

21 January 2020

Review of the NDIS Act 2013: Report

Background

In June 2019 the Australian Government commissioned a review of the NDIS Act 2013 (the Act), with a focus on streamlining NDIS processes and removing red tape for participants and providers. A key facet of the review was to honour an election commitment made by the Coalition to introduce a Participant Service Guarantee (the Guarantee).

The review, led by David Tune AO PSM, was informed by public consultation, to which the VHA provided a member submission. Our contribution to the review can be accessed [here](#).

On 20 January the Minister for the NDIS, the Hon Stuart Robert MP, publically released the review and its 29 recommendations.

Psychosocial disability and developmental delay

Participants with psychosocial disabilities or those with developmental delay often have challenges in accessing the NDIS, with the NDIA's operational response constrained by a lack of clarity in the legislation on what an appropriate service response entails.

Tune recommends legislating changes that:

- Clarify when an impairment is considered permanent for those with psychosocial disability, while appreciating 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.

Participant Service Guarantee

The Participant Service Guarantee intends to remedy two consistent points of frustration for participants; delays in decision making and a lack of information.

In designing the Guarantee, Tune suggests five core engagement principles:

- **Transparent** – information about the NDIS and participant plans is accessible, clear, accurate, consistent, up-to-date, easy to understand and available in relevant formats.
- **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.

Proposed legislated timeframes

Tune recommends that from 1 July 2020, new legislated timeframes be introduced for the 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.

Support Coordination

Tune notes the potential conflicts of interest that can occur when a provider of support coordination also offers other core and capacity building supports to participants, with those receiving supported independent living supports identified as a cohort most at-risk of experiencing a conflict.

While Tune does not recommend legislating any restrictions to the provision of support coordination and broader NDIS supports; he does recommend (**see recommendation 16**) amending the NDIS Rule to protect participants from provider's conflicts of interest.

VHA members that offer support coordination and broader core and capacity building supports should familiarise themselves with the potential risk of conflicts of interest in these circumstances, and ensure that any advice offered to participants through a support coordination function does not limit a participant's choice and control over their provider, in any way.

Alternative Commissioning

Tune notes the risk of thin markets, an issue the VHA is actively advocating on, reducing access for participants with funded supports, particularly those with specialised needs or those living in rural and remote areas.

While a definitive market intervention is not recommended, Tune does suggest amending the Act and Rules to enable the NDIA, in limited circumstances, to enter into 'alternative funding arrangements' in cases where a participant cannot access the services identified in their plan.

This is intended to enable the NDIA to act quickly to fill service gaps and encourage positive market behaviour.

The VHA welcomes this recommendation, and will continue to work with the NDIA and Department of Social Services to ensure service delivery in regions identified as being thin markets is protected and where necessary, enhanced.

VHA commentary

The proposed changes are a welcome shift towards a more flexible and participant-centric NDIS. The VHA is particularly enthused by the proposed changes to the understanding of the needs of people with psychosocial disability, in particular the alignment of 'reasonable and necessary' supports with best practice recovery approaches, and in particular the enabling of the NDIA to intervene in thin markets.

Next steps

The Government will provide a public response to the Review in the coming weeks, and intends to legislate its changes, including introducing the Participant Service Guarantee, by 1 July 2020.

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.
- 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.