

# Proposed National Disability Insurance Scheme legislative improvements and the Participant Service Guarantee

Submission to Australian Government Department of  
Social Services

**7 October 2021**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to provide this submission to the Department of Social Services' consultation regarding the proposed National Disability Insurance Scheme legislative improvements and the Participant Service Guarantee.
2. This submission will focus on the draft National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Amendments) Bill 2021 ('the Bill'), the proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* and the proposed *National Disability Insurance Scheme (Becoming A Participant) Rules 2021*.

## Variation of participant's plan by CEO

3. The National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Amendments) Bill 2021 ('the Bill') proposes to insert section 47A, entitled "Variation of participant's plan by CEO etc.". Under the proposed section 47A:
  - (1) The CEO may, in writing, vary a participant's plan (except the participant's statement of goals and aspirations).

*Variation on CEO's own initiative or on request*
  - (2) The CEO may do so on the CEO's own initiative or on request of the participant.
4. The ALA is concerned that the proposed section allows participant plans to be varied without a reassessment, and also allows plans to be varied on the CEO's own initiative, without request, consultation, or consent from the participant. The ALA notes that this appears to be broader than the Tune recommendations, namely Recommendations 20 and 21.
5. The ALA submits that the NDIA should not have a general discretion to vary plans without consultation or consent by the participant. Any variation to a participant's plan however initiated should require consultation and consent. The ALA submits that the NDIA should only have discretion to vary plans without consultation or consent by the participant in rare cases of urgency where the participant cannot be consulted within a reasonable period of time.
6. The ALA submits that the CEO already has power to conduct reassessments on their own initiative. If a participant declines to have their plan varied, the CEO can still undertake a full

reassessment, if that is needed. As such, the discretion afforded to the CEO in the proposed section 47A is an unnecessary and concerning expansion of the CEO's powers

7. The ALA is also concerned that the proposed power for the CEO to vary plans is not constrained. Rule 10 of the proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* sets out a non-exhaustive list of matters the CEO must consider when deciding to vary a plan on their own initiative. However, the matters detailed in Rule 10 do not limit the CEO's power. This leaves it open for the CEO to vary a participant's plan on matters such as changes to funding amounts or restrictions on how funding could be used. These variations could be made without consultation with or consent by the participants.
8. The ALA submits that if the Bill retains a power for the CEO to vary a participant's plan on their own initiative, that such an exercise of this power, insofar as it is exercised to approve or deny funding for supports in a particular case, should still be subject to the 'reasonable and necessary' criteria and that it must be a reviewable decision that enlivens the right to internal review and appeal to the Administrative Appeals Tribunal.

### **The proposed *National Disability Insurance Scheme (Becoming A Participant) Rules 2021***

9. The ALA welcomes any change that clarifies the interpretation and application of the NDIS eligibility criteria but is concerned that the proposed *National Disability Insurance Scheme (Becoming A Participant) Rules 2021* ('the Becoming a Participant Rules') will have the opposite effect.
10. Rule 8 of the Becoming a Participant Rules requires that, to access the NDIS, a person must be undergoing or have undergone appropriate treatment for the purposes of managing their condition, and that the treatment has not led to a substantial improvement in their functional capacity after a reasonable period of time. Alternatively, there must be no appropriate treatment reasonably available to the person.
11. The ALA submits that the proposed changes will increase uncertainty. Terms like 'appropriate treatment', 'substantial improvement' and 'reasonable period of time' are not defined in the proposed Becoming a Participant Rules, yet are clearly open to interpretation and argument. This will likely lead to increased disputes over eligibility.

12. In addition, the proposed Becoming a Participant Rules may have the unintended consequences of effectively forcing participants to undertake treatment in order to satisfy the eligibility criteria. What the NDIA deems to be ‘appropriate treatment’ could differ from what a participant decides is best for them, or be contrary to advice from their treating clinicians. Yet a participant may feel coerced into undergoing the treatment in order to access the NDIS. It is inappropriate to undermine a participant’s freedom to choose their medical treatment in this way.

## Conclusion

13. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the draft National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Amendments) Bill 2021, the proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* and the proposed *National Disability Insurance Scheme (Becoming A Participant) Rules 2021*. The ALA is available to provide further assistance and advice to the Department of Social Services regarding the issues raised in this submission.



**Graham Droppert SC**

**President**

**Australian Lawyers Alliance**