



# New NDIS Legislation

## A Review by the Summer Foundation

April 2022

### Introduction

On 30 March 2022, the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2022* passed through both Houses of Parliament.

These changes consist of 2 new sets of rules, 2 amended rules and 3 updates to existing rules. The amendments are designed to provide participants with greater confidence and clarity around what they can expect from the NDIS. This includes the process of applying for a plan, getting funding, applying for additional supports and making sure service providers are giving participants the best services they can. Changes are significantly based on the recommendations from the 2019 [Tune Review](#).

### 1. Amendment Act

The Amendment Act contains Schedule 1 (the Participant Service Guarantee (PSG)), Schedule 2 (improving National Disability Insurance Scheme (NDIS) processes), and Schedule 3 (NDIS at full scheme). The changes **do not** affect functional assessments, what is reasonable and necessary or plan budgeting.

Many of the changes, such as timeframes, draw from both Schedules 1 and 2.

## 2. The Participant Service Guarantee

In line with recommendation 25<sup>1</sup> of the [Tune Review](#) (2019), the PSG has been placed within the legislation itself. The PSG sets out timeframes for decision-making, provides engagement principles between participants and the NDIS, empowers participants to request reasons for decisions and receive and discuss a draft plan before it is approved.

It also establishes an annual report by the Commonwealth Ombudsman to demonstrate how the NDIS is being delivered against the PSG.

Entrenched service standards will reduce and standardise planning timeframes, increase transparency around National Disability Insurance Agency (NDIA, Agency) processes and go towards addressing long-held frustrations experienced by participants and their families.

### 2.1 Timeframes

**Many timeframes will be clearer.**

The legislation includes a number of timeframes. Most notably, a CEO-initiated reassessment must generally be finalised within 28 days or 50 days for addressing complex needs.

The NDIA has created a [webpage with their new timeframes](#), but many of the timelines remain unclear or difficult to understand as they apply to wide-ranging matters and are often open to interpretation. The Summer Foundation has provided a guide below.

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<sup>1</sup> 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.

The Process		Timeframes
<b>Handling access requests: The CEO must either decide on the access request, request an assessment, or request an examination</b>		21 days
Asking for more information		90 days
<b>Developing a participant's plan</b>		
Assistance to implement a plan		Within 28 days of you agreeing to meet
Starting a scheduled reassessment		56 days before the review date
<b>Deciding whether to review a plan</b>		21 days
Review changes the NDIA has agreed to	Small changes	28 days
	Large changes	50 days
Deciding whether to approve statements of supports (starting a new plan)		56 days
Getting you a copy of your new plan or a copy of your plan after it was changed		7 days
<b>Cancelling appointments of nominees</b>		
Period for cancelling appointments of nominees		14 days
<b>Information required by the agency</b>		
Period for the Agency to review information or ask for more		28 days, to 90 days
Period for actioning requests relating to a CEO-initiated reassessment, such as providing further information		28 days
Reviewing decisions, either to vary or reassess	Period for giving reasons for a reviewable decision	28 days
	Period for reviewing a reviewable decision	60 days
<b>Administrative Appeals Tribunal (AAT)</b>		
Period to make changes after being notified by the AAT		28 days
<b>Internal reviews</b>		
Timeframes for internal reviews		Within 60 days, if not otherwise stated
<b>Other timeframes</b>		
Resolving a complaint if they can		21 days

Further work must be done to ensure these timeframes are representative of the process as experienced by the participant, inclusive of the point of submission of request/evidence, up until they receive an outcome and can access funding. Timeframes must enable participants, close others, and their decision-supporters to experience meaningful transparency through easy-to-access and understandable information regarding specific timeframes for each part of their planning journey.

*“I feel there are lots of delays with communication from NDIA.... I want them to give more power to us by responding quickly (same or next business day) letting us know how long the process will take. I also want them to make any decisions within a month.”*

**Ali\* – Participant**

*“I believe that the chain of command needs to be outlined, including a ‘transparent’ breakdown of individual timeframes along the way, to keep each investigator/decision-maker accountable at each step in the processes required to achieve that final timeframe albeit 28 or 56 days.”*

**Claire\* – Participant**

*“Really just [want] straightforward information, without jargon, which is written in clear language that isn’t designed to give them ‘wiggle room’ when they don’t or can’t meet the timeline.”*

**Rachel\* – Participant**

Participants require access to plans that support their needs as quickly as possible or within 28 days. Participants needing to wait for approval of more complex funding line items (Specialist Disability Accommodation (SDA), home modifications, Assistive Technology, etc.) may have their supports delayed while awaiting decisions on these matters if their whole plan is held up. Complex funding decisions, taking up to 50 days, should not impact or otherwise hold up the majority of a participant’s plan, such as arranging supports and services necessary to the participant’s health and wellbeing.

*“For example, if the person was waiting on ‘home modifications’, again for ‘crucial’ safety reasons, then they should be offered some interim accommodation while the decision is being made. Alternatively, additional in the home supports should be implemented into their current plan, while awaiting an outcome.”*

**Claire\* – Participant**

## 2.2 Engagement principles

The engagement principles and service standards are intended to help participants or prospective participants engage with the NDIA. Participants, their decision-supporters and their representatives will be expected to provide timely and accurate information to support decision-making, keeping the Agency informed of any changes in circumstance.

The engagement principles consist of:

- a. **Transparency** – Clear, accurate, consistent and up-to-date information about:
  - i. The NDIS
  - ii. Participants' plans
  - iii. The funding allocated for the purposes of their plans and supports

Peer-led information and participant-led videos would greatly assist with the provision of information and transparency

- b. **Responsiveness** – Participants' independence is maximised by addressing their individual circumstances and needs
- c. **Respect** – Participants are valued, listened to and respected
- d. **Empowerment** – Participants are empowered to make access requests, navigate the NDIS system, participate in the planning process and purchase supports under their plans
- e. **Connectedness** – Barriers are removed so participants are connected to the services and supports they need. Information is to be provided in participants' preferred formats

*"I worry that they won't actually meet those standards. They should have already been meeting these principles.*

**Ali\* – Participant**

*"It's hard to disagree with the principles. The problem is that they are so broad, it's hard to pin down what they actually mean in practice. E.g., what does it mean to be empowered to 'make an access request'? Or what does connectedness have to do with removing barriers?"*

*I feel these concepts/words may not speak to a lot of people. I can't quite think of the right word, but they sound like the service sort of concepts that a workshop would come up with that is trying to get consensus among everyone. It is very conceptual, and maybe difficult for someone for whom English is a second language, or finds conceptual thinking difficult."*

**Rachel\* – Participant**

The engagement principles have been generally well received although some participants believe there should have been wider consultation and co-design of the principles.

*“The NDIA needs to co-design the NDIS with participant involvement. [The Agency] needs to ask participants how it's doing and respond to improve their experience.*

*Do they use participant's knowledge or experiences or include participants on their board?”*

**Daniella\* – Participant**

*“People with disability should always be involved. People with disability should be running the NDIA.”*

**Ali\* – Participant**

## 2.3 Reporting performance

The Commonwealth Ombudsman will write a report every year to the Minister of the NDIS to demonstrate how the NDIS is living up to the PSG standards. Ideally, the report should be made widely available and participants, close others and organisations should have an opportunity for regular consultation with the Ombudsman.

*“[Reports] might tell them the period of time it took to resolve a request for a review, but not the experience and possible anguish of the person who was waiting for that review request to be resolved. Or it may not tell them about the number of people who have given up on making complaints because it is so difficult.”*

**Rachel\* – Participant**

*“[People with disability] should be involved since we are the ones receiving support and dealing directly with the NDIS.”*

**Ali\* – Participant**

## 3. Plan Administration Rules

**The Admin Rules have been designed to be more fit-for-purpose, providing participants with funding to cover needs, including changing situations requiring more supports and funding.**

The Plan Administration Rules (Admin Rules) are Category D rules, meaning they required consultation and agreement from all States and Territory Governments. Simple funding should be relatively quick, though more complex ones may take longer as the NDIA reviews the evidence provided.

*"[NDIA] should [get participant agreement to plans] so participants have more control over their own plan and therefore their own lives."*

**Daniella\* – Participant**

These Admin Rules:

- Set out circumstances for varying a plan without requiring a review or creation of a new plan (see **reassessments** and **variations** below)
- Set out circumstances for the NDIA to conduct a participant or CEO-initiated plan review
- Describe when the NDIA may intervene in the market on behalf of a participant to help them access their NDIS supports
- Set record keeping expectations for people receiving NDIS funding

### 3.1 Plan variation

**Participants must have the supports and services necessary to live the way they choose to.**

**Reassessments** involve collection of evidence that informs the creation of a new plan.

Reassessments can happen when participants:

- Experience significant changes in circumstance
- Encounter changes in their needed level of support
- Require additional funding to achieve a new goal

**Plan variations** are a new concept, replacing the existing plan 'review' provisions, allowing participants to request minor changes that will update, rather than replace, their current plan.

These consist of:

- Changes to participants' goals
- Crisis or emergency funding due to significant changes in supports
- Changes to plan management type after risk assessment, applying or adjusting a compensation reduction amount
- Implementation of an Administrative Appeals Tribunal decision

**Note:** This will be especially useful for people needing simple home modifications or Assistive Technology.

Under the legislation, the CEO can initiate a plan variation, restricted to several prescribed examples and if the variations are in line with the NDIS Rules. The CEO is required to consult with the participant and ultimately the participant should be better off as a result of the variation. How this will be put into practice is yet to be seen and concern has been raised through consultation on the draft legislation that without proper safeguards in place, participants may experience cuts to their plan funding without their consent.

Additionally, the CEO or delegate has 21 days to decide to vary a plan, if requested by a participant.

*“Earlier this year my whole plan was reviewed and a new one put in its place. My plan manager was informed before I was. Some of the plan was okay, but it didn't include many of the things that I needed – for example it didn't even include the level of support that I had been previously receiving.”*

**Rachel\* – Participant**

If no action or decision is taken within this timeframe the participant will have to resubmit their request for variation. This creates more work and places the onus to follow up on participants, rather than holding the NDIA accountable for its planning processes. Plan variations are set out in both the PSG (timelines) and the Admin Rules (clarification).

The legislation makes it clear when participants can initiate a plan variation (Tune recommendation 21<sup>2</sup>) or reassessment (Tune recommendation 20<sup>3</sup>). The legislative amendments provide 2 options for plan changes for relatively simple, and more substantive changes:

- 1) The CEO can vary a plan without a reassessment or creation of a new plan<sup>4</sup>
- 2) The CEO can require a reassessment of a participant's plan.

### 3.2 Fit-for-purpose

The NDIA has stated that participants have a right to choose where they live and who they live with. This means NDIS planning decisions must not force people into shared living arrangements with people or providers they have not chosen. This is consistent with the [United Nations Convention on the Rights of Persons with Disabilities \(UNCRPD\)](#) and with an ordinary life.

*“You spend so much time preparing for the plan, so you'd like to be able to discuss changes if the plan is going to be changed.”*

**Daniella\* - Participant**

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<sup>2</sup> Recommendation 21 of the 2019 Tune review: “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.”

<sup>3</sup> Recommendation 20 of the 2019 Tune review: “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.”

<sup>4</sup> Under section 47A of the legislation. Plan Administration Rules section 10(2) provides further clarification.



## 3.3 Market intervention

**The NDIA may intervene in the market on behalf of a participant to help them access their NDIS supports.**

The legislation clarifies that the NDIA has the power to act quickly to fill service gaps. This may happen in thin markets. The NDIA may provide funding to a person or entity, to:

- a) Assist one or more participants to access supports
- b) Assist a participant who is a child under 7 to access support before the child's plan comes into effect in relation to the child's disability support needs

This will be particularly beneficial in thin markets or where participants may be exposed to a level of risk, provided the NDIA implements this section in an appropriate way to support the best interests of participants.

## 4. Plan Management

### 4.1 Conflicts of interest

**The revised NDIS Plan Management Rules clarify conflicts of interest, such as the separation of housing and supports.**

The phrasing in the legislation will reduce conflicts of interest. Supports are not to be provided by a particular provider if:

- a) The CEO determines supports are not likely to substantially improve outcomes for the participant or to benefit the participant in the long term
- b) Another person could provide support, and is likely to provide better outcomes
- c) The participant has particular cultural safety needs and provision of the support creates a risk to the participant's long-term wellbeing
- d) Provision of support is likely to adversely affect the participant's inclusion in their community and ability to exercise choice and control in relation to other supports
- e) There is a risk that the person may inappropriately influence participants' choices of other providers of support
- f) There is a risk that provision of support may cause harm (including financial harm)
- g) Providers refuse to provide support to a participant, or refuse to provide support in accordance with the participant's plan

### 4.2 Funding

The legislation focuses on disqualifying criteria and the participant needing to demonstrate their ability to self-manage, rather than on building the capacity of participants and their decision-supporters to self-manage. For the most part, this is designed to reduce unreasonable risk and protect vulnerable participants from undue influence and harm.

Dignity of risk must be considered as furthering the capacity of participants or their chosen plan managers to manage their funds. Considerations around unreasonable risk or harm must be based on clear evidence.

## 5. Becoming a participant

**There is more clarity around when psychosocial disabilities, including those that are episodic or fluctuating, are to be considered as permanent and life-long disabilities.**

People with psychosocial disabilities have faced challenges in accessing the NDIS due to lack of clarity around whether psychosocial disabilities were to be considered as permanent and life-long disabilities. Terminology has changed from 'psychiatric condition' to 'psychosocial disability'.

In the new legislation, the legal definitions of permanency and significantly reduced functional capacity are separated for people with or without psychosocial disability. If a person has a psychosocial disability, it may be considered permanent despite the episodic or fluctuating nature<sup>5</sup> if:

**1. Both**

a) The person is undergoing, or has undergone, appropriate treatment for the purpose of managing the person's mental, behavioural, or emotional condition

**and**

b) The treatment has not led to a substantial improvement in the person's functional capacity, after a period of time that is reasonable considering the nature of the impairment (and in particular considering whether the impairment is episodic or fluctuates)

**or**

**2.** No appropriate treatment for the purpose of managing the person's mental, behavioural, or emotional condition is reasonably available to the person

While it is great to see further clarification around psychosocial disability, more support needs to be provided around accessibility of 'appropriate treatments' to meet these disability requirements. There are various economic, social, and geographical reasons why people may not yet have access to these.

## 6. NDIS (SDA) Rules

The SDA Rules previously referenced the NDIS Act for the definition of 'in-kind' supports. The definition has been moved from the legislation to the SDA Rules.

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<sup>5</sup> Paragraph 25(1), [Explanation of the Becoming a Participant Rule](#)