Submission to the Tune Review on the National Disability Insurance Scheme Act and Rules

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This submission has five main cross-cutting themes. This Review should:

1. Implement a Service Guarantee with an **improved emphasis upon enforceability, precision and detail**.
2. Endorse specific and detailed interventions to **lessen the evidential onus** placed on participants, which is distorting access, funding and outcome under the scheme.
3. Endorse specific and detailed measures to **ensure Agency compliance with tribunal decisions and address the broken review process**.
4. **Limit and properly regulate secondary administrative processes** within the scheme. The processes of quoting and specific approval that have arisen in key areas such as assistive technology and supported independent living is corrosive of people's trust in its administration. The unstructured nature of these secondary processes has obstructed the activation of the market for key supports. These processes should be substantially reformed through **specific legal obligations regarding timeframes and limiting recourse to them**.
5. The Review should endorse a **timely, accessible and legislated mechanism for the person-centred conciliation of federal and state disputes regarding service responsibilities**. An **independent advocacy clearing house** should be co-funded so that individuals are supported to access the services and reasonable adjustments the NDIS plan is premised upon. This clearing house should also have a mandate to support individuals to navigate the health system in applying for the NDIS.

The NDIS does not lack values, principles, political support or big policy concepts. It lacks definitions, clear evidential thresholds and precise secondary legislation. Too many core elements of the scheme are regulated through vague, inherently limited operational policy rather than the firm policy leadership and administrative certainty offered by formal NDIS rules. Fundamentally I would encourage the Review Team to create a detailed document that differs from general policy takes offered by the parliamentary or Productivity Commission reviews.[2] This review represents the best opportunity to present a firm blueprint for concrete legislative action to deliver the shared vision of the scheme. This review will succeed only if it puts direct and focused recommendations to COAG and the Federal Government. Statements of a more general or limited character will, similar to the 2015 review of the Act, simply drift off the COAG or Federal parliamentary agenda.

[1] I am co-author of the regular NDIS Digest available at: https://www.latrobe.edu.au/lids/resources/aat-ndis-decision-digest, and am engaged in ongoing legal research into the scheme.

[2] It is notable that in the entire term of the last parliament the Joint Committee on the NDIS did not call for legislative amendments or push forward the 2015 review proposals. This is a contributing to a dynamic where the Agency is the sole addressee of a crowded, reactive policy agenda. While there is an inbuilt focus on the service guarantee, this review needs to deliver clear recommendations to interrupt the failures in policy leadership by the Department of Social Services and COAG.

The review can be an important circuit-breaker on the tendency of Senate committees, the Department of Social Services, and COAG to avoid making needed legislative reform a point of emphasis. Despite the emphasis on "service standards" in its terms of reference, the Review should not simply attribute any past or current challenges to Agency underperformance. Policy settings such as staffing caps and the silences within the formal legislative framework have driven many negative experiences within the scheme. Unfocused claims e.g. "the Agency is responsible for market stewardship" must not distract from the fact policy responsibility for the *design* and *implementation* of the scheme rests with the Department of Social Services and COAG. The Agency is not, in any way, the sole author of any its difficulties. As with all things NDIS, there is much to celebrate and value in its work.

Q 1: Which of the above principles do you think are important for the NDIA to adhere to, and why?

Recommendations:

- **When correctly re-drafted to ensure the proper emphasis on enforceability and a clear range of actual meaning, all these principles can be endorsed. None of these principles should be endorsed in their current form as they are not sufficiently clear and certain to promote practical change.**
- **The Review should underline that the concept of a "Guarantee" must be understood as embracing mandatory, enforceable duties of sufficient precision. Otherwise the language of "guarantee" should be avoided in favour of a more accurate label for the corporate character of the "commitment" e.g. "preferred internal customer service values"**
- **The refined principles should be included in legislation, with direct, supporting commitments to <u>ensure implementation</u> placed into delegated legislation.**

The Proposed Principles are unenforceable and reflect a flawed regulatory philosophy

The government's stated policy is to construct a participant service **guarantee**. None of these current principles possess the necessary levels of precision, detail or mandatory character to fall within the ambit of this commitment. While acknowledging that timeframes (or *"standards"* for timeframes?) will be legislated, the discussion paper immediately flows away from the key debate of *how* to regulate:

> "…These approaches include quality frameworks designed to encourage good internal processes, statutory timeframes for responsiveness, service standards to set good practices, or statements of rights or charters intended to make it clear what users can expect."

This sentence is remarkable for the manner in which it passive aggressively pivots off the option of enforceable standards of conduct.[3]

[3] As outlined under question 4, while the discussion paper notes that "These principles may or may not be legislated alongside specific timeframes" it does not seek submitters views on this. This needs to be remedied through a process of reflection and determination by the Review Team.

Properly read it becomes clear that what is termed a "guarantee" by the discussion paper is threatening to become:

- A quality framework which "encourages"
- Sets 'good practices'
- Constitutes a statement of expectation rather than an enforceable guarantee of conduct.

As a lawyer, none of the principles in their current form are enforceable or even likely to constitute practical tools for the administrative appeal tribunal when it stands in the shoes of decision-makers on appeal. At a time when the Act requires serious review, when significant areas of the Agency's operational guidance are not reflecting the letter or values of primary legislation, a focus on generality, however well meaning, is a substantial misdirection of regulatory effort. The Review should not lapse into principles-based drafting without serious reflection and the existing literature is clear on the substantial downsides and limited reach of principles shaped regulation.[4]

An affinity with the "corporate speak" of customer service should not blur the centrality of defined legal responsibility. At the level of *plain English*, that is what defines and distinguishes a ***guarantee***. Ironically the paper contemplates secondary administrative processes of "measurement" that will actually increase the red tape this review is formed to combat. The Review should focus upon developing a solid core of detailed, concrete legal duties which sit underneath the existing legislative framework.[5] Happily, these will also require fewer top-heavy organisational processes to parse, oversee and report upon, and can be enforced, if necessary, through existing internal review and complaint processes.

The Principles should be redrafted to better deliver the promised "guarantee"

This submission argues that the Review should avoid unenforceable high-level principles of "endeavour" in favour of more precise, impactful guarantees of conduct. Should the Review Team wish to maintain the current hortatory principles, I would argue that their meaning is best spelled out by immediately accompanying them with the type of specific legislated obligations I outline here. Whether we label them specific obligations or service standards is irrelevant. What matters most is the obligatory status and specific content.

Principle 1: "Decisions are made on merit"

"The NDIA must act in a transparent, informative and collaborative spirit so that participants understand why decisions are made"

[4] I have elsewhere argued that the use of principles in section 3 and 4 has not succeeded: Bedford and O'Donovan reference available at: https://research.bond.edu.au/en/publications/are-objects-provisions-valuable-to-primary-decision-makers-the-ca The Act and rules are producing litigation because they are not specific enough, and use broad labels like "reasonable relative to costs" without unpacking the guiding logic with precision.

[5] The author is of the broad view, that outside of its utterly disastrous system for reviewing decisions and its generality at key spots, the primary legislation is a pretty solid starting foundation. The key driver of the Scheme's problems has been the absence of detailed secondary rules. The primary legislation was intended to function as a framework that was later filled in by direct political choices made through the NDIS rules. The author makes no political speculations about why these choices have not occurred, but fundamentally the delegated legislation level is the regulatory lever the review should focus on.

An unfocused statement like "decisions are made on merit" involves legislating or restating what should, in the context of a professional Australian Public Service, be hardly worth saying. The principle would be improved by clarifying that the issues here are ones of detail, not motivation: what are the logics of the legislation? What are the evidence thresholds for access? How do we transparently and legitimately balance cost – benefit? There are a range of really concrete, legislative actions that can be taken to enhance consistency or to support people to tender evidence describing their situation.

Imposing some duty of happy "spirit" would be an innovative but unwelcome experiment for the Australian statutebook. Setting that vague, placeholder language to one side, this principle can be supported if it is redrafted to reflect actual functional requirements or *guaranteed* conduct on the part of the Agency,

Proposed Redrafted Principle and supporting rules:

Principle:

The Agency must act in a transparent manner, It must take all available practicable steps to ensure that participants understand the factual, expert and financial determinations upon which decisions or actions concerning them are based.

The Agency must ensure that individuals' requests, plans and circumstances are approached in a consistent manner.

Specific obligations:

- **The Agency must ensure that individuals' access or funding to the scheme does not reflect their inability to secure information narrating their disability, support needs or potential outcomes. The Agency must exercise its power of information gathering to secure any required assessments where a person is not capable of engaging with health system or bears a vulnerable cohort indicator defined by secondary legislation.[6]**
- **The Agency must ensure that all actuarial material and financial justifications supporting its "typical" funding levels are published and included in its reasons for planning decisions.**
- **The Agency must not table actuarial data during tribunal matters which has not been previously published publicly on its website or disclosed earlier in the internal review process.**
- **The Agency must limit recourse to expert evidence where the individual has already supplied medical evidence from a treating doctor or therapist of established qualifications. Specifically, the Agency must not secure additional expert information at tribunal stage which it chose not to secure this during internal review or the access or planning process.**
- **When communicating an access decision at first instance, the Agency must provide a core, factual explanation of why substantially reduced capacity in each specific functional field was not established.**

[6] The principle here is that while we must respect the state-federal division of responsibilities, there needs to be much greater policy leadership to ensure we do not replicate the disadvantage within the health system. There are further proposals to address the legitimate moral hazard of states leveraging the NDIS to save their diagnostic budgets elsewhere in the submission.

- **The Agency must ensure knowledge of the value for money criterion by ensuring that all workplace instructions which relate to escalated approvals or internal guidance regulating funding approvals above "typical amounts" or beyond "reference packages" are immediately published.**
- **The Agency must publish anonymised descriptions and outcomes of all settlements approved at the Administrative Appeals Tribunal.**

Principle 2: Expert

This principle is quite well expressed, and requires the least amendment but I would refocus it like this:

All practicable measures will be taken to ensure NDIA staff have the high level of disability training necessary to adequately assess and value the impact particular disabilities have on people's lives.

Specific obligations:

- **Decision makers must identify and record what supports are most effective for every participant's disability as part of the planning process.**
- **The Agency must ensure the publication of all its commissioned expert reports categorising available treatments or defining impairments. These general positions relating to the remedying of particular conditions must be transparently and consistently balanced against the individual's treatment history at first instance.**
- **In every planning decision the Agency must provide a statement of the benefits which a support will or is contemplated to, deliver. Each plan review must include a statement identifying and recording the benefits produced by the previous plan.[7]**
- **Where proposing preferred service models for early childhood intervention, the Agency must accord priority to the preferences of parents as documented by past productive experiences of successful services.[8]**

Principle 3: Engaged

The NDIA engages with people with disability, their family, carers and other support persons when developing operating procedures and processes.

[7] This avoid the pronounced tendency of decision-makers to rely on typical amounts without adequately recording and considered the individualised benefits attaching to supporting the particular person in front of them.

[8] This did not occur in *WKZQ and National Disability Insurance Agency* [2019] AATA 1480 (24 June 2019).

There is no specific, imperative duty contained in this principle as drafted. The principle's focus is clearly to ensure the proposed transparency principle applies to the Agency's internal ordering as an institution. The principle's current emphasis on *procedures* and *processes* neglects the importance of disability led participation in other, vital institutional matters such **as staffing, leadership, training and procurement**. I submit that a more accurate, concrete and freestanding redraft would be:

The NDIA must ensure effective participation of and consultation with, people with disability in all matters relating to its staffing, operational processes and policy design.

The NDIA must ensure all information required to ensure effective participation and consultation is provided to representative organisations, people with disability and their advocates through the prior publication of all internal operational information such as task cards, actuarial data and commissioned medical research.[9]

As an administrative lawyer I would underline that every Agency decision needs to be driven by an understanding how a person's everyday life is navigating and how potential can be unlocked. This is as important, legally speaking, as technical interpretations or actuarial modelling. People with disability are experts in their own lives: directly mandating a target for the employment of people with direct lived experience at all levels of the organisations should be considered.

Principles 4&5: Connected and Valued

Neither of these principles constitute rules of substantive conduct as such, being rather unstructured procedural obligations to "work well to ensure" or to generate subjective feelings in others. I would redraft these principle to incorporate a substantive duty to identify and determine disputes relating to service boundaries. I strongly support the principle that everyone should feel valued etc, but the legislated principle should attempt to address the institutional, as well as the interpersonal, context in which this is most likely to occur.

In giving Agency staff concrete support to implement the worthy aims of the current principles, I would propose creating a statutory dispute resolution mechanism and a federal-state advocacy clearing house. The latter body would help the warm handover to the mainstream services system that must accompany every access refusal or ensure that the general supports listed in every plan are actually functioning.

Redrafted Principle:

Add the following to the current draft:

The NDIA must take all practicable steps to ensure the timely resolution of disputes relating to boundaries between its responsibilities and those of other state and federal departments.

[9] While this is a small matter in the context of the overall review, it would be helpful if the Agency simply published and live streamed its existing invited stakeholder briefings. The disability sector is under tremendous strain, and the flow of information needs to be improved. The existence of these Chatham house esque briefings is a source of confusion for participants. The material is obviously FOI-able. The most informative material relating to important features like the complex support needs pathway has tended to be shared via these seminars.

Specific Implementation Measures:

- **A timely, accessible, person centred mechanism for arbitrating boundary disputes between federal and state governments should be established by legislation.**
- **A NDIS-state advocacy clearing house should be legislated and fully funded, with a mandate to ensure participants are supported to secure the reasonable adjustments or general supports upon which their NDIS plan are premised. These advocates can also lodge NDIS review where there is a mainstream service or general support breakdown.**

Principle 6: Addressing intersectional disadvantage

All people with disability can understand and use the NDIS, and the NDIS ensures its services are appropriate and sensitive for Aboriginal and Torres Strait Islander people, people from Culturally and Linguistically Diverse (CALD) backgrounds, LGBTQIA+ and other individuals.

Firstly, unlike the previous four, this principle features mandatory language such as "ensures". It is notable however, that the addressee of this principle is, confusingly, the *National Disability Insurance Scheme.* The first clause is directed at the goal that everyone can "use" the scheme, rather than concretely addressing the Agency actions obligation to deliver this. The second clause refers to how the "NDIS ensures its services", which again, reads confusingly as potentially referring to services (supports) offered by providers? Any principles underpinning the Service Guarantee must obviously be clearly directed at what the Agency is obliged to deliver for participants.

The current draft also reminds us the sheer number of similarly worded principles already in the Act – which is a reminder of the possible duplication in the Review's approach should it retain the generality of the current principles.

Recommendation:

This principle is very welcome but must be refocused to specifically relate to <u>all Agency actions.</u>

Supporting Specific Obligations:

The Agency should placed be under enhanced obligations of information gathering e.g. to secure required assessments or ensure first instance advocacy support, where a person belongs to a recognised "hard to get" or diverse cohort.[10]

*It is not appropriate for an academic to paternalistically suggest a definition or model of protection for diverse cohorts. The Review Team should closely consult with CALD, indigenous and other representative bodies in designing specific obligations to guarantee compliance with this principle. **<u>I would propose that a set of NDIS rules be passed to specifically address the equity gap in the NDIS.</u>***

Principle 1: Timely

The NDIS process will be easier to understand and use, enabling decision to be taken more quickly

This proposed principle does not focus adequately on the Agency's existing obligations to reach timely decisions. Secondly, the obligation such as it is, is to put in place an "easier" (relative term) process to "understand" and "use", rather than a direct obligation to take access, planning and review decisions promptly. The principle simply does not grasp the nettles before the Review Team: who will support people to chase paper in scheme? At what point is the agency being too rigid in the evidence it demands? How has review process spun out of control to such an extend that leading members of the Administrative Appeal Tribunal have been forced to publicly condemn it? These issues are vital and are intended to be at the front of the legislative agenda. The principle should be far more direct and reflect the obligations argued for in the package of legislative amendments outlined later in this submission.

Recommendation: Legislate statutory time limits on agency decisions relating to the approval of quotes for assistive technology, specialist disability accommodation. These secondary process need to be formally regulated by legislative requirements.

Question 2: In your experience with the NDIA, do you think they fulfilled the above principles? If not, how are they falling short?

I will focus my comments on the most substantial and significant obligations – merit and timeliness.

"Decisions are made on merit"

Agency failures to abide by this principle are evident in the following tribunal matters:

- The tribunal decisions of *Ewin, Perosh and David,* together with the Federal Court decision in *McGarrigle* underline the recurring failure to properly identify the benefits for transport funding and a rigid adherence to funding levels. In *Ewin* and *David*, the Tribunal specifically warned agency decision makers to disregard the wording of the Agency's current transport policy in making decisions. The manner in which the current transport tightly restricts departures from level 3 funding to a particular exception runs a serious risk of court litigation.[11] The transport policy must be recast to ensure an individualised analysis of the person's circumstances always occurs.
- The Agency has continually tabled actuarial evidence late in the day. It has been presented in a manner which is over general and not probative to the matter at hand.[12]
- The Agency has then not tabled actuarial financial costings where the Tribunal expected it to do so.[13]

[11] Notwithstanding the Full Federal Court ruling in *G v Minister for Immigration*, I remain of the belief that the lack of openness in the policy can arguably be regarded as "cutting down" the analysis required by legislation. Its crude language is undoubtedly a hot house for error at the coalface.
[12] *WRMF and National Disability Insurance Agency* [2019] AATA 1771.
[13] WKZQ and NDIA **[2019] AATA 1480**

- *David and Perosh* show a failure to secure occupational therapist reports where applicants have tendered professional opinions supporting their position. Expert evidence should be properly valued, and challenges to professional judgment only made by commissioned professional judgment based on in person engagement with the individual.
- Two recent access cases show the Agency failing to take adequate account of the caring responsibilities of mothers and arguing their actions in caring to exclusion of their own well being was evidence of function. The NDIS rules need to be recast to properly ensure that those who run risks and sacrifice their lives cannot be superficially dubbed as "functioning".
- Agency policy needs to **avoid unacceptably categorical distinctions**, for instance its bar on funding supports related to professional or representative sport has been condemned by the tribunal in *Sing v NDIA*. Its initial approach to gym funding and private petrol costs have also not survived tribunal review. I'd also nominate its unacceptably crude time-based rule relating to the replacement of assistive technology as also a potentially unlawful cutting down of the individualised analysis required by section 34 of the Act.

Timely

The difficulties here well mapped and will be outlined elsewhere in this submission. The specific barriers to timely decision-making in the NDIS include:

- The legislation restricts formal support for access applicants to those whose applications have been validated, and to whom prospective participant status has been granted. While part of the motivation for this is to avoid a cost push**, the Agency should take responsibility where individuals' existing paper trail is particularly dated and target "hard to get cohorts" for validation, access and planning support**.
- I would be of the view that the Agency has at times been too broad and too rigid in the information it seeks to have participants gather, particularly its position on when a treatment will be appropriate, available and likely to remedy a condition. The structure of the legislation requires that the decision-maker be satisfied of key matters, but there are many probative paths to this. Agency evidence handling is at times too rigid and dependent on the presence or utterance of **magic words**, not substance.
- **The precise circumstances in which the Agency will assist individuals in providing requested reports information gathering policy is unpublished**. The relevant operational guidelines uses only the placeholder phrase "where appopriate". The author has not encountered any published data on the extent of assistance. While this reflects the general reactive posture of social security system, it is a policy setting which can be refined or challenged. Amending the NDIS rules to ensuring accurate diagnostic or support assessment occurs for **key vulnerable cohorts** would ensure the NDIS has ***quality*** data, not just "big" data.
- The **loss of the ability of enforce the requirement that planning reviews occur within a "reasonably practicable" time period must be redressed** by the legislative reforms outlined later in this submission. There is also a need to place the "practical" onus of establishing the grounds for a delay on the agency rather than requiring individuals to lead evidence of unreasonable delay. That would also ensure

that instances are proactively categorised and triaged by the Agency not escalated by individuals.

- **The Agency must abandon the position that an NDIS plan "expire"** and write plans to function on a timeless, pro rata basis until the date of review completion.
- A **more subtle and thoughtful approach must be taken to plan lengths and review dates**. Confidence must be restored in the change of circumstance process through full on the ground implementation of the Ombudsman and ANAO reports.

Question 4. One way to measure these principles is through a set of 'Service Standards'. Some ideas for what these Service Standards could be are listed in Attachment A. Do you think these Service Standards are fitting? Are there other standards you believe should be included?

A sine qua non of responding coherently to this question is knowing whether the principles or the supporting *service standards* will be legislated. I note the following statement in the main body of the discussion:

"These principles may or may not be legislated alongside specific timeframes"

As no such statement is made about the service standards, are we to assume that the **paper rules out granting the service standards NDIS rule status**? Legislating the paper's principles or standards would require a degree of precision and detail that is not present in the principles as drafted or in the attachment A standards.

It is with regret that I must observe that the discussion paper is prematurely nudging contributors towards what may be preferred regulatory outcomes. It is stated that:

- Timeframes are to be legislated
- The Principles may or may not be legislated
- The principles are to be measured through service standards.

I would encourage the Review to make a finding that legislating the service standards is required to meet the government's commitment to a service **guarantee**. The language of "measuring" the principles underlines that we are drifting into the realm of hortatory direction rather than legal duty.

This pyramid presents as a sliding scale of enforceability, with the most detailed (and therefore useful) rules constituting only "measurements" or "indicators" of vague general obligations. This should be named for what it is**: a model of responsive, "soft" regulation, not a guarantee**.

In the context of the Banking Royal Commission and other ongoing royal commissions, this model of enforceability is increasingly recognised as flawed. In the specific context of Ombudsman, ANAO and tribunal decisions which identify and fully document substantial failures in legal compliance by the Agency, this model should be expressly disavowed. The NDIS Act already boasts an overpopulated "principles" section, which has limited regulatory

reach.[14] Proposing that the principles and the standards be legislated will also promote a proper debate about needed budgetary funding, ensuring an already pressured Agency is not provided with yet another unfunded mandate.

Recommendation:

- **The Review focus on responding to the answers provided by submitters to points 1-3 and draft language that is recognisable as actual draft heads for a bill or delegated legislation, as denoted by the language of "guarantee"**
- **The Review should ensure that terms of any "guarantee" are sufficiently detailed and precise to ensure enforcement.**
- **If the Review insists on adopting the sliding scale structure immanent in its discussion paper, the term "guarantee" should only refer to those aspects which are specifically legislated (timeframes), mandatory in effect and enforceable by individual participants.[15]**

Feedback on the listed potential standards

This is only a discussion paper and no one could expect an entire set of fully formed standards. That's what we are working towards. But the nature of current indicative standards is concerning. The standards would need to be far more developed and precise if the guarantee is to function. The standards would need to work together as consolidated, holistic and clear obligations, or at worst measures, which ensure compliance with the proposed principles. I will provide specific feedback on why the examples provided in the discussion paper need to be improved upon.

Timeliness Standards

- **The standards are too qualified to be of practical utility**

The qualifiers "Once the NDIA has appropriate information…" and "following the provision of all necessary evidence" fail to address participants' fundamental needs and concerns.

This is an easy standard to sign up to, as famously, it currently only takes the Agency 2 days once the information is in. This standard will not address the key policy issue: remedying the **slow intake of specific cohorts**, **plan gaps or "expiry"** and **delays in determining reviews**.

To improve access decisions, it is vital to regulate the validation process more closely and the overarching evidential threshold placed on applicants. The service standards must underline the status of NDIS as a beneficial scheme and embrace an obligation to support applicants to clarify their applications including through the efficient and intelligent use of the Agency's information gathering powers.

To improve planning and reviews…

[14] The author has charted the limited impact, and adverse effects of sections 3 and 4 of the legislation in a recent piece.

[15] Simply put, nothing else will have been guaranteed.

- **The limited actions proposed don't address participants fundamental needs and concerns.**

The other three timeliness standards focus on a secondary administrative action rather than the delivery of substantial outcomes: they guarantee people will be "contacted", "are considered", "are offered". These should be replaced by commitments of result: "absent compelling practical reasons, a planning meeting will be held in XX days".

Other potential standards

Engaged: An obligation to "work with" is insufficiently precise or demanding and would function as a needless tickbox for the Agency's already existing activity.

Valued: This standard collapses into a duty to ensure understanding in a manner which duplicates the role of civil society, advocates. I do like the use of the firm verb "ensure" however.

Decision are made on merit: The standard "The NDIA acts in a transparent, informative and collaborative spirit" is marred by an undue emphasis on ill-defined, subjective motivations.

Accessible: the proposed standard unduly duplicates a statutory obligation already present in the Act. Why not just amend that provision of Act to make it stronger, and expressly list the groups listed in the standards.

Q. 6: What are some of the significant challenges faced by NDIS participants in the access process?

I would highlight the following problematic trends:

- The failure to properly gender proof the assessment of function, resulting in two tribunal cases which made crude assumptions about the levels of functioning of mothers who risked their health, well-being and social interaction in caring for their children.[16]
- The failure of government to properly define "substantially reduced capacity" or the life domains and a resulting overreliance on policy as regulation. This creates inconsistency, legal challenges and preference towards those who can best narrate or argue their case.[17] The NDIS *Becoming a Participant* Rules provide only three instances where the "substantially reduced" criterion will ***be deemed*** to have been satisfied. Neither the primary or secondary legislation provide express general criteria relevant to judging the severity of an impairment or a generally applicable definition of "substantially reduced capacity". This normative gap is compounded by the failure of the primary and secondary legislation to adequately address another core question: reduced capacity to do what? The Act provides that we must assess the individual's functioning in six broad domains of activity: self-care, learning, mobility, self-management, communication, and social interaction. Three of these are given a broad

[16] KDYG v NDIA

[17] The author argues this point here: https://auspublaw.org/2018/07/renewing-the-ndis-refocusing-the-eligibility-debate/ It is unacceptable

outline definition in the NDIS operational guidelines, but the remainder are under-defined, with the guidelines only providing a number of examples falling within each domain.

- The failure of the legislation to give the Agency the ability to formally help individuals secure evidence until they are granted "prospective participant" status.
- The failure of the Agency to exercise its powers to assist prospective participants from low SES, backgrounds to secure diagnoses or documentation which is created to address the specific, distinctive requirements of section 24 or 25. Disadvantaged people are forced by circumstance to rely on older documents created for separate administrative processes such as DSP or medical treatment.
- The use of unpublished expert evidence by the Agency which seeks to categorise entire conditions or treatments.
- The incorrect position of the Agency that early intervention means early from the first emergence of a person's condition, rather than "early" in the *lifecourse progression* of the disability.
- A failure to properly reflect upon the requirement that a treatment option be "appropriate", which results in the Agency insisting that individuals attempt to pursue treatment options their doctor rules out, they cannot afford or which involve substantial risk to the person's *overall* well-being.

7. The NDIS Act currently requires the NDIA to make a decision on an access request within 21 days from when the required evidence has been provided. How long do you think it should take for the NDIA to make an access decision?

For those advocates and lawyers, the wording of this question has a certain black humour to it. This question needs to be refocused upon where the Agency's underperformance lies – the validation and the evidence threshold applied through the evidence policy.

The review needs to obtain the primary data on the number of withdrawn or rejected applicants and get line of sight on the validation process. I would encourage the Review to find that the "access" delays is not about "demand" but about proactive support and onus.

I refer the Review team to the tribunal of ***FSQQ and National Disability Insurance Agency [2019] AATA 186*** (18 February 2019), paragraphs 19-20, which helpfully underlines the importance of working collaborative and constructive approach to evidence tendered by people throughout an application (or planning process) process:

"As the Agency correctly pointed out, it is appropriate to look for guidance in judgements and decisions interpreting the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Both that Act and the *National Disability Insurance Scheme Act* are beneficial legislation and both provide for a similar two-tier review process.

In *Abrahams v Comcare,* in reference to the *Safety, Rehabilitation and Compensation Act,* the Federal Court said, in part:

In construing a document purporting to be a notice of injury under the Act, a broad, generous and practical interpretation should be made, consistent with both the beneficial purposes of

the Act and the likelihood that laypeople of differing levels of education, differing levels of medical advice and differing levels of legal advice (indeed in most cases they would not have any) will be giving the notice… "

Recommendation: The Agency should have no trouble making an access request once the required evidence has been provided. The terms of the guarantee should focus on regulation and redress of the financial, human and status inequity that shapes the validation process, the process of assembling evidence and eventual decisions.

10. Is the NDIA being transparent and clear when they make decisions about people's access to the NDIS? What could the NDIA do to be more open and clear in their decisions?

Having regularly encountered the Agency's templated letters, I would make the comment that the lack of clear narrative explanation is actually driving appeals and further contacts with the agency. For instance, primary first instance correspondence does not contain an adequate narrative of *how* it was determining the individual's condition was not permanent – in particular which treatments they must now pursue. It does not contain an adequate narrative of the findings made about the person's capacity and why they did not meet the "substantially reduced" threshold.

The Review Team should value the on the ground feedback that will communicate the issues here. Participants speak of "decisions falling from the sky", "once I appealed I heard a lot more…" "this person had tried five drugs without improvement, totally inconsistent", "if the complex needs team saw this it would be different", "the reasoning changed completely on appeal" etc.

As the volume of access decisions fall, it is entirely legitimate for people with disabilities and their families to expect a level of narrative explanation beyond that which would be obtained under mass centrelink schemes. The level of access requests will fall back to a much more manageable level and the service standards should be pitched at securing substantial improvements in correspondence.

In relation to the early intervention cohort, section 25(1)(c) requires that the "supports" requested must be appropriately provided by the NDIS. Applicants' eligibility will therefore be determined by the extent to which they know what is available for people with their conditions in the NDIS, and how a functional support differs from a clinical support. Many individuals seek "early intervention" in the form of additional medicare sessions, when in fact they would benefit from functional supports to return to work, engage with the community or practically manage a condition that's likely to be permanent. Agency decisions relating to early intervention are in danger of reflecting the degree of knowledge the person has of what supports are available in the NDIS not the character of people's needs. Assessing a person's eligibility for the scheme by what they would ask for when they are in the scheme is confusing and not person centred. The Agency must clearly communicate the early intervention programmes it offers or will approve.

Recommendations:

It should be a required service standard for Agency decision makers to provide an adequate narrative explanation for first instance access refusals that extends beyond the generic nomination the subsection which the applicant has failed to satisfy.

The Agency should publish a list of early intervention supports or programmes which the NDIS will be automatically deemed appropriate for the NDIS to fund, particularly for psychosocial disability.

12. Are there stages of the planning process that don't work well? If so, how could they be better?

I would nominate the progression of the draft plan from types of support to financial numbers. I believe that a lot of the tension relates to the black box of "typical support packages" which are inbuilt into the Agency's computer software. The Scheme Actuary needs to be placed under direct obligation to publish these packages, and publicly narrate the judgments underpinning them. It is difficult to understand how such core operational information, which is intimately connected to participant's funding levels could possibly be blocked under section 47E(d) of the Freedom of information Act. Legislating an obligation to publish would also help overcome the more conventional use of Federal-state FOI exemption, making it clear that the states and federal governments are willing to have a mature, informed policy debate about the funding parameters of the scheme.

Planners need to properly quantify the benefits or the outcomes an individual has achieved and hopes to achieve, as is required by the legislation. Very often the emphasis is upon where the individual fits in terms of disability "levels" and cost, to exclusion of important variables.

13. How long do you think the planning process should take? What can the NDIA do to make this quicker, remembering that they must have all the information they need to make a good decision?

In an era where agencies and departments possess formidable efficiencies presented by automated correspondence and online platforms, participants and their families have a right to request practical support in securing and clarifying evidence for accessing a beneficial scheme. The Agency's possesses the ability to assist key equity cohorts in the prospective participant phase and in planning. The era of big data needs to be the era of supported information gathering: we must address the key human drivers which will either successfully populate or contaminate larger data sets. This is also not just a matter of "supporting" participants but also of delivering the accurate investments the scheme is intended to deliver. I would remind relevant decision-makers that:

- Where the NDIA has made a request that a participant undergo an assessment or examination, the NDIA will support the participant to comply with the request by providing assistance, including financial assistance where appropriate (section 6).
- The Agency owns policy contemplates that those who need can have assistance purchased from an external service provider.

The degree to which government will support specific vulnerable cohorts within the scheme is a key policy choice. There is a dearth of reporting on the use of these powers and there is therefore no sustained research of any type into the lifeblood of NDIS: information arbitrage.

It is important to note that many people have self-funded their diagnosis and therapy reports. A data driven scheme should value practically supporting participants to obtain information so that its decisions are driven by the most accurate qualitative data. We should all be concerned that the Agency is collating existing pre-existing social disadvantage. That is a serious policy matter that properly falls within the scope of this review. The manner in which this question has been drafted is unduly conclusory and inappropriately attempts to foreclose discussion on an important policy issue.

The Agency must understand that why while participants bear the practical onus of satisfying decision-makers, this is not a formal onus. Parts of its evidential policy relating to the age of medical evidence etc appear to be overly rigid.

Where a person is a participant in the scheme, the Agency is under an obligation to fund ancillary costs to deliver supports that are reasonable and necessary. In the recent tribunal decision of Stephenson v NDIA, which is a great illustration of how the insistence on the supply of evidence has at times obstructed the approval of supports. In this decision, the tribunal found that provided if the modification of a person's driveway could be carried out for less than $60,000 following a survey it was approved as a reasonable and necessary support. It condemned the failure of the Agency to fund the survey as an ancillary support to the core reasonable and necessary support at [44]:

> "If the Agency had funded a survey early in the life of the application for the driveway modification, at a cost of $1,500 to $1,800 according to the quotations, the expense of running contested proceedings on this issue may not have been incurred or may have been much reduced because it would be clear whether the proposal was feasible on the site, inquiries about the need for a DA would have been possible, and a reliable estimate of the cost would have been available. Absent a survey the expert evidence suggests that the proposed driveway modification may be carried out in compliance with planning laws and regulations, although it is not known whether council approval is required. Further investigation is necessary to ensure that drainage can be directed to stormwater."

The review should recommend that government or the Agency:

- **Amend the NDIS rules to clarify that a reasonable and necessary support can and should cover assessment or planning processes necessary to deliver that support.**
- **Increase its funding of cross disciplinary assessments and planning for the delivery of supports in line with tribunal decisions such as LMNT and Stephenson. The effective delivery of supports under the scheme should always entail professional assessment of outcomes, pre-planning and multidisciplinary interaction. In that sense, the review process should not be marked by paper chasing as defining the participant's situation is a pre-requisite for delivering the previous plan which should have been funded.**
- **Publish a far more detailed policy on when it is "appropriate" to secure evidence on behalf of individuals. At the moment the publicly available guideline simply states "when appropriate". This is unacceptably passive approach to equity issues.**

16. What are some of the significant challenges faced by NDIS participants in using the supports in their plan?

The degree to which particular line item supports are flexible is a key issue that arises. I would refer the Review team to the failure of the Agency to properly advise as to whether plans can be used flexibly in the recent case of *Hiney and National Disability Insurance Agency* [2019] AATA 3643 (10 September 2019). This decision highlights how challenging it is to identify what flexibility exists in a plan, a tendency to use core support funding to cross subsidise specific line items which are not funded adequately.

Questions 19: What are some of the significant challenges faced by NDIS participants in having their plan reviewed (by planned or unplanned review)?

Recommendation: abandon any use of expiry dates in NDIS plans, write them to function on a pro rata basis up until review <u>outcomes</u> are implemented.

It is important to note that the notion of a "plan gap" is a product of Agency practice not the legislation. The author prefers an approach which recognises the reality of inherent delays in the review process, usually reflecting evidential and secondary quoting processes.There are sustainable solutions available, for instance **removing so called "expiry dates**" from plans and the computer system. NDIS plans should contain one date: the review date. This is the critical date defined by the legislation. By law, however, **NDIS plans function until they are replaced** following this review.

Thus, as Deputy President Forgie recently found in *Williamson*:

> "It follows that, if there are any funds remaining unspent after the review date has passed, a participant should be able to have access to them for purposes set out in the statement of participant supports. The plan is ongoing….In reaching my view, I note the practical difficulties raised by the Agency. One is that, to access funding for supports by way of the participant portal, it is necessary to change the review date in the NDIA's computerised system. The system does not generally allow for a participant to have access to funding after the review date has passed although the Agency continues to process requests to have access to funding it has received before that date. The reason why the Agency has set up its system in this way stems from its concern that a change in the review date would mean that it had decided to replace the plan."

This decision thus underlines the manner in which **the Agency's computer system has, to an unhealthy extent, driven the administration of timelines under the Act**. Reasonable and necessary supports can and should be expressed in pro rata terms: e.g. 20 hours weekly, three sessions monthly etc. It is not incompatible with the NDIS Act for **supports to be written in such timeless terms, contingent upon re-evaluation following review**. The Committee should explore the Agency's views on this matter. In support of my view I would instance the recent comments of Deputy President Forgie in *Williamson*:

> "…in the submissions made on its behalf, the Agency has referred to decisions made by variously constituted Tribunals in which reference is made to an "*expired plan*" or to a

participant's plan's "*expiring*" when the date or circumstances for review have passed. **None of the decisions referred to analysed the point or gave any reasons as to why the CEO's failure to conduct a review as required led to the participant's plan's having expired.** On looking further into the matter, it seems to me that the use of the word "*expire*" or some form of it is not appropriate. It is not a word that is used in the NDIS Act and should be avoided for that reason. More importantly, a failure by the CEO to perform a statutory duty under s 48(5) does not mean that the participant's plan is of no effect of that it ceases to be in effect. On the contrary, it seems to me that s 37 makes it clear that it does not..."

This view was also adopted by Deputy President Constance in the *SGHG* decision.

It is time for a **first principles reorientation of the Agency's approach to the length of plans**. The emphasis on plan expiry should be moderated as the scheme has now rolled out, and the importance of certainty is underlined by the Act.

I would also recommend that:

- **Review dates should be defined by the occurance of a future events as well as a calendar date**. The legislation originally intended this, but a drafting oversight complicates the ability to do this currently. Too many change of circumstances forms are being lodged when the original plan could simply read "the review date is with X days of you obtaining a date of release from prison" or "this plan will be reviewed within X days of you applicant obtains a SDA accommodation option". Instead of an unwieldy "change of circumstance" we could easily have a "notification of circumstance" process. The planning process should always be looking for these events in any case. Too much of the current planning process is driven by the need for the computer system to have sliceable data for reporting purposes.
- As was highlighted by the recent case of *Castledine v National Disability Insurance Scheme*, it is possible for **a support to be found reasonable and necessary when only its broad cost can be estimated.** The pressure on the planning process would be relieved somewhat if the Agency was willing to implement plans with line items like: "fund all trips to work on rainy days", rather than "$2,116.17 to travel to work on rainy days."

23: Are there other issues or challenges you have identified with the internal and external review process?

Recommendation: Amend section s 100(6) of the NDIS to ensure cases of unreasonable delay in determining internal reviews can be taken up by Administrative Appeal Tribunal

The Review should recommend **immediate action to restore participants' right to apply** to the Tribunal in case where internal reviews of funding **having been subjected to unreasonable delay**. Recent decisions of the Administrative Appeals Tribunal, *LQTF* and *KRBG* have highlighted that an ambiguity in the Act's drafting may mean that the tribunal is unable to intervene in cases of severe delay. The Act imposes a duty to reach a planning review decision within a "reasonably practicable period of time, but participants have lost a primary means of enforcing this. An amendment to reflect the initial promise of the NDIS Act should be urgently implemented.

The comments of Deputy President Forgie in the recent matter of LQTF need to be underlined:

> "In giving these reasons, I have set out the steps that must be followed in seeking review of a statement of participant supports and review of a participant's plan. I have done so in order to illustrate the complexity of the review process provided for in the NDIS Act. It is a process that I respectfully suggest is often too complex for a participant to navigate with any ease, let alone with any confidence, and that is not conducive to the NDIA's being able to respond quickly to the needs of participants. It is a process that may leave both the participant the NDIA disagreeing about the proper characterisation of the decision that has been made."

The Review should support an amendment to restore the right to access the tribunal as a circuitbreaker in cases of unacceptable delay. The process is best achieved by cloning the language of section 56 of the Freedom of Information Act 1982 (as amended).

Question 21: How long do you think reviews of decisions should take?

The Review should call for something in the region of 30 days as a generic **requirement**, with an accompanying extenuating circumstances clause. As the Ombudsman and Audit Office noted, the dataset on how long reviews are taking is contaminated by poor data recording and the confusions of the past.

I would expect the agency to request an extenuating circumstances clause for any specific time period which the Review might proposed to be legislated. Any such clauses **must** place the "practical" onus of establishing the grounds for a delay on the agency rather than requiring individuals to lead evidence of unreasonable delay. That would also ensure that instances are proactively categorised and triaged by the Agency

Question 27:

What changes could be made to the legislation (if any) to:

a. Improve the way participants and providers interact with the Scheme?

Amend the legislation to permit the Agency to formally assist or obtain information and assessments on behalf of anyone seeking to have their access request validated.

It is important to note that this amendment would merely give the Agency a power to intervene. The question of for whom this power is to be exercised can be addressed by defining vulnerable or priority cohorts through delegated legislation or policy. I acknowledge fully the complexities involved in the issue of ordering assessments, but I believe that the demand for the NDIS out there.

Legislating early, proactive information gathering for key equity cohorts is the circuitbreaker. It reflects that the eligibility criteria for the NDIS are distinctive and technical. Existing medical reports may not align with them. It is abundantly clear from all the data we have, that the scheme is replicating existing social advantages. The Agency *can* intervene by funding information gathering but is rightly concerned about the budgetary implications. The Review

should call for a joint federal-state effort to resolve this issue. This review cannot solve health inequities in Australia, but it should at least frame the issue and propose the creation of a specific policy and line item budget for early support to ensure key marginalised groups are not stalled out in their applications. The submission elsewhere proposed a more focused used on information gathering in access and planning decisions.

b. Improve the access request process?

Recommendations:

- **Remove the lifetime requirement from section 24(1)(e), and insert a provision noting that where an individual currently has substantially reduced capacity but is likely to improve, they should be admitted as an early intervention participant.**
- **Amend the NDIS Access Rules to provide full definition of the relevant life domains and to define generally applicable criteria for substantially reduced capacity.**
- **Revise the NDIS Access Rules to assess a person's capacity to undertake key *ongoing* activities not just their 'usual' 'daily' functioning. The Rules should emphasise that where a person's predictable, repeated "acute episodes" have led or will lead to them having difficulties staying healthy and safe, or avoiding imprisonment/contact with the justice system, this can constitute substantially reduced capacity, notwithstanding that they have or may have better days.**
- **Amend the NDIS Access Rules to provide a proper definition of an acute episode.**
- **Amend the NDIS Rules to specifically list types of early intervention supports which are deemed "appropriate for the NDIS to provide"**

Amend Section 24(1)(e)

As was discussed by the 2015 Review of the Act, section 24(e) presents serious interpretive difficulties for lawyers. The Review noted that consideration should be given to its removal

Various lawyers have struggled with this provision – statutory language must have or at least be given a meaning. Does this provision have a purpose?

Based on my study of the tribunal caselaw, I see the following dynamics:

- In no published case has this criterion been determinative of a person's access to the NDIS.
- Under the Agency's understanding, the criterion involves requiring an applicant to scheme to be able to identify the supports they will later obtain, and to somehow prove or project that their need for these supports will continue for the rest of their life (even during periods of hospitalisation, imprisonment, palliative care etc?)

I believe the Agency's interpretation is flawed. In tribunal matters, applicants have generally disposed of the Agency's arguments by noting their condition has already been found permanent and then nominating a NDIS support they would benefit from off the price list. This itself underlines that the interpretation is not opening up new ground. We should stop the unfortunate exercise of defining someone's eligibility not off their situation, but off their knowledge of the scheme. It seems absurd for section 24(1)(e) to require a timeless, omniscient assessment of whether future support needs will meet the reasonable and necessary test. Justice

Mortimer rightly noted the unprincipled, untidy nature of this in her general discussion in *Mulligan*.

I think the original role of section 24(e) was to ensure that a person who currently has substantially reduced capacity *but may improve* is admitted to the scheme as an early intervention participant. The legislation should be amended to reflect this fairly uncontroversial purpose: section 24(1)(e) is useful to extent it ensures that someone whose capacity may leap forward is directed to early intervention cohort and "double qualification" is avoided.

Define substantially reduced capacity and the life domains in more detail

The failure of government to properly define "substantially reduced capacity" or the life domains has created inconsistency, legal challenges and preference towards those who can best narrate or argue their case.[18] The NDIS *Becoming a Participant* Rules provide only three instances where the "substantially reduced" criterion will ***be deemed*** to have been satisfied. Neither the primary or secondary legislation provide express general criteria relevant to judging the severity of an impairment or a generally applicable definition of "substantially reduced capacity". This normative gap is compounded by the failure of the primary and secondary legislation to adequately address another core question: reduced capacity to do what? The Act provides that we must assess the individual's functioning in six broad domains of activity: self-care, learning, mobility, self-management, communication, and social interaction. Three of these are given a broad outline definition in the NDIS operational guidelines, but the remainder are under-defined, with the guidelines only providing a number of examples falling within each domain.

Better capture the negative outcomes for those with fluctuating conditions

Those whose impairments may fluctuate day to day are a particularly vulnerable cohort in assessing functional capacity. Eligibility for the NDIS also rests on an individual's capacity to adequately narrate or map the specific impacts of their disability on their everyday lives. A common complaint I often hear from people at community fora is that "the Agency didn't want to hear about my bad days". This reflects the use of the term "usually" in the NDIS rules, and the Agency's operational guideline that capacity should be assessed outside of "acute episodes" (a term not further defined in guidelines). Individuals can present well on a particular day or month, but lack the capacity to undertake *ongoing* activities. The activities of self-management and self-care, for example, are arguably only achievable with *constant functioning*. For instance, the periodic loss during regular acute episodes of the capacity to "manage finances" or "take responsibility for oneself" – specifically listed as examples in Agency policy – can have the most serious consequences for life outcomes, such as interactions with the justice system or extreme poverty.

d. Better define 'reasonable and necessary' supports?

- I would express concern at the use of interim $10,000 plans for ECLEI early intervention cohorts. I struggle to see how a general approval for an interim plan meets the reasoning

[18] The author argues this point here: https://auspublaw.org/2018/07/renewing-the-ndis-refocusing-the-eligibility-debate/ It is unacceptable

requirements laid down by section 34. I believe that any such programme needs to be properly legislated.

- The NDIS rules should be amended to regulate how and when decision-makers take under-utilisation of previous plans into account in their decision making. The Rules should expressly state that where funds are under-utilised the decision-maker must consider increasing support coordination in the next plan and the reasons for under-utilisation must be identified and record.

- Legislate for the proactive disclosure of a greater range of NDIS data, particularly the reference packages/expected funding levels and the judgments underpinning them. In the author's view one of the most significant drivers of appeals is the tendency of plans to draw upon or reflect opaque financial judgments. The Agency should place its justifications for not publishing the key cost/benefit logic underpinning its "reference packages" or "funding levels" on the public record. Until there is greater visibility of how cost/benefit is pitched by the Agency, section 34(c) value for money test will be accompanied by a "ghost in the machine" dynamic. The idea that the Agency has not approached the matter with appropriate investment logic has driven many successful appeals.

e. Improve the plan review process?

- Amend the legislation to more clearly allow for circumstantial review dates like "a review will occur thirty days before your release from prison". Obviously plans should continue to include a calendar date as well, and the review should occur on whichever comes first.

- restore the right to challenge unreasonable delay in internal review (as outlined earlier in this submission)

- clarify the right to use a circumstantial review date (outlined elsewhere in my response to question 29)

g. Improve the way other government services interact with the Scheme

As described elsewhere in this submission:

- the Review should recommend the legislation be amended to provide for a system of advocacy referral to confirm and assist in obtaining the general supports listed in the plan.

- the Review should recommend that the legislation be amended to provide for a formal procedure for timely, practical information exchange and dispute resolution between federal and state government where the NDIS and state both deny responsibility or people are handed over following a refused access request.

Both these proposed amendments reflect the hollowing out of the Local Area Coordinator role into a shadow planning one. My proposal goes beyond the LAC role being focused on providing participants with a practical mechanism to generate a firm statement of support from their state government and ensure they get the reasonable adjustments or accessible services their plan is premised upon. Plan breakdown will occur if people cannot obtain these key inputs. The Agency will also be held accountable for asserting state responsibilities where they do not exist, allowing for the more rapid determination of these disputes.

Q 28. What are the significant challenges faced by NDIS participants in changing their plan?

The most significant challenge is that, at law, an NDIS plan cannot be varied, it can only be replaced. This naturally entails a sizeable administrative process.

I would be intrigued to see the detailed legal justification for the current system of 'light touch amendments' and I am even more sceptical about the legality of the pragmatic "auto-extension" of plan review dates. That's actually no criticism of the Agency who are in a difficult position authored by their own computer system. I'd really encourage the Review to help clear this up. It is a substantial mess which is attributable to the rushed build of the Agency's computer system.

Q 29. How do you think a 'plan amendment' could improve the experience for participants? Are there ways in which this would make things harder or more complicated for people?

I support plan amendments where these are targeted at "light touch", beneficial amendments such as allowing the management provisions, shifting funds between line items etc. The advocacy and representative sector will no doubt take the lead proposing these simple changes that prove so frustrating in practice.

The discussion paper however bundles together the possible right to make "minor changes" with the possible right of the agency to defer decisions about key supports like AT, home mods and SDA because evidence is "lacking". This approach, or any approach which allowed for the pragmatic extension of plan review dates due to the Agency not being "ready", would be **unwelcome** for a number of important reasons.

These supports are not just line items but **key structural elements of plans**. If the person's accommodation or assistive tech is "unknown" or TBA, this has a spillover effect for the entire planning process. The plan might end up reflecting an interim, wait and see or holding philosophy and benefits may be foregone. Other supports might not be approved as a key input has stalled. It is important to reflect upon the fact that a plan is more than a set of line items, but a holistic model of delivery. Placing a question mark or a TBA over key questions like accommodation or assistive technology can have serious adverse consequences. Some items, like transport, "turn the key" on the whole plan, ensuring funds are utilised and other supports actually get approved as 'value for money'

One counterpoint that might be expressed to this is that it is wrong to "hold up" the delivery of support for one item. But this danger falls away when we reflect upon the underlying armoury of measures the Agency has to avoid such situations:

- There is **no such thing** as an "expiring" NDIS plan. Plans can be written to be cover eventualities. If a conversation about the limitations of the NDIS computer system needs to be had, let us confront that. But those limitations have to stop determining how plans are functioning.
- The NDIS is reaching maturity, and from now on people will increasingly be reviewing existing plans, any ***lack of paper*** at the plan review date actually reflects on the

Agency's earlier inaction. If auxillary processes are required to identify and implement reasonable and necessary supports these **could have been funded in the previous plan** e.g. through support co-ordination or commissioning needs assessment or planning as was stressed by the tribunal in *Stephenson* and.*LNMT and National Disability Insurance Agency* [2018] AATA 431 (6 March 2018) There is a degree of moral hazard in permitting the Agency to defer decisions it should have already helped to resource.

- The emphasis on SDA, AT and Home mods all reflect the choices the Agency has made to adopt unstructured, unwieldy quoting processes which the Agency itself recognises it has overengineered. That needs to change, not potentially be accommodated.
- As was pointed out forcefully in the Aged Care Royal Commission proceedings, early 'in principle' approval of SDA as a reasonable and necessary support activates the market. Where there are thin markets, we might have to accept that not all plan funds can be used. But we must define the market. If we don't build it, they won't come. People can and should be approved for funding for these items contingent on the later provision of an acceptable quote or identification of a specific service provider. Parts of the current evidential approach is not activating the market or empowering the participant as a consumer. Again, the recent tribunal ruling in *Castledine* has raised the possibility it may not always be legally necessary to identify the *specific* monetary amount when broad perameters can suffice and the need and benefits to a support are clear.
- Deferral would introduce another ongoing administrative process, when it is more efficient to work with people to get it all right in one go. **Focus on early communication and concrete preparatory support well before the review meeting**. People have a right to put their claims for a reasonable and necessary support and have them determined.

I'm concerned that the emphasis on possible **big ticket** plan amendments might be driven by a "swallow the spider to catch the fly" dynamic. In considering the scope of plan amendments or deferred decisions, I believe that the Review needs to first identify and tackle the ***drivers of amendments:***

- Taking review decisions in a hurry because the plan is "expiring", when actually it can and should be written to function on a pro rata basis until the person's needs, situation and documents are clarified. If the original plan is "dated" that can be addressed to early resort to the change of circumstance mechanism.
- Generically basing the review cycle around arbitrary calendar dates rather than planning to review for predictable key life events.
- The failure to respond to the preferences of the individual when considering how long the plan should be.
- Not putting 'in principle' approval or contingent support approvals into plans but rather imposing up front evidential burden to identify the cost to last dollar and even identify a specific provider/product before approval.[19]
- The loss of confidence in the change of circumstance reviews caused by the Agency's internal conflation of internal reviews with change of circumstance reviews.

[19] Again, the approach of Member Parker in Castledine opens up interesting choices, the Agency should seek legal opinion on it, and consider whether its IT system can accommodate that approach.

We need to control, not increase, the number of secondary or ongoing administrative processes attaching to scheme so people can get on with **the real substance**: getting those badly needed services and unlocking their potential.