

Proposed NDIS legislative improvements and the Participant Service Guarantee

**Submission by Osteopathy Australia to the National Disability
Insurance Scheme (NDIS)**

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Contact

Contact Peter Lalli, Senior Policy Officer- Clinical Excellence, for questions or comments about this submission via phone: (02) 9410 0099 or email:

clinicalpolicy@osteopathy.org.au

Executive summary and recommendations

Osteopathy Australia welcomes the opportunity to lodge a submission to the Commonwealth Department of Social Services for the proposed legislative improvements and Participant Service Guarantee.

We are regularly involved in discussions concerning the NDIS, legislative and operational issues through our frequent involvement with Allied Health Professions Australia's Disability Working Group, liaisons with participants and service providers themselves, including members of Osteopathy Australia servicing self and/or plan managed participants, and other providers. As such, this opportunity for feedback is valued and we hope the department receives our feedback in a spirit of partnership toward improving the service experience for NDIS participants and creating the diversified open markets that were originally envisaged for the scheme.

We section our comments and recommendations by legislative bill or instrument and restrict our comment to legislative changes relevant to Osteopathy Australia, its members and participants accessing an osteopath for functional capacity improvement and support in achieving daily activity milestones. Our recommendations are as follows:

Consultation processes

Recommendation 1: that in future, after all public consultations, the NDIA or Department of Social Services, report to the public and respondent stakeholders: all key themes in consultation feedback received, changes the scheme will consider, those it will not, and the associated rationales.

Recommendation 2: all future consultation processes regarding scheme matters should allow sufficient time of at least six to eight weeks wherever multiple frameworks, legislative instruments and consultation documents require comment and feedback.

Recommendation 3: all future consultation opportunities regarding the NDIS, whether facilitated by the scheme or Department of Social Services, should clearly differentiate between changes approved to occur in lieu of feedback, issues requiring substantive public comment for significant scheme development, and issues requiring comment for scheme refinement. This recommendation would aid transparency and public engagement in the consultation process, in tandem with reporting of consultation outcomes per *recommendation 1*.

National Disability Insurance Scheme Participant Service Guarantee Rules (2021)

Recommendation 4: rule components referring to scheme staff delegations should clearly specify:

- Situations where a decision sits solely with the CEO as delegate
- Situations where a scheme delegate on behalf of the CEO may make a decision.

This recommendation is consistent with other NDIS rules now in exposure draft form, for example, the National Disability Insurance Scheme Amendment Plan Management Rules (2021), in which 'Agency' and 'CEO' are used interchangeably in reference to approval delegation.

Recommendation 5: that Part 3 more clearly specify the correct maximum timeframe by which the scheme must make plan approval and review decisions or variations to such decisions. For example, is the maximum timeframe 21 days in general or 90 days for participants under age seven and 56 days for all other participant age groups?

Recommendation 6: that Part 3 (8) specify in-principle considerations the scheme must make where evaluating support plan request decisions in addition to the maximum timeframes for these decisions now included in the exposure draft.

Recommendation 7: that Part 3 (8) give consideration to constraints participants in rural, regional and remote areas may face in meeting the proposed 90-day time limit for providing further information to the scheme, as well as the constraints participants requiring multiple or complex assessments may face in meeting the time limit.

Recommendation 8: that Part 3 (8) clarify whether the 90-day maximum timeframe is renewed each time the scheme seeks clarification of information lodged by participants within the initial 90-day timeframe. For example, where participants provide the requested information, and the scheme poses further questions about that information, would an additional 90 days (180 days overall for information collection) be facilitated?

Recommendation 9: that Part 4 (16) require the Commonwealth Ombudsman to report scheme performance annually against all five engagement principles and service standards rather than against 'one or more' in the present exposure draft. Consistent thorough reporting enables longitudinal assessment of scheme operational performance over time.

National Disability Insurance Scheme Amendment (Plan Management) Rules 2021

Recommendation 10: Part 8, 1(a) should be supported by definitions that allow plan manager decisions about provider access to be scrutinised. The exposure draft requires participants that are plan managed to access services which ‘substantially improve outcomes in the long term’. Despite the centrality of these terms to this part of the exposure draft, the list of definitions offers no clarity of their meaning and application to significant lifelong disability and therefore is a transparency issue.

Recommendation 11: Part 8 (1e) should remain as written in the exposure draft. The wording at present limits provision of plan management services by providers or persons that may improperly influence participant choice and control of third-party providers; this rule is welcomed.

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

Recommendation 12: Schedule 1 48 – new 103 (2) should limit the powers of the NDIS CEO to vary a plan or statement of support once a matter is before the Administrative Appeals Tribunal --- where variation would further complicate the dispute needing a tribunal ruling.

Osteopaths and people with a significant lifelong disability

Osteopaths are skilled government regulated allied health professionals applying adaptable and diverse clinical management approaches. Osteopaths complete a dual Bachelor or Bachelor/Masters qualification covering functional anatomy, biomechanics, human movement, the musculoskeletal and neurological systems as well as clinical intervention approaches.

As a defining characteristic, the osteopathic profession emphasises the neuromusculoskeletal system as integral to function and uses client-centred biopsychosocial approaches in managing presenting issues. Evidence informed reasoning is fundamental to case management and clinical intervention. Osteopaths prescribe skilled clinical exercise, including general and specific exercise programming for functional improvement in activities of daily living. ii

Osteopaths are consulted for advice on physical activity, positioning, posture, and movement in managing a diverse range of neuromusculoskeletal functional impairments and needs. Most osteopaths are consulted within primary care practices, being a key source of allied health advice for tens of thousands of people per week. Osteopaths work within hundreds of primary health care practices, both osteopathy specific and multidisciplinary. Many osteopaths work in aged care, disability service or rehabilitation settings/programs, including settings receiving state jurisdictional or Commonwealth government funding.

For people with acute or persistent pain, osteopaths may offer lifestyle and/or movement advice, injury specific exercises, manual therapy, and health promotional strategies to aid symptom recovery. Osteopaths apply contrasting clinical management approaches when managing people with significant physical disabilities and/or other disability syndromes with a physical impact. Osteopaths acknowledge that growing skills for self-coping and community participation is the overarching goal, despite what may be persisting health care symptoms.

Osteopaths, applying person-centred care:

- Review and identify functional capacity and movement barriers to individual goal fulfillment and/or community participation
- Aid and educate participants, their families and carers on mobility, mobility strategies and whole-body movement for participation in the home and community
- Assist participants in developing and applying physical skills needed for activities of daily living, including coordination, strength, flexibility, stability, conditioning, and balance
- Assist participants in establishing whole body movement styles and postural interventions preventing injury in activities of daily living

- Where appropriate, manage pain associated with movement that could compound core activity limitations.

Osteopaths, in meeting these disability care objectives:

- Observe participant movement and function in specific environments to assess barriers to whole-body physical skill use
- Perform assessments of physical function, including but not limited to muscular strength, joint movement, and limb function
- Recommend and prescribe mobility equipment assisting participants to stand, walk and move around more easily or independently within their home, school or local community
- Provide advice and education to participants on positioning and posture in undertaking daily living activities
- Design and prescribe exercises, motor related activities and tasks, whether land or water based (hydrotherapy) that can enhance whole-body movement or specific functional skills.

These skillsets inform tertiary educational content for all osteopaths in the country. Osteopathy regulators, the Australian Health Practitioner Regulation Agency (AHPRA) and Osteopathy Board of Australia (OBA), require each osteopathy registrant to possess attributes and skills aligned with the *Capabilities for Osteopathic Practice (2019)*. Osteopaths must make a measurable contribution to neuromusculoskeletal function, adhere to best available neuromusculoskeletal evidence, work in an interdisciplinary and coordinated fashion, and encourage individual empowerment in clinical care.¹

Specifically, on graduating an osteopathy course, registrants must be able to:

- Identify and understand individual goals and concerns
- Evaluate the social determinates of core activity limitations interacting with physiology
- Develop and review management plans based on sound clinical evidence to facilitate optimum participation in activities of daily living
- Development clinical management interventions incorporating manual therapy, exercise and activity-based interventions, educational interventions, and assisted movement strategies

- Apply appropriate standardised outcome measures for milestone mapping, including measures of disability and function. ⁱⁱ

These overlapping capabilities are shared by other allied health professionals, including registered musculoskeletal physiotherapistsⁱⁱⁱ; as such, they are interdisciplinary and are not the exclusive preserve of any one profession.

Many osteopaths are consulted by self and plan managed NDIS participants for support goals associated with growing skills for daily activities- among the most important being independent living skills like mobility, conditioning, gross or fine motor skill management and dexterity. Osteopaths also liaise with carers, families, plan managers and support coordinators to maximise participant capacity for community participation.

Osteopathy Australia

Osteopathy Australia is the national peak body for the osteopathic profession. We promote standards of professional behaviour over and above the requirements of AHPRA registration. A vast majority of registered osteopaths are members of Osteopathy Australia.

Our core work is liaising with state and federal government, and all other statutory agencies, professional bodies, and private industry regarding professional, educational, legislative, and regulatory issues. As such, we have close working relationships with the Osteopathy Board of Australia (the national registration board), the Australian Health Practitioner Regulation Agency (AHPRA), the Australasian Osteopathic Accreditation Council (the university accreditor and assessor of overseas osteopaths), schemes in each jurisdiction, and other professional health bodies through our collaborative work with Allied Health Professions Australia (AHPA) where we are a party to its Disability Working Group that explores and reviews legislative, reform and operational issues and their implications for the allied health sector. We also engage extensively with service delivery networks in the community, including plan management organisations, individual plan managers, support coordinators, NDIA staff and with participants themselves. In our capacity, we offer this submission to *Proposed NDIS legislative improvements and the Participant Service Guarantee*.

General comments on and recommendations for NDIS consultation processes

Need for summaries of perspectives and feedback received

Throughout 2021, we note multiple consultation opportunities--- at least seven on various NDIS operational and strategic issues--- where the NDIS and now Department of Social Services has stated it wishes for feedback, evaluates, and integrates feedback. This is of-course a welcome commitment, but notwithstanding

the commitment, there has been very little insight given on how any feedback has been used, if at all.

A more open and transparent approach is needed in outcomes reporting post-consultation; outcomes or resolutions reached following a consultation should be clearly communicated to the public. In addition, more transparency and timeliness in reporting would show that respondent viewpoints are legitimately valued.

Recommendation 1: in future after all public consultations regarding the NDIS, a report should be generated and published outlining key themes in consultation feedback, changes for consideration, those beyond consideration, and the associated rationales.

Need for expanded consultation timeframes for complex inquiries like this legislative review

The consultation timeline for this legislative review in particular (just short of one month) is a very short span of time within which to review bills and major amendments as featured within at least six different legislative documents and instruments.

Unless all invested organisations and individuals review every legal document, instrument and associated consultation paper in the short time provided, the consultation process and the nature of feedback it attracts ultimately relies on the Department of Social Service's own proffered summary table of amendments; this is itself problematic for transparency (we would hope the table is therefore truly exhaustive of every legislative change with an implication for NDIS operation and participant entitlements or rights, major or minor).

We note that the legislative review proffers a significant number of amendments after community concerns were raised about Independent Assessments earlier in 2021. Trust that may have been eroded during the Independent Assessment reforms must now be repaired. Streamlined and clear consultation arrangements are a vehicle for trust growth. To add, the scope of the current consultation would also be a barrier to some participants or their representatives providing full and meaningful responses.

Recommendation 2: all future consultation processes involving scheme matters should allow sufficient time of at least six to eight weeks wherever multiple frameworks, legislative instruments and consultation documents require comment and feedback.

Need for openness on proposals/amendments already decided irrespective of feedback received

Based upon the Department of Social Service NDIS legislative proposal consultation webpage, all changes proposed present as fait accompli. The language used within this webpage undermines neutrality in the feedback process. For instance, the webpage specifies upfront: 'why changes are needed' and 'what will change'; such language is closed and unengaging. An open and neutral consultation process should instead be couched in language like 'what we propose and why' first--- particularly as all bills and amendments contained are exposure drafts, as specified.

If changes already earmarked for introduction will go ahead irrespective of a public consultation, this should be clearly stated.

Recommendation 3: all future consultation opportunities regarding the NDIS, whether managed by the scheme itself or Department of Social Services, should clearly differentiate between changes approved to occur in lieu of feedback, issues requiring substantive public comment for significant scheme development, and issues requiring comment for scheme refinement. This recommendation in action would also aid transparency and public engagement in the consultation process, in tandem with reporting of consultation outcomes per recommendation 1.

National Disability Insurance Scheme Participant Service Guarantee Rules (2021)

Need for delegations beyond the scheme CEO in Part 2 of the Participant Service Guarantee Rules (2021)

While we recognise the scheme CEO has lead delegation, the operational reality is that disputed access decisions should generally be made by delegates at the local level on behalf of the CEO for timeliness. The rules now essentially direct access, approval and plan goal disputes to the highest level of the NDIS.

For a scheme of several hundred thousand participants, this rule is clearly not possible or even tangible--- particularly where disputed decisions are received in mass at a single point in time. Further, deferral to the CEO frequently within the rules can be counterintuitive to participants seeking to have their voices heard. Should the rule as written in the exposure draft be legislated and interpreted stringently, bottlenecks in approval processes could emerge with major consequences for local level scheme flexibility and responsiveness to participant need and choice.

Recommendation 4: rule components referring to scheme staff delegations should clearly specify:

- Situations where a decision sits solely with the CEO as delegate
- Situations where a scheme delegate on behalf of the CEO can make a decision.

This recommendation is consistent with other NDIS rules now in exposure draft form, for example, the National Disability Insurance Scheme Amendment Plan Management Rules (2021), in which 'Agency' and 'CEO' are used interchangeably in for approval delegation.

Need for greater clarity and consistency around maximum timeframes for participant support statement approvals

There is need for more coherence between clauses relating to maximum timeframes in which a participant support statement must be approved or reviewed. In the exposure draft, Part 3 Section 7 (d note) could be contradicted by Section 8 (1). While d note specifies that the CEO has 21 days to decide whether to vary or

reassess a plan, the section immediately below outlines timeframes that are significantly longer than note d stipulates. Section 8 (1) provides that 'in deciding whether or not to approve a statement of participant supports, the CEO or NDIS explicitly has 90 days for a participant under age seven or 56 days for other participant age groups'.

Recommendation 5: that Part 3 more clearly specify the correct maximum timeframe by which the scheme must make plan approval and review decisions or variations to such decisions. For example, is the maximum timeframe 21 days in general or 90 days for participants under age seven and 56 days for all other participant age groups?

Need for standards governing support plan decisions beyond approval timelines

Part 3 (8) appears to solely focus upon the maximum timeframe within which support plan request decisions must be made by the scheme. However, this part is devoid of any other legislated principles or considerations the agency must apply in assessing these requests within the maximum timeframes detailed. For example, exactly how Part 3 (8) would enable service access decisions to occur in such a way that meets the service rule principles at the start of the exposure draft document and puts the participant at the centre of their service goals is generally unclear.

Recommendation 6: that Part 3 (8) specify in-principle considerations the scheme must make where evaluating support plan request decisions in addition to the maximum timeframes for these decisions now included in the exposure draft.

Need for greater clarity regarding maximum timeframe for participants to provide information to the scheme when requested

Part 3 (8) clearly states that participants will have up to 90 days to provide information to the NDIS supporting a plan request or support review decision. However, for some participants who are rural, remote, or where multiple or complex assessments are indicated for a decision, the 90 days may be unsuitable. The risk is that individual/social context, access to resources and appointment constraints could mean that some participants are denied consideration irrespective of the merit of their request.

We are also unclear as to whether the 90-day maximum timeframe for information provision to the scheme would recommence each time the NDIS requests supplementary or follow up information from a participant after any initial information has been provided. For example, say a participant is asked for specific information, it is then provided within the 90-day time limit, but the scheme then requests additional information, would the participant have 180 days for full provision of information?

Recommendation 7: that Part 3 (8) give consideration to constraints participants in rural, regional and remote areas may face in meeting the proposed 90-day time limit for providing further information to the scheme, as well as the constraints participants requiring multiple or complex assessments may face in meeting the time limit.

Recommendation 8: that Part 3 (8) clarify whether the 90-day maximum timeframe is renewed each time the scheme seeks clarification of information lodged by participants within the initial 90-day timeframe. For example, where participants provide the requested information, and the scheme poses further questions about that information, would an additional 90 days (180 days overall for information collection) be facilitated?

Need for exhaustive and thorough annual Commonwealth Ombudsman reports to the Minister

Part 4 (16) governs issues and matters that the Commonwealth Ombudsman ought to report to the Minister within each financial year. The wording states that the Ombudsman will report scheme performance against 'one or more' of the five engagement principles and service standards set out in the instrument (i.e. transparency toward participants, responsiveness to participant need and choice, respect of participants and their value, participant empowerment, as well as participant connectedness- removal of barriers to service access). Each of these principles and standards are fundamental to scheme operation, and to determining whether it is meeting its ends. As such, we believe that all annual reporting should cover all aspects, not 'one or more'. Inconsistent terms for reporting annual scheme issues or concerns may not be helpful for gauging longitudinal qualitative and quantitative scheme operational/performance issues and any changes to them.

Recommendation 9: that Part 4 (16) require the Commonwealth Ombudsman to report scheme performance annually against all five engagement principles and service standards rather than against 'one or more' per the exposure draft. Consistent thorough reporting enables longitudinal assessment of scheme operational performance over time.

National Disability Insurance Scheme Amendment (Plan Management) Rules 2021

Part 8 (1a) requires further definition in order to not give the NDIS and partner plan management providers unrestricted power over the service affairs and choices of participants. The exposure draft now stipulates that 'a support must not be provided by a particular person if the provision of the support is not likely to substantially improve outcomes in the long term'. On referring to definitions within the exposure draft, there is however no citing of these terms, nor any meaning given to them.

We and many others in the care and support sector wish for clarity regarding the meaning of 'substantial' and 'long term' in the context of significant lifelong disability. Where participants for instance have a disability related to a deteriorating condition, or terminal syndrome, how would 'long term' and 'substantial' be defined if at all, is one question that needs to be factored in considering the definition of these terms.

Recommendation 10: Part 8 (1a) should be supported by definitions that allow for scrutiny of plan management decisions regarding provider access. The exposure

draft now limits support provision to providers able to ‘substantially improve outcomes in the long term’. Despite the centrality of these terms to this part of the exposure draft, the list of definitions offers no clarity of their meaning and application to significant lifelong disability; this is a transparency issue.

Osteopathy Australia agrees with provisions requiring plan management services not be provided by agencies or persons that may inappropriately influence participant choice of providers

Part 8 (1e) is an important clause for plan management services requiring ‘that plan management supports not be provided by agencies or persons if there is a risk that that they may inappropriately influence participant choice of providers able to deliver on the statement of participant supports’. We agree that this is an appropriate rule for plan management services consistent with our previous submissions which have discouraged the provision of plan management services by a plan management provider to a participant where:

- The plan management provider has commercial, business or other cross promotional interests with specific local allied health services that could improperly influence participant choice within competitive local markets, for example, a relationship or interests intertwined with a local physiotherapy provider that would pose a barrier to a participant choosing an osteopath to provide similar or like clinical interventions.

Recommendation 11: Part 8 (1e) should remain as it is now written in the exposure draft. The wording at present limits provision of plan management services by providers or persons that may improperly influence participant choice and control of third-party providers to fulfil plan goals; this rule is welcomed.

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

CEO power to vary a plan or statement of plan supports once a matter is before the Administrative Appeals Tribunal is too open ended

Schedule 1 48 – new 103(2) determines the jurisdiction and powers of the Administrative Appeals Tribunal where a reviewable decision is under consideration. The new schedule appears to allow the NDIS CEO to vary a plan or statement of supports while a matter is before the tribunal.

We have concerns that this clause could be used in ways that could make for complexities in tribunal proceedings, and we strongly believe the CEO should be limited from making decisions that would further deny a participant plan of supports from such time as a matter is before the tribunal.

Recommendation 12: Schedule 1 48 – new 103 (2) should limit the powers of the NDIS CEO to vary a plan or statement of support once a matter is before the

Administrative Appeals Tribunal --- where variation would further complicate the dispute needing a tribunal ruling.

References

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- ⁱ Osteopathy Board of Australia, *Capabilities for Osteopathic Practice (2019)* [online]; <https://www.osteopathyboard.gov.au/Codes-Guidelines/Capabilities-for-osteopathic-practice.aspx> pp. 3-8
- ⁱⁱ Osteopathy Board of Australia, *Capabilities for Osteopathic Practice (2019)* [online]; <https://www.osteopathyboard.gov.au/Codes-Guidelines/Capabilities-for-osteopathic-practice.aspx> pp. 9-17
- ⁱⁱⁱ Physiotherapy Board of Australia, *Physiotherapy Practice Thresholds Statement* [online]; <https://www.physiotherapyboard.gov.au/Accreditation.aspx>