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Response to NDIS draft legislation.

Introduction

Autism Aspergers Advocacy Australia, known as A4, appreciates that the proposed amendments to the *NDIS Act 2013* significantly step back from many of the changes that were being considered previously.

A4 recognises that government is consulting with the disability sector over this legislation however we are deeply disappointed that the consultation is:

- extremely late in the process; and
- limited in time to an extent that many regard as being discriminatory since it does not allow people with disability sufficient time to consider and respond to the proposed changes.

A4 does not regard most of the changes as being necessary or beneficial, and is concerned that the consultation over the changes may not be genuine. The following explains why we feel this way.

In our experience, the *NDIS Act 2013* itself is working well. While people take quite a high number of the NDIA's decisions to the AAT for review, this is because the NDIA's actions and decisions are the problem, and in the context of external review or when the AAT applies the law properly decisions often meet people's expectations of the law and of their human rights. The problem seems to be not with the actual law, but more with the NDIA's poor interpretation and implementation of the law.

Participant Service Guarantee

The proposed changes to the [*National Disability Insurance Scheme Act 2013*](#), the [*National Disability Insurance Scheme Amendment \(Participant Service Guarantee and Other Measures\) Bill 2021*](#), has "Participant Service Guarantee" in its title but the legislation does not introduce a Participant Service Guarantee (PSG). A4 regards naming the proposed legislation change after something that is not a proposed legislative change as misleading and deceptive. This is a reliable way to ensure mistrust.

The NDIA can never deliver a "service guarantee"; but it can have "service aspirations".

The PSG is mentioned in the proposed rules, not in the proposed law. The Rules are separate, and they appear to have their own names.

The autism community and the disability sector are not easily fooled; and we are disappointed that you think we are and that you would disrespect us by trying.

The NDIA has already created a PSG. Demonstrably, there is no need to legislate a PSG for one to exist. The key issue is whether a legislated PSG is better for people with disability than a voluntary PSG: would having legal requirements for a PSG be better or stronger?

Schedule 1 in the Draft legislation is primarily about changing the name of the plan review process to be “reassessment” and “variation”. We regard these changes as ill-advised and unnecessary. The existing term, “review”, is more accurate and better understood.

The primary argument for legislating a requirement for a PSG is to ensure one exists.

The disadvantage of legislating a PSG is that the NDIA will respond by meeting the letter of the law rather than the intent.

A4 expects that legislating a PSG will degrade any value of a PSG because the legal requirement will be substantially less than the expectation associated with a voluntary PSG with a perception of credibility.

In our experience, the NDIA will simply interpret any legislation to diminish their responsibility. Putting legislation behind the PSG will encourage the NDIA to monumental feats of creative interpretation ... they will feel this is necessary.

The NDIA is currently committed to *having* a PSG rather than to delivering an effective PSG. For example, their PSG emphasises “transparency” yet the NDIA, under its current PSG, the NDIA ...

- keeps its TSP process as secret as possible,
- limits access to data and information about disability supports for sub-sections of the heterogeneous disability participants (and applicants),
- avoids (declines) some FoI requests which is conduct contrary to its PSG,
- remains unnecessarily secretive about much of its operations,
- etc.

Better processes - flexibility

The second part of the proposed changes are meant to improve processes of the NDIS. These are called “flexibility measures”.

The changes propose to introduce **co-design** into the law. However, the changes do not define *co-design* in Section 9. And the limited consultation period of about 4 weeks is not a co-design process ... ironically.

A4 feels that there are some misunderstandings and misinformation due to so odd claims from the NDIA. They seem to feel that a “plan review” means the whole plan will be reviewed; that there is no option for a partial review. A4 cannot find words in the NDIS Act 2013 to support the NDIA’s view on this, and we observe that that AAT seems to be quite comfortable with reviewing specific parts of a plan and agreeing that other parts need no review effort. A4 does not feel that the NDIA’s view on this justifies changes to the legislation.

A4 strongly opposes replacing the term “review” with terms like “reassessment” or “variation”. We simply cannot see that when someone wants to review all or part of a person’s NDIS plan, that they cannot simply agree that some of the existing plan would remain unchanged. If it’s really that difficult, then introduce formally a “partial review” process into the law, but it seems unnecessary and complicated when it need not be.

People, that is everyone, will find the proposed terms are less clear and bring confusion.

The term “carer” in both the *Carers Act* and the *NDIS Act* should be consistent.

Full Scheme amendments

As the draft mentions, this is the Main Part of the Act so the Act should be named after this part of the Act, not the absent PSG.

Clearly, we have reached full scheme roll-out. The legislation should reflect that the NDIS is uniformly accessible.

Other issues

Thin markets

Maybe the legislation should imbue the NDIA with some responsibility for recognising and addressing thin markets .. though more thought is needed before words are proposed.

Sustainability

Recently, the NDIA and the Minister have raised concerns about the sustainability of the NDIS.

The Productivity Commission said from the outset "from an economic perspective, the benefits of the NDIS will exceed the cost". Any analysis that says otherwise is unlikely to reflect reality; it would need very detailed explanation justifying its prediction. The analyses provided by the NDIA recently fail to consider adequately financial and economic benefits from the NDIS. They are partial and unbalanced cost models that treat the disability sector as homogenous and too simplistically.

So far, the NDIA's modelling and predictions have not been accurate. Scientifically, we expect the future will resemble the past, so clearly we expect that the NDIA's modelling will continue to be inaccurate.

Previously, the NDIA repeatedly underestimated the numbers of participants. They seem to have switched to over-estimates.

Need to change the NDIS legislation

A4 observes that the AAT often changes NDIS decisions when they are asked to review a decision: NDIS decisions either don't follow the legislation and the rules, or rules are unclear and interpreted differently by the AAT. We see no evidence that the rules are unclear based on decisions and experience in the AAT.

A4 is not aware of AAT decisions that are regarded as inappropriate or the result of unintended legal complications.

The existing NDIS Act is holding up quite well. The problems with how the NDIA interprets the Act and the associated rules, and why it chooses to misinterpret the law and rules. To address these problems, the NDIA needs to work with the disability sector to properly identify and understand the problems, challenges, issues, etc. Real solutions are unlikely to emerge until the problems and challenges are clearly articulated.

A4 has access to modelling expertise and some experience estimating numbers and projecting into the future for the Autistic section of the disability sector. A4 is open to discussions about estimates and projections.

Basically, A4 feels that changes to the NDIS legislation need more thorough consultation and consideration. And we do not recognise any need for urgency at this stage.

Yours sincerely

Bob Buckley
Convenor

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