Submission to the Community Affairs Legislation Committee

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

Dr Darren O'Donovan, La Trobe Law School

The Committee's consideration of this legislative package, and the reaching of consensus, would have been greatly assisted by having revised rules ahead of submissions going in. At core points in this submission, I argue:

- The rule making powers are of a breadth and nature that many of the matters they potentially touch on should only be placed in primary legislation.
- The broad rule making powers are not necessary as elevating a revised rule or aspects of the rules to the Act is preferable.

The tendency to rely on the agency's operational guidelines to fill in underactive, unstructured legislation or rules is **a key driver of bureaucracy** in the NDIS. The three levels of rules must be designed together and worked through coherently if we are going to improve the scheme. We must be clear about what should be in the Act, what should be in the rules, and the fundamental limitations and lack of legitimacy attaching to operational guidelines.

Core Recommendations:

1. **The need for greater care and substantive revision of the proposed amendments relating to access to the scheme. The new powers to create access 'requirements' by rule under sections 27(2) and 27(3) should not progress. The revised access rules must be developed as a coherent package alongside, not after, this Bill.**

2. The need to confine the CEO's own-motion variation power to the circumstances identified in the Tune review.

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Recommendations:

1. **Provisions which implement broad based hurdle requirements for accessing a scheme of such significance should be anchored in primary legislation.**
2. **The shift in rule making power from criteria/circumstances to requirements by revising Section 27(2) and (3) should be abandoned in order to ensure the fullest parliamentary engagement with access to the NDIS.**

Revised Section 27 powers: Making access ‘requirements’ by rule

The Bill in its current form implements a significant passage of power from the Federal Parliament to the executive. While disallowance will provide some level of future control, it is not a panacea and the traditional rights of each individual member over measures of this character should not be diluted.

Currently the NDIS Act section 27 permits only the following:

- Rules which define ‘circumstances’ in which the access criteria will be met i.e. “deeming provisions” which include cohorts.
- Rules which define ‘criteria’ to guide an evaluative judgment about the legislative criteria of permanence and substantially reduced.

The new Bill will permit the insertion of rigid requirements which must be met prior to access.[1] The rules will no longer be limited to principled guidance about the performance of a statutory task. Instead, the rules will implement all or nothing requirements without which a finding of ‘likely permanent’ or ‘substantial reduction’ cannot be legally reached.

The appropriate method for implementing broad based ‘requirements’ for accessing a scheme of this sensitivity and importance is primary legislation. Recent debates around assessment tools have underlined the subtlety of evaluating the statutory criteria of ‘substantially reduced’ and the related life domains. We witnessed members of parliament – across party lines - play an important role in exploring and improving the proposals around access.

The Department of Prime Minister and Cabinet’s *Legislation Handbook* provides guidance as to what matters may not be appropriate for delegated legislation:

> *(b) significant questions of policy (including significant new policy or fundamental changes to existing policy)*
> *(c) rules which have a significant impact on individual rights and liberties;*
> *(d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation…)*

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[1] The Bill grants the Minister power to make rules about the ‘requirements’ that must be satisfied for an impairment to be considered permanent, or for substantially reduced functional capacity: s 27(2) and (3).

The Committee should be clear that allowing ‘requirements’ to be made by rule via section 27 involves such situations. I will now show some downsides to the requirement by rule approach under the current proposals, rather than raising hypothetical scenarios.

Removal of space for evaluative judgments about function.

Recommendation 3:

Preserve the space to implement the approaches in the *Schwartz* and *Ray* tribunal decisions. Those decisions show the value of NDIS access where a person’s participation in an activity would be *ineffective or incomplete*, namely where the person would be at risk of serious harm or significant functional decline without:

- **(e) Significantly limiting the performance of the activity outside controlled, domestic environments**
- **(f) Without the significant ongoing supervision and monitoring of a carer who can intervene to prevent such serious harm or functional decline.**

The Bill (if combined with the proposed related rule) erases an existing flexibility enjoyed by decision-makers in assessing whether a person’s functioning is substantially reduced.

The ‘requirement’ power, and the revised NDIS Becoming a Participant rules, change the old rule 5.8 from a deeming provision to a **requirement**.[2] This needs to be more carefully reflected upon.[3]

The current status of rule 5.8 was succinctly described by Justice Mortimer in Mulligan at [77]:

> *“I note that the Tribunal appears to have approached the concept of “substantially reduced functional capacity” in s 24(1)(c) as if it is exhaustively defined by r 5.8.* ***That is not necessarily the case****. As a deeming provision,* ***r 5.8 has the effect of mandatorily including some people*** *in the category of persons with substantially reduced functional capacity if the criteria in r 5.8(a), (b) or (c) are met. In that sense, a decision-maker must turn his or her mind to whether an applicant falls within the deeming effect of r 5.8.* ***That is not necessarily the end of the exercise in terms of s 24(1)(c)****. The statutory task remains to consider whether a person’s functional capacity is substantially reduced in any of the six specified areas.”*[4]

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[2] The **new rule** is expressed as follows:
“The impairment or impairments ***may be considered*** *to result in substantially reduced functional capacity of a person to undertake the activity* ***only if, as a result of the impairment or impairments****:..[same text]”*
The old rule 5.8 was expressed as follows:
‘An impairment ***results*** *in substantially reduced functional capacity of a person to undertake one or more of the relevant activities* ***if its result is that****: [same text]’*

[3] The current Rule 5.8 reads as follows:
‘An impairment results in substantially reduced functional capacity of a person to undertake one or more of the relevant activities…—if its result is that:
(a) the person is unable to participate effectively or completely in the activity, or to perform tasks or actions required to undertake or participate effectively or completely in the activity, without assistive technology, equipment (other than commonly used items such as glasses) or home modifications; or
(b) the person usually requires assistance (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity or to perform tasks or actions required to undertake or participate in the activity…

[4] Emphasis added.

Under the proposed revisions, the old rule 5.8 will no longer have this status of a deeming provision but will function as a requirement.

The proposed shift in the Act and rules may have some adverse impacts. In cases such as *Ray* and *Schwartz* the Tribunal has relied on the freedom recognised expressed in Justice Mortimer's ruling to recognise that controlled environments and carer monitoring/oversight can mask substantially reduced function. This has moderated any lack of subtlety to the requirement of 'usually' in rule 5.8.

Case Examples

Two AAT cases show the value of preserving a holistic evaluation which:

- **(i)** **takes into account the constrained movement of people and how function looks different in a controlled environment**
- **(ii)** **Fully values how the presence of carer monitoring and oversight can mask a lack of underlying function.**

The *Ray* case is one where the Agency was sharply condemned for a 'superficial' reliance on a blunt concept of 'high functioning' autism. The Tribunal strong criticised its overly selective assessment which did not account for how function shifts across environments. As part of this, we saw the tribunal use the flexibility potentially erased by these proposed changes:

> *'On balance, the Tribunal is not satisfied that Mrs Ray is usually assisted to undertake self-care activities. The Tribunal does not find that the deeming provision in r 5.8(b) of the NDIS Access Rules applies to Mrs Ray in respect of the activity of self-care. However, the Tribunal is satisfied that that Mrs Ray requires a significant degree of assistance and oversight in respect of self-care and that this is provided by Mr Ray. The Tribunal considers that if that assistance and oversight was not provided by him, it is likely that Mrs Ray's health and well-being would decline. For these reasons, the Tribunal is otherwise satisfied that Mrs Ray's impairments have resulted in a substantially reduced functional capacity in the activity of self-care,* ***even though the specific deeming provision under r 5.8(b) does not apply in this case****.'*[5]

The above finding could not be reached where rule 5.8(b) was transformed into a requirement.

A similar supplementary judgment was made in case of *Schwartz*:

> *"The Tribunal is satisfied that Mrs Schwartz's impairments of CRPS and bronchiectasis have resulted in a substantially reduced functional capacity in self-care within the meaning of s 24(1)(c)(iv) of the NDIS Act.* ***The deeming provisions in r 5.8(b) of the NDIS Rules do not apply****, however the Tribunal is satisfied that Mrs Schwartz requires support and monitoring which is provided for her daily by Mr Schwartz."*[6]

Importantly this finding was driven by the need to assess substantially reduced functioning beyond the home environment and current living patterns, and to guard against the risk of harm or significant functional decline.

The new draft rules also mirror the existing, unexplained failure to consistently assess whether the person can 'effectively' or 'completely' participate in activities. The current rule 5.8(a) states that a person will be found to have substantially reduced functioning if they cannot

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[5] *Ray and National Disability Insurance Agency* [2020] AATA 3452 (8 September 2020), at [130]. The applicant was also successful in characterising another life domain under rule 5.8. Emphasis added.

[6] *Schwartz and National Disability Insurance Agency* [2021] AATA 311 (19 February 2021) at [326].

participate effectively or completely without assistive technology. But Rule 5.8(b) [concerning support from *people*] does not have a similar focus on effective or complete participation.

The failure to consistently use the yardstick of 'effectively' or 'completely' participating will have greater implications if rule 5.8 is to function as a requirement rather than a deeming provision. Up to now, where rule 5.8 was a deeming provision only, such flaws were largely manageable as they could be supplemented. But their existence should give us pause about reliance upon delegated legislation to define NDIS access, and what drafting and scrutiny resources will be devoted to their creation.

Any new psychosocial 'management' pathway should be better developed, and anchored in the Act

Recommendations:

4. **The reshaping of the psychosocial pathway is a significant issue of policy with an accompanying evidential process that should, after revision, be anchored in primary legislation.**
5. **At a minimum, the legislation permitting the imposition of requirements should not pass until we see a finalised text of the pathway. The current effort is unstable, being largely a placeholder for the NDIA to coin its own concepts.**

The new psychosocial pathway is again not structured as a simple deeming provision, offering merely an additional pathway into the scheme for a vulnerable cohort. Instead, it implements and defines a **hurdle requirement** for the scheme. It is not informing a finding about permanence but creating a sine qua non that **must** be established. Irrespective of the merits, that is a matter of policy for primary legislation.

The new psychosocial pathway currently inappropriately sitting in the proposed rules is imprecisely drafted with some key failings:

- **Insufficient guidance** on the new concept of 'treatment with the purpose of managing a condition'. Instead of 'will you recover?', we are now asking 'are you managing?' If 'management' is the underlying goal of the treatment, this can colour what counts as a 'substantial improvement'. Many people presenting in acute crisis may experience an improvement but still meet the current NDIS criteria. The period a person may be required to trial and test management options is difficult to predict without a clear statement of what 'management' is trying to ultimately achieve for the person.

- This interacts with **failure to create objective criteria** for judging, or a definition of, a 'substantial improvement'. The improvement currently is one relative to the individual's past, and no target outcome or end state is specified. The goal of a treatment should be to ensure the person no longer has substantially reduced capacity. If that goal is not available or is likely not available through the treatment, the person must progress to the NDIS.

- While a medical judgment will be central, the lack of any principles or other guidance about how to calculate the time period required to form a judgment, aggravates the instability generated by the foregoing flaws. **How will participants understand where they are at**? How will any of this be communicated?

- the explanatory memorandum to the rules compounds this vagueness by **adding concepts** like ‘stabilisation’. It also makes clear that the process of management runs a gamut of activities ‘associated with’ ‘crisis, symptom and medication management’ and ‘establishment of pathways for longer-term recovery’.

The current draft rule risks individuals being superficially dubbed ‘not treatment resistant’ or as ‘having options for management’. If people are being asked to delay entry to the NDIS to trial options, they need a clear principled statement of the point at which the treatment evaluation stage will end. We need to have more insight on the criteria that will have to be communicated to their treating doctors. This concentrates power in administrators who are not accountable to people with disability or the public.

This can be stopped by putting the criteria for access in the Act, developing them through rules and operationalising the resulting clear policy through ‘operational’ guidelines.

Equal recognition of non-psychosocial, fluctuating disability

Recommendation 6:

Amend Sections 24(3) and 25(1A) of the Bill to clarify that all impairments which are episodic or fluctuating in nature may be taken to be permanent, regardless of whether the impairment is attributable to a psychosocial or non-psychosocial disability.

Legally, the treatment of fluctuating impairments within the scheme will remain complex and unstable. To an uncomfortable extent, the agency has been left to coin its own concepts in addressing these impairments. For instance, neither the legislation nor the rules provide guidance around what counts as an ‘acute’ period, something the NDIA elects to disregard when assessing what it seems to regard as someone’s ‘baseline’ capacity. When does an ‘acute period’ become a predictable fluctuation?

The clarificatory provisions in this Bill fulfill a legal pot pourri function: they simply make fluctuating impairments more visible. They state the obvious: fluctuation is not a bar to permanence. They restate the reality that it is in the nature of many conditions to fluctuate, and this is not individual to the person. These are not the type of provisions that would trigger a range of unintended consequences if extended to non-psychosocial conditions.

On the other hand, where such an express recognition is *absent*, the decision-maker may have more scope to say that the person’s situation is ‘uncertain’ and individual to them. I don’t believe we can firmly state that the current proposed inconsistency is academic – context sits alongside text in interpretation. We need to recognise that we are operating in a context where the Act and rules have already failed to properly map the relationship between fluctuating disability and permanence.

Section 47A: CEO's Own Motion Variation Power

The CEO's power to conduct own initiative variations of participant plans needs to be confined, and more clearly linked to the specific situations carefully drawn up by the Tune Review, paragraph 8.33.

Recommendations:

- **7. Own motion variation processes should be limited to beneficial situations listed at [8.33] of the Tune Review.** Reductions to funding should only be permitted after careful reassessment. This reflects the fact that any reduction would be cutting funding previously found to be *necessary*. Given r 2.4 of the *Support for Participants Rules* requires the CEO to reflect on how supports slot into the overall package, a 'line item' review power just windows out into matters better dealt with via reassessment.

- **8. An own motion variation process should only commence with the consent of the participant or their nominee, except in cases of urgency and risk, where this is not practicable.**
- **9. Delete Section 47A(4)(c), which allows the CEO to refuse to vary a plan but to undertake a reassessment under s 48(1) instead.**

The own initiative variation power in section 47A should simply be limited to the situations agreed upon in the Tune Review. For security, this can be implemented in the primary legislation. It is time to leave the era of debating plan bureaucracy behind.

In discussing variation powers, it is important to focus on *the decision commence* a variation **process**, rather than the variation *outcome*. The clarifications offered post exposure draft only speak to variation outcomes, rather than the ability of the CEO to commence a *variation process*. It goes without saying that any support variations must in line with section 34 criteria. It goes without saying that the amended support must be prepared 'with' the participant.

These changes do not alter the fact that the Bill gives potentially increased powers to the CEO to **call down bureaucracy on participants.** The CEO is given the ability to announce an intention to vary a plan, to draw participants into an administrative *process* without their consent. At a time when they should be focusing on using their supports, obtaining the best outcomes, getting on with their lives. Certainty in one's plan contents was a foundational principle of the original Act. The planning process centralised all the bureaucratic interactions, so that individuals could get a plan into their hands and focus on the important bit: receiving the supports.

The fact that the CEO enjoys an own motion reassessment power does not mean variations should be treated in an equivalent manner. Own motion variations – *line item review* – differ conceptually in potentially giving the Agency the right to dine ala carte on a participants plan without the discipline of a full planning process and resourcing.

For the sake of clarity: this is **not** saying a participant must always have consent over the contents of their plan (!?!) Rather participants deserve a right to consent before the Agency elects to undertake a selective line item review of an individual support or plan element, out of cycle with their scheduled review, in a context where it won't commit to a reassessment. Such unannounced, episodic, split out, bureaucratic interactions with the NDIA should be limited to the situations listed by Tune at [8.33].

‘Unreasonable Risk’ and Plan Management

Recommendations:

10. Section 44 should be amended to more clearly provide a substantive standard of proof around the concept of ‘unreasonable risk’. Unreasonable risk should be connected to a risk of types of situations or harms to be prevented.

11. Alternatively, the legislation should not pass until revised rules are available and co-designed

Section 44(3) empowers the CEO to deny someone the right to self-manage their fund where ‘unreasonable risk to the participant’ exists. The current proposals have not sufficiently grasped the nettle: unreasonable risk of what? We need to pin down the openness of this, with a clearer, agreed vision of what this power is trying to achieve.

The Act is again creating a framework power to implement risk management. The rules are then to clarify what the situations and circumstances in which such a risk arises. Unfortunately, the rules have been structured around ‘lists’ of relevant matters, rather than situations or harms to be prevented.

The provisions can at least be strengthened to refer to the right to choose and be supported to grow into the role of an effective consumer in the scheme. There should be a clearer yardstick for reasoning for instance, satisfaction that there is an established risk to the safety and well-being of the participant were they to self-manage. Given the centrality of choice and control in the scheme, participants must be seen to be heard on the draft rules now, so they can have confidence in the primary legislation.

Other Matters: Targeted Recommendations

12. **The lack of a definition of ‘treatment’ in the Act is developing into a serious normative gap. The proposed *Becoming a Participant rules* collapse the boundaries between treatment and functional support in a manner that will cause confusion and boundary disputes at the point of access requests.**
13. **Rules relating to sections 14, 47A(6) and 48(5) should not be turned into Category D rules. They bear on significant matters of policy, financial consequences and equity within the scheme.**
14. **Amend section 45 to emphasise participant choice as to payment forms. In no scenario should the CEO inherit an overly broad, default power to determine payment methods.**
15. **A new subsection should be inserted into the Bill mirroring the requirement to provide reasons under s 100(1) for all reviewable decisions, in respect of s 100(6) internal review decisions.**
16. **The ‘special circumstances’ debt waiver provision of the current Act in section 195, should be amended to ensure financial hardship and the person’s disability can be taken into account and properly valued in identifying special circumstances.**

Positive Elements to the Package

Whilst this submission raises some specific concerns around the package, the following elements are undoubtedly welcome:

- Amendments to facilitate the implementation of tribunal decisions by overcoming long unremedied legislative problems mapped in matters such as *Williamson v NDIA*. I wish to take the chance to acknowledge the suffering of participants who were caught by the jurisdictional traps which should have been immediately cured upon being flagged by tribunal members.
- The commitment to time limits for NDIA decisions.
- Amendments to facilitate longer plans, greater flexibility across the reasonable and necessary categories which will provide breathing room for participants to focus on generating outcomes rather than navigating Agency processes.
- The Participant Service Guarantee which provides a series of norms to anchor and structure Ombudsman engagement in the scheme.
- Improved market levers for the Agency to intervene to remedy thin markets, drive quality in services.