

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

Submission to Department of Social Services

7 October 2021



Introduction

National Legal Aid (NLA) welcomes the opportunity to provide this submission to the Department of Social Services consultation on the Exposure Draft - *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* and the associated Rules.

About National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Our submission

In 2019, NLA made a submission to the 2019 review of the National Disability Insurance Scheme (NDIS) Act and the new NDIS Participant Service Guarantee (the Tune Review) entitled *Putting People First – Removing Barriers for People with Disability to access NDIS supports*.

The submission drew on the stories of LAC clients in navigating the NDIS and made forty-six recommendations for improvements, including recommended timeframes for decision making and changes to law and practice. Many of our recommendations were reflected in the Tune Review report.¹

In general, we support the changes that are proposed to the *National Disability Insurance Scheme Act 2013* (the NDIS Act) and associated instruments as part of this review. We consider that many of the proposed changes will bring benefits to our clients, including:

- Improvements to the access criteria for psychosocial disabilities;
- Clear timeframes for decision making;

¹ David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013, Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019 (the Tune Review report).

- Changing the confusing terminology around multiple uses of the term ‘review’; and
- Removing procedural hurdles in the Tribunal caused by replacement plans.

Our submission to this consultation will focus on areas where we think additional changes and clarifications could bring further benefits to prospective participants and participants in the NDIS.

The submission is in four parts:

1. The Participant Service Guarantee.
2. The proposed changes to powers to vary and reassess plans.
3. The proposed changes to the access criteria.
4. The proposed changes to the Plan Management Rules.

Our recommendations for changes to the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Amendments) Bill 2021* and to the Rules instruments are at the end of the submission.

1. The Participant Service Guarantee

We refer to the items in Schedule 1 of the Exposure Draft Bill, and provisions in the proposed *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021* (Cth) (Participant Service Guarantee Rules), which institute timeframes for decision making by the Agency. As the Tune Review report said, the provision of timeframes should give some degree of certainty to applicants and participants, improving their experience of the NDIS.

We largely endorse the timeframes proposed as part of the implementation of the Participant Service Guarantee, noting the following specific matters.

1.1 Period for approving a statement of participant supports for children under 7 (rule 8, Participant Service Guarantee Rules)

In relation to the period for approving a statement of participant supports, we understand the rationale for the prescription by rule 8 of the Participant Service Guarantee Rules of a lengthier period for approval where the participant is aged under 7 (of 90 days rather than 56). However, we note that it will benefit a child for there to be certainty and clarity as to their statement of participant supports, and we encourage the Agency to take steps to make decisions in these cases as early as possible.

1.2 Time for a plan implementation meeting (rule 9, Participant Service Guarantee Rules)

We refer to the prescription by rule 9 of the Participant Service Guarantee Rules that a plan implementation meeting be held within 28 days of acceptance of an offer of such a meeting, which in turn must be made as soon as “reasonably practicable” after approval of a plan. We note that this is a slightly longer period than the 28 days from plan approval recommended by the Tune Review. It is also less stringent than the 14 days from plan approval proposed by NLA.

1.3 Policy to assist in interpreting “complex” needs and risks (rule 10, Participant Service Guarantee Rules)

We refer to the period prescribed by rule 10(3) of the Participant Service Guarantee Rules, of 28 days for the variation of a plan following a request for variation, save “if the request addresses complex needs or raises complex risks, or relates to complex assistive technology or complex home modifications”, which are to be dealt with in 50 days. We recommend that the Operational Guidelines are updated to include guidance on what might constitute “complex needs”, “complex risks”, “complex assistive technology” or “complex home modifications”, before the Participant Service Guarantee Rules take effect.

Recommendation 1: Participant Service Guarantee

The Operational Guidelines should provide guidance on what might constitute “complex needs”, “complex risks”, “complex assistive technology” and “complex home modifications” for the purpose of rule 10(3) of the *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021*.

2. Variation, reassessment and merits review

The Tune Review report recognised the need for some power for variation of an NDIS participant’s plan, without it being replaced. In the lives of many people with disability, there will be circumstances which occur which change their support needs, and thus require changes to their NDIS plan. It will not always be appropriate that the plan be replaced: the plan may largely be fit for purpose. For example, the Tune Review report noted that the creation of a new plan would likely require the re-establishment of service bookings with providers.² By way of further example, and more notably, the replacement of a plan has implications for the conduct of merits review proceedings still on foot. For these reasons the review process offered by s 48 of the NDIS Act will not always be optimal, as it leads to the creation of a new plan.

Recognising this, the Tune Review report sought to draw a distinction between the ‘plan amendment’ power it proposed be inserted into the NDIS Act, and the s 48 process (which is proposed to be renamed ‘reassessment’). The Tune Review report specified a number of circumstances in which the ‘plan amendment’ power would be open to be exercised.³ It is clear from the list of specified circumstances in the Tune Review report that the proposed plan variation power was intended to allow for variation in circumstances such as where there is a crisis or emergency requiring funding, where there is a typographical error in the participant’s plan, or where an Administrative Appeals Tribunal (Tribunal) decision needs to be implemented.

Insofar as the proposed s 47A in the Exposure Draft Bill is intended to allow the Agency to deal with the circumstances outlined in the Tune Review report, we recognise that there is value in instituting such a power.

² The Tune Review report [8.31].

³ The Tune Review report [8.33].

The version of s 47A contained in the Exposure Draft Bill, however, confers an unconfined power on the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) to undertake a variation of a participant's NDIS plan, on the CEO's own initiative or on the request of the participant. The proposed new s 48 provides that a reassessment may be conducted at the CEO's own initiative, with no right for a participant to request such a reassessment.

Several issues arise in relation to the proposed s 47A and the revised s 48. First, its unconfined terms, with the power able to be exercised for an unlimited variety of purposes. Second, that the participant may not request the exercise of the reassessment power. Third, the considerations proposed to be imposed by new NDIS rules.

2.1 The unlimited scope of s 47A

The text of the proposed s 47A does not confine the circumstances in which the CEO may exercise the variation power, beyond providing at s 47A(6) for rules to be made as to matters to which the CEO must have regard in deciding whether to vary a plan. The proposed *National Disability Insurance Scheme (Plan Administration) Rules 2021* (Cth) (Plan Administration Rules) set out a number of considerations, at rules 10 and 11, which must be taken into account in deciding on variation at the CEO's own initiative, and at the participant's request, respectively. These considerations are at a high level of generality. They do limit the exercise of the CEO's variation power to the circumstances in which the Tune Review report contemplated it should be exercised.

In our submission, there is no compelling reason why the proposed s 47A power should be unconfined. The Tune Review report suggested a power to amend a plan without creating a new plan "in certain limited circumstance", and laid out an appropriate (and appropriately flexible) range of circumstances for the exercise of the mooted 'plan amendment' power.⁴ We note the Tune Review report indicated that the purpose of the proposed variation power would be to allow for "quick adjustments ... reserving the formal review process for participants who have had a significant change of circumstances".⁵

Recommendation 2: Variation power

The exercise of the proposed s 47A of the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* variation power should be limited to the circumstances laid out in the Tune Review report:

- 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

⁴ The Tune Review report at [8.33].

⁵ The Tune Review report at [8.34].

- 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.

2.2 The absolute discretion of the CEO in relation to reassessment

We note that the variation power is proposed to be exercisable at the CEO's own motion or at the participant's request, but the revised s 48 will provide for reassessment only on the CEO's own initiative. There is no reason, in our submission, for a participant not to have a right to request a reassessment rather than a variation, noting that the decision to exercise the variation power would, irrespective, remain at the CEO's discretion. If a participant were given that right, a request for s 48 reassessment could be dealt with in the same way as a variation request. That is:

1. by reassessing;
2. by refusing to reassess but varying; or
3. by refusing to reassess or vary.

Recommendation 3: Reassessment power

An NDIS participant should be permitted to request the exercise of the proposed s 48 of the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* reassessment power.

2.3 The merits review provisions relating to plan variation

We endorse the proposed amendment to s 103 of the NDIS Act by clause 48 of Schedule 1 of the Exposure Draft Bill. Deeming the Tribunal to have jurisdiction over a plan as varied, or a plan which has come into effect for the participant, will likely prevent situations occurring as exemplified in *Williamson and National Disability Insurance Agency* [2019] AATA 2944. That is, situations where an application for review of a plan is submitted to the Tribunal, but before the review is heard the plan is replaced. Currently, the Tribunal lacks clear jurisdiction to review the new plan in such circumstances.

We also endorse the repeal of s 37(2) of the NDIS Act, which has created unnecessary confusion about the scope of the power of the Tribunal to undertake review.

A significant issue affecting NDIS participants in recent months has been the uncertain state of the Tribunal's jurisdiction in relation to NDIS supports matters. There is currently

disagreement within the Tribunal as to whether it has the power to consider supports not explicitly requested by a participant on internal review.

The matter before the Tribunal, on an application for review under s 103 of the NDIS Act made by a participant seeking additional supports, is the decision to approve a statement of participant supports.

The general approach to the exercise of merits review jurisdiction in Australian law was recently described by the High Court in this way:⁶

... except where altered by some other statute, ... the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address.

It follows, in our view, that it is the whole matter before the decision-maker that is subject to review, not limited by either the submissions made to the decision-maker or the particular grounds of the original decision.⁷ Secondly, it is open to the Tribunal to have regard to things that have occurred after the decision under review (such as, for example, further expert reports, which, in the case of the NDIS may contain recommendations for additional or different supports).⁸ The NDIS Act does not expressly restrict the role of the Tribunal on review and therefore does not modify those general principles.

Despite these strong norms in relation to merits review in Australia, in *QDKH and National Disability Insurance Agency* [2021] AATA 922 (*QDKH*), the Tribunal concluded that:

23. The Tribunal's jurisdiction is limited to reviewing a decision made by a reviewer. This is the only jurisdiction given to it by section 102 of the NDIS Act.

24. In Fuad and Telstra Corporation Limited, the Tribunal President, Justice Downes, said:

... all matters put before the decision-maker as part of a claim under the [Safety, Rehabilitation and Compensation] Act are before this Tribunal for review when an application for review is made, even though the decision may not address them in any particular way. That leaves a problem identifying

⁶ *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [51] (Bell, Gageler, Gordon And Edelman JJ) (footnotes removed); see also at [15] (Kiefel CJ, Keane and Nettle JJ).

⁷ *Novosel v Comcare* (2017) 72 AAR 269 at [92], citing *Casarotto v Australian Postal Commission* (1989) 86 ALR 399 at 402; *Pacific International College Pty Ltd and Secretary, Department of Education and Training* (2015) 67 AAR 412 at [18]-[19] (DP Tamberlin).

⁸ See, e.g., *Shi v Migration Agents Protection Authority* (2008) 235 CLR 286 at [99] (Hayne and Heydon JJ).

exactly what was before the decision-maker but that is a practical problem and not a jurisdictional problem.^[6]

25. *It is important to note that the President referred to “matters **put before** the decision-maker”. [Emphasis added]. These are the matters in respect of which the Tribunal has jurisdiction.*

As a consequence, the Tribunal held it was limited in terms of the supports it could consider; it could not consider requests for supports raised for the first time at the Tribunal.

QDKH has been followed in a number of subsequent cases.⁹ However, a number of other Tribunal decisions have articulated a contrary view.¹⁰ Notably, in *VXVL and National Disability Insurance Agency* [2021] AATA 1709, Member Buxton held:¹¹

There is no basis to conclude that the Tribunal’s jurisdiction to review a decision made under subsection 33(2) of the NDIS Act would be limited by virtue of the fact that a participant failed to identify all aspects of the decision with which they disagreed, or particular supports that should have been included, when initiating an internal review under section 100 of the NDIS Act.

This question – the scope of the Tribunal’s jurisdiction in supports matters – is still being litigated, with a pending appeal before the Full Court of the Federal Court. However, for the avoidance of doubt, we consider that the NDIS Act as it stands provides ample scope for the Tribunal to consider any new supports sought by the participant at hearing. That said, we suggest that the NDIS Act be amended to make it clear that the Tribunal truly ‘stands in the shoes’ of the Agency. Confirming the scope of the Tribunal’s jurisdiction would also recognise the profound need for a broad review jurisdiction, for people with disability, some of whom will inevitably have their support needs change over time.

Recommendation 4: Tribunal’s jurisdiction on review

The *National Disability Insurance Scheme Act 2013* should be amended to confirm the full scope of the Administrative Appeals Tribunal’s jurisdiction in relation to s 33(2) decisions.

3. Access requirements

3.1 Proposed Amendments Relating to Psychosocial Disabilities

3.1.1 Terminology

We welcome the removal of the term “psychiatric condition” in favour of “psychosocial disability” in ss 24 and 25 NDIS Act and in the new *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* (Becoming a Participant Rules). The terminology better

⁹ See, e.g. *BWLK and National Disability Insurance Agency* [2021] AATA 1631; *Napper and National Disability Insurance Agency* [2021] AATA 2363.

¹⁰ See, e.g. *Dunstan and National Disability Insurance Agency* [2021] AATA 2406; *Steley and National Disability Insurance Agency* [2021] AATA 2539.

¹¹ At [26].

aligns with the social model of disability and reflects the submissions of mental health organisations to the Tune Review.¹²

Currently the NDIA's information about psychosocial disability says:

Psychosocial disability is a term used to describe a disability that may arise from a mental health issue.

Not everyone who has a mental health condition will have a psychosocial disability, but for people who do, it can be severe, longstanding and impact on their recovery. People with a disability as a result of their mental health condition may qualify for the NDIS.¹³

For this change to have its intended result – clarifying and simplifying access for people with psychosocial disabilities¹⁴ – the material for practitioners about how to assess whether an impairment causes a psychosocial disability should be revised.

3.1.2 Permanency of Psychosocial Disability (rule 8)

We welcome the change to the rules that remove the requirement to show that there are no known, available and appropriate evidence-based clinical or medical treatments that are likely to remedy an impairment for a psychosocial disability. We consider that this requirement did not adequately take into account the recovery model of mental health.¹⁵

However, we have concerns about the way that the new rule is phrased. There are a number of components to the requirements in rule 8 of the Becoming a Participant Rules that are not defined and require evaluative judgment.

Substantial improvement: For example, in rule 8(2)(a)(ii), there is no guidance about what would constitute a “substantial improvement” in a person’s functional capacity such that the impairment can be said to no longer be permanent. Similarly, there is no explanation of what will be considered a reasonable period of time to have undergone treatment without substantial improvement. Without clarification, this assessment is left to individual decision makers, who may reach different conclusions about “substantial improvement” and “reasonable” time, leading to inconsistent decision making.

It is also difficult to reconcile assessing whether there has been a “substantial improvement” in functional capacity with the recognition of the fluctuation and episodic nature of many psychosocial disabilities. A fluctuating or episodic impairment inherently has periods that are better and worse. Between episodes, NDIS supports can be just as critical to allow someone to continue to live an ordinary life and to continue to work on their recovery. Our concern is that periods between episodes could be conflated with

¹² See, for example, submission from Mental Health Australia in the Tune Review report at page 73.

¹³ National Disability Insurance Scheme, [Mental health and the NDIS | NDIS](#)

¹⁴ The Tune Review report, page 9.

¹⁵ See the Tune Review report at pages [5.10] to [5.19].

“substantial improvement”, which could see people with psychosocial disability incorrectly excluded from the Scheme.

Reference to condition: The rule also contains a third descriptor for what is being assessed – “a mental, behavioural or emotional condition”. The relationship between condition, impairment and disability is not explained in the Becoming a Participant Rules.

Managing a condition: This phrase is used twice in the rule at 8(2)(a)(i) and 8(2)(b). In decisions of the Agency that we have seen, there is generally a distinction made between ‘treatment’ and ‘management’ of a condition which comes in part from the wording of Schedule 1 of the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, particularly rules 7.4, 7.5, 7.6 and 7.7. These rules, which delineate the responsibilities of the NDIS and of the health and mental health systems, make a distinction between treatment/clinical support and maintenance supports that focus on a person’s ability to function and participate in daily life.

Many NDIS participants who have psychosocial disabilities receive support from psychologists, support workers, coaches or mentors under the Scheme to manage the impacts of mental, emotional or behavioural conditions on their lives. We are concerned that these rules may be interpreted so that a person who needs support to manage their psychosocial disability under the NDIS could be excluded from accessing it on the basis of rule 8(2)(b). To avoid this unintended consequence, we recommend that the term ‘managing’ is removed from the section, or alternatively that ‘treatment’ is defined to exclude the mental health support that a person may receive under the NDIS.

3.1.3 Psychosocial and Non-Psychosocial Disabilities

While we recognise that there was a need to create separate criteria for psychosocial conditions and non-psychosocial conditions, we consider that there are changes that are needed to NDIA practices to ensure that this separation does not disadvantage prospective participants.

In our submission to the Tune Review, we wrote about the Agency’s reliance on the idea of a primary disability, when many of the clients we assist have multiple impairments that impact them significantly.¹⁶ With the proposal to apply two separate sets of criteria to the two categories of disability, there is even greater need to ensure that decision makers look at the disabilities and needs of applicants holistically and consider the ways in which multiple disabilities can compound each other.

3.1.4 Substantially Reduced Functional Capacity for Psychosocial Disability (rule 10)

Rule 10 sets out the requirement for the Agency to be satisfied that a person with a psychosocial disability has a substantially reduced functional capacity. Subrule 10(3) directs

¹⁶ National Legal Aid, *Putting People First – Removing Barriers for People with Disability to access NDIS supports, Submission to the Review of the NDIS Act and the new Participant Service Guarantee*, 4 November 2019, at page 39.

the decision maker to consider the overall effect of the impairment or impairments over a “period of time that is reasonable”, considering the nature of the impairments, including whether an impairment is episodic or fluctuates.

We recommend that “over a period of time that is reasonable” is removed from subrule 10(3). We are concerned that the subsection as it stands could allow a decision maker to decline or delay deciding on an application on the basis that they consider more time is needed to observe the overall effect of an impairment. This is counter to the aim of the Participant Service Guarantee to promote timely decision making.

Rule 10(2) directs the decision maker to consider the assistance a person with a psychosocial disability needs from a person to participate in the activities in s 24(1)(c) NDIS Act. We recommend that the word “usually” is removed from rule 10(2)(a) to better reflect the often episodic or fluctuating nature of psychosocial disabilities. In our experience, there are prospective participants who experience acute episodes in which they require intensive support and periods where they require less intensive support. Although rule 10(3) guides the decision maker to consider the overall impact of the impairment, it does not remove the requirement to be satisfied that the person usually requires assistance. This could push the two rules into contradiction and incorrectly exclude from the Scheme prospective participants with severe but fluctuating impairments.

This change must come with a revision to the Operational Guidance on how to assess substantially reduced functional capacity. Currently, the Guideline on Access says:

When considering whether a fluctuating or episodic impairment results in substantially reduced functional capacity to undertake relevant activities, the NDIA will consider the impact on the person’s ability to function in the periods between acute episodes.¹⁷

We are aware that in some cases the Agency has taken this to mean that only the person’s ability to function between acute episodes is relevant, rather than its natural meaning that functioning both during and between acute episodes is relevant. The wording of the Operational Guideline should be revised for clarity.

3.1.5 Conclusion

The proposed amendments to better reflect the nature of psychosocial disabilities and their functional impacts are welcome. We recommend further revisions to remove uncertainty and ensure that the amendments have their intended effect. We also consider that updates to Operational Guidelines and advice to mental health practitioners will be essential to promoting fair, timely and correct decisions on access for psychosocial disabilities.

¹⁷ National Disability Insurance Scheme, Operational Guidelines - [Access to the NDIS - The disability requirements | NDIS, 8.3.1 When does an impairment result in substantially reduced functional capacity to undertake activities?](#)

Recommendation 5: Permanency for psychosocial disabilities

- A. That rules 8(2) and 12(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, be substituted as follows:
- (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 impairment or impairments attributable to a psychosocial disability; 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 impairment or impairments attributable to a psychosocial disability that is likely to lead to a substantial improvement in the person's functional capacity is reasonably available to the person.
- B. That the meaning of "substantial improvement" and "period of time that is reasonable" are specified in the Rules.

Recommendation 6: Substantially reduced functional capacity for psychosocial disabilities

- A. That "over a period of time that is reasonable" is removed from rule 10(3) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.
- B. That "usually" is removed from rule 10 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* so that the rule reflects the intention that the episodic and fluctuating nature of some psychosocial disabilities is taken into account.

Recommendation 7: Changes to Operational Guidelines

- A. That the Operational Guidelines and guidance to mental health practitioners are updated to describe when an impairment will be said to cause a psychosocial disability.
- B. That the Operational Guidelines are amended to clarify the original intention that a person's functioning both during and between acute episodes is relevant to determining whether they have a substantially reduced functional capacity.

3.2 Proposed Amendments Relating to Access for Non-Psychosocial Disabilities

The new Becoming a Participant Rules also make changes in relation to the requirements and considerations for access for non-psychosocial disabilities.

3.2.1 Permanency of Non-Psychosocial Disabilities (rule 7)

Rule 7 is to replace current rules 5.4 to 5.7 Becoming a Participant Rules. The wording of rule 7 is similar to current rule 5.4, with the addition of two notes providing guidance on impairments that vary in intensity and on degenerative impairments.

There is no equivalent to current rule 5.6, which says that an impairment will be, or is likely to be, permanent only if the impairment does not require further medical treatment or review in order for its permanency to be demonstrated (even though treatment and review may continue after it has been demonstrated.)

We recommend that the principle set out in rule 5.6 be included in the new rules. It is an important part of considering the permanency of an impairment that a distinction is made between ongoing treatment and review of an impairment after permanency is established and treatment that is likely to remedy an impairment.

3.2.2 Non-Psychosocial Disabilities and Impairments of a Fluctuating or Episodic Nature

There is no express recognition in the new rules that disabilities other than psychosocial disabilities can be fluctuating or episodic. While the rule does recognise that impairments might ‘vary in intensity’, the reference in rule 5.5 to fluctuation has been removed. The absence of this wording means that a decision maker isn’t directed to consider whether a disability attributable to a non-psychosocial disability is fluctuating or episodic.

It is not the case that all non-psychosocial impairments are static and unlikely to change. Impairments arising from conditions such as Ehlers-Danlos Syndrome, chronic pain, chronic fatigue syndrome, fibromyalgia and arthritis, among others, can fluctuate significantly. We welcome changes to the legislation which reflect fluctuations of impairments in psychosocial conditions, but we consider that those changes should also be specifically extended to non-psychosocial disabilities. Incorporating the same changes recognises the spectrum of experience of individuals with non-psychosocial disabilities.

3.2.3 ‘Reasonably available’

The new rule 8(2)(b) asks the decision maker to consider whether treatments are ‘reasonably available’ to a prospective participant with a psychosocial disability. We consider that rule 7(2) should also adopt the wording of ‘reasonably available’ for treatment of impairments arising from non-psychosocial disabilities. This would allow a decision maker to take into account reasons why a person may not be able to access a treatment, including accessibility, cost and a person’s choice and control over their own health.

3.2.4 ‘Other’ treatments

The current rule 5.4 directs the decision maker to consider whether there are clinical, medical or ‘other’ treatments that would be likely to remedy an impairment, and that wording also appears in the replacement rule 7. The meaning of ‘other’ treatments is unclear, and therefore open to inconsistent application by decision-makers. We recommend that it is removed from the rule.

3.2.5 Substantially reduced functional capacity of non-psychosocial impairments

There are two significant proposed changes in this rule:

1. to make satisfaction of one of the limbs in rule 9(2) mandatory; and

2. to specify that there be “no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to lead to the impairment or impairments no longer having that result” (rule 9(2)(b)).

We consider that there is no basis in the findings of the Tune Review to make rule 9(2) mandatory. Currently, those who meet rule 5.8 will be deemed to have a substantially reduced functional capacity, but s 24(1)(c) of the NDIS Act allows a decision maker to be satisfied that an impairment causes a person substantially reduced functional capacity although the narrower requirements of the rules are not met.

In the past, this has allowed the Tribunal to make decisions that recognise the different manifestations and impacts of disability. For example, in the matter of *Ray and National Disability Insurance Agency* [2020] AATA 3542, the Tribunal found that the Applicant had a substantially reduced functional capacity in relation to the activity of self-care although she did not meet rule 5.8. It found at [130]:

On balance, the Tribunal is not satisfied that Mrs Ray is usually assisted to undertake self-care activities. The Tribunal does not find that the deeming provision in r 5.8(b) of the NDIS Access Rules applies to Mrs Ray in respect of the activity of self-care. However, the Tribunal is satisfied that Mrs Ray requires a significant degree of assistance and oversight in respect of self-care and that this is provided by Mr Ray. The Tribunal considers that if that assistance and oversight was not provided by him, it is likely that Mrs Ray’s health and well-being would decline. For these reasons, the Tribunal is otherwise satisfied that Mrs Ray’s impairments have resulted in a substantially reduced functional capacity in the activity of self-care, even though the specific deeming provision under r 5.8(b) does not apply in this case.

We consider the current wording of the legislation and rules provides the discretion to make appropriate and flexible decisions about NDIS access that take into account participants’ experience more fully than the proposed change.

In rule 9(2)(b), in relation to ‘treatment that would be likely to lead to the impairment or impairments no longer having that result’, there is a need to make clear that treatment is not intended to include support available to a participant under the NDIS. Otherwise, it is possible that a decision maker might determine a prospective participant should not have access to the Scheme because they could receive supports under the NDIS that would improve their functional capacity.

3.2.6 ‘Usually’ requiring assistance

At 3.1.4 above, we expressed our concerns that the use of the word ‘usually’ when assessing whether somebody requires assistance to perform tasks or activities was limiting for prospective participants with psychosocial disabilities with fluctuating impairments. The same is true of non-psychosocial impairments – there are many people who require individual disability supports for intensive, shorter periods. We consider that it is important that the decision maker still have the ability to find a person’s impairment causes

substantially reduced functional capacity even if it does not meet the narrower requirements of the current rule 5.8. We therefore recommend that rule 9(1) be removed, and that 'only if' is removed from rule 9(2). Alternatively, we recommend that the section is amended so that it better accommodates episodic and fluctuating impairments.

Recommendation 8: Permanency for impairments attributable to non-psychosocial disabilities

- A. That current rule 5.6 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* be replicated in the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.
- B. That note 2 to rule 8 (which notes that an impairment may be permanent despite being fluctuating or episodic) should be replicated for rule 7 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.
- C. That rule 7(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* be amended to specify that any treatment must be 'reasonably available', and that 'other treatment' is removed.

Recommendation 9: Substantially reduced functional capacity for impairments attributable to non-psychosocial disabilities

- A. That rule 9(1) be removed, and that 'only if' is deleted from rule 9(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, so that the current ability of a decision maker to find an impairment causes substantially reduced functional capacity even if the narrower requirements of rule 9(2) are not met is retained.
- B. That 'usually' is removed from rule 9(2)(ii) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* or qualified to better accommodate episodic and fluctuating impairments.

3.3 Revocation

A consequence of these changes is that participants who already have access to the Scheme can have their eligibility reassessed and may be expected to meet requirements that were not in operation when they first applied.

Section 30 of the NDIS Act allows the NDIA to revoke the status of a participant at any time if the CEO is not satisfied that the person meets the disability or early intervention criteria. If a person's status is revoked and they seek an internal review or appeal to the Tribunal, they have no access to supports throughout that review process. This places significant pressure on applicants to pursue their appeal rights without support. If the decision is later reversed, their mechanism to seek reimbursement for supports they otherwise would have been entitled to is unclear.

We are concerned about the potential adverse and unintended consequences of amending the disability and early intervention criteria for access to the NDIS. There are potentially a significant number of participants who meet the current access eligibility criteria who may

not meet the proposed amendments in ss 24 and 25 of the NDIS Act and the Becoming a Participant Rules, or who may not have provided the NDIA with evidence supporting that they meet the amended criteria. If those participants are assessed against the amended criteria, pursuant to s 30 of the NDIS Act, they may have their status revoked. The impact could be devastating with their NDIS funding, and therefore provision of supports, suddenly ceasing. The results could include significant risk of harm to the person following sudden withdrawal of supports, in addition to distress and confusion.

We recommend that s 30 of the NDIS Act be amended so that the CEO can only revoke a person's status as a participant under s 30(b) if satisfied that the person does not meet either the disability or early intervention requirements in operation at the time the person applied for access to the NDIS. This ensures that participants are not adversely impacted by retrospective changes to the Act and Rules, which they had no notice of at the time they established their eligibility for the Scheme.

Alternatively, we recommend that the NDIA develop a policy that includes a process that must be followed if the CEO is considering whether a current participant meets the amended access criteria. This should include, at a minimum – written notice of the intention to reassess eligibility, a period of no less than 3 months to provide evidence to show that the participant does meet the amended criteria and an effective date of revocation no earlier than 3 months after the decision is made to allow the participant to make other arrangements for their care and support.

Further, we recommend that the NDIS Act is amended to include a provision under which if a person's status as a participant is revoked, payments for supports would continue pending a review, similar to s 131 of the *Social Security (Administration) Act 1999* (Cth). This would provide the person with continuity of supports while they obtain evidence in support of their request for review, and time to re-consider their care arrangements and supports in the event that they are unsuccessful on review.

Recommendation 10: Revocation

- A. That s 30 of the *National Disability Insurance Scheme Act 2013* is amended so that a participant's status as a participant can only be revoked if the CEO is satisfied the person no longer meets the disability or early intervention criteria which applied at the time access was granted to the participant.
- B. Alternatively, that the NDIA establish a policy to follow if the CEO is considering whether a current participant of the NDIS meets the amended access criteria. This policy should include:
 - written notice to the participant that their eligibility to the NDIS is being reassessed against the amended access requirements;
 - written notice to the participant of the amended access requirements and an invitation to provide evidence showing they meet the requirements;

- a participant must be given no less than 3 months to provide evidence to show they meet the amended requirements; and
 - if a decision is made to revoke a person's status as a participant, the date the revocation takes effect must be at least 3 months from the date of the written notice (s 33(2) of the NDIS Act).
- C. That the *National Disability Insurance Scheme Act 2013* is amended to include a provision that allows supports to continue pending a review of whether the decision to revoke a participant's status was correct.

4. National Disability Insurance Scheme (Plan Management) Rules 2021

The *National Disability Insurance Scheme (Plan Management) Rules 2021* (the Plan Management Rules) are to replace the *National Disability Insurance Scheme (Plan Management) Rules 2013*. The Plan Management Rules set out how supports should be expressed in a plan and how they should be provided, including whether the NDIA should intervene in the market to provide them. They also set out considerations in relation to the management of funding under an NDIS plan and when various forms of funding management will pose an unreasonable risk to a participant.

In 2019 Victoria Legal Aid and Legal Aid NSW made submissions to the Department of Social Services and the NDIA's *NDIS 'Thin Markets' Project*.¹⁸ In our submissions we outlined the ways in which the NDIA should assist people to access the supports they need, particularly for our clients in rural and regional areas and in custodial settings. The inclusion of a rule that recognises the need for the NDIA to intervene so that participants do not bear the burden of market failures is a necessary and important change.

4.1 Funding and provision of supports included in participant's plan

Subrules 6(2)-(4) of the Plan Management Rules set out different circumstances in which a statement of participant supports must specify who delivers a support or class of supports to a participant, or the manner in which the support/s must be delivered.

Subrule 6(5) explains when the NDIA will intervene to address a problem in the NDIS market and allows the NDIA to prescribe the manner of providing supports or the provider, while taking into account the preferences of the participant and the principle that market intervention should be as limited as possible.

In contrast to subrule 6(5), subrules 6(2)-(4) do not require the CEO to have regard to the preferences of the participant. We recommend that the CEO be required to have regard to the preferences of the participant in any decision under rule 6. Any decision to prescribe

¹⁸ Submission on the Thin Markets Project by [Legal Aid NSW](#) and [Victoria Legal Aid](#) in June 2019.

the way a support is delivered or by whom it is delivered has the potential to affect the choice and control of a participant.¹⁹

Our concern is that participants may be in situations where they are removed from a safe, appropriate and beneficial support environment and placed in circumstances which are undesirable and not suitable to their needs without consultation.

The Tune Review report noted that a barrier to effective use of plans was the rigidity in the way that some supports were described and commended the shift towards greater flexibility in the use of plan budgets. It recommended that the Plan Management Rules be amended to say that supports should be described generally except in limited circumstances.²⁰ We consider that including consideration of a participant's preference for any decision that will result in a support not being described generally is in keeping with this recommendation.

Further, the power for the CEO to specifically identify supports in a statement of participant supports comes from section 33(3) of the NDIS Act. We recommend that it is made explicit that decisions about how to specify supports in a plan, including the manner in which they are delivered and by whom, are part of a reviewable decision under s 33(2). It is important that choice and control over how supports are delivered to a participant are preserved to the greatest extent possible. This means providing a mechanism for participants to be able to seek review if they consider that a decision of the Agency makes about support delivery is incorrect.

Recommendation 11: Specifying supports in a plan

- A. That the requirement to take into account a participant's preference when making decisions about support delivery should apply to each of subrules 6(2)-(4) of the *National Disability Insurance Scheme (Plan Management) Rules 2021*.
- B. That section 33(2) of the *National Disability Insurance Scheme Act 2013* is amended to include 'and (f) whether any of the supports funded or provided are to be provided:
 - (i) by a particular person or provider; or
 - (ii) in a particular manner.'

4.2 Unreasonable risk—registered plan management provider, plan nominee or child's representative managing funding (rule 9)

Section 43 of the NDIS Act sets out the default for NDIA decisions about the management of funding under a plan – if the participant makes a request about how the funding in their plan is to be managed, the NDIA must give effect to that request, unless an exception applies. Currently, there are two exceptions when a request is made - where the Agency

¹⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

²⁰ Tune Review report at [7.12] to [7.17].

considers that self-management would pose an unreasonable risk to the participant, and where the participant has a nominee.

The Tune Review report noted that from 2018 to 2019 there was an increase in participants choosing self or plan management of funding.²¹ We consider that this is a positive development that shows that the Scheme is meeting its aims to provide flexibility and choice to participants. It also noted that it had heard feedback about the risks to participants from plan management and recommended that plan management be subject to the same constraints as self-management.²²

The new rules propose to broaden the NDIA's powers to decline to implement a participant's plan management request. Rule 9 of the Plan Management Rules extends the concept of unreasonable risk to plan management agencies.

We consider that rule 9(2) introduces necessary safeguards for plan nominees and child representatives managing an NDIS plan which includes conflicts of interest, assessment of capacity and for nominees only, misapplication of NDIS funding.

However, we are of the view that including plan management agencies in this section is unnecessarily prescriptive. As the Tune Review report noted, plan management providers are subject to requirements to be registered and to meet the standards set by the NDIS Quality and Safeguards Commission.²³ The relationship between a registered plan management agency and a participant is a professional one that is regulated by agreement and professional standards, and very different from that of a participant and a nominee or representative.

Plan management decisions must be made for plan management reasons – that is, there must be real evidence that the proposed management will not work to see the participant get the supports they need. Plan management decisions should not be used as a way to restrain the way in which supports are delivered (including whether they are delivered by non-registered providers).

The only considerations about whether management of funding by a registered plan management agency would pose an unreasonable risk are:

1. whether, and the extent to which, the risk could be mitigated by the inclusion of particular safeguards or strategies in the participant's plan; and
2. the possibility that the participant may receive supports from a person or entity that is not a registered provider of supports.

We recommend that rule 9(2)(b) which specifies that "*possibility that the participant may receive supports from a person or entity that is not a registered provider of supports*" as an indicator of risk, be removed. It does not reflect the experience of our clients that the use of non-registered providers is not in and of itself an unacceptable risk to the person. In

²¹ Tune Review report at [7.5].

²² Tune Review report at [7.66] to [7.76].

²³ Tune Review report at [7.70].

many cases the ability to use a non-registered provider is important to ensure the effective and flexible operation of a plan. It is open to the Agency to specify certain supports that must be provided by registered providers, which they have done in relation to specialist disability accommodation, specialist behaviour support services, and supports involving the use of a regulated restrictive practice.

Plan management decisions should only be made taking into consideration factors which affect the risk that a person will not receive the support they need, and not their choices about how that support is delivered.

4.3 Unreasonable risk—adult participant managing funding (rule 10)

Again, we recommend that subrule 10(g) is removed for the same reasons as above – the possibility that a person may receive support from a non-registered provider is not an indication of unacceptable risk in itself and serves to limit a person’s choice about how they manage their funding. Other powers exist for the Agency to specify supports that must be delivered by registered providers, and the rule unnecessarily limits the ways in which a participant may exercise choice and control over their funding.

We also recommend an additional consideration for inclusion – that under rule 10 that where a decision is made to change management of funding from self-management to plan management or to remove a plan nominee, the CEO must consider:

- a) whether the plan should be varied to fund capacity building support to assist the applicant to return to self-managing, and
- b) whether to reassess the applicant’s plan due to a change in functional capacity.

This inclusion would reflect the principle that people with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives (s 17A(1) NDIS Act).

Recommendation 12: Unreasonable risk - registered plan management provider, plan nominee or child’s representative

- A. That management by a registered plan management provider is not included in rule 9 of the *National Disability Insurance Scheme (Plan Management) Rules 2021*.
- B. That subrule 9(2)(b) of the *National Disability Insurance Scheme (Plan Management) Rules 2021* is removed.

Recommendation 13: Unreasonable risk – adult participant managing funding

- A. That subrule 10(g) of the *National Disability Insurance Scheme (Plan Management) Rules 2021* is removed.
- B. That under rule 10 of the *National Disability Insurance Scheme (Plan Management) Rules 2021* that where a decision is made to change management of funding from self-management to plan management or to remove a plan nominee, the CEO must consider:

- a) whether the plan should be varied to fund capacity building support to assist the applicant to return to self-managing, and
- b) whether to reassess the applicant’s plan due to a change in functional capacity.

Conclusion and recommendations

We thank the Department of Social Services for the opportunity to be involved in consultations about the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Amendments) Bill 2021* and the associated Rules. These changes are a significant step forward in overcoming the hurdles for prospective participants with psychosocial disabilities and in providing much needed clarity around participants’ review rights about NDIS supports decisions.

Our recommendations for further improvement are as follows:

Recommendation 1: Participant Service Guarantee

The Operational Guidelines should provide guidance on what might constitute “complex needs”, “complex risks”, “complex assistive technology” and “complex home modifications” for the purpose of rule 10(3) of the *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021*.

Recommendation 2: Variation power

The exercise of the proposed s 47A variation power of the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021*, should be limited to the circumstances laid out in the Tune Review report:

- 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.

Recommendation 3: Reassessment power

An NDIS participant should be permitted to request the exercise of the proposed s 48 reassessment power of the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021*.

Recommendation 4: Tribunal jurisdiction on review

The *National Disability Insurance Scheme Act 2013* should be amended to confirm the full scope of the Administrative Appeals Tribunal's jurisdiction in relation to s 33(2) decisions.

Recommendation 5: Permanency for psychosocial disabilities

A. That rules 8(2) and 12(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* be substituted as follows:

(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 impairment or impairments attributable to a psychosocial disability; 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 impairment or impairments attributable to a psychosocial disability that is likely to lead to a substantial improvement in the person's functional capacity is reasonably available to the person.

B. That the meaning of "substantial improvement" and "period of time that is reasonable" are specified in the Rules.

Recommendation 6: Substantially reduced functional capacity for psychosocial disabilities

A. That "over a period of time that is reasonable" is removed from rule 10(3) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.

B. That "usually" is removed from rule 10 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* so that the rule reflects the intention that the episodic and fluctuating nature of some psychosocial disabilities is taken into account.

Recommendation 7: Changes to Operational Guidelines

A. That the Operational Guidelines and guidance to mental health practitioners are updated to describe when an impairment will be said to cause a psychosocial disability.

B. That the Operational Guidelines are amended to clarify the original intention that a person's functioning both during and between acute episodes is relevant to determining whether they have a substantially reduced functional capacity.

Recommendation 8: Permanency for impairments attributable to non-psychosocial disabilities

- A. That current rule 5.6 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* be replicated in the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.
- B. That note 2 to rule 8 (which notes that an impairment may be permanent despite being fluctuating or episodic) should be replicated for rule 7 of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*.
- C. That rule 7(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* be amended to specify that any treatment must be 'reasonably available', and that 'other treatment' is removed.

Recommendation 9: Substantially reduced functional capacity for impairments attributable to non-psychosocial disabilities

- A. That rule 9(1) be removed, and that 'only if' is deleted from rule 9(2) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021*, so that the current ability of a decision maker to find an impairment causes substantially reduced functional capacity even if the narrower requirements of rule 9(2) are not met is retained.
- B. That 'usually' is removed from rule 9(2)(ii) of the *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* or qualified to better accommodate episodic and fluctuating impairments.

Recommendation 10: Revocation

- A. That s 30 of the *National Disability Insurance Scheme Act 2013* is amended so that a participant's status as a participant can only be revoked if the CEO is satisfied the person no longer meets the disability or early intervention criteria which applied at the time access was granted to the participant.
- B. Alternatively, that the NDIA establish a policy to follow if the CEO is considering whether a current participant of the NDIS meets the amended access criteria. This policy should include:
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 - if a decision is made to revoke a person's status as a participant, the date the revocation takes effect must be at least 3 months from the date of the written notice (s 33(2) of the NDIS Act).
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- A. That the requirement to take into account a participant’s preference when making decisions about support delivery should apply to each of subrules 6(2)-(4) of the *National Disability Insurance Scheme (Plan Management) Rules 2021*.
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 - (i) by a particular person or provider; or
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Recommendation 12: Unreasonable risk - registered plan management provider, plan nominee or child’s representative

- A. That management by a registered plan management provider is not included in rule 9 of the *National Disability Insurance Scheme (Plan Management) Rules 2021*.
- B. That subrule 9(2)(b) of the *National Disability Insurance Scheme (Plan Management) Rules 2021* is removed.

Recommendation 13: Unreasonable risk – adult participant managing funding

- A. That subrule 10(g) of the *National Disability Insurance Scheme (Plan Management) Rules 2021* is removed.
- B. That under rule 10 of the *National Disability Insurance Scheme (Plan Management) Rules 2021* that where a decision is made to change management of funding from self-management to plan management or to remove a plan nominee, the CEO must consider:
 - a) whether the plan should be varied to fund capacity building support to assist the applicant to return to self-managing, and
 - b) whether to reassess the applicant’s plan due to a change in functional capacity.

Should you require any further information from us please be in touch with the [REDACTED] on [REDACTED] or [REDACTED]

Yours sincerely,

Louise Glanville
Chair