



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

***Submission***

## About Advocacy for Inclusion

Advocacy for Inclusion incorporating People with Disabilities ACT<sup>1</sup> is a leading independent organisation delivering reputable national systemic advocacy informed by our extensive experience in individual advocacy and community and government consultation. We provide dedicated individual and self-advocacy services, training, information and resources in the ACT.

As a Disabled People's Organisation, the majority of our organisation, including our Board of Management, staff and members, are people with disabilities. Advocacy for Inclusion speaks with the authority of lived experience and is strongly committed to advancing opportunities for the insights, experiences and opinions of people with disabilities to be heard and acknowledged.

Advocacy for Inclusion operates under a human rights framework. We uphold the principles of the United Nations Convention on the Rights of Persons with Disabilities and strive to promote and advance the human rights and inclusion of people with disabilities in the community. Advocacy for Inclusion is a declared public authority under the Human Rights Act 2004.

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Advocacy for Inclusion acknowledges the Aboriginal and Torres Strait Islander peoples as Traditional Custodians of the lands where we live, learn and work.



We respect and celebrate diversity of individuals, including those amongst the lesbian, gay, bisexual, trans, and intersex communities and we value and promote inclusion and diversity in our communities.

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<sup>1</sup> On March 24, 2021, Advocacy for Inclusion (AFI) officially merged with People with Disabilities ACT (PWDACT), a systemic advocacy organisation based in the ACT. Herein, reference to 'AFI' also acknowledges the values and philosophies of PWDACT.

## Introduction

Advocacy for Inclusion incorporating People with Disabilities ACT (AFI) welcomes the opportunity to comment on the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (the Bill) to the Senate Community Affairs Legislation Committee. Advocacy for Inclusion also provided a response to the Department of Social Services *Proposed NDIS legislative improvements and the Participant Service Guarantee*, which was endorsed by Women with Disabilities ACT, the Mental Health Community Coalition ACT and the ACT Council of Social Service.

In addition to the recommendations raised in this submission, AFI strongly supports the recommendations provided by the Public Interest Advocacy Centre (PIAC) in the *Submission to Department of Social Services Proposed NDIS legislative changes*.

AFI acknowledges that many aspects of the proposed reforms bring considerable positive changes. However, it is also necessary to highlight concerning elements which should be reconsidered and adapted to ensure they will effectively improve the experiences of NDIS participants and accurately reflect previous review recommendations. We particularly highlight several areas of the Bill which provide broad powers with few limitations, and significant ambiguity which requires further clarification. We also note further necessary considerations which would be required to support effective implementation of the changes, and areas where the impact of the changes would need to be monitored closely to for potential negative outcomes for participants.

AFI also wish to highlight our concerns with the short consultation period which was provided through the Department of Social Services consultation of the proposed changes, as well as the decision to deny sector requests to extend the consultation period. The constraints of the limited timeframe prevented comprehensive consultation and engagement, to the significant detriment of people with disabilities and their representatives. The lack of informative detail and the ambiguity within the proposed changes combined with the short consultation period compounded concerns for our members and networks. AFI notes the inclusion of '[p]eople with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity'<sup>2</sup> in these changes, and we look forward to the introduction of a comprehensive strategy that enables true codesign with people with disability to support effective legislation development and implementation of the NDIS to better meet the needs of participants, families, carers, and our community. We also welcome the recent recommendation of the Joint Standing Committee on the National Disability Insurance Scheme that 'the Commonwealth Government amend the National

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<sup>2</sup> Ss 4(9A) *Exposure Draft National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021*.

Disability Insurance Scheme Act 2013 to include a specific commitment to and definition of co-design, following extensive consultation on what 'co-design' should be.<sup>3</sup>

Within the proposed changes, AFI welcomes the implementation of recommendations from the *2019 Review of the National Disability Insurance Scheme Act 2013 report* (the Tune Review), and measures to improve the experience for participants, including the introduction of timeframes, specification of the Administrative Appeals Tribunal (AAT) jurisdiction, clarifications of some terms, improvements of inclusive language and the increased role of the Commonwealth Ombudsman to respond to individual complaints and contribute to the identification of systemic issues.

A significant concern within the proposed changes is the inclusion of broad and unclarified powers, with few defined limitations. Wherever possible, AFI encourages transparency of decision-making, adequate codesign of criteria and the substantiation of significant requirements and guidance within the Act rather than within NDIS Rules. We highlight the overreliance on powers being situated within the NDIS Rules rather than in the Act, and the lack of detail provided on potential future NDIS Rules. This impacts the experience of security and transparency of the scheme for participants and those attempting to access the scheme. It also impacts the stability of NDIS operation, as well as the transparency of criteria development and decision-making, and the ability to effectively codesign. Particularly within the context of the short consultation period and the lack of information provided on potential future NDIS Rules, the Department of Social Services consultation cannot be considered to have been a transparent and collaborative approach. Within these reforms, efforts should be focused on moving powers from the NDIS Rules into the Act and defining limiting criteria.

AFI's recommendations are founded on the importance of the stability and security of plans and supports, transparency of criteria and requirements, access to justice and the reduction of the administrative burden on participants.

### **Subsections 27(2) & (3)**

**27(2) Subject to subsections 24(2) and (3) and 25(1A), National Disability Insurance Scheme rules made for the purposes of paragraph (1)(a) of this section may specify requirements that must be satisfied for an impairment to be considered permanent or likely to be permanent.**

**27(3) National Disability Insurance Scheme rules made for the purposes of paragraph (1)(b) may specify requirements that must be satisfied for one or more impairments to be considered to result in substantially reduced functional capacity referred to in that paragraph.**

Positioning definitive criteria of access requirements within the NDIS Rules is concerning due to the potential for instability and reduced codesign in the development of NDIS Rules. To better

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<sup>3</sup> *Joint Standing Committee on the National Disability Insurance Scheme Independent Assessments* (Report) October 2021, p. vii.

ensure stability and transparency of critically important elements, such as eligibility requirements, it would be preferential for such criteria to be contained within the Act. Further, the criteria should be codesigned with people with disability to ensure it adequately reflects the needs of people with disability. The development of NDIS Rules appears to provide reduced opportunity for comprehensive codesign in comparison to the opportunities potentially available through the development of legislation.

AFI highlights that the potential implementation of these amendments is concerning, particularly due to the lack of information provided about what the possible NDIS Rules may entail. The prescription of definitive criteria may be a detrimental move away from a person-centred approach with distinctive flexibility to respond to individual circumstances, and, depending on the criteria which is specified, may result in an increased disadvantageous administrative burden on people with disability (particularly if criteria such as specific pieces of medical evidence are required). Consideration should be given to the identified issues experienced by individuals in systems such as the Disability Support Pension regarding access to, and provision of, specific evidence, to ensure similar difficulties are not repeated through the introduction of such criteria.<sup>4</sup>

**Recommendation:**

Criteria requirements should be contained within the Act and should be codesigned with people with disability.

## **CEO variation and reassessment of plans**

### **47A Variation of participant's plan by CEO etc. & 48 Reassessment of participant's plan**

The proposed changes of variation and reassessment go beyond the recommendations made by the Tune Review, and should be limited to ensure transparency of decision-making and stability for participants. Disappointingly, the proposed changes also appear to miss opportunities to address several issues highlighted within the Tune Review and instead, in some cases, appear to perpetuate previously identified concerns. As has been highlighted, efforts should be made to contain such significant powers within the Act as opposed to within the NDIS Rules.

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<sup>4</sup> See the ongoing *Senate Community Affairs References Committee inquiry into the Purpose, intent and adequacy of the Disability Support Pension*.

## Variation

The lack of defined criteria as to in what circumstances a plan may be varied is not sufficient. This is particularly concerning given the short consultation period. We note that the 'certain limited circumstances' in which a plan amendment were recommended to occur were outlined within the Tune Review:

*'A plan amendment would be suitable in cases where the NDIA is satisfied that the change to be made, or the new support to be added, could be considered in isolation from the other supports in the plan. These circumstances would be:*

- a. if a participant changes their statement of goals and aspirations*
- b. if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary*
- c. if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of the support is reasonable and necessary (for example, for assistive technology and home modifications)*
- d. if the plan contains a drafting error (e.g. a typographical error)*
- e. if, after the completion of appropriate risk assessments, plan management type is changed*
- f. for the purposes of applying or adjusting a compensation reduction amount*
- g. to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT*
- h. upon reconciliation of an appeal made to the AAT*
- i. to implement an AAT decision that was not appealed by the parties.<sup>5</sup>*

In the absence of further codesign and consultation on these matters, the power to vary plans should at least be limited to those identified in the Tune Review.

## Reassessment

AFI highlights significant concern with the proposal that Category D NDIS rules 'will set out matters to which the CEO will be required to have regard in deciding whether to conduct a reassessment of a participant's plan on the CEO's own initiative.'<sup>6</sup> This is not adequate for a codesign approach and was not sufficiently transparent for consultation. Such matters should be clearly outlined as definitive criteria and developed in consultation with people with disability.

AFI notes that the Tune Review highlighted the confusion around understanding when the NDIA might decide to initiate a plan review.<sup>7</sup> Unfortunately the the Bill does not appear to make any attempt to provide any further clarity to address this issue within reassessment decisions. Further, AFI recommends additional considerations be made regarding the timing of a reassessment. **Subsection 48 (1)** states **The CEO may, on the CEO's own initiative, conduct a reassessment of a participant's plan at any time.** It is overly burdensome on a participant and

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<sup>5</sup> Tune, D. *Review of the National Disability Insurance Scheme Act 2013* Report, December 2019, p 139.

<sup>6</sup> *Explanation of proposed amendments to the National Disability Insurance Scheme Act 2013*, p 14.

<sup>7</sup> *Ibid* p 134.

undermines the stability of the operation of the NDIS for a participant to face a reassessment at any time (including within weeks or months of receiving a new plan) in anything other than the most pressing circumstances. Participants should have some sense of security in their plan, to enable them to comfortably prepare and utilise their supports.

### **Participant agency**

AFI also notes with concern the apparent lack of agency of a participant in circumstances where a plan is varied or reassessed on the CEO's initiative. Participants should be provided the option to consent or not to a variation, to request to maintain a plan as is in the case of reassessment, and the ability to have their voice heard through the process. Additionally, an option does not appear to have been provided for a participant to request a reassessment themselves.

It appears from subsection **48 (3) If the CEO conducts a reassessment under subsection (1) of a participant's plan, the CEO must: (a) complete the reassessment; and (b) either: (i) vary, under section 47A, the participant's plan as a result of that reassessment; or (ii) prepare a new plan with the participant in accordance with Division 2 and approve, under subsection 33(2), the statement of participant supports in the new plan**, that if a reassessment is started, the only outcome possible is to vary the plan or to create a new plan. It is concerning that participants appear to have no option to request a plan to be maintained, or to contest the initiation of a reassessment if they are satisfied with the current version of the plan.

The Tune Review had also highlighted that a significant concern of participants is the risk they face of their entire plan going up for review if a small change is requested. The Tune Review found that this concern acted as a preventative barrier in the case of light touch reviews:

*'Consultation feedback indicates that participants feel this process might mean that all their plan supports could be reassessed and reduced, rather than the review being limited to the matter in contention. For this reason, a significant number of participants indicated that they, despite needing additional or new supports, are choosing not to request unscheduled reviews of their plan. Although, it should be noted the legislation currently requires the NDIA to be satisfied all supports in the plan are reasonable and necessary, regardless of the reason the review was initiated or the type of change the participant asked for.'*<sup>8</sup>

This concern does not appear to have been addressed through the proposed changes, as a variation request can still result in a decision to reassess the plan under subsection 48(1). Additionally, we note that a reassessment is a fallback option if a decision is not made within the specified period

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<sup>8</sup> Tune, above n 5, p 137.

(47A(5)). The perceived risk of a reassessment occurring as a result of a request for variation may continue to prevent participants from attempting to request variations.

**Recommendations:**

Powers to vary and reassess plans and the criteria for these decisions should be contained in the Act rather than in NDIS Rules.

CEO powers to initiate variations and reassessments should be restricted to certain situations in line with Tune recommendations, with further considerations regarding timing.

Participants should be provided greater agency in the variation and reassessment process, including through the option to consent or not to a variation, to request to maintain a plan as is in the case of reassessment and to request a reassessment.

## **Becoming a Participant Rules**

Within the *Becoming a Participant Rules*, AFI again notes the overreliance of significant criteria and considerations being contained in NDIS Rules. Requirements for access should be contained in the Act to ensure greater stability and transparency. Additionally, the language around psychosocial access considerations in the NDIS Rules is ambiguous and needs to be more clearly defined. The implementation of these Rules also appears likely to result in outcomes which are inconsistent with the objects and principles of the Act.

The terminology introduced in sections 8 and 12 of the *Becoming a Participant Rules* is concerningly ambiguous, and not yet further clarified within the Act or NDIS Rules. AFI highlights the significant risk of ambiguous terms contributing to inconsistent decision-making and a lack of transparency, with a high likelihood of such terms being applied differently in individual circumstances. Retaining ambiguous terminology also increases the likelihood of such terms being further defined and clarified through review processes, which is a highly onerous process for individuals and the NDIA. There are a number of concepts and terms within the proposed changes which require further clarification. AFI recommends further consultation and codesign processes occur to ensure this terminology is defined to be effective and accurately reflective of people with disability.



We note that some further clarification is contained in the explanatory materials, but this is not contained in the Bill or NDIS Rules. Further, the explanatory materials actually raise additional issues which require further consideration.

AFI highlights the following terminology from sections 8 and 12 as requiring further clarification and consideration:

### **'Appropriate treatment'**

The language of **'the person is undergoing, or has undergone, appropriate treatment for the purpose of managing the person's mental, behavioural or emotional condition'**<sup>9</sup> has the potential to raise significant implications regarding medical autonomy and decision-making. Consideration should be given to the United Nations *Committee on the Rights of Persons with Disabilities* continuing concerns regarding Australia's *'ongoing practice of obliging persons with "cognitive and mental impairment" to undergo treatment'*.<sup>10</sup>

Further, what will constitute 'appropriate treatment' is not clear from the provided terminology or explanation:

*'For the purposes of subsection 8(2), appropriate treatment would include activities associated with stabilisation and management of the condition to which a psychosocial disability is attributable (including crisis, symptom and medication management) and establishment of pathways for longer-term recovery. For example: Appropriate treatment for pharmacological and other treatment of mental condition should be reasonable and manageable for the person given their psychosocial disability and biological reactions, and their level of access to treatment services. The effects of this pharmacological treatment should be manageable for a person to allow them to reach a state of personal, social and emotional wellbeing.'*<sup>11</sup>

For example, will an individual who does not wish to take medication, but engages with other options such as therapy, peer support, exercise, nutrition management or meditation be considered to have satisfied this requirement? Implementation of such criteria should include recognition that 'appropriate treatment' may exist outside of clinical treatment. The *Senate Select Committee on Mental Health* highlighted the issue of the medical model view of mental health contributing to an overreliance on pharmacological options to the detriment of access to non-pharmacological support:

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<sup>9</sup> Ss8(2)(a)(i) and ss 12(2)(a)(i) *Exposure Draft National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.

<sup>10</sup> United Nations, Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia CRPD/C/AUS/CO/2-3* 15 October 2019 para 27.

<sup>11</sup> *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, p 9.

*'As the dominant paradigm governing the care and treatment of mental illness, the medical model emphasises pharmacological approaches that aim to cure mental disorders that find their genesis in bio-chemical disturbances. Less attention is given to the prevention of mental illness, to non-pharmacological treatments and to the psycho-social causes of mental health disorders...'<sup>12</sup>*

*...a very common call from consumers is for greater attention on and access to counselling services, psychotherapies, psychosocial services, peer support groups, nutritional and so called 'alternative' approaches such as natural therapies, yoga and meditation etc.'<sup>13</sup>*

Additionally, the *2020 Productivity Commission Inquiry into Mental Health* highlighted the need to improve and increase offerings of 'alternative non-pharmaceutical treatment options,'<sup>14</sup> stating that 'the most effective treatment for an individual may be non-medical.'<sup>15</sup>

The recognition of non-pharmaceutical supports to manage a psychosocial condition raises a significant inconsistency within the proposed changes, in that the NDIS may be the most appropriate scheme through which to access some of these non-pharmaceutical support options. The requirement to have engaged with such supports prior to accessing the NDIS, when the NDIS may be the most appropriate means through which to access these supports is illogical and creates an excessively punitive barrier to accessing adequate support, which is inconsistent with the objects and principles of the Act.

#### **'a period of time that is reasonable'**

The concept of 'a period of time that is reasonable' with the further information provided,<sup>16</sup> to be considered on a case-by-case basis, also presents an opportunity for inconsistent decision-making and increased use of review processes to establish the meaning of the concept.

#### **'Substantial improvement'**

This does not appear to be defined or explained in the proposed changes materials. This term could be further clarified by being defined as 'a level of improvement such that the person no longer has substantially reduced functional capacity'. Additionally, to improve the efficacy and adequacy of this term, it could also be further clarified to include a requirement that the

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<sup>12</sup> Commonwealth of Australia, *A national approach to mental health – from crisis to community First Report 30 March 2006 Commonwealth of Australia 2006*, para 5.77.

<sup>13</sup> Commonwealth of Australia, above n 12, para 5.81.

<sup>14</sup> See *Productivity Commission Inquiry Report Mental Health Volume 2 No. 95*, 30 June 2020.

<sup>15</sup> *Ibid*, p 714.

<sup>16</sup> *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, p 9.

improvement is 'sustained' as various treatments exist which may cause significant substantial improvement for short periods (of days, weeks, or months) before relapse or return of severity of the condition.

Alternatively, this standard could be reconsidered in comparison to the standard used for disabilities other than psychosocial disabilities: **'The impairment may be considered permanent, or likely to be permanent, only if there are no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment.'**<sup>17</sup> It is unclear why a different standard is imposed between psychosocial and other disabilities, and it appears possible that the 'substantial improvement' standard could equate to a much lower standard in practice. There may be various therapies and support options which would substantially improve the functional capacity of a person with a non-psychosocial disability, yet this is not the standard which is imposed (with the result potentially being that an individual does not meet the permanency requirements). Instead of retaining the ambiguous term of 'substantial improvement', the same standard of *no appropriate treatment which is likely to remedy the impairment* could also be applied to psychosocial disabilities.

#### **'Managing' a condition**

This does not appear to be defined or explained in the proposed changes materials. In context with the other terms addressed here, this appears to create an additional access test to manage a condition prior to accessing NDIS supports which is not required in non-psychosocial disabilities. In AFI's view, this highlights a need to recognise that individuals with psychosocial disability may be most appropriately supported through NDIS supports, or through both NDIS and other service systems concurrently. We emphasise that an additional barrier created by this requirement for psychosocial disability access is inconsistent with the objects and principles of the Act.

#### **'Reasonably available'**

The term 'reasonably available' regarding access to treatment also does not appear to be defined or explained in the proposed changes materials. AFI notes that the addition of 'reasonably available' has not been made to requirements for disabilities other than psychosocial disabilities, which states only 'available' treatments. The consideration of whether treatment is 'reasonably available' should also be applied to non-psychosocial disabilities, to improve consistency of the NDIS.

The introduction of some of these changes, if clearly defined and implemented well, could have strong positive consequences for participant access and experience, and would be very welcome. The requirement that treatment is 'reasonably available' has the potential to significantly reduce

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<sup>17</sup> *Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, p 7.

existing barriers, as could the addition of a well-defined 'substantial improvement' or 'remedy the impairment' standard. However, other inclusions, such as 'appropriate treatment', without further definition could result in greater complexity, additional administrative burden and increased barriers to access. AFI notes that overall, the additional changes to psychosocial access may do little to address the significant structural issues within the NDIS Act and its operation that contribute to the difficulties experienced by individuals attempting to gain access or supports for psychosocial disabilities. These changes should not be considered a substitute for the substantial reform and codesign which would be needed to ensure effective support and equal access for people with psychosocial disabilities.

**Recommendations:**

Criteria requirements should be included in the Act rather than in the NDIS Rules.

The ambiguous terms in the Becoming a Participant Rules should be clearly defined. This should be done in codesign with people with disability.

'Substantial improvement' could be further clarified by being defined as meaning a level of improvement such that the person no longer has substantially reduced functional capacity. Additionally, 'sustained' should be defined and included in the term, to appear as 'sustained substantial improvement'. Alternatively, the 'substantial improvement' standard should be replaced with the 'likely to remedy' standard.

Due to apparent inconsistency with the objects and principles of the Act, remove the 'managing a condition' criteria.

The consideration of whether treatment is 'reasonably available' should also be applied to non-psychosocial disabilities.

**Provision of information**

**100 (1B) If a person receives a notice under subsection (1) in relation to a reviewable decision made by the CEO, the person may request the CEO to give the person the reasons for the decision.**

**100 (1C) If a person makes a request under subsection (1B), the CEO must give the person the reasons: (a) within the period worked out in accordance with the National Disability Insurance Scheme rules prescribed for the purposes of this paragraph; or (b) if there are no such rules—as soon as reasonably practicable**

To reduce the administrative burden on participants, the provision of this information should be automatic, rather than dependent on a request being made. AFI highlights that the Tune Review recommended this as a backup option in case of failure to provide information as a routine process.<sup>18</sup>

**Recommendation:**

Remove the need for a participant to make a request under ss 100(1B) &(1C), and make the provision of information automatic.

## Considerations for implementation

### New Payment Platform

**45 This amendment will enable the Agency to pay service providers directly on behalf of participants, including self-managing participants, through a new payment platform.**

The introduction of a new payment platform, with very little further information, raises concerns about accessibility and transparency of funding payments and management of budgets, particularly for people with barriers to technology use and management of funding. The implementation of this method would need to be monitored closely to identify possible disadvantages.

The level of monitoring implied by the statement *'Allowing the Agency to more closely see what participants are using their plan budgets for, helping provide vital data to inform what services and activities appear to be most effective in helping participants achieve their goals; as well as helping to identify where market supply of services may be lacking'*<sup>19</sup> is concerning, particularly if monitoring and collection of data is occurring at a level in which individual's payments can be tracked and evaluated against their goal achievements. Informed consent and transparency of collection of personal information should be prioritised for participants.

### Plan management

The implementation of amendments to section 44 would also need to be closely monitored for potential unintended consequences, such as a significant increase in the number of participants

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<sup>18</sup> Tune, above n 5, p 52.

<sup>19</sup> *Explanatory Draft National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021*, p 35.

moved to and remaining as agency-managed. AFI also highlights that the Tune Review noted that such changes should be supported by additional action to support more participants to be self-managed.<sup>20</sup> Such additional support was not outlined within any of the proposed changes materials provided through the Department of Social Services consultation.

The application of the amendments, particularly considerations of unreasonable risk, have the potential to restrict an increased number of people to agency-managed. With the reduced choice of providers under agency management, it is essential that any considerations to move a participant to agency management occur within a human rights framework, with particular consideration given to Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), as consideration will be given to the participant's 'cognitive function and decision-making capacity'.<sup>21</sup> Implementation must include robust supported decision-making strategies. Further the NDIA has asserted that part of the role of plan managers is capacity building. Considerations of the implementation of these amendments should include evaluations of whether or not plan managers are effectively conducting this role of capacity building. Consideration should also be given to the need for further evaluation of, and action to address, the administrative burden and complexities associated with self-management processes.

## Families and Carers

### **4 (12A) The relationship between people with disability and their families and carers is to be recognised and respected.**

The statement that the relationship between people with disability and their families and carers is to be 'recognised and respected' is ambiguous, and it is not clear exactly what this means when it is applied to 'preparation, review and replacement of a participant's plan, and the management of funding for supports under a participant's plan'.<sup>22</sup> In recognising and respecting the relationship, the participant's will and preferences must be prioritised and their choice and control must be maintained, particularly with consideration to supported decision-making and the CRPD.

## Quarterly Report information

The decision of what matters must be contained in the Quarterly Report should be specifically made in codesign with people with disability to improve transparency and accessibility of relevant information.

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<sup>20</sup> Tune, above n 5, p 128.

<sup>21</sup> Ibid, p 34.

<sup>22</sup> *Explanation of proposed amendments to the National Disability Insurance Scheme Act 2013*, p 25.

## **Conclusion**

While many aspects of the proposed reforms bring considerable positive changes, there are concerning elements of the Bill and Rules which should be reconsidered and adapted to ensure they will effectively improve the experiences of NDIS participants and accurately reflect previous review recommendations. Particularly, several areas of the Bill which provide broad powers with few limitations, and the significant ambiguity within the terms and concepts presented requires further clarification and review to ensure the outcomes will be consistent with the objects and principles of the Act, and to avoid negative outcomes for participants.

## All Recommendations

1. Criteria requirements should be contained within the Act and should be codesigned with people with disability.
2. Powers to vary and reassess plans and the criteria for these decisions should be contained in the Act rather than in NDIS Rules.
3. CEO powers to initiate variations and reassessments should be restricted to certain situations in line with Tune recommendations, with further considerations regarding timing.
4. Participants should be provided greater agency in the variation and reassessment process, including through the option to consent or not to a variation, to request to maintain a plan as is in the case of reassessment and to request a reassessment.
5. Criteria requirements should be included in the Act rather than in the NDIS Rules.
6. The ambiguous terms in the Becoming a Participant Rules should be clearly defined. This should be done in codesign with people with disability.
7. 'Substantial improvement' could be further clarified by being defined as meaning a level of improvement such that the person no longer has substantially reduced functional capacity. Additionally, 'sustained' should be defined and included in the term, to appear as 'sustained substantial improvement'. Alternatively, the 'substantial improvement' standard should be replaced with the 'likely to remedy' standard.
8. Due to apparent inconsistency with the objects and principles of the Act, remove the 'managing a condition' criteria.
9. The consideration of whether treatment is 'reasonably available' should also be applied to non-psychosocial disabilities.
10. Remove the need for a participant to make a request under ss 100(1B) &(1C), and make the provision of information automatic.
11. Consider the implementation issues raised with the New Payment Platform, Plan management, Families and Carers and Quarterly Report information.
12. Consider addressing the matters of AAT jurisdiction following QDKH and emergency situation support flexibility.