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Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
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Via email: community.affairs.sen@aph.gov.au

**RE: Brief submission to the Senate Standing Committee on Community Affairs proposed NDIS legislative improvements and the Participant Service Guarantee**

National Ethnic Disability Alliance (NEDA) welcomes the opportunity to provide a brief response to the Senate Standing Committee on Community Affairs on the proposed NDIS legislative improvements and the Participant Service Guarantee (PSG Bill).

## Background

NEDA is a national Disabled People's Organisation (DPO) that advocates for the human rights of people with disability from culturally and linguistically diverse (CALD), and migrant and refugee backgrounds. NEDA is a founding member of DPO Australia, an alliance of four national DPOs, which are organisations constituted and governed by people with disability.

While NEDA welcomes the discussions to improve the NDIS legislation, we are deeply concerned by the brief time period provided by DSS to conduct thorough consultation with our constituents and this may result in people with disabilities, especially those from CALD background, their family and carers from being excluded in this discussion. Although NEDA understands the reasoning behind not extending the consultation period, we remain concerned about the overall complex NDIS framework (including changes to the NDIS Act, two new Rules, and 5 amended Rules) that was put before this consultation period was not easily understood by the CALD community.

NEDA has made a submission regarding the PSG Bill to DSS on 7 October 2021. Since that submission has been made, the PSG Bill has been introduced into Parliament with some minor changes. This submission largely remains the same with some updated comments.

## Submission

<u>General comments regarding PSG Bill introduced to Parliament</u>

DSS' exposure draft of the PSG Bill included proposed changes to the NDIS Act and Rules, however the final draft introduced to Parliament, that is publicly available, only contains changes to the NDIS Act. Without knowing if the NDIS Rules were also revised, NEDA is concerned whether the NDIS Rules contain revisions that were not initially proposed during the consultation period or whether our concerns have been addressed.

Schedule 1 – the PSG

*Variation of participant's plan on request of participant or CEO own initiative (s47A)*

NEDA is very concerned about the broad power of the CEO to vary a participant's plan on their own initiative under s47A(2). Initially, NEDA was concerned that the amendment did not state whether the CEO's discretionary power would be exercised without the participant's consent or knowledge. The final draft introduced to Parliament has revised s47A and has added in that "each variation must be prepared with the participant" however it is unclear whether this means that the participant has consented to a variation in their plan. A simple solution to clear up this ambiguity would be to say "**each variation must be prepared with the participant's consent**".

The amendment also does not state what appeal rights a participant has when a variation is proposed by the CEO under s47A(2). If the intent is for a participant to appeal a decision by the CEO via a formal review request after the variation has occurred without their consent, this places too great of a burden on a participant to explain why the decision was incorrect.

The proposed Rule 10 of the Plan Administration Rules (in the exposure draft) sets out a non-exhaustive list of matters that the CEO must consider when varying a plan on their own initiative, however this list does not explicitly limit the CEO's power which can lead to unintended consequences.

The final draft has included requirements of the CEO when varying a plan (ss47A(3)(d) and 47A(6)), including a requirement to apply the NDIS Rules. As highlighted above, without knowing what the Rules say about variation of plans, NEDA remains concerned what the CEO's power involves. The proposed Rules are characterised as Category D rules which do not require oversight from any State or Territory making them the easiest type of rules to change.

We note that the explanatory memorandum states that the variation power is intended to be beneficial to participant and that s47A introduces a less administrative burdensome mechanism for a participant when making minor changes to their NDIS plan. NEDA welcomes the revised change that variations must be prepared with the participant. However, one of the fundamental pillars of the NDIS is the participant's choice and control and by legislating unfettered power to the CEO goes against this very pivotal pillar that underpins the NDIS.

*Reasons for decisions*

NEDA was initially concerned that in the exposure draft of the PSG Bill a participant had to request a statement of reasons for reviewable decisions, NEDA is pleased that the final draft has included a requirement to provide reasons under the proposed s100(1). However, NEDA remains concerned that there is no corresponding revision requiring that reasons after a review of the reviewable decision under s100(6) has been made must be provided.

NEDA also remains concerned that the provision of draft plans prior to plan approval is dependent on the request by the participant. This ultimately puts the burden on the participant to review what was discussed at their planning meeting *after* plan approval. This requires a certain level a self-advocacy that people with disability may not necessarily possess when it comes to understanding how their plans are being implemented and how decisions are being made under s100. This issue is further compounded for the cohort of CALD people with disability, particularly from new and emerging communities, who experience increased disadvantage due to the nexus of belonging to two stigmatised groups.[1]

[1] CALD people with disability are at an increased risk of discrimination, disadvantage and stigma due to barriers arising from the intersection of racism and ableism, and other factors relating to: language; culture; migration history; migration experience; visa status; ethnicity; religion; sexism; and LGBTIQ status, to name a few.

In the spirit of co-design and empowering people with disability, provision of draft plans and reasons after a review of a reviewable decision has been made should be given as a routine operational process rather than an additional step that must be explicitly articulated.

*Change in terminology for 'plan review' to 'plan reassessment'*

NEDA believes that the term 'reassessment' will unintentionally cause similar feelings raised by the disability sector following the introduction and subsequent departure from 'independent assessments'. The term 'reassessment' implies that the NDIS will conduct its own assessment of a participant's plan instead of relying on the participant's supporting documentation and progress reports by their allied health professionals. Although this is not what the proposed term means, NEDA believes it will invariably lead many to be confused with the change in terminology. Terms such as 'plan renewal' is an option that may relieve some of the anxiety and provides an opportunity to remedy the breach of trust felt by many when independent assessments were first introduced.

*Administrative Appeal Tribunal (AAT) jurisdiction (s103)*

The PSG includes some recommendations of the Tune Review in regards to clarifying the AAT's jurisdiction and includes the power to vary a plan while the matter is before the AAT. While NEDA welcomes these changes, the amendments have failed to address an important technical issue that continues to prolong matters in the AAT. The specific issue is the AAT's jurisdiction concerning the additional supports raised by participants during the AAT process that were not considered at the internal review stage. The proposed amendment under s103 of the NDIS Act specifies the AAT's jurisdiction on plans that have been varied during the AAT proceedings but is silent on additional supports that have not been implemented or varied.

There have been several AAT interlocutory decisions reaching differing conclusions about the AAT's jurisdiction about a plan on appeal.[2] The fact that legally trained, highly experienced members of the Tribunal are reaching differing conclusions on this aspect highlights the extreme complexity participants must navigate while their plan is before the AAT. This complexity is compounded for CALD people with disability who are left at a higher disadvantage due to not understanding this very technical legal issue that prolongs their matter.

Since NEDA's original submission to DSS, a Federal Court decision regarding the AAT's jurisdiction was handed down on 18 October 2021.[3] The decision states that the AAT's jurisdiction extends to what should have been included in a participant's NDIS plan and allows for the Tribunal to consider supports which have not been previously raised. Regardless of how the Federal Court has addressed this technical issue, it remains unclear how it will be trickle down to NDIS decision makers.

A simple solution would be to amend s103 to include the AAT's jurisdiction to consider *all* matters raised during their proceedings. This would effectively legislatively require the NDIA to reconsider all aspects of a participant's plan under review rather than relying on legally trained individuals within the NDIA and Tribunal to uphold the Federal Court's decision.

[2] See, *QDKH and National Disability Insurance Agency* [2012] AATA 922, where Deputy President Constance determined that only specific supports raised at the internal review stage would be considered by the AAT, rather than the entire plan. But see, *VXVL and National Disability Insurance Agency* [2021] AATA 1709, where Member Buxton determined that the AAT did not lack jurisdiction to consider additional supports simply because they were not considered at the internal review stage.
[3] *QDKH, by his litigation representative BGJF v National Disability Insurance Agency* [2021] FCAFC 189

Schedule 2 – Improving NDIS process

*'Unreasonable risk' assessment for plan-managed participants (s44)*

NEDA is concerned about the implementation of a risk assessment at the discretion of the CEO for plan managed participants. While this reflects the Tune Review recommendation 19, NEDA holds some reservations about the use and appropriateness of the risk assessment.

The criteria for 'unreasonable risk' are consistent with self-managed participants, however, the proposed rule 10 of the Plan Management Rules allows for a broad discretion by the CEO. Similar to our concerns about the CEO's power to vary a plan at their own initiative, this amendment needs to be clarified to ensure choice and control is preserved for the participant.

**Conclusion**

NEDA welcomes the Government's commitment to improving the NDIS. We wish to emphasise the Terms of Engagement signed by various disability advocates[4] that specifies changes to the NDIS needs to be co-produced in collaboration with people with disability, their families, and representative organisations.

The evidence shows that CALD people with disability, as a cohort, experience significant discrimination, marginalisation and compounding barriers to rights, recognition, and participation. This consultation period presented a limited opportunity for the Government and the disability community to rebuild a better NDIS for all Australians, however there is more room for improvement to ensure CALD people with disability and their representative DPOs are genuinely working in partnership to drive NDIS agendas and outcomes.

NEDA would be happy to provide further information regarding our views. We thank you for the opportunity to provide feedback on the proposed amendments to the NDIS legislation. For further enquiries please contact NEDA's Senior Research & Policy Officer Blanca Ramirez on
or at .

Yours sincerely,

**Dwayne Cranfield**
Chief Executive Officer

[4] http://neda.org.au/terms-engagement-ndis-minister-reynolds-disability-community