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ADVOCACY CENTRE

Submission to Senate Community Affairs Legislation Committee

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

8 November 2021

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendation 2 – Amend s 47A of the Bill to limit the power of the CEO to vary plans on their own initiative

Section 47A should be amended to limit the power of the CEO to vary plans on their own initiative, in line with the circumstances set out at paragraph 8.33 of the Tune Review Report, or in any other instance with the express consent of the participant. These limits should be set out in s 47A of the Bill, and not in delegated legislation. The power should be limited to the following circumstances:

- *where a participant changes their statement of goals and aspirations, and the changes to the plan are to reflect the amended statement;*
- *if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary*
- *if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of that specific support is reasonable and necessary;*
- *where a technical mistake or drafting error is made in the plan;*
- *where, after completion of risk assessments in accordance with ss 43 and 44, the plan management type is changed;*
- *for the purposes of applying or adjusting a compensation reduction amount;*
- *to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT;*
- *upon reconciliation of an appeal made to the AAT;*
- *to implement an AAT decision that was not appealed by the parties; and*
- *in any other instance, with the express consent of the participant.*

Recommendation 3 – Section 48(5) rules should be designated as Category A rules

Section 48(5) rules should be designated as Category A rules, in line with the current designation for rules under s 48. These rules concern the circumstances in which the CEO may undertake reassessments and are significant policy matters with potential financial implication for States and Territories.

Recommendation 4 – Procedural fairness requirements for CEO's exercise of reassessment power on own initiative

Section 48 should include a Category C rule-making power to set out procedural fairness requirements for the CEO's exercise of power to reassess plans on their own initiative. These requirements should include notification periods, the provision of information to participants as to

why the decision has been made, the matters which will be open for reassessment and the opportunities for participants to be heard in the reassessment process.

Recommendation 5 – Remove s 27(2) and (3) of the Bill

Section 27(2) and (3) of the Bill allow rules to specify threshold requirements for access to the NDIS, through setting requirements that must be satisfied for impairments to be considered permanent or result in substantially reduced functional capacity. This is a significant matter of policy which determines who can access the Scheme. Any new requirements for access to the Scheme should be inserted into the Bill for parliamentary debate, and not be subject to the Minister's discretion.

Recommendation 6 – Amend ss 24(3) and 25(1A) of the Bill to include all disabilities

Sections 24(3) and 25(1A) of the Bill should be amended 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.

Recommendation 7 – Clarification of drafting in s 45 of the Bill

Section 45 of the Bill should be amended to clarify that this change is not intended to remove the ability of participants to continue paying their service provider in the method of their choosing.

Recommendation 8 – Insert new s 100(6B) requiring reasons to be provided following internal reviews

A new s 100(6B) 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.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee's inquiry into the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (**Bill**).

PIAC has lengthy experience in working with people with disability to tackle barriers to justice and fairness. Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the NDIS for people with disability. This work has been done in close consultation with key peak disability organisations.

We are pleased to see several positive changes proposed in the Bill, which reflect a number of our longstanding concerns. In particular, we welcome proposals to:

- insert timeframes into the Act and Rules, including timeframes around access, participant plans and internal reviews;
- require annual reporting by the Commonwealth Ombudsman to review the NDIA's performance against the Participant Service Guarantee, as well as in relation to participant experience;
- clarify the language around the different types of 'reviews' which has caused confusion between participants and the NDIA;
- fix the Administrative Appeals Tribunal (**AAT**)'s jurisdiction when it comes to reviewing plans which have been varied or replaced by new plans over the course of the appeal; and
- improve the NDIS principles, including adding co-design with people with disability, and using more inclusive language.

However, we are concerned by the expansion of rule-making powers and the use of broad discretionary powers for the administration of the NDIS.

Our submission addresses four matters:

- our overarching concerns about the NDIS framework and the continued reliance on broad discretionary powers;
- the CEO's variation and reassessment power;
- the eligibility criteria for access to the NDIS; and
- other amendments necessary to clarify aspects of NDIS administration.

PIAC previously lodged a submission to the Department of Social Services' short consultation on the exposure draft of this Bill. That submission included feedback and recommendations on the proposed new and amended rules. In important aspects, the operation of this Bill relies on rules which have not been published for the purposes of the Senate Committee's inquiry. In these circumstances, it is difficult to comment on the practical operation of a number of provisions in the Bill. It is regrettable that the proposed or revised rules have not been provided for the purpose of this inquiry.

2. Reliance on rules and discretionary powers

Our overarching concern with the Bill is the continued reliance on delegated legislation for significant aspects of the NDIS. This includes a number of new rule-making powers in the Bill, and a number of proposed new rules. Our concerns around this continued expansion of rule-making power are compounded by the expansion of discretionary powers of the CEO. The combination of these aspects represents poor legislative and administrative practice and should be avoided.

Concerns about the overuse of delegated legislation are not new, and not unique to the NDIS. Delegated legislation should only be used for the purposes of administration, for instance to facilitate flexibility in frequently changing regulatory regimes or in providing technical detail to the Act. It should not be used for significant and substantive aspects of law-making.

The Senate Standing Committee on Regulations and Ordinances has recently raised concerns regarding the overuse of legislative instruments:[1]

> …the power to enact laws is a primary power of Parliament. Nevertheless, the Parliament frequently delegates its law-making powers to the executive government or specified bodies or office-holders. The committee considers it essential that the Parliament does not delegate legislative powers that should be exercised by the Parliament itself.
>
> The committee is particularly concerned that bills all too often leave significant matters of policy to delegated legislation. The committee considers that the Scrutiny of Bills committee plays an essential role in drawing bills which inappropriately delegate legislative power to the Senate's attention. However, despite the Scrutiny of Bills committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored, and legislation is enacted that leaves significant matters to delegated legislation, or allows delegated legislation to amend primary legislation. Once enacted, these powers are used to make legislative instruments which this committee considers contain matters more appropriate for parliamentary enactment. However, by the time this committee alerts the Senate to its concerns, it is effectively too late: the relevant primary legislation has already passed both Houses of Parliament.
>
> The committee considers that when government is developing primary legislation which seeks to delegate legislative power, it should pay close attention to the importance of ensuring adequate parliamentary oversight. In particular, government officials should consider the advice issued by this committee and by the Scrutiny of Bills committee as to when matters would be more appropriately included in primary legislation.

Parliamentary oversight of delegated legislation, through its power to disallow pieces of delegated legislation, is not sufficient when it comes to significant matters of policy. The Senate Standing Committee has stated:[2]

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1 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of delegated legislation* (Commonwealth of Australia, 2019), [5.33]-[5.35].

2 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of delegated legislation* (Commonwealth of Australia, 2019), x.

> in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation (despite the warnings of the Senate Standing Committee for the Scrutiny of Bills). While the committee draws its technical scrutiny concerns about delegated legislation to the Senate's attention, there is no consistent scrutiny of its policy implications.

In the context of the NDIS, there are a two new rule-making powers of particular concern: s 27, allowing rules to specify 'requirements that must be satisfied' for the purposes of determining whether impairments are 'permanent' or result in 'substantially reduced functional capacity', and s 47A, concerning rules for the exercise of the CEO's power to vary plans.

These relate to matters which are fundamental to the Scheme, and should be incorporated in the legislation. We detail our concerns under the relevant headings below.

This inappropriate use of delegated legislation is made more concerning by the broad discretionary power given to the CEO in the rules. These powers, discussed further below, embed one person – the CEO – with significant and unstructured decision-making power in respect of key aspects of a participant's NDIS plan.

This is especially inappropriate in the context of the NDIS legislation, the object of which is to give effect to obligations under the Convention on the Rights of Persons with Disabilities and to enable people with disability to exercise choice and control in pursuit of their goals.

An added consequence of the reliance on delegated legislation is the complexity of the NDIS framework. The Bill, along with the anticipated new rules, adds to this complexity, with a growing number of rules and principles found in disparate locations. For example, when making a decision about specialist disability accommodation (**SDA**) supports, the rules that need to be considered for that one decision include (at least):

- the 'reasonable and necessary supports' rules under ss 33 and 34 of the Act;
- the principles which underlie decision-making in the Act, including under ss 4, 5, 17A and 31;
- the proposed Participant Service Guarantee Rules;
- the Support for Participants Rules;
- the SDA Rules;
- the Plan Management Rules;
- the proposed Plan Administration Rules; and
- the NDIA's Operational Guidelines.

Many of these rules overlap and are not entirely consistent. This is unwieldy and at odds with the objects of the Scheme, making it impossible for participants to navigate and follow the process.

Our comments on the specific proposed changes below should be considered in the context of this overarching concern about the continued expansion of rule-making power and the use of broad discretionary powers.

3. CEO's variation and reassessment power

Section 47A of the Bill allows participant plans to be varied without a reassessment. We support the introduction of a plan variation power to allow for minor changes upon request by a participant, without requiring a participant to go through a full reassessment process. We also support the change in terminology, avoiding multiple uses of the word 'review'.

However, we have a number of concerns with the drafting of ss 47A and 48. These concerns remain, despite some amendments to the exposure draft version of the Bill.

First, s 47A(4)(c) (and subsequent amendments) should be deleted. If the participant requests a variation of their plan, the CEO should only be able to decide to vary the plan, or not vary the plan. The CEO should not have the power to decline the plan variation and instead reassess the plan under s 48(1).

In effect, this power means the CEO can change a participant's request to vary a plan into a request for a reassessment. A participant should be able to request a plan variation without being concerned that their access to the Scheme and all of their existing supports are open for reassessment.

There may be circumstances where a participant would prefer to seek review of the decision not to vary, rather than proceed to reassessment.

For example, a participant may request a plan variation following settlement of an AAT appeal. Section 47A(4)(c) as drafted would allow the CEO to decline that variation request, despite having settled the appeal, and instead proceed to a reassessment.

In the event that a reassessment is necessary, the CEO retains the power under s 48 to reassess plans on their own initiative. That is, removing s 47A(4)(c) does not limit the CEO's power to ultimately decide that a reassessment is necessary, but it provides some assurance to participants that requests for plan variation will be considered only for that purpose. Section 47A(4)(c) is therefore unnecessary and should be deleted.

This will also ensure plan variation and reassessment remain distinct concepts.

Second, we oppose the unrestrained power given to the CEO to vary a plan on their own initiative under s 47A.

The Bill contains some 'soft' limits to the CEO's power to vary a plan. Section 47A(1) limits the variation power to:

(a) a change to the statement of participant supports in the circumstances prescribed by the National Disability Insurance Scheme rules; or
(b) a correction of a minor or technical error; or
(c) of a kind prescribed by the National Disability Insurance Scheme rules.

Section 47A(6) provides that the rules may also set out matters to which the CEO must have regard when making a decision to vary or not vary a plan.

These rules are designated as Category D rules under s 209, meaning the Minister does not require State and Territory agreement before making the rules. They are the easiest category of rules to amend.

The reliance on Category D rules to constrain the CEO's power in making plan variations is problematic, as any constraints prescribed in the rules can be changed or expanded easily.

While s 47A(3) sets out matters which the CEO must have regard to, or be satisfied of, in varying statements of participant supports, these matters do not restrict the extent to which the CEO could vary plans.

For instance, this variation power leaves it open for the CEO to unilaterally make variations like changes to funding amounts and restrictions on how funding could be used by a participant, without consent from the participant and without a reassessment. There is also no process set out for ensuring adequate consultation with the participant. It is not evident why the CEO needs or should have this broad power, especially where the CEO already has a broad reassessment power under s 48.

The breadth of this power is also inconsistent with the Tune Review recommendation.

The Tune Review report stated, at [8.33], that 'a plan should be able to be amended, without requiring a plan review or automatically creating a new plan, *in certain limited circumstances*'[3] (emphasis added). The Tune Review was clear in stating that this should not be a discretionary power to be wielded in all circumstances.

The explanatory memorandum states that the 'intention is that any variation will be for the benefit of the participant'.[4] This does not address our concern, is subjective, and may be used to patronising effect if participants do not agree with a variation but the CEO insists it is 'for their benefit' – for instance, if the CEO decides that a participant should no longer rely on a particular service provider for supports which they have otherwise been happy with.

The use of this power on the CEO's own initiative should be limited to highly specific instances, as recommended in the Tune Review, or otherwise to be exercised with the consent of the participant. The power should be limited to the following circumstances:

- where a participant changes their statement of goals and aspirations, and the changes to the plan are to reflect the amended statement;
- if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary
- if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of that *specific* support is reasonable and necessary;
- where a technical mistake or drafting error is made in the plan;

3 David Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the Participant Service Guarantee* (December 2019), [8.33].

4 Explanatory memorandum, 20.

- where, after completion of risk assessments in accordance with ss 43 and 44, the plan management type is changed;
- for the purposes of applying or adjusting a compensation reduction amount;
- to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT;
- upon reconciliation of an appeal made to the AAT;
- to implement an AAT decision that was not appealed by the parties; and
- in any other instance, with the express consent of the participant.

These circumstances are consistent with those stated in the Tune Review.

Third, we are concerned by the use of broad Category D rules in setting out matters for consideration in the exercise of ss 47A and 48 powers.

We have submitted above that constraints regarding the CEO's power to make plan variations under s 47A should not be in the rules, but in the Act.

The circumstances in which the CEO may vary a plan on their own initiative should not be subject to administrative flexibility. The CEO already has the power to vary plans on request, and to undertake reassessments on their own initiative under s 48. These powers provide sufficient flexibility. The limited circumstances we set out above are easily definable in the legislation, without requiring technical details in the rules. Limits on the CEO's power to vary plans on their own initiative should not be subject to change at the discretion of the Minister.

In respect of rules under s 48(5), we submit these should instead be designated as Category A rules. Rules in respect of the current s 48 are Category A rules. There is no reason why this should be changed to Category D. As the Tune Review states at [2.17a]:

> Category A rules are those that relate to significant policy matters with financial implications for the Commonwealth and states and territories, or which interact closely with relevant state and territory laws. The unanimous agreement of the Commonwealth and all states and territories is required for their making or amending

Rules about the circumstances in which the CEO may undertake reassessments are significant policy matters with financial implication for States and Territories. These rules may relate to the size of funding, and the allocation of funding decisions between the Commonwealth and States and Territories. It is appropriate that they remain Category A rules.

Section 48 should also include a Category C rule-making power to set out procedural fairness requirements in the event the CEO exercises their power to reassess plans on their own initiative. These requirements should include matters such as the timing of notification periods for participants, the provision of information as to why such a decision has been made, information on the aspects of the plan that will be open for reassessment as well as the opportunities for participants to be heard in the reassessment process. These should be Category C rules, consistent with the Participant Service Guarantee rules.

Recommendation 1 – Remove the power of the CEO to refuse a plan variation request and undertake a reassessment instead

Section 47A(4)(c), which allows the CEO to refuse to vary a plan but to undertake a reassessment under s 48(1) instead, should be deleted. This power is unnecessary given the CEO already has powers to undertake reassessments on their own initiative under s 48(1).

Recommendation 2 – Amend s 47A of the Bill to limit the power of the CEO to vary plans on their own initiative

Section 47A should be amended to limit the power of the CEO to vary plans on their own initiative, in line with the circumstances set out at paragraph 8.33 of the Tune Review Report, or in any other instance with the express consent of the participant. These limits should be set out in s 47A of the Bill, and not in delegated legislation. The power should be limited to the following circumstances:

- *where a participant changes their statement of goals and aspirations, and the changes to the plan are to reflect the amended statement;*
- *if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary*
- *if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of that specific support is reasonable and necessary;*
- *where a technical mistake or drafting error is made in the plan;*
- *where, after completion of risk assessments in accordance with ss 43 and 44, the plan management type is changed;*
- *for the purposes of applying or adjusting a compensation reduction amount;*
- *to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT;*
- *upon reconciliation of an appeal made to the AAT;*
- *to implement an AAT decision that was not appealed by the parties; and*
- *in any other instance, with the express consent of the participant.*

Recommendation 3 – Section 48(5) rules should be designated as Category A rules

Section 48(5) rules should be designated as Category A rules, in line with the current designation for rules under s 48. These rules concern the circumstances in which the CEO may undertake reassessments and are significant policy matters with potential financial implication for States and Territories.

Recommendation 4 – Procedural fairness requirements for CEO's exercise of reassessment power on own initiative

Section 48 should include a Category C rule-making power to set out procedural fairness requirements for the CEO's exercise of power to reassess plans on their own initiative. These requirements should include notification periods, the provision of information to participants as to why the decision has been made, the matters which will be open for reassessment and the opportunities for participants to be heard in the reassessment process.

4. Eligibility for access to the NDIS

We have two concerns in relation to the changes to eligibility provisions in the Bill.

First, the new rule-making power permitting 'requirements' to be set out in the rules is problematic. Section 27(2) and (3) of the Bill provide that:

> (2) Subject to subsections 24(2) and (3) and 25(1A), National Disability Insurance Scheme rules made for the purposes of paragraph (1)(a) of this section may specify requirements that must be satisfied for an impairment to be considered permanent or likely to be permanent.
>
> (3) National Disability Insurance Scheme rules made for the purposes of paragraph (1)(b) may specify requirements that must be satisfied for one or more impairments to be considered to result in substantially reduced functional capacity referred to in that paragraph.

The current s 27 does not permit 'requirements' to be specified in the rules. Rather, it provides that 'criteria' or 'circumstances' can be prescribed by the rules to guide judgments about whether a condition is likely to permanent. If a person does not meet the criteria or circumstances prescribed in the rules for permanence, it does not necessarily mean they do not meet the disability requirements under the Act – the CEO (or delegate) must still consider the requirements by reference to the legislation.[5]

Proposed s 27(2) and (3) however, empower the Minister to make rules which establish 'requirements that must be satisfied' for the purposes of meeting the permanence threshold for access to the Scheme. That is, rules made under this provision would create conditions for access to the Scheme. The failure to meet any of these requirements means a person will not be able to access the Scheme.

These provisions are not technical administrative details, or matters that require administrative flexibility which would be appropriate for delegated legislation. Rather, they are significant matters of policy and define who gets to access the NDIS.

Laws which determine the eligibility of a person for access to the NDIS should be considered, debated and made by Parliament, not at the discretion of the Minister.

Second, we are also concerned by the limitation of ss 24(3) and 25(1A) to impairments attributable to psychosocial disability.

These new provisions clarify that in relation to psychosocial disability, impairments which are 'episodic or fluctuating' may be taken to be permanent despite the episodic or fluctuating nature of those impairments.

The clarification around the permanence criteria for psychosocial disability reflects recommendations from the Tune Review, and is welcome.

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[5] See *Mulligan v National Disability Insurance Agency* [2015] FCA 544, [77].

However, the drafting of these provisions imply that impairments attributable to *non*-psychosocial disability which are episodic or fluctuating in nature are not considered permanent.

The explanatory memorandum suggests this is not the intention, and asserts that this gap is addressed by new s 24(4):[6]

> New subsection 24(4) provides that subsection 24(3) does not limit subsection 24(2). Subsection 24(2) provides that an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the NDIS for the person's lifetime, despite the variation. This maintains the allowance for conditions other than a psychosocial disability, such as a physical or intellectual disability to vary in intensity from time to time and still be assessed as permanent for the purposes of NDIS access.

However, as a matter of drafting and legal interpretation, the gap may result in unintended consequences where impairments which are episodic or fluctuating, and attributable to non-psychosocial disability (for example, multiple sclerosis, muscular dystrophy, chronic fatigue syndrome), are not considered to be permanent, and those individuals excluded from the Scheme.

This issue arises because of the different wording used for these impairments, depending on the nature of the disability – between 'vary in intensity' (which applies to all disabilities) and 'episodic or fluctuating' (which applies only to psychosocial disabilities). The use of different wording suggests a different meaning is attributable to these words, and as a consequence, psychosocial and non-psychosocial disabilities are treated differently when it comes to episodic or fluctuating impairments.

This should be amended to avoid any confusion arising given the intention is not to exclude non-psychosocial disabilities from this clarification.

Recommendation 5 – Remove s 27(2) and (3) of the Bill

Section 27(2) and (3) of the Bill allow rules to specify threshold requirements for access to the NDIS, through setting requirements that must be satisfied for impairments to be considered permanent or result in substantially reduced functional capacity. This is a significant matter of policy which determines who can access the Scheme. Any new requirements for access to the Scheme should be inserted into the Bill for parliamentary debate, and not be subject to the Minister's discretion.

Recommendation 6 – Amend ss 24(3) and 25(1A) of the Bill to include all disabilities

Sections 24(3) and 25(1A) of the Bill should be amended 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.

5. Other necessary amendments

PIAC proposes further amendments to two other aspects of the Bill.

6 Explanatory memorandum, 38.

First, in relation to s 45 of the Bill, we understand from the explanatory materials that the intention of these amendments is to enable the NDIA to pay service providers directly on behalf of participants, through a new payment platform. The new payment platform is intended to simplify the payment process for both participants and the NDIA. We do not oppose, in principle, these amendments.

However, we recommend that s 45 be amended to clarify that participants will not be *required* to utilise this payment method. The explanatory memorandum states that:

> Participants retain the ability to choose their supports and control over the use of their NDIS funding within the terms of their plan. All plan management types, including self-managed and agency-managed, will continue to be able to pay providers using existing mechanisms. The new direct payment system will be available as an alternative and will not prevent the use of unregistered providers by self-managed participants.[7]

This clarification is welcome, however as presently drafted, s 45 states that the NDIS amount payable is to be paid 'to the person determined by the CEO' and either in accordance with the prescribed rules, or if there are no rules 'in the manner determined by the CEO'.

This allows the CEO to determine how the money is paid and to whom, without requiring them to take into account or adhere to a participant's choice. If the intention is to allow participants to continue to choose, this provision ought to be amended to make that clear.

Second, PIAC welcomes the amendment to s 100(1) to require reasons be provided for all reviewable decisions.

However, there is no corresponding requirement for reasons to be provided once a review of the reviewable decision has been made under s 100(6). In practice, we understand that reasons are often – but not always – provided in relation to internal reviews.

We consider that a provision should be inserted to make this a legislated requirement. That is, every decision made by an NDIA reviewer must be accompanied by a statement of reasons. This is consistent with the intentions of the Tune recommendation, and with good administrative decision-making principles.

Recommendation 7 – Clarification of drafting in s 45 of the Bill

Section 45 of the Bill should be amended to clarify that this change is not intended to remove the ability of participants to continue paying their service provider in the method of their choosing.

Recommendation 8 – Insert new s 100(6B) requiring reasons to be provided following internal reviews

A new s 100(6B) 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.

7 Explanatory memorandum, 44.

6. Conclusion

PIAC supports a number of the proposed amendments, and recommends further amendments to address the shortcomings of the other changes. However, we are concerned by the Government's continued practice of relying on delegated legislation and expansive discretionary powers for the administration of the NDIS. This reflects poor legislative and administrative practice.

More importantly however, is the missed opportunity to rebuild trust within the disability community. The Government is aware of the serious undermining of confidence in the NDIA following the attempts to introduce independent assessments without co-design. In this instance, the release of a large number of documents for consultation within a short four-week period, and the referral of the Bill to the Senate Committee for an even shorter consultation period, creates barriers for engagement with the reform process, and fails to address the trust and confidence issues.