



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

to the Senate Community Affairs Legislation Committee

8/11/2021

“It is not wisdom but Authority that makes a law.”

— Thomas Hobbes



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Introduction

Autism Aspergers Advocacy Australia, known as A4, appreciates [the opportunity to comment on the proposed legislation](#). A4 also appreciates that the proposed amendments to the *NDIS Act 2013* significantly step back from many of the changes that the government is considering.

A4 recognises that government is consulting with the disability sector over this legislative change however we are disappointed that the consultation is:

- extremely late in the process; and
- limited in time to an extent that many regard as being discriminatory since it does not allow people with disability sufficient time to consider and respond to the proposed changes.

The NDIA and the Government lost the trust of the disability sector over its approach to their so-called Independent Assessments. They say they want to rebuild trust though doing more co-design. Yet here we are changing the NDIS through its legislation without a genuine co-design process.

A4 regards most of the proposed changes as unnecessary, inappropriate or of little or no benefit. A4 is also concerned that DSS's consultation over the changes may not be genuine.

In our experience, the *NDIS Act 2013* itself is working relatively well because many people with disability get supports that they need though the NDIS; supports they did not get before they became participants in NDIS Tier 3.

A4 would even say that the NDIS is a world-leading approach to disability support. The Australian Government should be proud of its scheme and not be trying to diminish its NDIS.

NDIS Tier 3, that main part of the NDIS being implemented, is intended for 420,000 to about 500,000 people. This is just a fraction of all the Australians with disability. Most people with disability are not eligible for the NDIS, but most of them still need some support. Many of them are not getting the support they need because the rest of the NDIS is not being properly implemented.

People take some of the NDIA's decisions to the AAT for review because too many of the NDIA's actions and decisions are considered illegal, and in the context of external review or when the AAT applies the law properly, its decisions often meet people's expectations of the law and of their human rights. The problem seems to be not with the actual law, but more with the NDIA's poor interpretation and implementation of the law.

This inquiry should be informed by the number of AAT review requests and their outcomes.

Participant Service Guarantee

The proposed changes to the [National Disability Insurance Scheme Act 2013](#), the [National Disability Insurance Scheme Amendment \(Participant Service Guarantee and Other Measures\) Bill 2021](#), has "Participant Service Guarantee"

in its title but the legislation does not introduce a Participant Service Guarantee (PSG). A4 regards naming the proposed legislation change after something that is not in the proposed legislative change as misleading and deceptive. This is a reliable way to ensure mistrust.

The NDIA can never deliver a “service guarantee”; but it can have “service aspirations”.

The PSG is mentioned in the proposed rules, not in the proposed law. The Rules are separate, and they appear to have their own names.

The autism community and the disability sector are not easily fooled. We are disappointed that you think we are and that you would disrespect us by trying.

The NDIA has already created a PSG. Demonstrably, there is no need to legislate a PSG for one to exist. The key issue is whether a legislated PSG is better for people with disability than a voluntary PSG: would having legal requirements for a PSG be better or stronger?

Schedule 1 in the draft legislation is primarily about changing the name of the plan review process to be “reassessment” and “variation”. We regard these changes as ill-advised and unnecessary. The existing term, “review”, is more accurate and better understood.

The primary argument for legislating a requirement for a PSG is to ensure one exists.

The disadvantage of legislating a PSG is that the NDIA will respond by meeting the letter of the law rather than the intent.

A4 expects that legislating a PSG will degrade any value of a PSG because the legal requirement will be substantially less than the expectation associated with a voluntary PSG with a perception of credibility.

In our experience, the NDIA will simply interpret any legislation to diminish their responsibility. Putting legislation behind the PSG will encourage the NDIA to monumental feats of creative interpretation ... they will feel this is necessary.

The NDIA is currently committed to *having* a PSG rather than to delivering an effective PSG. For example, their PSG emphasises “transparency” yet the NDIA, under its current PSG, the NDIA ...

- keeps its TSP process as secret as possible,
- limits access to data and information about disability supports for sub-sections of the heterogeneous disability participants (and applicants),
- avoids (declines) some FoI requests which is conduct contrary to its PSG,
- remains unnecessarily secretive about much of its operations,
- etc.

The NDIA has an unacceptable track record on “transparency”. Its responses to Freedom of Information requests have been abysmal. For example, recently [the media reported](#) “The Minister responsible for the National Disability Insurance Scheme has blamed an uptick of Australia’s aged, autistic and obese people for the ‘unsustainable’ rising costs of the service.” We doubt that the Minister made this up: far more likely, the NDIA briefed her. However, when the NDIA was

required to provide the briefing information under Freedom of Information legislation, [their response](#) did not include any information that the NDIA provided to the Minister, it contained Answers to Questions on Notice instead. It is likely that the NDIA does not comply with Freedom of Information legislation generally, so it probably won't take much notice of its own specific legislation unless it suits the Agency to do so.

Better processes - flexibility

The second part of the proposed changes are meant to improve processes of the NDIS. These are called “flexibility measures”.

The changes propose to introduce *co-design* into the law. However, the changes do not define *co-design* in Section 9. And the limited consultation period of about 4 weeks is not a co-design process ... ironically.

Section 33 (2) of the *NDIS Act 2013* says “A participant’s plan must include a statement (the *statement of participant supports*), prepared with the participant and approved by the CEO, ...”. The phrase “prepared *with* the participant” already requires co-design. Few participants would agree that this describes their experience of NDIS planning. Changing the law is unlikely to improve the NDIA’s compliance to this law.

A4 feels that there are some misunderstandings and misinformation due to so odd claims from the NDIA. They seem to feel that a “plan review” means the whole plan will be reviewed; that there is no option for a partial review. A4 cannot find words in the NDIS Act 2013 to support the NDIA’s view on this, and we observe that that AAT seems to be quite comfortable with reviewing specific parts of a plan and agreeing that other parts need no review effort. A4 does not feel that the NDIA’s view on this justifies changes to the legislation.

A4 strongly opposes replacing the term “review” with terms like “reassessment” or “variation”. We simply cannot see that when someone wants to review all or part of a person’s NDIS plan, that they cannot simply agree that some of the existing plan would remain unchanged. If it’s really that difficult, then introduce formally a “partial review” process into the law, but it seems unnecessary and complicated when it need not be.

People, that is everyone, will find the proposed terms are less clear and bring confusion.

The term “carer” in both the *Carers Act* and the *NDIS Act* should be consistent.

Full Scheme amendments

As the draft mentions, this is the Main Part of the Act so the Act should be named after this part of the Act, not the absent PSG.

Clearly, we have reached full scheme roll-out. The legislation should reflect that the NDIS is uniformly accessible.

Other issues

NDIA conduct in the AAT

The NDIA and its lawyers have abandoned the model litigant requirement. They don't even attempt to meet this standard. And the Government ignores complaints.

Thin markets

Maybe the legislation should imbue the NDIA with some responsibility for recognising and addressing thin markets ... though more thought is needed before words are proposed for inclusion in legislation.

Sustainability

Recently, the NDIA and the Minister have raised concerns about the sustainability of the NDIS.

The Productivity Commission said from the outset "from an economic perspective, the benefits of the NDIS will exceed the cost". Any analysis that says otherwise is unlikely to reflect reality; it would need very detailed explanation justifying its prediction. The analyses provided by the NDIA recently fail to consider adequately financial and economic benefits from the NDIS. They are partial and unbalanced cost models that treat the disability sector as homogenous and too simplistically.

So far, the NDIA's modelling, and predictions have not been accurate. Scientifically, we expect the future will resemble the past, so clearly, we expect that the NDIA's modelling will continue to be inaccurate.

Previously, the NDIA repeatedly underestimated the numbers of participants. They seem to have switched to over-estimates.

Need to change the NDIS legislation

A4 observes that the AAT often changes NDIS decisions when they are asked to review a decision: NDIS decisions either don't follow the legislation and the rules, or rules are unclear and interpreted differently by the AAT. We see no evidence that the rules are unclear based on decisions and experience in the AAT.

A4 is not aware of AAT decisions that are regarded as inappropriate or the result of unintended legal complications.

The existing NDIS Act is holding up quite well. The problems with how the NDIA interprets the Act and the associated rules, and why it chooses to misinterpret the law and rules. To address these problems, the NDIA needs to work with the disability sector to properly identify and understand the problems, challenges, issues, etc. Real solutions are unlikely to emerge until the problems and challenges are clearly articulated.

A4 has access to modelling expertise and some experience estimating numbers and projecting into the future for the Autistic section of the disability sector. A4 is open to discussions about estimates and projections.

Basically, A4 feels that changes to the NDIS legislation need more thorough consultation and consideration. And we do not recognise any need for urgency at this stage.