7 October 2021

NDIS Act Review Consultations
GPO Box 9820
CANBERRA ACT 2610

Via email: NDISConsultations@dss.gov.au

Mental Health Council of Tasmania (MHCT)

Response to the proposed NDIS legislative improvements and the Participant Service Guarantee

MHCT welcomes the opportunity to provide a response to proposed NDIS legislative improvements and the Participant Service Guarantee. MHCT's response focuses on the interests of participants with psychosocial disability and in particular the changes to the NDIS Act ('the Act') and the 'Becoming a Participant' rule. We would also like to acknowledge and support submissions being made by our colleagues at Community Mental Health Australia, Mental Health Australia and National Disability Services (NDS) Tasmania.

Broadly, MHCT welcomes the proposed modifications and additions that respond to the Tune review recommendations, including replacing the term "psychiatric condition" with "psychosocial disability" and making modifications that respond to the inherent differences and complexities in assessing psychosocial disability and the need to consider the episodic and fluctuating nature of psychosocial disability. However, we are concerned that the proposed amendments and additions remain overly ambiguous and open to interpretation.

Becoming a Participant Rules

With respect to the amendments to the 'Becoming a Participant' Rules, subsection 8(2) stipulates that a psychosocial disability may be considered permanent or likely to be permanent (therefore eligible for NDIS) only if:

> *"a) both:*
>
> *a. the person is undergoing, or has undergone, **appropriate treatment** for the purpose of **managing** the person's mental behavioural or emotional condition and,*
>
> *b. after a **period of time that is reasonable** considering the nature of the impairment (and in particular considering whether the impairment is episodic or fluctuates), the treatment has not led to a **substantial improvement** in the person's functional capacity; or*
>
> *b) no **appropriate treatment** for the purpose of managing the person's mental behavioural or emotional condition is **reasonably available** to the person."*

Further, subsection 9(2) and (3) stipulates that:

> *"the impairment or impairments may be considered to result in substantially reduced functional capacity of a person to undertake the activity only if, as a result of the impairment or impairments:*
>
> *a. the **person usually requires assistance** (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity or to perform tasks or actions required to undertake or participate in the activity; or*

b. *the person is unable to **participate** in the activity or to perform tasks or actions required to undertake or participate in the activity, even with assistive technology, equipment, home modifications or assistance from another person.*

*(3) Subsection (2) is to be applied with regard to the **overall effect** of the impairment or impairments over **a period of time that is reasonable**, considering the nature of the impairment or impairments (and in particular considering whether an impairment is episodic or fluctuates)."*

The lack of a definition of the words and phrases highlighted in **bold** in the above text leaves them ambiguous and open to interpretation. While some level of flexibility in interpretation is important to ensure inclusiveness, we believe this level of ambiguity will cause confusion and may be problematic for potential participants, as well as health care professionals. Further definition of these terms is required, especially given the subjective nature of personal decisions involved in treatment and related thresholds. For example, 'appropriate treatment', should support a person's right to choice and control in relation to decisions on medical procedures. Further, 'substantial improvement' should incorporate subjective assessments of a person's functional capacity. This is particularly relevant to psychosocial disability given its fluctuating and episodic nature.

MHCT also notes that in respect to who will make determinations in relation to 'a period of time that is reasonable', the explanatory document states:

> *"The period of time which is reasonable for the purposes of paragraph 8(2)(a) will be guided by an **appropriately qualified** health professional and supported by **medical evidence**. It will be worked out taking into account the usual period over which the impairment recurs, and assessing the impact on the person's functional capacity over that period. A reasonable period of time should be established on a case-by-case basis, taking into consideration the episodes and fluctuations of a person's mental condition and advice of a qualified health professional"*

While MHCT welcomes the recognition of episodic and fluctuating nature of psychosocial disability, the lack of definition of 'appropriately qualified' and 'medical evidence' leaves this explanation ambiguous and open to interpretation. Obtaining appropriate 'medical evidence' (and understanding exactly what this entails and who can provide it) is already a recognised barrier to persons with psychosocial disability accessing the NDIS[1].

With respect to subsection 8(2)(b), the lack of clarity provided around what is considered 'reasonably available' is particularly relevant in Tasmania. Given its regionality, relative isolation as an island state and small, highly dispersed population base, Tasmanians experience thin markets across a range of services and resources, particularly in relation to psychosocial support provision within the community[2]. This issue has been further exacerbated by the impact of the COVID-19 pandemic. How 'reasonably available' will be interpreted in this context is important to clarify.

MHCT recommends that clear, transparent and publicly available guidelines are developed to provide guidance around the ambiguous terms included in the legislative amendments. These guidelines and associated definitions should be developed in consultation with the mental health sector, including those with lived experience. Further, the period allocated to consultation should be much longer than timeframes provided previously, in the interests of genuine co-design and consultation.

Other changes to the NDIS Act

MHCT would also like to respond to proposed section 47A of the Act, which allows participant plans to be varied without a reassessment. While this may allow for small amendments or fixes requested by a participant to occur without needing to undergo a reassessment, it is concerning that this addition will also allow plans to be varied by the NDIS without request, consultation, or consent from the participant. This proposed addition means variations could occur in relation to funding amounts without consultation with participants. For example, a person with psychosocial disability may be hospitalised for two months due to an acute episode, during which time their supports are suspended, but need to be made available again upon discharge. Without a reassessment occurring, an assessor may not be aware of the full context and could incorrectly interpret that the supports weren't/aren't needed, consequently varying the participant's plan. We see no particular reason for this amendment to the Act, particularly given that the NDIA CEO already has power to conduct reassessments. Furthermore, making variations to a participant's plan without consultation with the participant does not align with the stated NDIA goal of providing participants with choice and control.

Proposed sections 100(1B) and (1C) of the Act allow participants to request reasons for NDIS decisions. However, to align with the Tune review recommendations, this could be improved by requiring the NDIA to provide rationales for decisions as standard practice, not only upon participant request. This is in the interests of transparency and best-practice administrative decision-making principles.

MHCT also recommends that the amendments and changes to legislation are aligned with the 'NDIS National Framework for Recovery-oriented Psychosocial Disability Services', to be released in 2021.

Finally, the principles of the Act have been updated to say that people with disability should be consulted in a co-design capacity. However, co-design has not been defined. Further, the particularly short time-frame allowed for submissions to this consultation does not set a good precedent in enabling genuine collaboration, consultation and co-design. MHCT suggests that genuine co-design and consultation is defined with appropriate processes and time frames in place to enable such an approach to take place.

For further discussion on any aspects of this response, please contact MHCT.

Yours sincerely,

Connie Digolis
CEO
Mental Health Council of Tasmania

References

[1] Mental Health Council of Tasmania (2020) *Submission: Removing barriers to testing for the NDIS.* http://mhct.org/wp-content/uploads/2020/02/MHCT-Removing-Barriers-to-Testing-for-the-NDIS-31012020.pdf
[2] Mental Health Council of Tasmania (2019) *Submission: NDIS Thin Markets Project*. https://mhct.org/wp-content/uploads/2019/09/2019-MHCT-NDIS-Thin-Markets-Project-Submission.pdf