



## National Ethnic Disability Alliance

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Sen. The Hon. Linda Reynolds CSC  
Minister for the National Disability Insurance Scheme (NDIS)  
GPO Box 9820  
CANBERRA ACT 2610

Via email: [NDISConsultations@dss.gov.au](mailto:NDISConsultations@dss.gov.au)

### **RE: Brief submission to the Department of Social Services' proposed NDIS legislative improvements and the Participant Service Guarantee**

National Ethnic Disability Alliance (NEDA) welcomes the opportunity to briefly provide a preliminary response to the Department of Social Services' consultation on the proposed NDIS legislative improvements and the Participant Service Guarantee (PSG).

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

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

### **Schedule 1 – the PSG**

*CEO's discretionary power to vary of plan on their own initiative (s47A(2)).*

NEDA is very concerned about the broad power of the CEO to vary a participant's plan. The amendment does not specifically state whether this power is exercised with or without the participant's consent or whether the participant is aware a variation has or would occur. The proposed rule 10 of the Plan Administration Rules sets out a non-exhaustive list of matters that the CEO must consider, however this list does not limit the CEO's power which can lead to unintended consequences when exercising the discretionary power.

The amendment also does not state what appeal rights a participant has when a variation has occurred by the CEO's own initiative. If the intent is for a participant to appeal a decision by the CEO via a formal review request after the variation has occurred without their consent, this places too great of a burden on a participant to explain why the decision is incorrect. One of the fundamental pillars of the NDIS is the participant's choice and control and by legislating unfettered power to the CEO goes against this very pivotal pillar that underpins the NDIS.

### *Provision of a participant's draft plan (item 4(e)) and reasons for decisions (s100(1B) and (c))*

While the schedule includes amendments regarding provision of draft plans to participants prior to plan approval (item 4(e) of the Service Standards) and the provision of reasons for all reviewable decisions (s100(1B) and (1C)), it ultimately puts the burden on the participant (or prospective participant) to request for these items. This requires a certain level of self-advocacy that people with disability may not necessarily possess when it comes to understanding how their plans are being implemented and how decisions are being made. This issue is further compounded for the cohort of CALD people with disability, particularly from new and emerging communities, who experience increased disadvantage due to the nexus of belonging to two stigmatised groups.<sup>1</sup> In the spirit of co-design and empowering people with disability, provision of these items should be given as a routine operational process rather than an additional step that must be explicitly articulated.

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

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

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

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

There have been several AAT interlocutory decisions<sup>2</sup> reaching differing conclusions about the AAT's jurisdiction about a plan on appeal. The fact that legally trained, highly experienced members of the Tribunal are reaching differing conclusions on this aspect highlights the extreme complexity participants must navigate while their plan is before the AAT. This complexity is compounded for CALD people with disability who are left at a higher disadvantage due to not understanding this very technical legal issue that prolongs their matter. A simple solution would be to amend s103 to include the AAT's jurisdiction to consider *all* matters raised during their proceedings.

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

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

## **Schedule 2 – Improving NDIS process**

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

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

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

NEDA welcomes the Government’s commitment to improving the NDIS. We wish to emphasise the Terms of Engagement signed by various disability advocates<sup>3</sup> that specifies changes to the NDIS needs to be co-produced in collaboration with people with disability, their families, and representative organisations.

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

NEDA would be happy to provide further information regarding our views. We thank you for the opportunity to provide feedback on the proposed amendments to the NDIS legislation. For further enquiries please contact NEDA’s Senior Research & Policy Officer Blanca Ramirez on 0407 423 773 or at [blanca@neda.org.au](mailto:blanca@neda.org.au).

Yours sincerely,



**Dwayne Cranfield**  
Chief Executive Officer

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<sup>3</sup> <http://neda.org.au/terms-engagement-ndis-minister-reynolds-disability-community>