

**The Hopkins Centre**  
Research for Rehabilitation and Resilience

 **Griffith** UNIVERSITY  
Queensland, Australia  
**Law Futures Centre**

**Submission to Senate Community Affairs Legislation Committee**

**The NDIS Amendment (Participant Service Guarantee and Other Measures)  
Bill 2021**

Associate Professor Kylie Burns

Professor Michele Foster

Professor Susan Harris Rimmer

Dr Eloise Hummell

Ms Samantha Borg

Ms Alyssa Venning

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**Contact:**

Associate Professor Kylie Burns

Email:

Phone:

**ARC Discovery Project (ARCDP2001100742) *Adjudicating Rights for a Sustainable National Disability Insurance Scheme* Research Investigators:**

Prof Michele Foster<sup>1</sup>, A/Prof Kylie Burns<sup>2</sup>, A/Prof Susan Harris Rimmer<sup>2</sup>

Dr Eloise Hummell<sup>1</sup>, Ms Samantha Borg<sup>1</sup>, Ms Alyssa Venning<sup>1</sup>

<sup>1</sup>The Hopkins Centre, Menzies Health Institute Queensland, Griffith University

<sup>2</sup>Law Futures Centre, Griffith Law School, Griffith University

## About Us

The Hopkins Centre, established in 2017 and co-located at Griffith University and Metro South Hospital and Health Service, is Queensland's premier research agency examining rehabilitation and resilience for people with disability. With over 200 research affiliates, including both academics and clinicians, The Hopkins Centre's approach to research involves a distinctive coupling of the voice of lived experience with systems and policy analysis. The Hopkins Centre's work transcends traditional disciplinary boundaries to investigate how to drive improved outcomes for people with severe disability through translating research into effective policies and practice.

The Law Futures Centre was established in 2015 to produce outstanding scholarship that anticipates, innovates, and meets pressing emerging challenges for law and legal institutions in Australia and internationally. Bringing together researchers from law, environmental sciences, international relations, business, health, criminology and humanities, Law Futures Centre members are committed to outstanding collaborative research that harnesses law as a key melioristic tool for shaping a better, more just future.

As academics and researchers from these two Griffith University centres, in drafting this submission we have drawn upon both our individual expertise and some of our preliminary work on a current research project, *Adjudicating Rights for a Sustainable NDIS (2020-2022)*, which is funded by an Australian Research Council (ARC) Discovery Project (ARCDP2001100742) grant. The project is described more fully in the Appendix to this submission.

Our submission is based on our current research and particularly relates to support decisions. In our view, it is important that any changes to the NDIS legislation and rules are consistent with the principles of administrative justice, enhance the rights of people with disability and are consistent with the CRPD. We note that this proposed suite of legislative reforms does not directly consider the determination of reasonable and necessary supports (eg s 34 NDIS Act). We believe it is very positive that the Government has withdrawn the previous proposed reforms in this area and there is progress towards much deeper consultation with stakeholders and co-design with the disability sector and people with disability.

We have recently made submissions to the Department of Social Services consultation process on the draft legislation which we attach as Annexure 1 to this submission. We reiterate those submissions particularly in relation to matters which have not been changed between the original draft legislation consultation and the referral of the Bill to this Committee. Given a further draft version of the National Disability Insurance Scheme (Participant Service Guarantee) Rules have not been released with the current Bill, we also reiterate our original submissions in relation to the proposed Rules.

## Our Recommendations

**Variation and Reassessment:** Amend s 47A and 48 so that is clear to participants the precise grounds on which the CEO can seek to vary or reassess a plan on the CEO's own volition. Amend s47A to specify the role that participants play in determining variation of plans as the current amendment is vague and without specific content.

**Reasons for Review Decision** Amend s 100 (6) to ensure that reasons for internal review decisions in relation to reviewable decisions are provided to participants at the time they are advised of the internal review decision.

**Co-design:** Amend Schedule 2 new subsection 4(9A): “People with disability are central to the National Disability 10 Insurance Scheme and should be included in a co-design capacity” - ‘should’ be replaced with ‘must’ in recognition of a genuine commitment to co-design.

## Our Submission

### Implementation of Tune Review Recommendations, Participant Guarantee and Variations

We generally support the legislative reforms which implement the Participant Service Guarantee particularly service standards and time frames.

We support legislative changes to allow easier and quicker plan variations for participants (for example for minor errors or changes of circumstances) and to clarify plan reassessments vs reviews (Schedule 1- insertion of s 47A and new s 48). However, we remain concerned that there is very significant discretion and lack of clarity in the legislation in relation to the circumstances when variation or reassessment may occur at the discretion of the CEO. S 47A (1), (3) and (6) and s 48(5) refer to NDIS Rules as outlining these circumstances. Current versions of the draft Rules have not been provided in this consultation. The original draft National Disability Insurance Scheme (Plan Administration) Rules 2021 s 10 and 11 (as provided during the DSS consultation) provided a very broad discretion for the CEO in relation to when plans can be varied and reassessed and on what grounds. A large number of matters were noted as potentially relevant matters for CEO decision making. Much further clarity and transparency to participants should be provided particularly in relation to the criteria or threshold that triggers the CEO’s initiative to vary a plan under s 47A or decide to reassess a plan under s 48(1) without consultation with participants. It should be very clear to all participants the precise circumstances in which their plan can be varied or reassessed by the NDIA on its own initiative, and this should never come as a surprise. We note the addition in the Bill before this Committee in s 47 A that ‘each variation must be prepared with the participant’ in response to feedback during DSS consultation that variation could occur without participant knowledge. However, we submit that this provision is vague and without content such that it is difficult to know what the legislation means- for example does it mean mere notification, does it require agreement with the participant, does it require a meeting with a participant? Further specificity should be added so participants are aware of the exact role they will play in varying their plan. Ideally, variations should be reached by agreement with participants.

### Reasons for Reviewable and Review Decisions

We support the amendment to s 100 (1) in response to feedback during DSS consultation to require the provision to participants of reasons for all reviewable decisions. We believe this an important amendment to ensure transparency of decision-making and to enhance administrative justice in the scheme. However, we suggest that s 100 (6) also be amended to ensure that reasons for internal review decisions in relation to reviewable decisions are also provided to participants at the time they are advised of the internal review decision. Again, this is important for transparency and administrative justice and allows participants to properly consider their rights of appeal to the AAT.

### Engaging in Genuine Co-Design

We support the Government’s move to deeper engagement and co-design with people with disability and the disability sector. To this end we advise the need for a subtle yet critical change to Schedule 2 new subsection 4(9A): “People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity”, whereby ‘should’ be replaced with ‘must’ in recognition of a genuine commitment to co-design, as well as the need to define the

Agency's understanding of co-design. This is important in building the trust of participants, people with disability and the community more broadly especially given the most recent history of subpar engagement and consultation around Independent Assessments, and the public process for these current legislative reforms. We comment with some concern that the draft legislative reforms were released to the public by DSS on 9 September, with only a four-week time frame for consideration and response. Additionally, we express concern that the legislation has entered Parliament and been referred to this Committee with a very limited time for due consideration and review of submissions.

Co-design with people with disability is not a 'should' but a 'must', and fulfils Australia's obligations under the Convention on the Rights of People with Disabilities. It is fundamental to moving further towards a successful and sustainable NDIS for people with disability and the Australian community.

## APPENDIX

### **About the ARC Project *Adjudicating Rights for a Sustainable National Disability Insurance Scheme (ARCDP2001100742)***

By enhancing the visibility and transparency of decision-making processes and priorities, and promoting informed public discussion, this project will contribute to making the National Disability Insurance Scheme a fair and sustainable scheme, and an international exemplar. The study involves three phases conducted over three years (2020 – 2022) and employs a multidisciplinary, translational design incorporating analysis of social, policy and legal frameworks, qualitative interviews, analysis of administrative data and qualitative case study methods to develop both a broad national understanding of dominant frames surrounding the administrative justice decisions and concepts of justice; and a more nuanced understanding of administrative justice as experienced by participants.

The project will highlight the power and justice effects of the administration of the NDIS, including what principles and values serve as dominant justifications for reasonable and necessary support, areas of contestation with choice and control, and the discrepancies in how administrative justice is viewed. The findings will contribute to a better understanding of which participants the NDIS is failing and contribute to a critical debate about the values guiding funded support decisions and fairness outcomes.

**Annexure 1: DSS Consultation Submission**



**Submission to the Department of Social Services on Proposed NDIS  
Legislative Improvements and the Participant Service Guarantee**

**Associate Professor Kylie Burns**

**Professor Michele Foster**

**Professor Susan Harris Rimmer**

**Dr Eloise Hummell**

**Ms Samantha Borg**

**Ms Alyssa Venning**

**7 October 2021**

**Contact:**

Associate Professor Kylie Burns  
Email: k.burns@griffith.edu.au  
Phone: +61 (0)7 3735 3642/0411 437 223

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Prof Michele Foster<sup>1</sup>, A/Prof Kylie Burns<sup>2</sup>, A/Prof Susan Harris Rimmer<sup>2</sup>  
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<sup>1</sup>The Hopkins Centre, Menzies Health Institute Queensland, Griffith University

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As academics and researchers from these two Griffith University centres, in drafting this submission we have drawn upon both our individual expertise and some of our preliminary work on a current research project, *Adjudicating Rights for a Sustainable NDIS (2020-2022)*, which is funded by an Australian Research Council (ARC) Discovery Project (ARCDP2001100742) grant. The project is described more fully in the Appendix to this submission.

### Our Recommendations

1. **Variation and Reassessment by CEO:** Amend the legislation so that the CEO must inform the participant that their plan is being considered for a variation or reassessment at the CEO's initiative. Further clarity should also be provided at s 47A (10): "The Agency must provide a copy of the varied plan to the participant within 7 days of the variation taking effect", that prior communication (verbal or written) must also be given to the participant informing them of the specific changes *before* they take effect. This is particularly important to provide opportunity for the participant to appeal the variation decision, especially if it was varied at the CEO's initiative without prior awareness of the participant.
2. **Reverse the onus for provisions of reasons for decisions:** We propose that s 100 (1B) should positively require the CEO to provide reasons for all reviewable decisions (including planning and support decisions) to participants at the time of communication of the decision. In addition, the bill should include a requirement for internal review outcomes to always include reasons.
3. **Provide Reasons for Decisions and Draft Plans:** The draft rules provide in Section 5 item 4 that participants can request reasons for reviewable decisions and can request to see draft plans in advance of final planning decisions and approval of statements of support. We believe this should be amended to oblige the NDIA to always proactively provide reasons for decisions and to provide participants with draft plans.
4. **Increase staffing resources to ensure connectedness:** Resource levels should be increased to support and enable the service guarantee especially in relation to the 'empowerment' and 'connectedness' of participants.
5. **Role of families:** In order to ensure participant/family relationships are properly accounted for at the operational level of decision-making, further consideration will be required during

the next phase of reforms concerned with reasonable and necessary supports and support planning.

6. **Co-design:** Amend Schedule 2 new subsection 4(9A): "People with disability are central to the National Disability 10 Insurance Scheme and should be included in a co-design capacity"  
- 'should' be replaced with 'must' in recognition of a genuine commitment to co-design.  
The Agency should seek to demonstrate a more detailed understanding of co-design.

### Our Submission

Our submission is based on our current research and particularly relates to planning decisions. In our view, it is important that any changes to the NDIS legislation and rules are consistent with the principles of administrative justice, enhance the rights of people with disability and are consistent with the CRPD. We note that this proposed suite of reforms does not directly consider the determination of reasonable and necessary supports (eg s 34 NDIS Act). We believe it is very positive that the Government has withdrawn the previous proposed reforms in this area and there is progress towards much deeper consultation with stakeholders and co-design with the disability sector and people with disability.

#### *Implementation of Tune Review Recommendations and Participant Guarantee*

We generally support the legislative reforms which implement the Participant Service Guarantee particularly service standards and time frames. We support legislative changes to allow easier and quicker plan variations for participants (for example for minor errors or changes of circumstances) and to clarify plan reassessments vs reviews (Schedule 1- insertion of s 47A and new s 48 ). However, we are concerned that the draft National Disability Insurance Scheme (Plan Administration) Rules 2021 s 10 and 11 provide a very broad discretion for the CEO in relation to when plans can be varied and reassessed and on what grounds. A large number of matters are noted as potentially relevant matters for CEO decision making. Much further clarity and transparency to participants should be provided particularly in relation to the criteria or threshold that triggers the CEO's initiative to vary a plan under s 47(A) or decide to reassess a plan under s 48(1) without consultation with participants. For example, instead of noting that a relevant matter to consider is whether a variation is minor or technical (s 10(2)(a)), the rule could provide that variations will only be made where the variation is minor or technical, with definitions provided. It should be very clear to all participants the precise circumstances in which their plan can be varied or reassessed by the NDIA on its own initiative, and this should never come as a surprise. It remains unclear whether the CEO must inform the participant that their plan is being considered for a variation or reassessment at the CEO's initiative. For example, further clarity should be provided at s 47A (10): "The Agency must provide a copy of the varied plan to the participant within 7 days of the variation taking effect", that prior communication (verbal or written) must also be given to the participant informing them of the specific changes *before* they take effect. This is particularly important to provide opportunity for the participant to appeal the variation decision, especially if it was varied at the CEO's initiative without prior awareness of the participant.

#### *Reasons for Decision and Review*

The draft bill proposes the insertion of s 100 (1 B) and (1 C) which provides for a participant to request that the CEO provide reasons for any reviewable decision. We do not believe that the onus should be on participants to have to request reasons for reviewable decisions. Administrative justice requires that all administrative decisions made should be explainable and transparent to citizens. We propose that s 100 (1B) should positively require the CEO to provide reasons for all reviewable decisions (including planning and support decisions) to participants at the time of communication of the

decision. This would reduce time and effort on the part of the participants (particularly those without advocacy support) and may prevent unnecessary reviews which result from participants not understanding the basis for original decisions. In addition, there could be a requirement for internal review outcomes to always include reasons, as proposed by PIAC.<sup>1</sup>

#### *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021*

We generally support the Engagement Principles and Service Standards embedded in Part 2 of the National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021 particularly in relation to transparency, responsiveness (including a focus on individualization), respect (including a participant-centred approach), empowerment (active engagement) and connectedness. Transparency of decision making and explainability of decisions in relation to planning and supports are important to ensure that participants receive administrative justice and can exercise rights of review. However, as we note above in relation to reviews, the obligation should be on the NDIA to always provide transparency in process and decision making, not on participants to have to request transparency. The draft rules provide in Section 5 item 4 that participants can request reasons for reviewable decisions and can request to see draft plans in advance of final planning decisions and approval of statements of support. We believe this should be amended to oblige the NDIA to always proactively provide reasons for decisions and to provide participants with draft plans. This is consistent with the Tune Review's finding that 'providing people with disability with an explanation of a decision should be a routine operational process for the NDIA when making access, planning and plan review' and 'it is preferable that participants should be empowered, under the Participant Service Guarantee, to review and consider a draft version of the entire plan rather than a plan summary.'<sup>2</sup> A question we also raise from our reading of the new rule is: what changes will be made to existing resource levels to support and enable the service guarantee especially in relation to the 'empowerment' and 'connectedness' of participants?

#### *The Role of Families and Reasonable and Necessary Support*

We support the proposed amendments in Schedule 2 of the draft Bill to introduce s 4 (12)(A) and s 31 (ca) in relation to the need to recognize and respect the relationship between participants and their families and carers as part of decision-making processes.

The recent Joint Standing Committee's inquiry on NDIS Planning identified that there continues to be over reliance on family members to provide the support required for NDIS participants in planning. It is also clear that there is a perceived availability of family members to provide support, and in some of these cases, there is no indication of previous family supports or alternatively these family supports (eg. ageing parents) are no longer able to undertake the role of caregiver. We also have concerns how typical support packages account for and make assumptions about the level of family support that can be provided to a participant and accordingly how much paid support will be provided in a plan budget. All of these matters have implications for the relationship between participants and their families. The proposed amendments begin to address these issues at a general aspirational principles-based level. However, we suggest that in order to ensure participant/family relationships are properly accounted for at the operational level of decision-making, further consideration will be required during the next phase of reforms concerned with reasonable and necessary supports and support planning.

<sup>1</sup><https://piac.asn.au/2021/09/20/explainer-what-are-the-proposed-changes-to-the-ndis-act/>

<sup>2</sup> [https://www.dss.gov.au/sites/default/files/documents/01\\_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf](https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf).

### *Engaging in Genuine Co-Design*

As noted above, we support the Government's move to deeper engagement and co-design with people with disability and the disability sector. To this end we advise the need for a subtle yet critical change to Schedule 2 new subsection 4(9A): "People with disability are central to the National Disability 10 Insurance Scheme and should be included in a co-design capacity", whereby 'should' be replaced with 'must' in recognition of a genuine commitment to co-design, as well as the need to define the Agency's understanding of co-design. This is important in building the trust of participants, people with disability and the community more broadly especially given the most recent history of subpar engagement and consultation around Independent Assessments, and the public process for these current legislative reforms. We comment with some concern that the draft legislative reforms were released to the public on 9 September, with only a four-week time frame for consideration and response to the proposed changes. This represents a very short timeframe for public engagement and feedback and contradicts the legislation's renewed commitment to genuine community engagement and co-design. Additionally, we express concern that the legislation is planned to enter parliament in late October, giving a very limited time for due consideration and review of submissions.

Co-design with people with disability is not a 'should' but a 'must', and fulfils Australia's obligations under the Convention on the Rights of People with Disabilities. It is fundamental to moving further towards a successful and sustainable NDIS for people with disability and the Australian community.

Kind regards,

Kylie Burns, Michele Foster, Susan Harris Rimmer, Eloise Hummell, Samantha Borg and Alyssa Venning

### APPENDIX