIS Act (2013). However, in the proposed section 14, there are now rules. It is proposed that they should be Category D rules. Section 14 is very broad, allowing the NDIA to provide funding to a person or entity. Under the proposed section 14(3), there are rules which the NDIA must have regard to when operationalising this part of the Act. If these are deemed to be Category D rules, then they can be set by the Commonwealth, effectively giving the Minister total control over how it provides funding to participants and service providers. Given the sweeping powers that are available through section 14 this is inadequate protection. It also undermines the national shared governance under which the NDIS was established.

Further, the draft legislation proposes that the rules in relation to sections 47A(6) and 48(5) also become Category D rules. These rules relate to the matters that the CEO must have regard to when varying or reassessing a participant’s plan. Again, this will provide the Commonwealth Minister with unfettered control to set plan variation and reassessment rules. In stark contrast, the rules in section 48 in the NDIS Act (2013) are Category A Rules.

Taken together, the proposal to make the rules in sections 14, 47A(6) and 48(5) Category D rules gives the Commonwealth Minister almost complete control of the NDIS. It fundamentally undermines the shared governance of the NDIS. The rules in relation to sections 14, 47A(6) and 48(5) should be Category A rules.²

² *ibid*

Sections 47A and 48

First, the structure of the powers in the proposed sections 47A and 48 departs from the proposal outlined in the Tune Review. In the Tune Review, the “plan amendment” (variation) power was described in terms which indicated it would be separate from the power in section 48. In contrast, the NDIS Amendment Bill 2021 explicitly links the two. It allows a request for variation under section 47A to be dealt by a reassessment under section 48. This entrenches the totally unacceptable behaviour of NDIA staff who have threatened participants seeking to make a minor change to their plan with the possibility of a full-blown review, placing their other supports at risk. This behaviour is viewed by participants as a thinly veiled attempt to deter them from seeking much needed changes to their plans.

Sections 47A and 48 should be separated and so the only outcomes from a participant seeking a plan variation should be acceptance or rejection by the CEO.

And while section 48 requires the CEO to notify a participant that the CEO is initiating a reassessment, there is no provision for the voice of the participant to be heard. This is unacceptable.

The PSG is being legislated to provide for a variety of measures to ensure participants are treated fairly. It is therefore inconsistent with the PSG to fail to provide a formal opportunity in the proposed legislation for participants to respond to actions by the CEO. Any own motion actions by the CEO under section 48 should only commence after the participant (and their plan nominee) has been notified of the specific areas of the plan which could be varied and provided with sufficient time to provide any evidence they wish to be considered during the variation process. There should then be an opportunity for the participant and their nominee to see the draft reassessment before a decision. Anything less than these opportunities would not accord with the principles of natural justice.

Legislative provision must be made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO. This is essential to ensure transparency and fairness and is consistent with accepted principles of natural justice.

Our final recommendation

If the rules in sections 14, 47A(6) and 48(5) are reclassified as Category A rules; sections 47A and 48 are separated; provision is made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO, and all of the relevant rules are released and subject to consultation with people with disability, their families and their representative organisations then the NDIS Amendment Bill 2021 should be supported.

Submitted by:

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