

Senator Wendy Askew
Chair, Senate Community Affairs Legislation Committee

via: community.affairs.sen@aph.gov.au

8 November 2021

Dear Senator

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

Thank you for the opportunity to provide a submission to the Senate Community Affairs Legislation Committee inquiry regarding the NDIS Amendment (Participant Service Guarantee and Other Measures) Bill 2021.

Mental Health Australia has previously provided a detailed submission to the Department of Social Services' consultation regarding this Bill and associated rules. Please find attached a copy of this submission for the Committee's consideration.

It is pleasing that some changes were made to the Bill in response to this consultation. The requirement that reasons for a reviewable decision are provided automatically, rather than participants having to request the reason/s, is a welcome change (Schedule 1, item 40 - subsection 100(1)). Mental Health Australia also welcomes changes to circumscribe the powers of the National Disability Insurance Agency (NDIA) CEO to vary participants' plans within a manner or circumstances prescribed by the NDIS rules, or to making a minor or technical correction (Schedule 1, item 23 – section 47A). The confirmation in the Explanatory Memorandum (p.20) that the *"intention is that any variation will be for the benefit of the participant"* is positive, however the rules associated with these changes are not yet publically available. Mental Health Australia calls on the Australian Government to engage with the disability sector, and in particular people with lived experience of disability and caring for someone with disability, in the finalisation of these rules and their implementation in order to support this intention. The inclusion in the Bill that *"Each variation must be prepared with the participant"* (Schedule 1, item 23 - subsection 47A (1)) is particularly significant, but appears to still allow plan variations without a participant's consent.

Regarding changes specifically relating to psychosocial disability, this Bill represents an improvement to the current legislation and would implement recommendations made by the mental health sector and past inquiries. However, as outlined in our previous submission, the changes in this Bill and associated Becoming a Participant Rule introduce new terms which are not yet clearly defined. Further work is required to ensure appropriate and consistent interpretation and prevent unintended consequences. As such, Mental Health Australia urges the Australian Government to engage in a process with the mental health sector to establish agreed guidelines for interpretation and implementation.



Mental Health Australia also welcomes the inclusion of a specific clarification that “*an impairment or impairments to which a psychosocial disability is attributable and that are episodic or fluctuating may be taken to be permanent, and the person may be taken to be likely to require support under the National Disability Insurance Scheme for the person’s lifetime, despite the episodic or fluctuating nature of the impairments*” (Schedule 2, item 18, subsection 24(3)).

As recommended by the Tune Review of the NDIS Act,¹ this explicit clarification addresses a particular barrier for people with psychosocial disability in demonstrating eligibility for the NDIS, where there has been confusion as to whether psychosocial disabilities with fluctuating and episodic impairments may be considered permanent. Mental Health Australia understands there are concerns that the wording of this clarification may inadvertently make it more difficult for people with disabilities with episodic or fluctuating impairments other than psychosocial disability to access the Scheme. Mental Health Australia recommends this potential unintended consequence be prevented by *addition* of a reference to ‘disabilities other than psychosocial disability’ and retaining the existing specific reference to psychosocial disability. If specific reference to psychosocial disability were to be removed, this would negate a particular intent to provide clearer guidance on when psychosocial disability may be considered permanent, as is required to improve equitable access to the NDIS and recommended by the Tune Review.

Mental Health Australia looks forward to continuing to work with the Australian Government and the NDIA to ensure the final Bill and its implementation is in line with the intention to improve access and participant experience for people with psychosocial and other disabilities.

Yours sincerely



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CEO
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¹ Tune, D (2019) *Review of the National Disability Insurance Scheme Act 2013*, Recommendation 8, accessed 8 Nov 2021
<https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/review-of-the-ndis-act-report>



**Mental Health
Australia**

**Submission: Response to Department
of Social Services consultation on
proposed NDIS legislation changes**

7 October 2021



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Introduction

Mental Health Australia is pleased to provide this submission to inform the Department of Social Services (DSS) consultation considering proposed changes to National Disability Insurance Scheme (NDIS) legislation. The proposed changes would establish a number of long-anticipated reforms advocated for by the sector and recommended by the Tune Review.

The NDIS has been life-changing for many Australians, however people with psychosocial disability have faced barriers in accessing both the Scheme and appropriate NDIS supports. The proportion of NDIS participants with primary psychosocial disability (10.4%) has remained well below the anticipated rate (13.9%), with only three-quarters of the 64,000 people with psychosocial disability anticipated to be eligible accessing the NDIS as of June 2021.¹ Analysis indicates this is due to both low NDIS application rates and lower rates of success for those with psychosocial disability who do apply.²

Further, people with psychosocial disability often face challenges in accessing appropriate supports through the NDIS, due to inappropriate NDIS policies and practices. In 2018, Mental Health Australia, commissioned by the NDIA, undertook extensive consultation with over 170 people with lived experience of psychosocial disability, carers and service providers, to identify particular barriers people with psychosocial disability were facing and potential solutions.³ Through this work, Mental Health Australia called for significant reforms to the NDIS to improve the accessibility and experience for people with psychosocial disability.

Since that time, Mental Health Australia has worked with the NDIA to progress these reforms - however much more remains to be done. The current proposed legislative changes represent one aspect of these required broader reforms. It is anticipated that the proposed changes to the NDIS legislation to better recognise the distinct aspects of psychosocial disability will support further changes towards a recovery-oriented approach for NDIS participants with a psychosocial disability.

The proposed changes regarding psychosocial disability represent an improvement to the current legislation. However, further work will be required to establish consensus around its interpretation and implementation. Mental Health Australia strongly encourages the Australian Government to work with the mental health sector in developing guidelines for implementation of the new legislation related to psychosocial disability, as outlined in this submission.

Mental Health Australia also continues to call on the Australian, State and Territory Governments to work together to fund adequate psychosocial supports outside of the NDIS. This was a crucial recommendation of the Productivity Commission inquiry into mental health (Action 17.3)⁴, and a necessity to ensure both the accessibility of appropriate supports for people with psychosocial disability and the sustainability of the NDIS.

¹ National Disability Insurance Agency (2021), Explore data: participants, accessed 24 Sept 2021 <https://data.ndis.gov.au/explore-data>; Productivity Commission (2020) *Mental Health, Report 95*, p. 851, accessed 16 August 2021 <https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume3.pdf>

² Productivity Commission (2020) *Mental Health, Report 95*, p. 852, accessed 7 Oct 2021 <https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume3.pdf>

³ Mental Health Australia (2018) *National Disability Insurance Scheme: Psychosocial Disability Pathway*, accessed 5 Oct 2021, https://mhaustralia.org/sites/default/files/images/ndis_psychosocial_pathway_consultation_project_-_final_report_-_may_2018.pdf

⁴ Productivity Commission (2020) *Mental Health, Report 95*, p. 826, accessed 7 Oct 2021 <https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume3.pdf>



This submission is informed by specific engagement with Mental Health Australia members and sector stakeholders, including people with lived experience of mental ill-health and/or caring for someone experiencing mental ill-health, service providers and other representative bodies. However, the short consultation time-frame limited the extent of stakeholder engagement.

Mental Health Australia offers the following feedback regarding the specific legislative changes proposed.

Changes to NDIS Act – Exposure Bill, Schedules 1 & 2

Changes relating to psychosocial disability

The proposed amendments to the terminology of the disability requirements in the NDIS Act from “psychiatric condition” to “psychosocial disability” are a welcome improvement. This change implements a recommendation previously made by Mental Health Australia and other sector advocates, and supported by the Review of the NDIS Act (Tune review).⁵

This change better reflects language commonly preferred by people with lived experience of psychosocial disability or caring for someone with psychosocial disability,⁶ and supports a focus on functional impact rather than diagnosis.

The proposed additional subsection 24(3) clarifying that impairment/s “to which a psychosocial disability is attributable and that are episodic or fluctuating may be taken to be permanent” is also welcome. This explicit clarification addresses a particular barrier for people with psychosocial disability in demonstrating eligibility for the NDIS, where there has been confusion as to whether psychosocial disabilities with fluctuating impairments can be considered permanent.

However, further work is required to ensure appropriate and consistent interpretation of this new legislation, and to prevent unintended consequences.

The new wording proposed for the disability requirements in the NDIS Act is “the person has one more impairments to which a psychosocial disability is attributable”. However, there is not yet a clear, agreed meaning of an “impairment to which a psychosocial disability is attributable”, and the term “psychosocial disability” itself remains un-defined.

Without further clarification, this language is likely to be ambiguous to health professionals providing support and evidence for NDIS applications. It is also unclear what evidence will be required to demonstrate that this disability requirement is met.

As such, Mental Health Australia urges the Australian Government to engage in a process with the sector to establish agreed guidelines for interpretation of these terms.

⁵ Mental Health Australia, Mental Illness Fellowship of Australia, Community Mental Health Australia (2019), *Submission to the Review of the National Disability Insurance Scheme Act and the new NDIS Participant Service Guarantee*, accessed 6 Oct 2021 https://mhaustralia.org/sites/default/files/images/mha_cmha_and_mifa_-_submission_to_the_ndis_legislation_review.pdf

⁶ National Mental Health Consumer & Carer Forum (2011) *Unravelling Psychosocial Disability, A Position Statement by the National Mental Health Consumer & Carer Forum on Psychosocial Disability Associated with Mental Health Conditions*, accessed 6 Oct 2021 https://nmhccf.org.au/sites/default/files/docs/nmhccf_psychosocial_disability_booklet_web_version_27oct11.pdf



Other changes

Participant Service Guarantee

The implementation of the Participant Service Guarantee is welcome in providing greater clarity and certainty for participants and accountability for the NDIA in engaging with participants. However, Mental Health Australia sees the current proposed timelines as a 'minimum' service guarantee. Mental Health Australia encourages the Government to monitor the NDIA's progress against the Participant Service Guarantee, and continue to set ambitious timeframes (supported in the proposed legislation), to continually improve participant experience.

Plan variation

Proposed changes to allow the NDIA to more easily amend or update participants' plans are welcome where the variations are minor, revise an error or are requested by the participant. Mental Health Australia is concerned however that as they currently stand, the proposed changes allow the NDIA to make changes to a participant's plan at the initiative of the NDIA CEO without consultation with the participant. Other than in exceptional circumstances, variations and reassessments should be undertaken in consultation with participants and with their consent.

Further, greater clarity is required to confirm that participants will not lose abilities under the existing legislation to request changes to their plan. Currently, under section 48, participants can request a review of their plan at any time. Under the proposed new clarified terminology, it appears such a plan review will be called a 'reassessment' and a 'review' will pertain to review of a 'reviewable decision'.

Under the newly proposed section 47A, a plan can be varied upon initiative of the NDIA CEO or request of a participant. If the participant requests a variation of their plan, the CEO must then decide whether to vary or reassess the plan, or neither. While a reassessment may then be undertaken at the discretion of the CEO, it is no longer a direct result of a participant request. Mental Health Australia calls for clarification and potential amendment if the proposed changes would reduce ability of participants to request substantive changes to their plans as compared to previous legislation.

Requests for a draft plan or reasons for a decision

Mental Health Australia supports inclusion of provisions for participants to request a copy of their draft plan and the reason for a decision made by the NDIA, but argues that these provisions should be strengthened such that participants receive a draft plan and reasons for a decision as a matter of course rather than upon particular request.

Under the proposed legislation, participants may remain unaware of their right to request a draft plan or reasons for a decision. In Mental Health Australia's experience, service providers have supported many people with psychosocial disability who have received an "access not met" decision, who feel discouraged from ever applying again, do not know why they have not been accepted (so cannot seek appropriate further evidence to support their application) and are unaware they are able to request further information on this decision from the NDIA. This leads to significant inequalities in access to the NDIS. Having to make a request, rather than receiving this information as a matter of course, also causes further delays. Similarly, the sector has long-advocated that access to draft plans will improve the quality and accuracy of participants plans and reduce amendments required in the future.

An automatic provision of a draft plan and reasons for a decision would support equity in access to information (regardless of a person's awareness of this right in NDIS legislation), and enable people with disability and their supporters to make timely decisions about the NDIS or accessing other services.



Changes to NDIS Rules

Becoming a Participant Rule

Mental Health Australia has continuously raised concerns that the requirements regarding permanency in the NDIS Act 2013 are not suitable for people with psychosocial disability.⁷ Mental Health Australia and other representative organisations have previously recommended replacing the word “permanent” with “ongoing, enduring or chronic”, and exempting people with psychosocial disability from the requirement that all treatments that could possibly remedy an impairment had been explored.

This difficulty was recognised by the Tune review, which recommended NDIS legislation provide clearer guidance regarding when a psychosocial impairment may be considered permanent.

It is welcome then that the Government has recognised this unique barrier regarding ‘permanency’ for people with psychosocial disability accessing the NDIS, and are proposing different definitions of permanency in the NDIS Rules for people with psychosocial and other disabilities. The proposed requirements are more appropriate for psychosocial disability and an improvement to the previous legislation. However, a number of ambiguities and concerns remain.

The proposed terminology states that regarding psychosocial disabilities, an impairment may be considered or likely to be permanent if “the person is undergoing, or has undergone, appropriate treatment” and “the treatment has not led to a substantial improvement in the person’s functional capacity, after a period of time that is reasonable”, or “no appropriate treatment for the purpose of managing the person’s mental, behavioural or emotional condition is reasonably available to the person”.

Mental Health Australia members have raised concerns regarding the ambiguity of many of these terms. For example, it is not clear what constitutes “appropriate treatment”, and there remains concern that people with psychosocial disability will continue to be denied access to the NDIS because they have not accessed a contested treatment regardless of suitability to their personal situation. Similarly, it is not clear what “reasonably available” means. There are often extensive waiting lists for psychiatric and other mental health services, and for people in areas of thin markets these services may not exist. Interpretation of “available treatment” is particularly fraught for further marginalised groups including First Nations, CALD and LGBTQI+ people with psychosocial disability where culturally appropriate services are essential.

Mental Health Australia notes that the intention of the proposed requirements, as stated in the Explanatory Document,⁸ is to “broaden the eligibility criteria for permanency” and attend to peoples’ “subjective experience of receiving treatment”, to provide appropriate flexibility for the variety of experiences of psychosocial disability. This intention is extremely welcome.

The Explanatory Document provides limited further guidance regarding interpretation of “appropriate treatment” however, and states a “period of time that is reasonable” will be defined on a case-by-case basis, guided by “an appropriately qualified health professional and supported by medical evidence”⁹, which is itself ambiguous.

⁷ Mental Health Australia, Mental Illness Fellowship of Australia, Community Mental Health Australia (2019), *Submission to the Review of the National Disability Insurance Scheme Act and the new NDIS Participant Service Guarantee*, accessed 6 Oct 2021 https://mhaustralia.org/sites/default/files/images/mha_cmha_and_mifa_-_submission_to_the_ndis_legislation_review.pdf

⁸ Department of Social Services (2021) *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, p8., accessed 6 Oct 2021 <https://engage.dss.gov.au/wp-content/uploads/2021/09/consultation-becoming-participant-explanatory-statement-1.pdf>

⁹ Department of Social Services (2021) *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, p9



Given the implications of interpretation of these ambiguous terms, Mental Health Australia urges the Australian Government to undertake a process with the sector to establish agreed guidelines for interpretation of these requirements, to support greater clarity for NDIS applicants and health professionals, while maintaining responsiveness to individual situations.

Similarly, the proposed changes to clarify when a psychosocial disability may be considered to be associated with “substantially reduced functional capacity to undertake relevant activity” are welcome. These changes distinguish between psychosocial and other disabilities and include a stipulation regarding overall effect to account for episodic needs, and as such are an improvement to previous legislation. However, the proposed requirements also rely on ambiguous terms and, as above, should be further clarified through work with the sector to develop guidelines for interpretation.

Plan Management Rule

The proposed amendments to the Plan Management Rule are positive in so far as they provide greater protection for participants’ interests and reduce potential impact of provider conflicts of interest. However, greater clarity in how this will work in practice is needed.

The amendments would grant the NDIA the power to determine that a provider is not appropriate to deliver a particular support. Mental Health Australia members have raised concerns regarding a lack of clarity as to how this new level of authority will be applied, particularly while maintaining choice and control for participants.

For example, enforcing a strict interpretation of conflict of interest requirements that the same provider cannot ever deliver Support Coordination and other services could be at the detriment of participant choice and control. NDIA participants with psychosocial disability have identified several benefits of having support coordination and other services delivered by the same provider, including better communication and having to retell their stories fewer times.¹⁰ This option could remain open where it is an *informed choice*. There may also be other circumstances in which it is difficult for participants to receive supports from different providers in thin markets, especially where psychosocial expertise is necessary.

Mental Health Australia recommends further clarity is included in the explanatory documents, and that participants should be consulted by the NDIA when considering if their plan should state a support cannot be provided by a particular person or organisation.

Conclusion

Overall, the proposed changes represent positive reform, which implement key recommendations of the sector and past inquiries. However, Mental Health Australia has concerns regarding how some of the additional powers granted to the NDIA may be implemented, and has called for clarifications and amendments to protect participant choice and control. Mental Health Australia is keen to work with the Government in engaging with the mental health sector to establish agreed guidelines for interpretation of the new legislation pertaining to psychosocial disability. This is imperative to ensure implementation of the legislation is in line with the intention to improve access and participant experience for people with psychosocial disability.

¹⁰ Mind Australia (2020), *Response to NDIA Support Coordination Discussion Paper*, pp14-15, accessed 6 Oct 2021
<https://www.mindaustralia.org.au/sites/default/files/Support%20Coordination%20Discussion%20Paper%20%28September%202020%29.pdf>



Mental Health Australia



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