

**REVIEW OF THE  
NATIONAL DISABILITY INSURANCE SCHEME ACT 2013**

**REMOVING RED TAPE AND IMPLEMENTING THE  
NDIS PARTICIPANT SERVICE GUARANTEE**

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**DECEMBER 2019**

# EXECUTIVE SUMMARY

The *National Disability Insurance Scheme Act 2013* (the NDIS Act) was enacted to deliver the National Disability Insurance Scheme (NDIS) – a world first approach to the provision of disability support that puts people with disability at the centre of decision-making through the principles of reasonable and necessary supports and individual choice and control.

Since its inception, the National Disability Insurance Agency (NDIA) has been responsible for the once in a lifetime role of completely transforming the disability support sector, with the key focus over the last three years on transitioning people with disability from existing state and territory service systems to the NDIS. The nature and speed of this transition was highly ambitious.

For many of its participants, the NDIS is helping to improve their social and economic outcomes, increasing their ability to live an ordinary life and achieve their goals and aspirations. However, the implementation of the NDIS has not been smooth and it is evident that the pressure of rolling the scheme out across Australia has directly impacted the NDIA's ability to provide a consistent, effective and high quality service delivery offering.

The intent of the NDIS is supported by all levels of government and the Australian community. However, people with disability have reported frustrations about the administration of the NDIS by the NDIA. Transparency, consistency and timeliness in decision-making are critical issues and people with disability have reported poor experiences when working with NDIA staff and its Partners in the Community.

The NDIA as an entity is not mature. Many of its enabling systems are still being developed and the current ICT system has significant limitations. Appropriate workflow management tools are yet to be fully deployed and significant usability features are in the process of being refined. In addition, more time is needed to strengthen the capability of the NDIA workforce to be understanding and responsive to the needs of people with disability.

1 July 2020 represents one of the most important milestones in the history of the NDIS. This is the date that the NDIS becomes available across all of Australia and the transition of people with disability from state and territory service systems is due to be completed. The next phase of the NDIS presents opportunities to deliver and embed improvements in the way the NDIS is delivered, with a stronger focus on improving the participant experience and maximising the benefits of what the NDIS can offer. However, it is clear that it will still take a number of years before the NDIS is delivering consistent positive experiences for people with disability.

The NDIA has a significant reform program underway, following reviews into the participant and provider experience in 2017 and new initiatives recently announced by the Australian Government. These new initiatives include joint planning approaches, longer plans if a participant's support needs are stable and the ability for participants to see draft plan summaries. These reforms aim to improve the consistency and quality of decisions and reduce significant pain points experienced by participants. The NDIA has also developed a significant forward work program of improvements to its ICT systems, including upgrades to the NDIS website and participant and provider portals.

While these reforms will see improvements to the participant experience, it is still not yet clear that the right operational balance has been found between the NDIA and their Partners in the Community. As the NDIA moves towards maturity, it would be beneficial to trial a service delivery model that has NDIA delegates perform all planning related functions, with a comparative evaluation undertaken to determine whether there are any material improvements to the participant experience when assessed against the current model. The trial would reduce the number of people involved in the planning process, and see the role of Local Area Coordinator Partners moving closer to their originally conceived roles – that is, helping participants connect to services in their community and build the capacity of the community for such interactions.

When considering feedback about the NDIS, it appears that the vast majority of issues are operational in nature or are a lingering effect of the transition from state and territory disability systems. That is to say, the NDIS Act and its accompanying Rules are broadly fit for purpose. However, after more than six years of implementation experience, some improvements could be made to the legislation to improve the participant experience.

## **The legislative framework of the NDIS**

The NDIS service delivery response works well in general for adults with physical disability, but not so well for some other cohorts. In particular, the provision of services to people with psychosocial disability or those with developmental delay has been challenging, with the NDIA's operational response constrained by a lack of clarity in the legislation on appropriate service responses.

The Australian Government can support the NDIA to deliver better outcomes for these cohorts through legislating changes that:

- clarify when an impairment is considered permanent for people with psychosocial disability, appreciating that their needs may be episodic and fluctuate over time
- clarify that the determination of reasonable and necessary supports for people with psychosocial disability should be aligned with best practice recovery approaches
- give the NDIA more flexibility to support families to build their capacity in understanding the needs of their child and exercise informed choice and control
- move the concept of reasonable and necessary supports for children towards a family-centred planning approach.

The concept of reasonable and necessary in the NDIS Act, while not being new to legislative frameworks across Australia, is subject to differing interpretations by people with disability and NDIA decision-makers. This is principally the result of the absence of a clear definition of what constitutes a reasonable and necessary support. This creates confusion around the role and purpose of the NDIS and drives a number of individual cases towards tribunals and courts.

All governments and the NDIA should take a greater role in defining reasonable and necessary in order to provide additional clarity on the services that will be funded by the NDIS. There are a number of actions that can deliver improvements in this area, including:

- providing publicly available and accessible examples of what types of supports are reasonable and necessary
- making the legislation available in accessible versions such as Easy Read
- amending the legislation in accordance with recent Disability Reform Council (DRC) decisions on the interface between the NDIS and mainstream service systems
- resolving ambiguity where a requested support may overlap or have interactions with supports that might usually be considered an ordinary living expense
- clarifying that supports provided in a participant's plan should not be considered in isolation from other funded supports, reflecting that a plan is a package of supports to help achieve an individual's goals and aspirations
- clarifying the role of the NDIS in providing supports when that support is not available through a more appropriate service system.

Importantly, these improvements are intended to reinforce the boundaries of the NDIS, not narrow its scope. If implemented properly, the debate around the role of the NDIS and what is reasonable and necessary can be elevated from discussions about individual participant experiences toward a more appropriate debate between governments and people with disability.

Flexibility is key to positive participant experiences and the current implementation of the NDIS is impacted by excessive complexity. While this complexity is largely driven by NDIA operational procedures, there are some areas of the NDIS Act that are unnecessarily rigid or do not incentivise flexibility. The inability to amend a plan is one of the key frustrations for participants and one of the biggest weaknesses of the NDIS Act.

Allowing a plan to be amended, in appropriate circumstances, would be one of the most effective levers to improve the participant experience. This would allow small changes to plans to be made quickly with a low administrative burden, such as adding capital or equipment supports after obtaining quotes, fixing obvious errors or enabling a fast response in crises. It would also help to resolve current jurisdictional issues between the NDIA and the Administrative Appeals Tribunal.

The Australian Government recently announced new initiatives to give participants more flexibility in using their NDIS funding to achieve their goals and aspirations. This includes through collapsing the 'core' and 'capacity building' budgets into a single budget and giving participants the ability to spend funding across support categories. Notwithstanding these reforms, flexibility should be enshrined into legislation, with a principle that, subject to certain limited circumstances, the default position is that participants should have full flexibility in implementing their plan.

## **The Participant Service Guarantee**

Delays in decision-making and a lack of information are two of the most regular complaints about the NDIS, with many participants indicating they have had to wait many months for the NDIA to contact them or make a decision. As the transition from state and territory disability systems comes to a close, and as the workforce of the NDIA and its Partners in the Community continues to mature, the NDIA is making inroads into improving its administration. This includes reducing backlogs, with the NDIA's Quarterly Report to the DRC for the period ending 30 September 2019 indicating a number of significant improvements in average access and planning timeframes.

Notwithstanding those improvements, it is reasonable to expect that there will always be some gap between participants' expectations of the NDIA and the reality of what the NDIA will be able to provide. The NDIA should aim to reduce this gap as much as possible.

The legislation is silent on when the NDIA will make decisions. In most instances, it prescribes that a decision will be made 'as soon as reasonably practicable'. Understandably, this uncertainty is causing frustration and anxiety for many people with disability. This review was therefore asked to consider what timeframes would be appropriate to insert into legislation to provide more clarity for people with disability as to when decisions will be made, in the form of a Participant Service Guarantee.

As the NDIS transition period has demonstrated, there is a clear tension between the speed and quality of decision-making and the NDIA's current state of maturity. It is also important to recognise that there are risks in providing a one-size-fits-all approach when setting timeframes because the circumstances of each individual are different. Therefore, aside from timeframes for decision-making, a Participant Service Guarantee should set out engagement principles to ensure the NDIA remains accountable for the way it engages with and works alongside people with disability in delivering the NDIS.

The Participant Service Guarantee should be built around five engagement principles:

- **Transparent** – Participants and prospective participants have access to information about the NDIS and their plans that is clear, accurate, consistent, up-to-date, easy to understand and available in formats that meet their needs.
- **Responsive** – Participants and prospective participants are supported and their independence is maximised by addressing their individual needs and circumstances.
- **Respectful** – Participants and prospective participants are valued, listened to and respected.
- **Empowering** – Participants and prospective participants are empowered to make an access request, navigate the NDIS system, participate in the planning process and use their plan supports.
- **Connected** – The NDIA breaks down barriers so that participants and prospective participants are connected to the services and supports they need.

The Participant Service Guarantee should require the NDIA, when requested by a person with disability, to provide an explanation of an access, planning or plan review decision in an accessible format of their choice. This would be consistent with best practice administrative decision-making principles, reinforce robust planning practices, and ensure the NDIS remains accountable to the people it was designed to support.

The Participant Service Guarantee should also empower participants to be able to review and consider a full version of their draft plan before it is approved, inclusive of the estimated plan budget. The provision of a whole draft plan is an important mechanism to ensure decision-making processes are transparent and for keeping the participant at the centre of the planning process.

The timeframes in the Participant Service Guarantee should be ambitious, but achievable. They should recognise that, due to current workforce capacity and ICT constraints, business as usual timeframes may not be deliverable by the NDIA by 1 July 2020, and/or requisite changes to the NDIA's ICT systems may not be deliverable by 1 July 2020. To provide certainty for participants, the Participant Service Guarantee should have a staged implementation, including slightly longer timeframes for the 2020–21 financial year.

From 1 July 2020, new legislated timeframes should be introduced for the vast majority of the NDIA's decision-making processes, including:

- extending the timeframe for participants to provide information to support an access decision from 28 days to 90 days
- a participant's first plan be put in place within 10 weeks of an access decision reducing to eight weeks from 1 July 2021
- a plan implementation meeting to be offered and scheduled no more than four weeks after the approval of a plan
- a scheduled plan review to commence no later than eight weeks before the scheduled plan review date
- providing certainty that if the NDIA does not make a decision to undertake an unscheduled plan review within three weeks, it is deemed to have decided to conduct the review
- an unscheduled plan review process to be completed within six weeks of a decision to conduct it, reducing to four weeks from 1 July 2021
- the new plan amendment process, which covers the quote approval process for assistive technology and home modifications, to be completed within four weeks following the provision of information to the NDIA, except for complex circumstances
- the internal (merits) review process to be completed within 90 days, reducing to 60 days from 1 July 2021.

These timeframes should only apply to ordinary NDIA administrative processes. Where a participant is gathering additional information, or is otherwise unavailable for a period (for instance they are on a holiday), the timeframes applied to the NDIA should be paused.

Finally, the Participant Service Guarantee should require the NDIA to report on its performance against these metrics and other relevant factors as part of its regular quarterly reporting to the DRC. This will provide important transparency around the administration and reasoning of NDIA decisions.

## Conclusion

There is still a long way to go before the NDIS is a mature system. However, by implementing the legislative changes outlined in this report and introducing the Participant Service Guarantee, people with disability will be provided with more certainty on the role of the NDIS and when and how the NDIA will make decisions. Service responses will be more aligned to best practice, particularly for children and their families and those with psychosocial disability, and transparency and flexibility enshrined as a key principle underpinning the delivery of this world-leading scheme.

# RECOMMENDATIONS

1. The Disability Reform Council (DRC) adds the resolution of the following outstanding policy matters to its forward work program:
  - a. the treatment of chronic health conditions under the NDIS
  - b. the role of nominees, guardians and supported-decision making under the NDIS, including the intersection between the NDIS and state and territory guardianship legislation
  - c. the role of the NDIA in undertaking fraud detection and enforcement activities, in consultation with the NDIS Quality and Safeguards Commission
  - d. the operation of compensation provisions under the NDIS Act.
2. The NDIA trials an arrangement where all planning related functions are undertaken with a person who has delegation to approve the plan, and compares the benefits of that approach with the roll out of Joint Planning Meetings.
3. The Commonwealth provides additional funding to support people with disability to navigate the NDIS, with a review of demand to occur as part of the next review of NDIS costs, currently scheduled for 2023.
4. Governments and the NDIA provide more clarity around the definition of 'reasonable and necessary', with:
  - a. the NDIA publishing information, in accessible formats, about how it determines when a support is reasonable and necessary
  - b. updating the NDIS Rules to reflect the DRC's agreements on the boundaries between the NDIS and mainstream service systems
  - c. the DRC working to resolve the interface between the NDIS and ordinary living costs
  - d. amending the NDIS Act to clarify that reasonable and necessary supports are considered together as a package
  - e. amending the NDIS Act to clarify that the NDIS is not responsible for funding supports in the absence of that support being provided through another more appropriate service system.
5. The NDIA gives priority to ICT upgrades to enable online access processes and allow people with disability to track the status of NDIA processes relating to them.
6. The Commonwealth publishes accessible versions of the NDIS Act and NDIS Rules, to help people with disability understand the legislative basis of the NDIS.
7. The NDIS Act is amended to:
  - a. allow evidence provided to the NDIA about a prospective participant or participant to be used for multiple purposes under the NDIS Act, including access, planning and plan review processes
  - b. provide discretionary powers for the NDIA to require a prospective participant or participant undergo an assessment for the purposes of decision-making under the NDIS Act, using NDIA-approved providers and in a form set by the NDIA.

8. The NDIS Act and Rules are amended to:
  - a. provide clearer guidance for the NDIA in considering whether a psychosocial impairment is permanent, recognising that some conditions may be episodic or fluctuating
  - b. remove references to 'psychiatric conditions' when determining eligibility and replace with 'psychosocial disability'.
9. The NDIS Act is amended to give a prospective participant up to 90 days to provide information requested by the NDIA to support an access decision, before it is deemed they have withdrawn their access request.
10. The NDIA develops a comprehensive national outreach strategy for engaging with people with disability who are unaware of, or are reluctant to seek support from the NDIS, with a dedicated focus on Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse communities, and people with psychosocial disability.
11. The NDIS Act is amended to reflect that a plan must be facilitated and approved in accordance with the timeframes outlined in the Participant Service Guarantee.
12. The NDIS Rules are amended to reinforce that the determination of reasonable and necessary supports for children with disability will:
  - a. recognise the additional informal supports provided by their families and carers, when compared to children without disability
  - b. provide families and carers with access to supports in the home and other forms of respite and
  - c. build the capacity of families and carers to support children with disability in natural settings such as the home and community.
13. The NDIS Act is amended to provide more flexibility for the NDIA to fund early intervention support for children under the age of seven years outside a NDIS plan, in order to develop family capacity and ability to exercise informed choice and control.

14. The NDIA undertakes a review of its operational guidelines when funding Supported Independent Living, with an emphasis on increasing the involvement of participants, families and carers in the decision-making process and the principles of choice and control.
15. The NDIS Rules are amended to clarify that supports in a participant's plan should be used flexibly, except in limited circumstances, such as capital supports.
16. The NDIS Rules are amended to:
  - a. set out the factors the NDIA will consider in funding support coordination in a participant's plan
  - b. outline circumstances in which it is not appropriate for the providers of support coordination to be the provider of any other funded supports in a participant's plan, to protect participants from provider's conflicts of interest.
17. The NDIS Rules are amended to give the NDIA more defined powers to undertake market intervention on behalf of participants.
18. The NDIA works with governments, researchers and experts in the provision of disability support to establish an accessible source of publically available information about evidence-based best practice approaches, to assist participants in exercising informed choice and control.
19. The NDIS Act is amended so a participant who requests to 'plan manage' their NDIS funding be subject to the same considerations that apply when a participant seeks to 'self-manage'.
20. The NDIS Act is amended to introduce a new Category D rule-making power that sets out the matters the NDIA must consider when deciding whether to undertake an unscheduled plan review.
21. The NDIS Act is amended to introduce a new Category D rule-making power giving the NDIA the ability to amend a plan in appropriate circumstances.
22. The NDIS Act is amended to remove the duplicate use of the word 'review'.
23. The NDIS Act is amended to clarify the Administrative Appeals Tribunal's (AAT) jurisdiction, including the power for a plan to be amended while a matter is before the AAT.
24. The NDIS Independent Advisory Council develops a new independent participant satisfaction survey, with reporting included in the NDIA's quarterly reporting to DRC.

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25. That the NDIS Act is amended to legislate a Participant Service Guarantee as a Category C rule, to be updated from time to time, with:
    - a. new timeframes for decision-making, engagement principles and performance metrics, as set out in Chapter 10 of this report
    - b. relevant existing timeframes for decision-making moved from the NDIS Act to the new rule
    - c. prospective participants and participants being empowered to request an explanation of an access, planning or plan review decision made by the NDIA
    - d. participants being empowered to receive a full draft plan before it is approved by the NDIA
    - e. a review within two years of the rule being enacted.
  26. The NDIS Act is amended to clarify the Commonwealth Ombudsman's powers to monitor the NDIA's performance in delivering against the Participant Service Guarantee.
  27. The NDIS Act and Rules are amended to:
    - a. remove trial and transition provisions
    - b. reflect agreed recommendations arising from the 2015 review of the NDIS Act
    - c. reflect current best practice drafting standards, and other amendments as proposed in this report.
  28. The NDIS Act is amended to reference the National Disability Strategy as in force from time to time.
  29. The new National Disability Strategy being developed for beyond 2020 makes reference to how it complements and builds on the NDIS.