

AMIDA's response to proposed NDIS legislative changes.

Introduction

AMIDA is a disability advocacy group. We receive funding from DSS to support NDIS participants, and potential participants, during internal and external reviews of NDIA decisions. Our opinions in this response are informed from our work over several years as NDIS Appeals Advocates at AMIDA. We are very familiar with the current NDIS legislation and Tune Review and we have read the material on the DSS Engage website in relation to the proposed changes. Given the short time frame for consultation we have restricted this response to the proposed changes that we consider will have the most impact on the people we support.

1. NDIS Amendment (PSG and Other Measures) Bill Schedule 1, changes to the NDIS Act at Chapter 3, Part 2, Division 4- Varying and replacing participants' plans (s47 – 50)

Broadly, we welcome the proposed change from the current s48 review, to s47A variations and s48 reassessments. The proposed changes address the Tune Review recommendation to remove the confusing triple use of the word 'review' and open a pathway to address errors in plans. However, we have a number of concerns about proposed changes. These include:

- A lack of detail around when a variation, as opposed to a reassessment, will be done. The Tune Review, at 8.33, stated that the variation power proposed in s47A should only be used in "certain limited circumstances" where the change "could be considered in isolation from the other supports". There is then a list of 9 circumstances where this could be done. There are lists of matters that the NDIA is to consider in making a decision to vary or reassess a plan at 10(2) and 11(4) of the proposed *NDIS (Plan Administration) Rules*. These matters give the impression that variations, rather than reassessments, are to be used unless there is a significant change of circumstances or a change in functional capacity, however we would like to see more clarity around this.
- A lack of right for a participant to request a s48 reassessment. It is unclear to us why a participant who wants, and/or requires, a s48 reassessment must request this as a s47A(3) variation. We see this as disempowering for participants and likely to lead to confusion.
- A lack of detail around the requirements to notify a participant of a variations and reassessments. The s47A(7) requirement to provide notice of a participant requested variation, under s47A(3), has no timeframes. A variation under the CEO's initiative using s47A(1) and a reassessment under s48(3)(b)(ii) do not require the NDIA to notify the participant of the change at all. We acknowledge that this power to change a plan without notice already exists under s48(4) and the requirement in s38 for the participant to be provided with a copy of a changed plan within 7 days remains. However, we do not think that it is reasonable for the NDIA to have the power to vary or reassess a plan without providing the participant with notice within a defined period.

2. NDIS Amendment (PSG and Other Measures) Bill Schedule 1, changes to the NDIS Act at Chapter 4, Part 6- Review of decisions (s99 – 103)

In general, we welcome the proposed changes to this part of the *NDIS Act*. In particular, the inclusion of a 90-day safety net in the *NDIS Act* to conduct a review of reviewable decision will be reassuring for participants who have previously waited much longer for these decisions. Also welcome is the addition s103 that makes clear that an application to the AAT can remain on foot

in circumstances where the plan is changed. However, we do have some concerns regarding the addition of a right, at s100(1B) & (1C), for participants to request reasons for a reviewable decision. These concerns include:

- Why it must be requested, rather than routinely done. An explanation of reasons for a reviewable decision should be provided without the person having to ask for them.
- The consistency of the decision making. We have often seen the s100 reasons change when the AAT Statement of Issues is presented. Even throughout AAT case conference process, the reasons often change again, sometimes multiple times. This is extremely frustrating for participants who feel that the NDIA are 'moving the goal posts' and 'looking for new ways to say no'. We feel adding another layer of reasons can only add to this frustration. In our opinion, it would be a far better for the NDIA to invest resources to empower decision makers to make more reasoned, and better explained, decisions at the very first decision making opportunity.
- The potential for confusion and frustration around time limits. We note that the proposed *NDIS (PSG) Rules* allows the NDIA 28 days to provide reasons for a reviewable decision, when requested. It is unclear why this long is required given that presumably the decision maker will have recorded the reasons already. We are also concerned about the impact this may have on the length of time it will take for a review of reviewable decision to then be requested. Given the discussion in the above point regarding the current inconsistency of decision making we wonder what the point would be in a person requesting reasons for a reviewable decision rather than just requesting a review.

3. *NDIS (PSG) Rules*

We welcome the PSG Rules and the increased certainty they will offer participants. However, we do have some concerns which include:

- How the NDIA will operationalise the standards. The standards are aspirational. The NDIA workforce does not seem anywhere near well-resourced enough to come close to being able to meet these standards. An example of this is the service standard in s5 table item 2(g) to provide each participant an "effective single point of contact". A large number of the plans we see has the participant's NDIA contact listed as enquiries@ndis.gov.au and we often hear from participants how difficult it is get hold of their planner or LAC. We are concerned that the NDIA will be unable to operationalise the standards in an effective way.
- How meaningful the standards, timeframes and obligations are. We are concerned that some of the standards, timeframes and obligations will provide little meaningful change, and in some cases work to increase participant confusion and frustration. For example, the service standard in s5 table item (e), which empowers a participant to see a draft plan, is meaningless without an accompanying right to have changes to the draft discussed and made. We fear that in practice, this right will simply become a mechanism for participants to be forewarned that their reasonable and necessary supports have not been included in the upcoming plan.
- A lack of enforcement. We note that the NDIA has been reporting on some of the PSG standards for some time, and also that the Commonwealth Ombudsman will be reporting on the standards. However, we remain concerned about the lack of any real consequence for the NDIA for when the standards, timeframes and obligations are not met.

4. *NDIS (Becoming a Participant) Rules 2021*

In general, we welcome the changes recognising the difficulties that participants with psychosocial disabilities have had in accessing and navigating the NDIS. In particular, we welcome the change

that allows a person with psychosocial disability to have the impact of impairment on their functional capacity tested over a period of time rather than, as the current Operational Guidelines state, “on the person’s ability to function in the periods between acute episodes”. However, we do hold some serious concerns about the proposed changes including:

- A stricter test because of a word change from ‘is’ to ‘may’. We are concerned that this seemingly minor change in wording will result in a much stricter test. For example, the current test for permanency in Rule 5.4 begins “an impairment is....”. The proposed changes in 7(2) & 8(2) begins “the impairment may...”. This word change also occurs in the 9(2) & 10(2) tests for substantially reduced functional capacity. There seems to be no recognition or explanation of this in the explanatory document. We recommend that ‘may’ is changed back to ‘is’.
- A lack of clarity in the wording. We would like to see some further clarification around what a ‘reasonable’ period of time will be in s8(2)(a)(ii), s10(3) and s12(2)(ii). We would also like to see further clarification around the circumstances under which a treatment is ‘reasonably’ available to a person in s8(2)(b).
- A different treatment of fluctuating or episodic conditions, depending on what type of disability a person has. We welcome the change proposed at s10(3), that the assessment of functional capacity for impairments from a psychosocial disability that is episodic or fluctuating, is to be applied to the “overall effect of the impairment... over a period of time”. We are concerned that non-psychosocial disabilities that are episodic or fluctuating do not have a similar change. The current Operational Guideline, which considers the impact in between periods of acute episodes, results in the assessment on functional capacity taking place during periods of time where the person’s functional capacity may be completely unaffected. We recommend that an equivalent of 10(3) is added at 9(3).

Conclusion

Overall, we welcome the proposed legislative changes that are less impactful than what we had expected following media reports earlier this year. We hope that DSS and the NDIA will continue to engage with and consult the disability community in their efforts to address the remaining Tune Review recommendations so that we can work toward true co-design and ensure the NDIS remains strong for generations to come.

Angela Horton
Judy Bourke
Belinda Filippis

AMIDA NDIS Appeals Advocates
7th October 2021