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Submission on proposed NDIS legislative amendments

Danila Dilba Health Service

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1. Executive Summary

Danila Dilba Health Service (**DDHS**) is an Aboriginal Community Controlled Health Service, delivering comprehensive primary health care to Aboriginal and Torres Strait Islander people in the Greater Darwin region.

Throughout our submission we make the following recommendations:

1. Section 47A be amended so that a CEO cannot vary a participant's plan without an appropriate level of consultation with the participant commensurate to the degree of variation.
2. Section 48 be amended to allow participants to:
 - a. Request reassessments of their plans; and
 - b. Require that participants are consulted where a CEO conducts a reassessment of their plan.
3. The necessary legislative amendments be made to require that all outcomes of reviewable decisions and the reviews of a reviewable decision include a statement of reasons for the decision in plain English and with the option for the participant to receive the reasons in a verbal explanation.
4. Section 45 provide clarification that self-managed participants can continue their existing payment methods or vary their payment methods.
5. The necessary legislative amendments be made to adequately recognise disability arising out of chronic diseases.

2. Introduction

DDHS is Darwin's only Aboriginal Community Controlled Health Service (**ACCHS**), providing comprehensive health and wellbeing services to 15,000 clients through nine clinic locations across the Greater Darwin area. DDHS enjoys a high level of trust and engagement with the local Aboriginal and Torres Strait Islander community of whom 80 per cent are counted as regular clients.

The DDHS vision is outlined in our strategic plan 2017-22; 'that the health, well-being and quality of life of Aboriginal and Torres Strait Islander Australians equals that of non-Indigenous Australians.' To achieve this, DDHS has adopted a comprehensive and integrated approach to the delivery of primary health care. Our services are culturally safe and locally relevant. We work in partnership with other organisations, researchers and community members, alongside the mainstream health sector, to best meet the needs of our clients.

DDHS is grateful for the opportunity to provide input on the proposed amendments to the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) and Rules. We welcome the Department of Social Service's (**DSS**) commitment to improve the NDIS legislative framework and its

implementation of many of the recommendations made in the 2019 review of the NDIS Act (**Tune Review**). We also commend the DSS's abandonment of the proposed changes that raised concerns amongst stakeholders, including changes related to independent assessments, 'reasonable and necessary supports' and debt recovery.

However, we wish to express our disappointment in the short period of consultation for these proposed changes. Four weeks is not a sufficient amount of time to allow for genuine engagement with participants, advocates and stakeholders, especially given how lengthy these amendments are and the significant impact they will have. We hope that in the future, the DSS performs better on its commitment to a co-designed framework, which is indeed a prospective principle.¹

Nevertheless, DDHS largely welcomes the proposed changes to the NDIS. Our submission focuses on the amendments that require further change to better service clients, increase their autonomy and involvement throughout the decision-making processes, and better achieve the goal of removing 'red tape'.

3. Background

3.1 Our role and services

DDHS provides a range of services to children, families and clients that interrelate with the NDIS and NDIA, including:

- **Comprehensive primary health care services** with integrated community and allied health services including social and emotional wellbeing support and a collaborative midwife lead model of antenatal care.
- **NDIA 'Community Connectors' program**, which provides assertive outreach to Aboriginal people in a culturally safe way to increase access to the NDIS. This includes linking potential participants with the local NDIS partner, assisting clients to complete Access Request Forms and providing follow-up on submitted forms. The program supports participants to understand their NDIS Plans, ensure those plans are meeting the client's needs and links the client with an appropriate support coordinator.
- **NDIA Information, Linkages and Capacity Building**, which aims to build the skills and capacity of children, young people and their families through a child development framework. The service consists of weekly skill building sessions for children and young people with a disability, weekly sessions for their parents, families and carers and individual support for families and children to access the NDIS where eligible.
- **Health Justice partnership with Northern Territory Legal Aid Commission**. DDHS has a full-time integrated family lawyer and Indigenous Outreach Worker, known as the Legal Health Mob, situated within DDHS clinics to improve access to legal supports for Aboriginal people. The Legal Health mob assist clients with their legal issues and connect clients with legal services through integrated referral pathways.

Our experiences delivering these services have informed our understanding of the NDIS framework and provided us insight into the types of issues that affect clients in accessing, navigating and using the NDIS. This submission was compiled by the DDHS policy team with input from our NDIS

¹ *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021*, Schedule 2, section 3, page 21.

Connectors, social workers, and physiotherapist. Our submission takes special consideration of the high levels of disability amongst the Aboriginal population, the unique challenges they face in accessing and using medical and NDIS services, and the likely effects the proposed legislation will have on our clients.

4. NDIS Amendment (Participant Service Guarantee and Other Measures) Bill 2021

4.1 Schedule 1 (Participant Service Guarantee)

4.1.1 Variation of participant's plan

Proposed section 47A will allow the CEO to vary a participant's plan without the need for a reassessment. This is a welcomed improvement that will hopefully allow for changes to be more easily and quickly made when required.

However, DDHS is concerned about subsection 2, which will allow the CEO to make these variations "on the CEO's own initiative" without the participant's involvement. This poses an obvious risk of unwelcomed changes to a participant's plan without their request, consent, or consultation. While Rule 10 of the new Plan Administration Rules will require the CEO to consider a non-exhaustive list of matters when deciding to vary a plan on their own initiative, the list does not require the CEO to consider the participant's wishes or input. Further, these considerations do not appear to constrain the CEO or their ability to make a variation. It is unclear what effect the list of considerations will practically have if a CEO is determined to make a variation.

Eliminating the need to consult with a participant, even where the variation is trivial, goes against best-practice policy of participant-centred planning and involvement, as well as many of the prospective engagement principles, including 'empowerment', 'respect' and 'transparency'.

The Tune Review identified the need to increase ways to actively involve participants in the planning and decision-making process of their NDIS plan. Involvement and empowerment are particularly important for Aboriginal participants, who generally experience a high level of service suspicion and governmental mistrust due to a history of racist and paternalistic policy. In order to build and maintain trust in the NDIA, and rehabilitate its reputation of paternalism, it is imperative that all processes actively include participant involvement.

Recommendation (1): Section 47A be amended so that a CEO cannot vary a participant's plan without an appropriate level of consultation commensurate to the degree of variation.

4.1.2 Reassessment of participant's plan

Similarly, the proposed section 48 empowers a CEO to conduct a reassessment of a participant's plan "on their own initiative". This replaces the previous section 48(1) which allowed a participant to request a review. The ability of a participant to make a request, be consulted or included in the CEO's reassessment of their plan is noticeably lacking in this provision. Removing a participant's involvement in their own plan is problematic for the various reasons stated above.

Recommendation (2): Section 48 be amended to allow participants to:

- (a) request reassessments of their plans; and
- (b) require that participants are consulted where a CEO conducts a reassessment of their plan.

4.1.3 Reasons for decisions

Proposed sections 100(1B) and (1C) allow a participant to request reasons for a reviewable decision made by the CEO. While DDHS commends this as a step in the right direction, we believe that reasons for decisions should be provided to all participants when a decision is made about them, not just upon request.

Providing reasons at the outset will allow participants to better understand the decision-making process, the rationale behind the decision-maker's policy and promote participant engagement. Transparency in this way was recognised in the Tune Review as being consistent with best practice administrative decision-making principles and ensuring the NDIS remains accountable to the people it was designed to support.²

It has been extensively recognised that participants often have difficulty navigating the NDIS due to the lengthy and convoluted nature of the processes involved. Requiring that participants go through the extra administrative step to request reasons makes the system more cumbersome, protracted and frustrating for participants. This is particularly true for Aboriginal clients, for many of whom English is a second language, and who often find it challenging navigating a bureaucratic system that is so culturally foreign to their own understandings and ways of working.

As one of our NDIS Connectors commented, "the NDIS is a very Western, individualistic system that doesn't often cater for Aboriginal clients. The process of review and challenging a decision is already so hard and confusing for clients. They've been told by their doctor that they have a disability, they gather their evidence, and then they get knocked back and they're confused with what's going on."

To assist clients with these issues, particularly where a client wishes to challenge a decision, DDHS provides wraparound support services through coordinated primary health clinicians, NDIS connectors and our integrated legal services. However, for the majority of participants that do not receive such supports, they are unlikely to be empowered to navigate this challenging system. Mandating that reasons be provided for all decisions simplifies this process and ensures that not only those that have the time, energy and ability to go through this extra step are given this information. In addition, reasons should be provided in plain English with the option for the participant to also receive the reasons in a verbal explanation.

Similarly, this should be a requirement in relation to reviews conducted of a reviewable decision under section 100(6).

Recommendation (3): The necessary legislative amendments be made to require that all outcomes of reviewable decisions and the reviews of a reviewable decision include a statement of reasons for the decision in plain English and with the option for the participant to receive the reasons in a verbal explanation.

² The Tune Review, page 11.

4.2 Schedule 2 (Flexibility Measures)

4.2.1 Risk assessment

Amendments to sections 43 and 44 of the NDIS Act and the Plan Management Rules extend the risk assessment process for self-management to those who wish to use plan management. Under these changes, the CEO must be satisfied that the management of the plan would not create an ‘unreasonable risk’ to the participant. The key justification for this appears to be the fact that “there may be similar risks inherent in engaging an unregistered provider to deliver NDIS supports or services”.³

This appears to incentivise Agency management, which will contain the least amount of obstacles for approval as a result of this amendment. However, for many clients that live in areas with thin markets and limited options of service providers, plan managed providers are the most effective and viable option, as they allow for the provision of unregistered providers. This is crucial in areas such as Darwin, where there are severely limited service providers and excessively long wait times. For example, the current wait time for an occupational therapist in Darwin is approximately 3 months, with similar wait times for a speech pathologist and paediatrician. For this reason, many clients will choose a plan management provider to broaden their options of service providers and improve their chances of receiving timely supports.

DDHS is concerned that extending the risk assessment to plan management provider requests will disproportionately disadvantage those living in more regional, rural and remote areas. If the DSS is seeking to promote registration of providers through these legislative amendments, we strongly encourage that it review the registration costs and requirements so as not to disadvantage clients.

4.2.2 Payments made under the NDIS

New subsection 45(1) provides that payments under the NDIS are to be paid to the person determined by the CEO. While the explanation of the proposed amendments indicates that this is not intended to remove the ability of self-managed participants to continue their existing payment method, the proposed section currently does not make this clear. DDHS recommends that this be clarified within the legislation to ensure self-managed participants retain their choice.

We also note that the example provided in the explanatory document states that claims will be made through a Point of Sale system, in which participants will use a ‘tap and go’ system on a smartphone app. Although details of this system have not yet been provided, we encourage the DSS to consider those that do not have access to such technology in the design of this system.

Recommendation (4): Section 45 provide clarification that self-managed participants can continue their existing payment methods or vary their payment methods.

5. Becoming a Participant Rules

DDHS welcomes the amendments to the ‘Becoming a Participant’ Rules that provide clarification on what constitutes ‘substantially reduced functional capacity’ and when an impairment is considered

³ Explanation of proposed amendments to the NDIS Act 2013, page 22.

'permanent'. Clarification of these terms is particularly helpful in regards to psychosocial disabilities and acknowledging that a psychosocial disability that is episodic or fluctuating may still be considered permanent.

DDHS believes that this clarification needs to be extended to people who experience a disability as a result of a chronic health condition. Our staff have experienced many situations in which what constitutes a 'disability' has been applied inconsistently amongst those with chronic health diseases, indicating a lack of clarity or understanding regarding the eligibility criteria amongst decision-makers. As a result, many people who have a disability due to their chronic disease are falling through the gaps and are not receiving the necessary supports they need.

For example, a DDHS physiotherapist reported of a current client that was refused access to mobility assistance when he had diabetic foot-related problems because this was considered a health complication as a result of his diabetes rather than a disability. However, when the client had the same foot amputated (as a result of his diabetes), he was then granted access to the NDIS and able to receive a wheelchair.

DDHS staff have expressed frustration with this seemingly illogical distinction. For Aboriginal people, who experience a disproportionately high level of chronic health issues and disability, this lack of clarity and consistency in allowing access to the NDIS is extremely disadvantageous and problematic.

Recommendation (5): The necessary legislative amendments be made to adequately recognise disability arising out of chronic diseases.

6. Plan Management Rules

The proposed section 8 of the Plan Management Rules empowers the CEO to prohibit the provision of support by certain persons in a participant's plan.

DDHS is concerned that these significant decisions can be made without consultation with the participant and without understanding the market context of the place in which the participant lives. For clients living in areas with limited service providers, further limiting who may provide services will only increase the red tape in participants' plans, and can create difficulty in accessing timely supports. This is particularly concerning for participants living in areas with small amounts of service providers and thin markets.