Department of Social Services

Consultation regarding the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 and changes to the NDIS Rules

Occupational Therapy Australia submission

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Introduction

Occupational Therapy Australia (OTA) welcomes the opportunity to provide comment on the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 and changes to the NDIS Rules.

OTA is the professional association and peak representative body for occupational therapists in Australia. As of June 2021, there were more than 24,800 registered occupational therapists working across the government, non-government, private and community sectors in Australia (AHPRA, 2021). Occupational therapists are allied health professionals whose role is to enable their clients to engage in meaningful and productive activities.

Occupational therapy is a person-centred health profession concerned with promoting health and wellbeing through participation in occupation. Occupational therapists achieve this by working with participants to enhance their ability to engage in the occupations they want, need, or are expected to do; or by modifying the occupation or the environment to better support their occupational engagement. Occupational therapists provide services across the lifespan and have a valuable role in supporting participants affected by developmental disorders; physical, intellectual, chronic and/or progressive disability; and mental health issues.

Given their expertise and area of practice, many occupational therapists deliver services funded by the NDIS. Services focus on promoting independence in activities of daily living and enablement of social and economic participation. These services may include functional capacity assessment and intervention; disability-related chronic disease management; prescription and implementation of assistive technology and/or environmental modifications; mental health interventions; positive behaviour support; driving assessments (when specifically trained to do so); and targeted, goal-focussed rehabilitation.

OTA endorses the Allied Health Professions Australia (AHPA) submission on the proposed legislative changes. We provide further comment, and emphasise observations included in this document at Figure 1.

OTA commends the ongoing commitment to providing individualised, reasonable and necessary support to people with a disability based on their needs.

We also welcome the decision to legislate a significant number of changes as recommended by the Tune review, including the Participant Service Guarantee (PSG). This includes an increased focus on co-design with people with disability and their representatives. Greater clarity around the range of review types that a participant may undertake will help ensure the Scheme is easier to understand and navigate.

While supporting the general purpose of the legislative changes, OTA does have concerns around the details of some of the proposed amendments, particularly those pertaining to NDIS participants with psychosocial disability. Please note, therefore, a dedicated section on psychosocial disability beginning at page six.

FIG 1: Summary of OTA feedback on Schedule 1 & 2 of proposed amendments

Item	Issue	OTA comment
Schedule 1: *NDIS (Plan Management) Rules 2021* s 8	Re s 35(1) PM Rules s 8 provides guidance to the CEO about circumstances in which it would be appropriate to specify that a support must not be provided by a particular person or provider if the CEO is satisfied of one or more of the following: (a) the provision of the support to the participant by that person is not likely to substantially improve outcomes for the participant or benefit the participant in the long term; (b) both of the following: (i) another person could provide the support to the participant; (ii) that other person is likely to provide better outcomes for the participant than that person; (c) both of the following: (i) the participant has particular cultural safety needs; (ii) the provision of the support to the participant by that person creates a risk to the participant's long-term wellbeing; (d) the provision of the support to the participant by that person is likely to adversely affect the participant's: (i) inclusion in the participant's community; or (ii) ability to exercise choice and control in relation to the other supports specified in the statement of participant supports; (e) there is a risk that that person may inappropriately influence the participant's choice of providers of other supports specified in the statement of participant supports; (f) there is a risk that the provision of the support to the participant by that person may cause harm (including financial harm) to the participant; (g) that person will not:	Further clarity is required on this PM Rule, and the circumstances in which the CEO may implement this rule. For example, how will the CEO determine if the provision of support by a person is not likely to substantially improve outcomes or benefit the participant in the long run? There continues to be NDIA misunderstanding and inconsistent interpretation of what constitutes evidence-based practice, and also the distinction between supports that are 'clinical treatment' and 'clinical in nature' and disability focused capacity building. Therefore this rule has the potential to reduce participant choice and control, and limit a client's capacity to make informed choices based on their needs and best evidence-based practice when they do not have access to expert professional opinion. Given the NDIA's misunderstandings around evidence-based practice, OTA shares AHPA's concern that "It is also deeply problematic that these proposed changes are buried in the PM Rules and not sufficiently addressed in the accompanying explanatory material".

	(i) provide the support to the participant; or (ii) provide the support to the participant in accordance with the participant's plan. The CEO must also have regard to various matters, one of which is 'any other matter the CEO considers relevant.'	OTA also has serious concerns about the CEO needing only one circumstance to be satisfied and that of the various matters to which the CEO must have regard, one is 'any other matter the CEO considers relevant.'
Schedule 1: Item 50	Repeals ss 174(3) to (4C) which allow the Minister to make a legislative instrument prescribing the matters which must be contained in the quarterly report, and set out prerequisites to making the legislative instrument. Instead provide that the NDIS rules may now prescribe the types of information and matters to be included in the report to the Ministerial Council. Rationale includes increased Board transparency and flexibility.	OTA queries the justification for removing prescribing of matters in their entirety from direct Ministerial authority. The Rules are likely to receive less scrutiny than the actual legislative instrument. This is likely to be perceived as leading to less transparency and accountability in the Quarterly reporting process. Specifically, how does this change increase NDIA Board transparency? While there might be some logic to prescribing in the Rules some of the detail of those matters relating to the Guarantee, there is no justification for removing prescribing of matters in their entirety from direct Ministerial authority. OTA is also concerned that the matters to be reported on are purely quantitative and tell us nothing about outcomes e.g. how many decisions denied access (cf Item 54).

Schedule 1: Item 22	Inserts new section 47A which empowers the CEO to vary a participant's plan (excluding the participant's statements of goals and aspirations), without requiring a plan reassessment to be undertaken, or a new plan to be created. In deciding whether to vary a participant's plan, the CEO will be required to have regard to matters that are set out in the NDIS rules. The matters set out in the NDIS rules will assist in clarifying when a variation or reassessment of a participant's plan should occur.	OTA supports the varying of participant plan, when this has been requested by the participant, in response to disability support needs. However, it is concerning that the CEO may vary a participant plan without requiring a plan reassessment; and without request, consultation, or consent of the participant.
Schedule 1: Item 13	Repeals s 32 which requires the CEO to commence facilitating the preparation of a participant's plan in accordance with any timeframe prescribed by the NDIS rules, or otherwise as soon as reasonably practicable.	OTA does not support the repeal of section 32 of the Act. The proposed new section 32 simply provides that if a person becomes a participant, the CEO must facilitate the preparation of the participant's plan. The explanatory document provides no explanation for the change, which is inconsistent with the Tune Review's recommendation that CEO facilitation of the preparation of a plan should commence no later than 21 days following the access decision. Will there be any provisions in the Rules, or at least the option of 'as soon as reasonably practicable' as per the new s 33(4) and s 89?
Schedule 1: Item 59	Provides (by amending s 209(8)) that all new rule-making provisions in Schedule 1 in relation to the Guarantee, which will be inserted by this Bill will be Category C rules. Category C rules require the agreement of the Commonwealth and a majority of the states and territories. Rationale: Rules that define access, supports or have an interface with other systems require unanimous agreement (Category A) by states and territories. As the Guarantee rules are not of that nature, requiring a majority of jurisdictions to agree to any changes to these rules provides a more appropriate check and balance.	OTA suggests that the *NDIS (Participant Service Guarantee) Rules 2021* should have a higher status than Category C, and require unanimous agreement from jurisdictions to any changes to these rules i.e. Category A. This is because many of the affected rules apply to issues significant for participants, such as those discussed in Items 3 – 5, 15, 29, 40, 50 and 54. Therefore Category A is the most appropriate.

Schedule 2: Item 5	Repeals s 4(15) Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted. Substitutes 'In exercising their right to choice and control, people with disability require access to a diverse and sustainable market for disability supports in which innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of those supports is promoted.'	OTA suggests that repealing s 4 (15) dilutes, weakens or removes governmental responsibility for the support of innovation, quality, continuous improvement, contemporary best practice and effectiveness in NDIS disability support provision. This inappropriately places this responsibility wholly in the hands of the 'market' i.e. dilutes, weakens or removes the NDIA role as market steward.

Proposed changes to NDIS Rules – Becoming a participant with psychosocial disability

While consulting with members about the proposed legislative changes, it became apparent to OTA that those members most concerned about the draft Bill are those providing supports to NDIS participants with psychosocial disability. It is appropriate therefore to offer the following observations, based on feedback received.

Occupational therapists work with people with psychosocial disability across the lifespan, and across the continuum of mental health care in Australia. As the assessment of functional capacity is a core focus of the work of occupational therapists, occupational therapists are frequently requested to provide evidence to accompany NDIS access requests.

OTA welcomes the continued commitment to recognise the substantial functional impact of psychosocial disability. OTA therefore welcomes the proposed changes to the NDIS Act, which include increased recognition of the episodic and fluctuating factors that impact upon psychosocial disability.

However, we note with concern the ambiguity of the terminology used in the *Proposed changes to NDIS Rules – Becoming a participant Rules (Part 2 (8)),* and fear that this ambiguity of language as it relates to proving permanence of disability, will delay, or create a barrier to, entry to the Scheme for people with psychosocial disability. It is felt there is a need for greater clarity around proposed terms pertaining to psychosocial disability.
Currently, NDIS data indicates that people with psychosocial disability are disproportionately disadvantaged in the Scheme access process. The NDIS quarterly report January-March 2021 demonstrated that people with psychosocial disability are twice as likely to be rejected when they first attempt to access the Scheme, relative to other disability types. Accordingly, it is imperative that the new legislation and Rules are clear, robust and unambiguous. Without this clarity the proposed rules are unlikely to address the significant barriers faced by people with psychosocial disability.

OTA is concerned that the clarification of these terms might occur through NDIA operational guidance. This creates less certainty and could see the meaning of these key terms being used inconsistently and without sufficient oversight. Such an approach would do nothing to improve on the current situation.

FIG 2

8 When an impairment is permanent or likely to be permanent for the purposes of the disability requirements—psychosocial disabilities

(1) This section sets out, for the purposes of paragraph 27(1)(a) and subsection 27(2) of the Act, a requirement that must be satisfied for a person's impairment to which a psychosocial disability is attributable to be considered permanent, or likely to be permanent, for the purposes of paragraph 24(1)(b) of the Act.

(2) The impairment may be considered permanent, or likely to be permanent, only if:

(a) both:

(i) the person is undergoing, or has undergone, appropriate treatment for the purpose of managing the person's mental, behavioural or emotional condition; and

(ii) the treatment has not led to a substantial improvement in the person's functional capacity, 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); or

(b) no appropriate treatment for the purpose of managing the person's mental, behavioural or emotional condition is reasonably available to the person.

With reference to Part 2 (8) of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021 Exposure Draft (copied above, FIG 2), the lack of definition around the highlighted terms is likely to disadvantage applicants with psychosocial disability for the following reasons.

- 'Appropriate treatment' and 'management of mental, behavioural or emotional condition' are vague terms, as is a 'reasonable' period of time to undergo 'treatment', and will likely lead to greater inconsistency in NDIS access eligibility decision-making.

- The highlighted terms create further lack of clarity around meeting permanence criteria for the NDIS on the grounds of treatment history or lack thereof. Without a clear definition of what is meant by 'appropriate treatment', there is potential for this to delay or become a barrier to entering the Scheme. Delayed access has the very real potential to lead to increased disability, to inappropriate reliance on an acute, medical or clinical system, or to harm. People with psychosocial disability already experience substantial barriers to adequate care, diagnosis and treatment. Lack of clarity around what is meant by 'appropriate treatment' will lead to further inconsistency of care for this group.

- It is important that a focus on 'appropriate treatment' does not disadvantage younger applicants and those who are at critical life stages developmentally, i.e. in their teens, 20's and 30's. During these developmental years, there are substantial barriers to

diagnosis, with this process taking up to 5 years or more in some cases. These are the groups who benefit substantially from disability support and capacity building, to prevent the compounding of disability impacting lifelong social and economic participation. Delays or barriers to Scheme access based on requirements to undertake a medical or clinical treatment will lead to further longer term disability, and prove more costly to the Scheme over time.

- 'Appropriate treatment' requirements for NDIS access should not place people with psychosocial disability at risk of: compromised bodily autonomy; iatrogenic harm; or increased exposure to involuntary treatment.

- Many evidence-based 'appropriate treatment' types are not accessible to people on a low income. 'Appropriate treatment' needs to reflect universally available and affordable treatment only.

- Even when 'appropriate treatment' is available and affordable, it may not be accessible to many people with psychosocial disability – due to reduced functional capacity in planning, organising or sustaining engagement in 'appropriate treatment'. These people should not be disadvantaged.

- People whose psychosocial disability is a result of severe and enduring mental illness, often experience extensive and fragmented engagement in 'appropriate treatment' over their lifespan. For many, reduced functional capacity in executive functioning and planning, organising and memory difficulties, or transience in lifestyle and accommodation, means they frequently do not maintain written records or any documentation of an 'appropriate treatment' history. Current treating psychiatrists or clinicians frequently do not have access to historical treatment records. Should the person's functional capacity be evidenced as reduced in the areas of self-management and self-care, they cannot be reasonably expected to provide detailed history of 'appropriate treatment' beyond what current treatment providers can provide with certainty.

- Assessing whether 'appropriate treatment' has led to improved functional capacity, should be undertaken by an occupational therapist or suitably qualified allied health professional. Treatment outcomes from a psychiatrist or medical practitioner frequently focus on symptom reduction, not improved functional capacity. Indeed, it is possible for the person with psychosocial disability to have 'treatment success' in terms of symptom reduction, while experiencing substantial limitations in their functional capacity in the self-care, social interaction, communication, mobility and self-management functional domains due to essential or life-saving treatment.

Further improvements to the NDIS Act

OTA believes government should use this opportunity to further improve and simplify the broader NDIS framework, by enacting clear legislation and implementing NDIS Rules that will facilitate equitable and consistent decision-making. A stronger, clearer NDIS Act has potential to anchor the NDIS, enabling the Scheme to fulfil its vision of improving the lives of people with disability in Australia. A strong, clear NDIS Act will restore public trust, as it will

constitute a solid foundation for fair and transparent decision-making. It will reduce the need for extensive and exhaustive rules and guidelines, which all too often lead to a perception of inconsistent or biased decision-making, and of reduced transparency.

In practice, a simplified NDIS framework will make the Scheme easier to navigate for participants and those who support them. Occupational therapists provide substantial evidence to enable applicants and participants to have their disability support needs met. However, complex and sometimes inconsistent guidelines and interpretations of the current *NDIS Act (2013)* and NDIS Rules and Guidelines, makes the documentation of reduced functional capacity and reasonable and necessary support needs, unnecessarily unwieldy and time-consuming.

For example, there is scope to use legislative reform as an opportunity to simplify specialist disability accommodation (SDA) processes. Occupational therapists are required to provide evidence to inform decision-making about SDA, and the following rules and guidelines need to be interpreted by the occupational therapist for each individual participant, at a minimum:

- 'Reasonable and necessary supports' rules under ss 33 and 34 of the Act;
- Principles which underlie decision-making in the Act, including under ss 4, 5, 17A and 31;
- Participant Service Guarantee Rules;
- Support for Participants Rules;
- SDA Rules; and
- NDIA's Operational Guidelines.

OTA believes this process need not be so complicated and time consuming. Now is the time to simplify it.

Conclusion

OTA thanks the Department of Social Services for the opportunity to provide comments on the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 and changes to the NDIS Rules.