
**Submission: The Senate Community Affairs
Legislation Committee's inquiry into the
National Disability Insurance Scheme
Amendment (Participant Service Guarantee and
Other Measures) Bill 2021**

QDN

QUEENSLANDERS WITH DISABILITY NETWORK
NOTHING ABOUT US WITHOUT US

8 November 2021

About Queenslanders with Disability Network (QDN)

Queenslanders with Disability Network (QDN) is an organisation of, for, and with people with disability. The organisation's motto is "nothing about us without us". QDN operates a state-wide network of over 2,000 members and supporters who provide information, feedback, and views from a consumer perspective to inform systemic disability policy and disability advocacy.

QDN also operates 26 Peer Support groups across a range of metropolitan, regional, and rural and remote locations in the state, run by people with disability for people with diverse disabilities. members and supporters who provide information, feedback, and views from a consumer perspective to inform systemic disability policy and disability advocacy.

QDN undertakes a range of work activities and projects as outlined on QDN's website and detailed in our Annual Report. Our systemic advocacy work encompasses a range of responses – from community campaigns, formal submissions, evidence to commissions and inquiries, and membership of roundtables and working groups around national, state, and local government legislative and policy initiatives.

QDN's work is focused on the rights and full social and economic inclusion of people with disability, along with areas of key importance identified by Queenslanders with disability. This includes the National Disability Insurance Scheme (NDIS), improving mainstream services that people with disability rely on every day, including health, housing, employment, transport, and the impact of COVID-19.

Introduction

Queenslanders with Disability Network (QDN) welcomes the opportunity to make a submission to the Senate Community Affairs Legislation Committee's (the Committee) inquiry into the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (the Bill). The disability sector has contributed and engaged with multiple inquiries, over many years, that were related to changes contained in the Bill. In particular, the sector has been anticipating how the Federal Government would put in action the recommendations contained in the Tune Review.

To date, the NDIS in Queensland has had a significant impact on the lives of over 90,000 Queenslanders with disability. For many people it is the first time in their life that they have accessed disability support. However, many Queenslanders with disability continue to experience challenges with not only access to the scheme, but also challenges as participants across varying aspects of the scheme, resulting in poorer outcomes.

QDN acknowledges the extensive work that has been undertaken at both the State and Commonwealth levels to address the scheme processes and implementation challenges that are being experienced by participants, families/carers, providers, and the systems that interact with them. It is important that the solutions and the way forward continue to be responsive to the feedback and perspectives of people with disability, families, and providers to deliver on the intention and foundations of the NDIS with people with disability in the driver's seat.

It is critical going forward that the Queensland Government continues in the important role they have as an investor and partner in the NDIS to ensure it delivers for all Queenslanders with disability.

General feedback

Overall, QDN welcomes the majority of the proposed changes and believes they are reflective of the feedback provided by the broader disability community. However, QDN is disappointed that the Bill does not include the vast majority of recommendations made to the Department of Social Services (the Department) in QDN's submission on the exposure draft. QDN's recommendations were reflective of the vast majority of submissions made by disability advocacy organisations across the country.

QDN members remain deeply concerned about the unstructured decision making powers contained in the Bill, and the expansion of the rule-making powers.

The Bill would significantly expand the rule-making powers of the Minister and broad discretion for the CEO. As QDN has repeatedly stated, we recognise that the use of rules allows more flexibility for the administration of the NDIS, but as currently drafted, the Bill gives the Minister and the NDIA too much ability to define and redefine the scope of its own power.

Additionally QDN is concerned that while the Department's exposure draft consultation included all the new Rules which were being proposed, the Bill has not been published with any amended Rules. Ultimately, this means that QDN members do not know if their concerns around the draft Rule have been addressed in the final Rules.

This highlights one of the overarching issues with the use of Rules – they can be changed much more easily than legislation, and with less transparency.

It is important that the NDIS framework maintains a balance of flexibility to change but also a balance of powers and decision making subject to parliamentary and public scrutiny. The level of powers and decision making required for Rules that are fundamental aspects of the scheme must continue to require joint decision making and agreement between State/Territory and Commonwealth Ministers at Disability Reform Council and should not be changed to be Rules that can be made at the discretion of a single Minister. State and Territory Governments continue to be shareholders contributing to the scheme, and QDN believes that it is critical that decisions that are fundamental to the scheme, remain in legislation and with high level decision making across Commonwealth, State and Territory Minister.

People with disability, their families and providers continue to require capacity building, education and mentoring delivered in accessible and inclusive ways to ensure they understand the new changes and impacts upon the participant and their supports.

QDN is pleased to see that the Bill does not contain any changes to 'reasonable and necessary supports', the introduction of independent assessments, or debt recovery powers and a commitment has been given to co-designing future significant changes with people with disability and the broader sector. QDN believes that fundamental to any change is the process of co-design and involving people with disability, their families, and providers from the beginning in planning, design, implementation, and review.

QDN supports the introduction of measures which improve participant experiences to make NDIS processes more straight forward, require timeframes around access, plans and reviews, remove barriers to access for specific disabilities, increase flexibility, and specify inclusion of people with disability in governance of the Agency. However, QDN members have raised the importance that this is balanced, that decision making powers have safeguards and measures are in place to ensure that they cannot be open to interpretation.

As outlined in QDN's submission on the exposure draft, QDN is pleased to see the following changes included in the Bill:

- The inclusion of timeframes into the Act and Rules is welcomed, however we believe these could be more ambitious.
- Annual reporting by the Commonwealth Ombudsman for review of the NDIA's performance in relation to the Participant Service Guarantee, as well as reporting on participant experience. However, QDN believes that this reporting could be strengthened to also be made to the Disability Reform Council given the responsibilities and roles of each of the jurisdictions.
- Changes to the different types of reviews in terms of 'variation' and 'reassessments' is positive, and the language is less confusing.
- Amendment of the Administrative Appeals Tribunal's jurisdiction with regard to reviewing plans which have been varied or replaced by new plans throughout the course of the appeal.
- The addition of co-design with people with disability is a vital and necessary NDIS principle, along with more inclusive language.

The Participant Service Guarantee is supported and QDN endorses this as a mechanism to inform and increase awareness of participant rights within the scheme, with associated timeframes hopefully resulting in reduction of participant uncertainty and gaps in provision of support.

The overarching complexity of the NDIS Framework generally with the Act, the Rules and Operational Guidelines continue to result in a lack of accessibility for people with disability and their families. Access to individual and systemic advocacy continues to be a critical factor in getting fair, reasonable, and equitable access and outcomes from the NDIS.

Specific areas of concern

Participant Service Guarantee

Overall, the feedback around Participant Service Guarantee is supported and in line with the Tune Review recommendations. The monitoring functions of the Commonwealth Ombudsman will play an important role to ensure this is being implemented on the ground. However, there a number of key issues that have been raised by QDN members which are outlined below.

In our submission on the exposure draft, QDN had recommended that the new threshold requirements that were proposed for the 'Becoming a Participant Rules' should be moved into the Bill. This recommendation has not been adopted. As a result, QDN members remain concerned that the Bill grants the Minister power to make rules about the 'requirements' that must be satisfied

for an impairment to be considered permanent, or for substantially reduced functional capacity: s 27(2) and (3).

This is a change to the current law. Under the current s27, 'criteria' or 'circumstances' can be prescribed by the rules to guide judgments about whether a condition is likely to be permanent. This Bill empowers the Minister to add 'requirements' that would allow the introduction of more rigid rules, which must be met before an impairment is considered 'permanent'.

Moving new 'requirements' into rules is an issue, as it is likely to create new barriers to accessing the NDIS. Any changes to eligibility thresholds for the NDIS should be made in the Act, where Parliament can debate any changes, rather than through the rules.

QDN welcomes the proposed changes to the NDIS Becoming a Participant Rule, which now recognises the fluctuating and episodic nature of some mental illnesses and helps clarify when someone with a psychosocial disability may be eligible for the NDIS.

Greater inclusiveness in the scheme for people with psycho-social disability signals a significant improvement, however, the proposed rules relating to permanency and substantial reduced function capacity includes ambiguous language that could be open to interpretation. In particular what is considered by 'appropriate treatment', what are the parameters for 'substantial improvement', and what is considered a period of time that is reasonable, and what is meant by reasonably available – is this in terms of availability of supports and dependent on the local market? The NDIS Rules must provide clarity around these terms.

QDN members support changes to variation of plans and reduction of red tape, however it is important that this is an agreement between the Agency and the participant about what needs to happen and why.

The Bill includes some new 'soft' limits to the CEO's power to vary a plan, and a requirement for the variation to be prepared 'with' the participant: s 47A(1) that were not included in the exposure draft. While this represents movement in the right direction they are not substantive limits, which means the CEO retains broad power to vary plans. This power is remains inconsistent with the Tune Review's recommendations.

The Bill states that the new 'soft' limits mean variations can only be made if they are:

- A change to the statement of participant supports in the circumstances prescribed the rules;
- A correction of a minor or technical error; or
- Of a kind prescribed by the rules.
- The reference to 'rules' in two of these limitations is problematic: (a) because we don't have a copy of the new rules, so we don't know what those prescribed matters are, and (b) because they can be changed (and expanded) easily by the Minister.

These are proposed to be Category D rules, meaning the Minister can change the rules without agreement from any State or Territory. As previously state, State and Territory Governments continue to be major shareholders contributing to the scheme cost and QDN believes it is critical that decisions that are fundamental to the scheme remain in legislation and with high level decision making across Commonwealth, State and Territory Minister.

While the new requirement that changes are to be prepared 'with' participants is welcome, the changes are not sufficient to address these issues. This compounded by the lack of detail of how a participant will actually be involved. Ultimately, the Bill as currently draft still means a participant does not need to consent to any plan variation.

QDN is pleased to see that the Bill now requires reasons for reviewable decisions to be provided: s100(1). Under the exposure draft, participants were allowed to request reasons. This new change means that reasons will have to be provided automatically, for all 'reviewable decisions'.

There is still no corresponding requirement for reasons to be provided once a review of the reviewable decision has been made under s 100(6). Again, QDN strongly believes that this should be a legislated requirement.

Recommendations:

- a) The 'Becoming a Participant Rules' are a significant matter of policy and should be located in legislation.
- b) The final version of the rules must be publicly released before the Bill is debated in Parliament.
- c) The Bill must include a requirement for reasons to be provided once a review of the reviewable decision has been made under s100(6).

Payment of Supports

QDN members welcome the introduction of systems that provide greater flexibility, that are easy to use and benefit people with disability as participants of the NDIS. However, QDN members overall do not support the proposed introduction of the payment system, which currently reads that the CEO can decide how the money is paid and to whom without regard to what the participant's choice. QDN members felt that they had little information about by the introduction of the new payment system, how it will work, what it will mean for participants.

Overall, QDN members do not support a unilateral requirement that everyone must use the new payment platform. QDN members feel that this needs further clarification and consideration and needs to be clear that people have a choice about the use of this system.

Recommendations:

- a) Clarification about the choice of participants to 'opt out' of the payment system and ensure they can continue payment to make direct payments to their service providers.
- b) Engagement with NDIS participants, particularly those who are self-managing and plan managing around the proposed payments platform.

Plan Management decisions

Feedback from QDN members overwhelmingly did not support the proposed changes to Plan Management Rules around the CEO's decision making powers and determination of 'unreasonable risks'. There are no clear parameters around these changes, meaning it can be open to interpretation, which is of great concern to members who note that the CEO has broad powers around how to change these criteria. QDN members also identified concerns around this

new decision making power being used to limit the number of people who can plan manage, and therefore their flexibility in engaging with providers.

Recommendation:

- a) Before the Bill is debated in Parliament, the final version of the Plan Management Rules must be publicly released, including definitions of 'unreasonable risks' and how this will be determined, what rationale and reasons will be given to participants.

Engagement Principles and Service Standards

The Bill still does not include a requirement for the NDIA to provide participants with a copy of their draft plan, rather that participants can request to see their plan. Feedback from QDN members acknowledges that this already occurs, and they do not get to see their draft plan before it is finalised and approved. A mandatory requirement that participants receive a copy of their draft plan is particularly important given the significant increase in cases to Administrative Appeals Tribunal, the high level of requests to alter plans when participants have not been able to review, meaning there is incorrect information, missing information, and determinations based upon old information. We believe a requirement to provide participants with a copy of their draft plan would reduce the administrative burden on plan reviews.

Recommendation:

- a) Requirement to provide participants with a copy of their draft plan is part of the engagement principles and service standards.

Conclusion

QDN supports the overall intent of a Participant Services Guarantee. However, we remain deeply concerned that the Bill does not incorporate changes that were widely recommended by disability advocacy organisations to the draft exposure bill.

As an overarching issue, the Bill too broadly expands the rule-making powers for the Minister and discretion for the CEO. The use of rules allows more flexibility for the administration of the NDIS, but it gives the Minister and the NDIA too much ability to define and redefine the scope of their own powers.

Additionally, people with disability and the organisations that represent them still don't have access to the final versions of the Rules included in the Bill.

We again thank the Committee for the opportunity to make this submission. We look forward to continuing to work with the Commonwealth Government, Queensland Government, National Disability Insurance Agency, and disability sector allies to ensure that the voice of people with disability is strong and part of the conversations to deliver an internationally leading disability support scheme that achieves real outcomes for people with disability. It is critical to ensure that the NDIS continues to grow and be shaped by people with disability, families and carers, and industry to jointly create the solutions that are needed to take this scheme forward to continuing change and refinement to honour the intentions of the scheme and deliver for people with disability.

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