Villamanta Disability Rights Legal Service Inc.

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Proposed NDIS legislative improvements and the Participant Service Guarantee

Joint submission by

Villamanta Disability Rights Legal Service Inc.

and

Rights Information Advocacy Centre Inc.

Endorsed by Disability Advocacy Network Australia

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Introduction

Villamanta Disability Rights Legal Service Inc (**Villamanta**) and Rights Information and Advocacy Centre (**RIAC**) welcome the opportunity to make this submission to the Department's consultation on the proposed reforms to the *National Disability Insurance Scheme Act 2013* (Cth) (the **Act**).

The authors of this document, Villamanta and RIAC are funded by the Department of Social Services to provide advocacy support for people with disability in relation to reviews and appeals of decisions related to the National Disability Insurance Scheme (**NDIS**). This includes appeals at the Administrative Appeals Tribunal under the existing Act.

This submission arises as a result of our experience advocating for clients in this context, and also in the context of our broader disability advocacy.

Summary of recommendations

Timeframes

1. The legislation be amended to include provisions for the CEO to employ sufficient employees to ensure that legislated timeframes are complied with.

Access to the Scheme

2. The legislation is amended to include provisions for access to NDIS-funded assessments for individuals who have sought access to the NDIS, but do not have the means to provide sufficient current allied health reports to demonstrate eligibility.

Planning timeframes

3. The legislation be amended to include mandated timeframes for the provision of a statement of supports.
4. The legislation be amended to include clear safeguards for participants when this does not occur, including mandatory rollover of plans, for at least three months (to ensure continuity of supports) and with adequate notice to the participant that this will occur.
5. The legislation be amended to include interim supports being made available for new participants if their statement of supports is not provided within the required timeframe.

Review types

6. The terms for review types be clearly defined at section 9.
7. The CEO be required to communicate the intent to vary a plan to the participant prior to doing so, and to provide a copy of the varied plan immediately.
8. The power for the CEO to vary plans on their own initiative at s 47A of the proposed Bill should be consistent with the Tune Review report at paragraph 8.33.
9. The limits at paragraph 8.33 of the Tune Review should be included in the proposed Bill and not in the Plan Administration Rules.
10. Separate the processes under s47A and s48. This ensures the NDIA cannot undertake a reassessment under S.47A(3)(c) and s.48 should allow participants to request a reassessment.
11. Revise the use of the word ‘reassessment’ and co-create this with persons with disabilities.

Nominees

12. Amend ss 89(1) and 89(3) to comply with the Tune Review recommendation of 14 day timeframes for cancellation of nominee appointments.
13. Amend ss 87 and 88 to require that a written decision of nominee appointment include:

- whether the appointment is at the request of the participant or on the initiative of the CEO;
- how the views of the participant were taken into account;
- the reasons for the decision to appoint a nominee; and
- the details of the nominee and their relationship to the participant;
- the reasons for the CEO determining that the person appointed is appropriate to act as nominee; and
- the duration of the nominee appointment, and reasons for this duration.

14. Nominee appointments should be communicated in a format which is accessible to the participant, and if necessary, support provided to ensure the participant understands the above details, and their review rights.

Reasons for Decisions

15. The proposed Bill should be amended to:

- ensure all reviewable decisions should include a statement of reasons without a request needing to be made; and
- ensure all internal review outcomes should include a statement of reasons without a request needing to be made; and
- ensure all statement of reasons are prepared in an accessible format for the person and that they have the appropriate support to understand those reasons; and
- provide a legislated right for a participant to request a statement of reasons for an internal review decision if one has not been provided.

Delegation of permanence definition to subordinate legislation

16. The proposed Bill should remove delegation of permanence to the NDIS rules.

Genuine Co-Design and Trust

We welcome the insertion of co-design as a principle in the Act, but note the missed opportunities in doing so.

NDIS participants tell us that their experience with the National Disability Insurance Agency (**NDIA**) does not always engender trust, and that they have been subjected to capricious and extraordinary comments, responses, and decisions. Our clients must rely on the Act limiting the extent to which the CEO can undermine the intent of the Act and the Scheme, and cause distress and disruption to the lives of participants.

The Department of Social Services has missed an opportunity to co-design the legislative proposals. The consultation period of 4 weeks is unreasonable and is not consistent with a fundamental obligation in the *Convention on the Rights of Persons with Disabilities* (CRPD) to co-design and to 'closely consult with and actively involve persons with disabilities, including children with disabilities'

While co-design has been included in principle, it is not defined and is certainly not being implemented, beginning with this rushed consultation which prevents meaningful participation by the people most affected by these proposed changes.

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

We welcome the inclusion of timeframes for the NDIA to complete specified actions.

However we do not consider these timeframes achievable while the NDIA is subject to a staffing cap which limits the number of employees available to carry out necessary tasks, including these specified actions. We are already aware of the level of turnover within the NDIA, and the impacts on participants when this occurs. We have no confidence that the legislated timeframes can be adhered to where the NDIA is subject to an arbitrary staffing cap.

We acknowledge that the evolution of an effective and efficient government agency of the size of the NDIA takes time, and that there will be challenges. It has been seven years now, and the agency continues to fail to complete necessary actions on a timely basis. Unless the CEO is empowered to employ sufficient staff we do not see that legislated timeframes can be successful.

Schedule 1 - Participant Service Guarantee

CHANGES TO ACCESS PROVISIONS

Timeframe for access decisions(21(3)(a))

We welcome the potential for NDIS rules to allow for shorter periods of time for the CEO to take action in relation to an access request.

Timeframe for participant to provide further information in relation to access request (26(2)(b) and (3)(b))

We welcome the longer period for individuals to provide the NDIA with further information about their access request.

Missed opportunity to deliver on the proposed benefit of Independent Assessments

We note that the earlier draft proposals for legislative change provided for the NDIA funding independent assessments for individuals who were seeking access but did not have the means to provide sufficient current allied health reports to demonstrate eligibility. In our experience, this includes:

- People who are indigenous or from CALD communities and have never had a diagnosis or support; and
- People with an intellectual disability who were not transitioned to the NDIS by the state authority for reasons including:
    - Their contact details had changed,
    - Their family members had previously withdrawn access to services,
    - They were homeless or detained,
    - They were experiencing family violence; and
- People in regional areas with recently acquired disabilities, and unable to afford the costs for an appropriate allied health professional to conduct the relevant functional assessment; and
- People whose diagnosis has only recently become clear, despite decades of struggling to achieve employment, social connection, community involvement and safety, and often having significant levels of involvement with the justice or health systems, or both.

Obviously there is significant overlap between these categories.

These are individuals who have fallen through the cracks of state based systems, the transitional arrangements, and continue to be left behind by the NDIS because they don’t have the means to fund appropriate assessments to demonstrate eligibility.

It is unconscionable that people with this level of disadvantage are excluded from the scheme, and disappointing that the proposed legislative changes do not specifically provide for their inclusion.

Whilst we understand that the NDIA cannot be responsible for funding assessments for every person who would like to seek access to the Scheme, we also consider it appropriate for:

- The legislation to be amended to include a requirement for the CEO to request NDIS-funded assessments for individuals who likely meet the access criteria, but cannot afford to pay for such an assessment; and
- Rules to be developed which define the circumstances in which such an assessment is required, based on the intent to overcome disadvantage and exclusion.

TIMEFRAME FOR APPROVAL OF A STATEMENT OF SUPPORTS

Introduction of a timeframe (33(4))

We welcome the introduction of a timeframe for the CEO approving a statement of supports. We do not consider it adequate that this timeframe is articulated in rules, rather than the legislation itself.

Further, related to comments above about adequate resourcing of the NDIA, we are not confident that it is achievable that the CEO is able to meet timeframes for approval of a statement of supports without adequate staffing.

Until such time as that occurs, participants should not be left in the position they currently are; with a plan about to end and no new plan in place, or with access to the Scheme and no plan for an extended period.

We recommend that the legislation be amended to include:

- Mandated timeframes for the provision of a statement of supports; and
- Clear safeguards for participants when this does not occur, including mandatory rollover of plans, for at least three months (to ensure continuity of supports) and with adequate notice to the participant that this will occur; and
- Interim supports to be made available for new participants if their statement of supports is not provided within the required timeframe.

CLARIFICATION OF DIFFERENT TYPES OF REVIEWS

We welcome the effort to clarify the language around reviews.

The proposed terms “variation” and “reassessment” are not defined. We recommended that new terms are included in the definitions section of the Act (section 9) and the parameters of each articulated.

The absence of definition is not consistent with paragraph 8.33 of Tune Review which referred to the provision for plan amendment which would be articulated in the legislation.

Further, the undefined variation power, coupled with the proposed changes to s 103, potentially allow the CEO to make decisions which undermine the jurisdiction of the AAT when a decision is under external review.

For example, a participant applies for external review of a decision which excludes certain supports from being funded. While the application is before the AAT, and has not been decided, the NDIA varies the plan by further reducing funding. While this decision can be overturned by the AAT under the proposed s 103(2)(d), the participant is meanwhile without the funding for the supports previously considered reasonable and necessary. The risk inherent in this position is significant and does not align with the principles of the Act itself.

Although this may seem a remote possibility, and certainly would not be in line with model litigant obligations, we have had multiple reports of participants having NDIA staff tell them "if you go to review, you might lose the funding you have." They are therefore afraid to seek a review or appeal, out of fear that funding for the supports that have been considered reasonable and necessary could be withdrawn. This type of coercion needs to be impossible under the legislation in order to defend the basic rights of appeal for NDIS participants.

Timeframe to provide participant copy of varied plan (s 47A(10))

Participants already experience significant challenges when the NDIA creates a new plan without notice. When matters such as the form of plan management are changed, and the participant is unaware of this change, participants can incur debts which they are unable to pay.

For example, if a participant is plan managed, and has engaged unregistered supports, they will be using those supports as agreed, and with the expectation that these supports can be paid by their plan manager. When a new plan is created without the knowledge of the participant, they continue using those supports, only to discover that they have no way of paying them out of their plan.

This is administratively unnecessary, and extremely distressing. If the CEO makes a decision to vary a plan, there is no reason why they cannot communicate this to the participant prior to the variation taking effect, and provide a copy of the varied plan to the participant immediately.

PLAN VARIATION AND REASSESSMENT (SS 47A AND 48)

We welcome the intent of plan variations to enable minor changes to plans without a full review, however the lack of definition for the team "variation" allows the CEO to deem

almost any change a "variation", with the participant having no notice, nor ability to have input into this process.

The revised s 48 allows for the CEO to decide to undertake a plan reassessment, but removes the right for a participant to request a reassessment. This has the potential to significantly limit the participant's right to request a reassessment when circumstances change; the participant only has the right to request a variation, and the CEO has the power to determine what a variation is. This would result in a considerable loss of rights for the participant, and expansion of the powers of the CEO.

Language of 'reassessment' is distressing

We have heard from our community that changing the language of a 'plan review' to a 'plan reassessment' is triggering, especially given the use of the same term in relation to Disability Support Pension eligibility.

The use of the word 'reassessment' has the potential to create another form of linguistic confusion, given the reliance of the NDIS on multiple forms of assessments in their processes. Participants are tired of being 'assessed' and 'reassessed'; introducing an annual reassessment of plans and the prospect that at any time the CEO has the power to 'reassess' the plan will only cause further confusion and fatigue.

The appropriate term should be co-created and should use more collaborative and person centred language.

INFORMATION AND REPORTS FOR THE PURPOSES OF VARYING OR REASSESSING A PARTICIPANT'S PLAN (S 50)

It is not clear why the CEO would need the power to request information and reports, especially from third parties for a plan variation. Allowing such requests in relation to a simple variation request potentially undermines the intent of the variation power.

NOMINEES

The minor changes proposed to nominees relate only to timeframes for cancellation of nominee arrangements, and do not comply with the Tune review recommendations for a 14 day timeframe for cancellation of a nominee (10.32).

This is a missed opportunity to limit the duration of nominee appointments, and to provide greater clarity about the appointment of nominees. This could be achieved by amending the legislation to require that a written decision of nominee appointment include:

- whether the appointment is at the request of the participant or on the initiative of the CEO;
- how the views of the participant were taken into account;

- the reasons for the decision to appoint a nominee; and
- the details of the nominee and their relationship to the participant;
- the reasons for the CEO determining that the person appointed is appropriate to act as nominee; and
- the duration of the nominee appointment, and reasons for this duration.

We have had feedback from multiple participants who did not know how a nominee came to be appointed, why they were appointed, or how that individual was considered appropriate. Enquiries to the NDIA have demonstrated that this information is not kept on record for participants, so they have no transparency of how or why such decisions were made.

Given the potential for nominees to be the sole person communicating with the NDIS about the participant, it is critical that the participant has access to the decision to make an appointment that directly affects their rights and choices.

REASONS FOR DECISION

We welcome the addition of the additional paragraphs (1B) and (1C) into s100 of the proposed Bill, enabling participants and prospective participants to request a statement of reasons for a reviewable decision.

However, we strongly believe a statement of reasons should not have to be requested but provided automatically. This will ensure there is less bureaucracy and less inequity and subsequent disadvantage to people who may be unable to make a request for a statement of reasons or unable to understand the request without support. People deserve an explanation for decisions made about them without having to ask; transparency of decision making has the additional benefit of preventing unnecessary reviews and appeals.

Furthermore, there is no proposed requirement that entitles a person to request a statement of reasons following an internal review outcome. While in practice this is generally provided to the participant, this is not always the case. Delays in producing these reasons are prejudicial to the rights of the participant to seek an external review of the decision. A right for participants to request reasons for decision in relation to an internal review should be legislated to safeguard these appeal rights.

Finally, the Act should specifically stipulate that a statement of reasons must be in an accessible format suitable to the communication needs of the participant and/or their nominee.

This should go without saying, however currently when the NDIA provide an additional statement of reasons, a significant bundle of inaccessible information for the participant

to decipher is provided. We also believe it needs to be specified that the NDIA will provide appropriate support to assist people to understand the statement of reasons.

Schedule 2 - Flexibility Measures

DELEGATION OF PERMANENCE REQUIREMENTS TO RULES (S 27)

The proposed changes to s 27 delegate the definition and interpretation of "permanence" under the Act to the NDIS rules. The criteria for access to the Scheme are fundamental to the underlying principles of the Scheme, and cannot be appropriately delegated to subordinate legislation.

DRAFT PLANS

Part 2(5) Item 4(e) states that a participant will be empowered to request a draft plan prior to final planning discussions and the approval of supports. We note this is inconsistent with the Tune Review recommendation 25 and further explanation in the Tune Review which states:

> *'The Participant Service Guarantee should also empower participants to be able to review and consider a full version of their draft plan before it is approved, inclusive of the estimated plan budget' (pg 11).*

Firstly, we recommend a draft plan should be provided automatically and not require requesting. Secondly, we recommend the item is redrafted to be consistent with the Tune Review recommendation that people are provided sufficient support to review and consider their draft plan before it is approved. It will be ineffective to empower participants to request a draft plan if they are not supported to understand what the plan actually means.

To implement draft plans and support to appropriately explain the draft plan, as previously stated, the NDIA will need to be adequately resourced to achieve this. Without appropriate resourcing this will likely be unsuccessful.

POWER OF THE CEO TO CONDUCT A VARIATION ON ITS OWN INITIATIVE

We are concerned there is far too much power for the CEO to conduct a variation on its own initiative.

We note at section 10 of the proposed 'Plan Administration Rules' there is a list of matters the CEO must have regard to when determining whether to vary a participant's plan on its own initiative. We believe the power for the CEO to vary plans is far too broad and does not instil trust in persons with disabilities.

These matters at section 10 are also not consistent with the Tune Review recommendation at 8.33 (pg. 139). The Tune Review noted that a plan amendment should occur in certain circumstances and listed these circumstances, which should be replicated in the legislation and not the rules.

Endorsement of submission by Public Interest Advocacy Centre

We endorse the following recommendations of the Public Interest Advocacy Centre:

Recommendation 1 – Remove the power of the CEO to refuse a plan variation request and undertake a reassessment instead

Recommendation 2 – Allow participants to request reassessments

Recommendation 3 – Amend s 47A of the Bill to limit the power of the CEO to vary plans on their own initiative

Recommendation 4 – Section 48(2) rules should be designated as Category A rules

Recommendation 5 – Procedural fairness requirements for CEO's exercise of power on own initiative

Recommendation 6 – Move ss 7 to 10 of the Becoming a Participant Rules to the Act

Recommendation 7 – Provide guidance in the Becoming a Participant Rules to new terminology and concepts

Recommendation 10 – Amend s 100(1B) and (1C) to require reasons to be provided automatically

Recommendation 11 – Insert new s 100(6A) requiring reasons to be provided following internal reviews

Recommendation 12 – Amend the Participant Service Guarantee Rules to strengthen the Engagement Principles and Service Standards