

NCOSS Submission to the National Disability Insurance Scheme Rules



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About NCOSS

The Council of Social Service of NSW (NCOSS) is the peak body for the non-government human services sector in NSW. Through its organisational membership, NCOSS represents a vast network of service delivery and consumer groups.

NCOSS has a vision of a society where there is social and economic equity, based on cooperation, participation, sustainability and respect.

We work with our members, the NSW Government and other relevant agencies, towards achieving this vision in New South Wales.

Introduction

NCOSS appreciates the opportunity to provide this submission on the National Disability Insurance Scheme Rules. NCOSS convenes the NSW Disability Network Forum which comprises non-government, non-provider peak representative groups whose primary aim is to promote the interests of people with disability. The aim of the NSW Disability Network Forum is to provide a new avenue to build capacity within and across all organisations and groups so that the interests of people with disability are advanced through policy and systemic advocacy. This submission builds on previous submissions to the NDIS from the NSW Disability Network Forum, particularly the response to the Rules Discussion Paper available at: <http://www.ncoss.org.au/resources/DNF/forum/130301-DNF-submission-NDIS-RULES.pdf>.

OVERALL COMMENTS

Consultation Timeframe

NCOSS notes that the seven sections of the NDIS Rules were released for consultation on 5 March, a matter of days after the consultation deadline for the Rules discussion paper which closed on 1 March.

NCOSS would normally convene a special meeting of the NSW Disability Network Forum to consider feedback to the NDIS Rules. The abbreviated consultation timeframe of merely 18 days was clearly insufficient to convene the NSW Disability Network Forum, nor to properly analyse and respond to the NDIS Rules in their entirety.

Amendments to the NDIS Bill and Rules

At the time of writing, the NDIS Bill that passed through the House of Representatives contained 77 amendments. NCOSS understands that this will necessarily affect how the Rules are both framed and implemented. Due to the timeframes, NCOSS can only respond to the Rules as they appear in the consultation documents.

Language of the Rules

NCOSS advises that the Rules seem not to have been drafted to support people with disability “to exercise choice and control and to engage as equal partners in decisions that will affect their lives”¹ Many of the Rules have been drafted in such a way as to suppress the very choice and control, social and economic participation that the Act has been developed to promote, encourage and uphold. The language of the Rules is dense, often difficult to understand, legalistic and unnecessarily obtuse. NCOSS recommends that the language of the Rules be made clearer for reasons of transparency and fairness to all stakeholders.

Operational Guidelines

The Operational Guidelines are referenced in several of the sets of Rules. For reasons of clarity, an explanation of their purpose and implementation would be useful in all sets of Rules. Further, NCOSS would be willing to provide advice on the Operational Guidelines before finalisation and could convene the NSW Disability Network Forum, given an appropriate consultation timeframe.

Independent information and independent advocacy

NCOSS strongly urges that the Agency refers participants to independent information and advocacy providers. These independent information providers can support participants with information on a range of options to make informed choices as well as perhaps possibilities not previously considered.

Commonwealth Draft: NDIS Rules – Becoming a participant

4.1 Residence requirements

NCOSS recommends that it makes good economic and logistical sense to provide the NDIS to anyone in Australia who needs it, including refugees.

4.2 When the residence status of a person with disability in Australia is revoked, NCOSS asks the Agency: who will be expected to provide the necessary supports to that person?

4.9 Qualifying residence requirement

Rule 4.9 (d) indicates that a person also meets the qualifying residence requirement if they start to reside in a launch area or the ACT at or after a certain date AND has predominantly moved there to access supports not provided under the NDIS AND exceptional circumstances apply – for example significant personal or financial hardship. NCOSS understands that this Rule is primarily aimed at the launch sites but the Rule does not specifically say so. The specific limits in this Rule must apply only during the period of the launch sites.

¹ NDIS Bill 2012 Clause 4, page 5 (lines 24, 25) ‘General Principles guiding actions under this Act’ incorporating Amendment 5

If this Rule were still in force when the full implementation of the NDIS occurs, as in NSW commencing **1 July 2016**, people with disability who move into the Hunter area from that date could be unfairly subject to different and more restrictive eligibility criteria than other prospective NDIS participants in NSW. Consequently, NCOSS recommends this Rule becomes time-limited to expire either at the conclusion of the Launch or at the commencement of the full NDIS implementation.

Division 2 Rules 5.5 to 5.7 When is an impairment permanent?

NCOSS recommends that the Rules state that the qualifying impairment should be 'long-term', rather than 'permanent'.

Part 6 Early intervention requirements

The recent amendments have significantly changed the original clauses in the draft Bill. NCOSS understands that the Rules will consequently be rewritten and so has not provided in-depth analysis of this section due to the short consultation timeframe. However, Rule 6.4 states that the CEO can take advice from the person with disability or a person acting on their behalf regarding evidence to support early intervention criteria. NCOSS considers this to be a valuable and worthwhile inclusion completely in line with the objects and principles of the Act.

Commonwealth Draft: NDIS Rules – Plan Management

3.5 Unreasonable risk to participant

NCOSS recommends that the CEO assumes that the person (and their family and/or chosen supporters) has capacity for self-management in the first instance. The Rules should stipulate the assumption of capacity unless there is a reason not to assume capacity for self-management. Reasons could include personal choice and recent history. Reasons must be determined on an individual basis, never by a class of people or by groups or stereotypes.

4.3 to 4.6 Timing for payments of NDIS amounts

The Rules should stipulate that the CEO will pay the NDIS amounts to the account nominated by the participant within specified time commitments. This provides protections for the participant or whoever is managing the funding and purchasing arrangements.

5.15 Participant prevented from returning to Australia

Rule 5.15 (a) (iv) delete the word "serious"

If the person has been a victim of crime then the impact of that crime, regardless of how serious that crime was, could affect their ability to travel. This situation should be assessed on an individual case level.

6.4 Whether supports should be specifically identified or described generally

NCOSS contends that how the supports in a person's plan are described will be determined largely on what is contained in the plan, and will depend on the person's life goals and

aspirations as well as their needs and daily supports. At best, this would be a negotiated process between the CEO and the participant. This would accord with the Objects and principles of choice and control by the person with disability contained in the Act. It would not be solely and primarily determined by the CEO as indicated by Rule 6.4. NCOSS recommends that this rule is reframed accordingly.

6.5 Supports provided by the Agency

The Agency should provide no direct supports (other than general supports) to the participant nor should the Agency receive payment from the participant for any of its general supports.

Commonwealth Draft: NDIS Rules – Supports for participants

3.2 Effective and beneficial and current good practice

NCOSS recommends that another criterion is added to Rule 3.2 that includes evidence in the form of information and advice from the participant regarding whether a particular support is likely to be effective and beneficial for that participant. This recommendation aligns with the existing Rule 6.4 in the *Becoming a participant* set of NDIS Rules. Information and advice from the participant will also allow creative and innovative responses and solutions that could give rise to improved outcomes for that person and then potentially benefit other people. NCOSS cautions against designing Rules that quash innovation and creativity as this can be neither desirable regarding participants' outcomes nor cost effective in the medium to longer term.

3.4 Reasonable family, carer and other supports

Rule 3.4 seems to indicate that there will be some sort of assessment process of the family, carer and other supports by the CEO regarding their suitability to continue in their role. NCOSS recommends that, while it is reasonable on the part of the participant to review all of these roles, it should be undertaken with a light touch and only assessed more closely if there is a reason to do so; for example, if the participant requests it or if the family or carers request it or where there is an identifiable risk to wellbeing. CEO decisions in these matters must be enabling rather than restrictive and participants and families and carers must have the assumption of capacity in the first instance. It is important that the Operational Guidelines are explicit in laying out criteria for decisions that are acceptable and unacceptable for officers representing the CEO and the Agency in this regard.

4.1 Needs assessment

The participant may wish to assume some personal responsibility for risk and the CEO is well advised to consider this under Rule 4.1 (c) risks and safeguards. Just like any other person, a person with disability must be enabled to assume a degree of risk to live an inclusive and good life. For a person living with impairments, there should be capacity to assume personal responsibility for some risk in order to access opportunities or enjoy leisure. Such opportunities and activities should not be unduly curtailed by the fears of vulnerability or perceived risks of others.

4.5 Specification of assessment tools in guidelines

Rule 4.5 (b) NCOSS advises that while tools may be specifically tailored to particular disabilities, the application of these assessment tools should be determined on a case by case basis. People with the same diagnosis could require very different assessment methods due to their personal circumstances, their goals and aspirations, their cultural and linguistic requirements and other determinants.

5.1 General criteria for supports

5.1 *A reasonable and necessary support will not be funded under the NDIS if:*

(a) *likely to cause harm or pose a risk*

NCOSS acknowledges that safeguards will be built into the Rules for the protection of people with disability in extreme or adverse circumstances. There are dangers that, with an automatic presumption of vulnerability, these safeguards over time become regular practice and could restrict the very choice and control that the Objects and general principles of the Bill seek to promote. The Rules should stipulate an acknowledgement of choice of ‘dignity in risk’ for the person with disability.

NCOSS recommends that the Rules are framed within an enabling approach rather than in a restrictive or prohibitive manner. This will avoid constantly limiting options for the person with disability rather than promoting opportunities for independence, social, economic and political participation.

5.1 (b) *not related to the participant’s disability*

NCOSS advises the CEO to use the social model² of disability as a guide in implementing this criterion. The social model of disability explains that people and their attitudes as well as the environment impose more barriers, limits and restrictions than the actual impairment for many people with disability. The CEO would be well advised to take a flexible view of how a person’s disability affects all aspects of their life and how a person’s entire life can be affected by their disability.

5.1 (d) *day-to-day living costs*

NCOSS agrees that day-to-day living costs should be covered by a person’s income and not by funding for supports. However, in recognising that many people with disability live in poverty and that disability can affect all aspects of a person’s life in ways that may not be easily predictable and may be different according to personal circumstances, NCOSS recommends that the CEO takes a flexible enabling approach to individual decision-making.

7.3 Supports most appropriately funded through the NDIS

This Rule says that while supports may be more appropriately provided or funded by another service system, it does not purport any obligation on that service system to fund or provide particular supports. NCOSS is concerned that the participant becomes the “unintended consequence” whereby the CEO says that the other service system is

² Refer People With Disabilities Australia website <http://www.pwd.org.au/students/social-model.html>

responsible for a particular support so the NDIS will not fund that support but the other service system will not provide it. The National Disability Strategy sets out the obligations of universal service systems to support people with disability. Where these fail or are inadequate, the NDIS has a responsibility to provide necessary supports to the participants until the appropriate system can take responsibility.

Health, guiding principles

7.6 (b) delete “permanent”

There should be some flexibility for a person to use shorter term prosthetics, orthoses and specialist hearing and vision supports where these are necessary and useful to the participant to fulfil the Objects and principles of the Act.

Mental Health, ...supports most appropriately funded though the NDIS

7.9 These are examples that support the Objects and principles of the Act for people with Mental Health disabilities.

School education, guiding principles

7.18 In the transition to the NDIS, no student with disability should be disadvantaged by this Rule. Accordingly, the CEO should provide an undertaking of no disadvantage for school students with disability under the NDIS.

Housing and community infrastructure, guiding principles

7.23 NCOSS supports the inclusion of home modifications in private dwellings, community housing, and the provision of capital costs. NCOSS recommends however, in line with the intentions of the United Nations Convention on the Rights of Persons with Disabilities, that no capital costs be granted under the NDIS towards detrimental infrastructure such as congregate care for people with disability.

7.24 (b) NDIS will not be responsible for: homelessness-specific services.

NCOSS is particularly concerned for people with disability who are marginalised under the NDIS including people who are homeless or living in insecure housing.

Transport, guiding principles

7.26 These are worthwhile examples that support the Objects and principles of the Act for people with disabilities.

Justice, guiding principles

7.29 NCOSS recommends the following addition:

(c) assistance to access supports and activities available to the general population in a custodial setting.

**Commonwealth Draft:
NDIS Rules – Protection and disclosure of information****Overall comments:****Disclosure of information**

Existing Commonwealth privacy legislation should determine the actions of the CEO in relation to the disclosure of information. NCOSS recommends that a Privacy Impact Assessment be conducted to ensure all appropriate safeguards are put into place.

Further to this, there should be no release of individual information without the express consent of the person or their nominee in every instance.

Participants own their own plans

Participant's plans will contain substantial amounts of very private information about the person with disability and the significant people in their lives. The Agency will hold and be responsible for, the security of important personal information of many thousands of people. It is very likely that service providers will require information from participants in order to deliver appropriate supports, despite information held by the Agency. The best way to overcome repetition is for participants to own, hold and be in control of their information. In this way, participants (or their nominees or chosen supporters) can use, amend, show and filter information for specific purposes to specific targets as they require it.

**Commonwealth Draft:
NDIS Rules – Registered providers of supports*****1.4 registered provider of supports***

NCOSS does not support the capacity for a person or entity to be both a registered plan management provider (fund manager) as well as a registered provider of supports (service provider) for a participant. Rule 1.4 indicates that mechanisms must be put in place to deal with the conflict of interest where this occurs. In cases where a person or entity acts as the registered plan management provider and the registered provider of supports for a participant, this creates a captured market where the participant could be subtly or deliberately persuaded to purchase supports from only that specific provider or entities connected to it. NCOSS is concerned that, despite mechanisms to guard against or manage conflict of interest, the CEO might be unaware of how a participant could become a captured market. Consequently this could lead to a reduction in options and opportunities for that participant at best and at worst to corrupt behaviour.

Part 3 Criteria for approval as a registered provider of supports

NCOSS supports the NSW Disability Network Forum recommendation that registration of supports applies only to more intensive service provision for people with disability with very high support needs.

3.7 to 3.14 The criteria

In order to become a registered provider of supports, an applicant must fulfil a number of criteria based largely on taxation, business, employment and workplace health and safety laws and other lawful requirements. The additional requirements are, in relation to the participant, whether the applicant has the relevant skills and qualifications, capacity, experience and whether the participant considers the applicant suitable. The Agency, when acting as a fund manager for participants who so choose, will only purchase supports from registered providers of supports. The above conditions are no different from the lawful requirements and considerations that any participant, not using the Agency as a fund manager, might give to any prospective providers of supports. NCOSS can see no reason for the added administrative burden, and possible disincentive, of registration in order to provide supports to participants, except as a safeguard in the case of people requiring intensive supports.

If the Registration of supports remains unchanged, will the Agency accept liability for the participant in cases where the registered provider has breached their registration and caused harm or distress to the participant?

3.14 Conflict of interest

As explained under 1.4 above, NCOSS does not support a person or entity having dual roles in relation to the same participant. If the Registration of supports remains unchanged, however, the CEO must have a closer level of scrutiny and a higher reporting mechanism on behalf of the participant where a person or entity is approved to act simultaneously as their registered plan management provider and their registered provider of supports. It is simply not sufficient for “mechanisms to be put in place”.

4.1 Requirements for registered providers

NCOSS is concerned that the Agency requires the provider to advise the Agency about complaints to responsible authorities, adverse actions, insolvency and failure to comply with certain laws. The onus is on the potentially errant provider who will be seeking to protect their income base. Therefore, there is an actual commercial disincentive to advise the Agency, with the likely result of de-registration and a loss of contracts. Rule 4.1 seems to rely on a provider honour system. There should be some legal requirement to provide this advice to the Agency with some real and actual consequence for the provider if they do not disclose this information to the Agency. This consequence must be separate from loss of registration and contracts and sufficiently severe to be taken seriously by providers.

Part 5 Revocation

If the CEO decides to revoke the approval of a registered provider of supports under the given circumstances, then the CEO must be compelled to inform all the participants using that registered provider, also including the reasons for the revocation.

**Commonwealth Draft:
NDIS Rules – Children****Part 4 Who has parental responsibility?**

Part 4 seems to indicate that there will be some sort of assessment process surrounding who has parental responsibility by the CEO and their suitability to continue in their role. NCOSS recommends that unless there is a reason to trigger an assessment of this role, the parent or parents should be assumed to continue. CEO decisions in these matters must be enabling rather than restrictive and parents must have the assumption of capacity in the first instance. It is very important that the Operational Guidelines are explicit in laying out criteria for decisions that are acceptable and unacceptable for officers representing the CEO and the Agency in this regard.

The language in this set of Rules can be somewhat difficult and heavy handed, in relation to parents and preserving family relationships. NCOSS acknowledges that in most instances, parents and family members will act in the best interests of children with disability. NCOSS also recognises that the NDIS Rules must account for children where this does not occur.

**Commonwealth Draft:
NDIS Rules – Nominees****4.4 Not to be appointed as a nominee**

NCOSS would have grave concerns about a person who worked for the Agency who was appointed as a nominee in a personal capacity. This could lead to a conflict of interest for the person and compromised outcomes for the participant.

Further, NCOSS contends that a service provider cannot be appointed as a nominee for a participant due to divided loyalties. Again the propensity for conflict in this case would be great and the outcomes for the participant would be unnecessarily put at risk. In accordance with rule 5.11, not appointing service providers would eliminate potential risks arising from this adverse situation.

4.8 CEO appointing a nominee**4.8 (iv) *is sensitive to the cultural and linguistic circumstances of the participant***

It is not sufficient to be sensitive to the cultural needs of the participant. The NSW Aboriginal Gathering Committee contends that the CEO must first offer the choice of an Aboriginal nominee to Aboriginal participants. NCOSS supports this position. Similarly, NCOSS contends that the CEO must first offer the choice of a nominee from the cultural and linguistic background matching that of the participant.

4.8 (v) delete “familiar with and”

The person whom the CEO identifies as a prospective nominee must be able to work with the participant’s communication system or other technological supports.

4.12 Requirements with which the CEO is to comply when appointing nominee

NCOSS does not support the appointment of a body corporate as a nominee for a participant. This does not accord with the person-centred nature of the NDIS Act, nor Objects and principles of the person's choice and control over the supports and decisions in their life. A participant must have a real person, not a legal entity, as a nominee to ensure continuity and the best opportunity for the necessary relationship to negotiate the preferences and goals as if the person had made their own decisions. NCOSS has no confidence that this function can be or should be capably fulfilled by a body corporate.

5.3 Duty to ascertain wishes

5.3 (a) the duty of the nominee is to ascertain the wishes of the participant. This must be strengthened by including the requirement that the nominee must also act on those wishes in the best interests of the participant.

5.9 Duty to develop the capacity of participant

NCOSS considers this to be a valuable and worthwhile inclusion completely in line with the objects and principles of the Act for people with disabilities.

5.11 Payment for service

Service providers and anyone who receives a fee or payment for service from the participant should not be appointed as a nominee. This rule must be amended accordingly.

Part 6 Suspension or cancellation of appointment

6.4 (b) in line with amendments³ 39 and 40 to the NDIS Bill, delete "severe"

Conclusion

The NCOSS appreciates the opportunity to provide input to the National Disability Insurance Scheme Rules.

If you require any further information or clarification, please contact NCOSS, Christine Regan at chris@ncoss.org.au ph. 02 92112599 ext. 117

³ NDIS Bill 2012 Clause 91, page 73 (lines 16 & 22) **Suspension of appointment of nominees**