



Australian Government  
Department of Social Services

# Explanation of proposed amendments to the *National Disability Insurance Scheme Act 2013*

Contained in the Exposure Draft of the National Disability  
Insurance Scheme Amendment (Participant Service Guarantee  
and Other Measures) Bill 2021

## Purpose of this document

This explanatory document has been prepared by the Department of Social Services to assist in understanding the legislative amendments proposed in the exposure draft of the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (the Bill).

This explanatory document has been produced to assist consultations only.

## Providing feedback on the Bill

If you have feedback on the proposed changes to the National Disability Insurance Scheme Act 2013 contained in the Bill you can make a submission via email or through the post.

Some things you might want to think about in your submission:

- Is it clear how the new ideas in the Bill will work?
- Could the new ideas in the Bill cause problems?
- Any other general comments

You can email your submissions to: [NDISConsultations@dss.gov.au](mailto:NDISConsultations@dss.gov.au)

Hard copy responses can be sent to:

NDIS Act Review Consultations  
GPO Box 9820  
CANBERRA ACT 2610

If you have any questions please contact: [NDISConsultations@dss.gov.au](mailto:NDISConsultations@dss.gov.au)

# NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (PARTICIPANT SERVICE GUARANTEE AND OTHER MEASURES) BILL 2021

## Outline

The National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (the Bill) addresses many of the issues raised in recent reviews of the *National Disability Insurance Scheme Act 2013* (the Act), with a strong focus on improving the experience and outcomes of people with disability engaging with the National Disability Insurance Scheme (NDIS). The Bill will legislate the Participant Service Guarantee and is also an important step in implementing significant improvements for participants identified by the 2019 Review of the Act conducted by Mr David Tune AO PSM ('the Tune Review').

The proposed changes will mean that people with disability are better off because the Bill will:

- enshrine the Participant Service Guarantee ('the Guarantee') that will legislate timeframes and engagement principles for how the National Disability Insurance Agency ('Agency') undertakes key administrative processes;
- consistent with the recommendations of the Tune Review:
  - simplify administrative processes in relation to making changes to a participant's plan,
  - reduce the administrative burden felt by participants and their families and carers,
  - clarify eligibility criteria for people with psychosocial disability; and
- provide a simplified payments design to allow the Agency to make direct payments on behalf of participants.

The Bill also:

- includes amendments in response to the 2015 independent review of the Act conducted under section 208 of the Act, including, consistent with the objects of the NDIS, acknowledging that people with disability should be included in a co-design capacity, and
- makes administrative amendments to ensure the Act is fit-for-purpose in a full-scheme environment removing redundant references and rules used during transition.

Together, the amendments in this Bill provide for a significant reduction in administrative red tape for participants, their families and carers, and strengthen the person-centred focus of the NDIS.

## *Schedule 1 – Participant Service Guarantee*

Schedule 1 amends the Act to give effect to the Guarantee, in accordance with the recommendations of the Tune Review.

Through extensive consultation, the Tune review provided a comprehensive snapshot of how participants, their families and carers felt about many aspects of the NDIS through their lived experience. The Tune review also allowed disability providers, the Agency and state and territory governments the opportunity to provide comment on aspects of the NDIS from an administrative point of view. Together, these consultation processes identified that, “*while the NDIS Act is broadly fit for purpose, there are a number of areas that can be amended to remove red tape and improve the participant experience*”.

Together with a new NDIS rule, the Guarantee will set out:

- the Agency must make decisions about a person’s access to the NDIS and their plans within certain timeframes, providing participants, families and carers greater certainty about how long NDIS processes will take;
- the Agency must meet specific service standards when working with people with disability and their families and carers; and
- the Agency must report on its progress in delivering each part of the Guarantee.

A service guarantee identifying timeframes and service standards that the Agency must meet will give participants, and their families and carers, certainty about their NDIS experience. It is also intended to simplify the personal administration of participant plans and thus enable participants to access NDIS funds with greater ease.

Schedule 1 also provides more flexibility for participants to request, and for the Agency to make, quick changes to plans through a plan variation, without needing to go through a full plan review (a Tune review recommendation). This will make it easier and faster for participants to have their plan adjusted without a full plan review.

## *Schedule 2 – Flexibility measures*

Schedule 2 makes a number of amendments to recognise the rights and diversity of people with disability and to improve the experience of participants, including by:

- strengthening the objects and principles of the Act to acknowledge the central role of people with disability in co-design and the need to recognise and respect the relationship between people with disability and their families and carers;
- giving the Agency more flexibility to support participants and their families to access NDIS supports, and help children with disability get access to early support;
- giving more protection to participants who want to use a registered plan management provider; and
- providing for a simplified payments design to allow the Agency to make direct payments on behalf of participants.

## Background

In addition to the Tune Review, in 2015, the then Minister for Social Services commissioned Ernst & Young to conduct an independent review of the Act. It was a requirement under section 208 of the Act that such a review be undertaken two years after the commencement of the NDIS.

The purpose of the 2015 review was to assess the operation of the Act, as well as to consider whether or not any amendments can be made to further the objects and principles of the Act.

The 2015 review of the Act found that there were opportunities to provide greater clarity to the legislative framework for the NDIS and provided recommendations to the Council of Australian Governments (COAG) for consideration. Recommendations endorsed by COAG included strengthening the objects and principles of the Act, providing a more appropriate description of the purposes of funding the Agency may provide, outside of participant plans, to strengthen information, linkages and capacity building and addressing other technical inadequacies of the legislation.

## *Schedule 3 – Full scheme amendments*

Schedule 3 makes administrative changes removing redundant references and rules used during transition to make sure the legislative framework for the NDIS is up to date. It will remove references to the trial and transition phases of the NDIS which are no longer relevant because the NDIS is available across Australia. These changes will have no practical effect on participants or on the operation of the Act.

# NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (PARTICIPANT SERVICE GUARANTEE AND OTHER MEASURES) BILL 2021

## Abbreviations used in this explanatory document

- **Act** means the *National Disability Insurance Scheme Act 2013*.
- **Agency** means the National Disability Insurance Agency.
- **CEO** means Chief Executive Officer.
- **NDIS** means the National Disability Insurance Scheme.
- **NDIS Commission** means the NDIS Quality and Safeguards Commission.
- **NDIS rules** means the National Disability Insurance Scheme Rules.
- **Tune review** means the Review of the *National Disability Insurance Scheme Act 2013*, 'Removing red tape and implementing the NDIS Participant Service Guarantee', by Mr David Tune AO PSM.
- **Bill** means the National Disability Insurance Amendment (Participant Service Guarantee and Other Measures) Bill 2021.

## Notes on Clauses

**Clause 1** sets out how the new Act is to be cited – that is, as the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2021*.

**Clause 2** provides a table setting out the commencement dates of the new Act, being the seventh day after the Act receives the Royal Assent.

**Clause 3** provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule to the Bill has effect according to its terms.

## Schedule 1 – Participant Service Guarantee

### Overview

Schedule 1 amends the Act to give effect to the Guarantee. The amendments made in this Schedule to implement the Guarantee will provide certainty for current and prospective participants regarding the timeframes for decision-making, and how the Agency and its workforce will engage with, and work alongside, participants in delivering the NDIS. This Schedule also provides the Commonwealth Ombudsman with monitoring functions to report on the Agency's performance in delivering the Guarantee.

Schedule 1 also gives effect to key findings of the Tune Review in Chapter 8 to improve plan reviews and enable plans to be amended without requiring a full plan review in circumstances where it is clear that the support or change to be made is reasonable and necessary. Plan reviews will be renamed as reassessments of a participant's plan to prevent confusion with decision reviews where a participant seeks a review of a planning decision under section 99 of the Act. Further, Schedule 1 introduces the new ability to vary existing plans without reassessing and replacing the plan. Together these amendments will substantially improve the experience of current and prospective participants.

### Background

Overall, participant experiences in the NDIS are positive and there have been significant improvements achieved as the NDIS continues to mature. The Guarantee was developed to continue to improve the experience for participants, and prospective participants with the NDIS.

The Guarantee was informed, in part, by the Tune review. The Tune review identified opportunities to simplify NDIS procedures and remove legislative barriers that may adversely impact on participant experiences within the NDIS. The Tune review was informed by national consultation with people with disability, their families and carers, advocates and providers from around Australia.

While the Tune review highlighted that participants, their families and carers were very supportive of legislating timeframes for Agency decision-making, it also cautioned against timeframes being the only measure for success. The Tune review stressed the need for the Guarantee to strike a balance between transparent and timely processes, while maintaining quality outcomes for participants.

The proposed legislated form of the Guarantee in this Schedule, gives effect to the recommendations of the Tune review and is consistent with ensuring the NDIS delivers consistent, effective, and high-quality experiences for those who engage with the NDIS across Australia. The Agency is already reporting against many of the timeframes in its Quarterly Reports to disability Ministers.

Together, the amendments in this Schedule seek to improve participant experiences with the NDIS and strengthen the person-centred focus of the NDIS by enshrining the Guarantee in legislation. The Guarantee will enable participants, their families and carers to have a very clear understanding of what they can expect each time they engage with the Agency and providers, and will also set out what participants can do to ensure the success of their planning decisions.

## Schedule 1 – Participant service guarantee

### Notes on Clauses

#### ***National Disability Insurance Scheme Act 2013***

##### **Definitions**

**Items 1 and 2** amend section 9 to provide for the definition of the ‘*Commonwealth Ombudsman*’. The definition of ‘*review date*’ is repealed, and a new definition of ‘*reassessment date*’ is inserted, recognising that the concept of a plan ‘review’ has been replaced with the concept of a plan ‘reassessment’.

##### **Participant Service Guarantee**

It is proposed that any rules that implement the Guarantee will be contained in one set of NDIS rules to be titled the *National Disability Insurance Scheme (Participant Service Guarantee) Rules* (the Guarantee rules). These rules will be category C rules, requiring the agreement of the Commonwealth and a majority of the States and Territories (see **item 59**). NDIS Rules are disallowable legislative instruments and are therefore subject to Parliamentary scrutiny.



### Timeframes for decision-making

**Tune Review Recommendation 25:** that the NDIS Act is amended to legislate a Participant Service Guarantee as a Category C rule, to be updated from time to time, with new timeframes for decision-making, engagement principles and performance metrics, as set out in Chapter 10 of the Tune report.

For timeframes, Tune Review recommendation 25a and 25b is implemented throughout Schedule 1 at:

- **Items 3, 4 and 5:** amended section 20.
- **Item 6:** amended section 21(3)(a).
- **Item 10:** amended section 26(2)(b).
- **Item 11:** amended section 26(3)(b).
- **Item 13:** new section 32.
- **Item 15:** substituted section 33(4).
- **Item 22:** new subsection 47A(4).
- **Items 33 and 34:** amended subsections 89(1) and (3).
- **Item 43:** new subsection 100(6A).

For engagement principles, Tune Review recommendation 25b is implemented at **Item 29** – new section 50J.

**Items 3 to 5** amend section 20, which provides the timeframe within which the CEO must consider and decide access requests. Section 20 provides that the CEO must decide access requests within 21 days of receiving a request. The amendments made by these items will allow the NDIS rules to prescribe a period less than 21 days. These amendments will not alter the requirement that a decision about a person's eligibility for the NDIS cannot take longer than the 21 days currently provided for by the Act. These amendments will build a greater understanding of the service delivery expectations between the Agency, participants, their families and carers and allow for the timeframe in which decisions must be made to be reduced via the rules.

**Item 6** amends paragraph 21(3)(a) to substitute reference to the new period applicable under section 20. Paragraph 21(3)(a) will now require the CEO to take action under subsection 21(3)(a) within 21 days, or a shorter period prescribed by NDIS rules. These amendments are consequential to the amendments to be made by **items 3 to 5**.

**Items 7 and 8** remove the first note under paragraph 21(3). The note provides that the period within which an access request must be decided may be extended under section 209. This note is being removed as periods to make access request decisions will no longer be able to be extended by way of the NDIS rules (see **item 52**).

**Item 9** amends a cross reference to section 20 in subsection 26(1). This item is consequential to amendments made by **item 5**.

**Items 10 and 11** amend paragraphs 26(2)(b) and 26(3)(b), which set out minimum timeframes that the CEO must allow for a participant to provide information or an assessment report relevant to an access request, before an access request is deemed to be withdrawn. These amendments extend the minimum timeframes from 28 days to 90 days. This is in recognition that for many prospective participants 28 days is not a reasonable timeframe to obtain such information. The amendment also retains discretion for the CEO to specify a longer, but not a shorter, period.

**Tune Review Recommendation 9:** the NDIS Act is amended to give a prospective participant up to 90 days to provide information requested by the Agency to support an access decision, before it is deemed they have withdrawn their access request.

Tune Review recommendation 9 is implemented at:

- **Item 10** – amended 26(2)(b)
- **Item 11** – amended 26(3)(b)

**Item 13** repeals sections 32 and 32A and substitutes new section 32.

Current section 32 requires the CEO to commence facilitating the preparation of a participant's plan in accordance with any timeframe prescribed by the NDIS rules, or otherwise as soon as reasonably practicable.

New section 32 simplifies current section 32 and provides that if a person becomes a participant, the CEO must facilitate the preparation of the participant's plan.

Current section 32A authorises the determination of classes where, within a period prescribed by the NDIS rules, or in circumstances prescribed by the NDIS rules, it was appropriate to commence the facilitation of a participant's plan within a particular timeframe. In practice, this provided the ability for NDIS rules to set out arrangements for the transition of people with disability from state and territory disability systems to the NDIS. Seven NDIS rules were created as a result of this section, providing for the transition of each state and territory to the NDIS. On 1 July 2020, the NDIS became available across Australia. Accordingly, existing section 32A is redundant and can be repealed.

**Item 15** repeals and substitutes subsection 33(4).

These amendments strengthen the participant-centred focus of the NDIS by providing greater clarity for participants, their families and carers in relation to when they can expect to be notified of the progress of their plan.

Section 33 deals with matters which must be included in a participant's plan and current subsection 33(4) provides that the CEO must decide whether or not to approve the statement of participant supports 'as soon as reasonably practicable'. New subsection 33(4) will provide for the NDIS rules to prescribe a timeframe within which the CEO must decide whether to approve the statement of participant supports. If there is no such period a decision will be required to be made as per the existing timeframe, as soon as reasonably practicable. The CEO will still be required to have regard to any information or reports requested pursuant to section 36.

**Tune Review Recommendation 11:** the NDIS Act is amended to reflect that a plan must be facilitated in accordance with the timeframes outlined in the Participant Service Guarantee.

Tune Review recommendation 11 is implemented at **Item 15** – substituted 33(4).

**Items 33 and 34** amend subsections 89(1) and 89(3) respectively.

Section 89 prescribes the circumstances in which the CEO must cancel the appointment of nominees at the request of either a participant or a nominee. These amendments will provide for NDIS rules to prescribe the time period within which the CEO must action such a request. If there are no rules in place, the request will need to be actioned as soon as reasonably practicable, consistent with existing requirements.

These amendments encourage choice and control for participants in their use of nominees as well as strengthening the safeguards for participants who require a change in nominee.

**Item 35** repeals and substitutes paragraph 90(3)(a).

Section 90 provides the general circumstances in which the CEO may cancel or suspend the appointment of nominees where the nominee was appointed on the initiative of the CEO. Currently the CEO must decide whether to cancel a nominee appointment upon a request by the participant within 14 days after receiving the request. This item provides for NDIS rules that can determine an alternate time period. This provides both flexibility and certainty for participants and nominees.

**Item 37** omits "paragraph 20(a)", and substitutes "paragraph 20(1)(a)" in subsection 99(1)(table item 1) which lists reviewable decisions and decision-makers for access decisions. This item is consequential to amendments made by **item 3**.

**Items 42 and 43** amend section 100 to allow NDIS rules to prescribe the time period within which a reviewer must make a decision on a request to review a reviewable decision.

If there are no rules in place, a reviewer must make a decision within the initial period of 90 days commencing on the day the request to review is made, or the day after a deemed refusal of access under paragraph 21(3)(a) or (b). This is beneficial for participants as it provides certainty and reliability when deciding to seek a review.

**Items 51 to 53** amend section 204.

Current subsection 204(1) allows NDIS rules to prescribe a longer timeframe where the Act sets out prescribed timeframes for administrative decision making by the CEO. This conflicts with the purpose of the Guarantee, which is designed to provide certainty and reduce waiting times for people with disability, their families and carers. To address this, subsection 204(1) will be repealed.

**Item 55** inserts new paragraphs 209(2A)(c) and (d). These will empower the qualitative elements of the Guarantee, which will focus on principles-based outcomes statements supported by underpinning service standards. This approach is consistent with the structure of the NDIS Practice Standards for registered providers, managed by the NDIS Commission.

Section 209 provides for the NDIS rules. New paragraph 209(2A)(c) will empower NDIS rules to provide for matters relating to how the Agency, CEO, and other specified persons are to engage with participants or prospective participants.

New paragraph 209(2A)(d) will empower NDIS rules to provide for matters relating to how participants or prospective participants are to engage with the Agency, CEO, and other specified persons.

The table at subsection 209(8) of the Act sets out the 4 categories of NDIS rules, including which rules fall into which category. This table will be amended to include that the rules relating to the Guarantee are category C rules. This amendment is contained at **item 59**.

### **Planning processes and reasons for decision making**

**Item 29** inserts new section 50J. These amendments will continue to assist participants, their families and carers to gain a greater understanding of the service delivery options they can expect from the Agency.

New section 50J empowers NDIS rules to prescribe the requirements the CEO must comply with when preparing a participant's plan or for participant plans that have come into effect. This may be used to prescribe timeframes for additional processes, such as the offer and holding of a meeting after the plan is approved to discuss how the participant and their family could implement it and begin to access their NDIS funding. The section also empowers NDIS rules to prescribe requirements with which the CEO must comply to give effect to decisions of the Administration Appeals Tribunal ('AAT').

**Item 40** inserts new subsections 100(1B) and (1C).

These new provisions create the capacity for a person to request the CEO give them reasons for a reviewable decision which has been made. These amendments further strengthen the participant-centred focus of the NDIS by providing an opportunity for participants, their families and carers to gain insight into why a decision about their plan has been made.

The CEO will be required to provide reasons to the person who made the request within the period worked out in accordance with the NDIS rules. Where there is no timeframe set out in a rule, reasons must be provided as soon as reasonably practicable. NDIS rules for this purpose will be category C rules (see **item 59**), as the prescribed time frame will be contained in the Guarantee Rules. Subsection 209(6) provides that category C Rules require majority agreement of the Commonwealth, and states and territories before they can be made.

**Tune Review Recommendation 25c:** that the NDIS Act is amended to legislate a Participant Service Guarantee as a Category C rule, to be updated from time to time, with prospective participants and participants being empowered to request an explanation of an access, planning or plan review decision made by the Agency.

Tune Review recommendation 25c is implemented at **Item 40** – new subsections 100(1B) and (1C).

### **Performance metrics - Quarterly report to the Ministerial Council**

The NDIS is overseen by a Ministerial Council, established by Part 5 of Chapter 1 of the Act. It is defined in section 9 as a body consisting of the Ministers of the Commonwealth, States and Territories, and that has been designated as having responsibility relating to the NDIS. Section 174 of the Act provides for the Board of the Agency (the Board) to report to the Ministerial Council on the operations of the Agency.

**Item 49** amends paragraph 174(1)(b) by substituting the one month timeframe with 42 days.

Section 174 requires the Board to provide a quarterly report to the Ministerial Council. Paragraph 174(1)(b) provides that the quarterly report must be given within 1 month after the end of the quarter. The amendment by this item will extend this period from 1 month to 42 days.

This amendment reflects the manner in which timeframes are proposed to be expressed in the Guarantee rules (days rather than months) and extends the reporting period from approximately 4 weeks to approximately 6 weeks (or 42 days). The additional time is based on experience to date. It takes into account the time required to gather data and report on the previous quarter's performance by the Agency, together with sufficient time for the Board to consider and comment on the Agency's performance.

**Item 50** repeals and replaces subsections 174(3) to (4C) of the Act.

Subsection 174(3) currently allows the Minister to make a legislative instrument prescribing the matters which must be contained in the quarterly report, and subsections 174(4) to (4C) sets out prerequisites to making the legislative instrument in s174(3).

This item will repeal those subsections and instead provide that the NDIS rules may now prescribe the types of information and matters to be included in the report to the Ministerial Council. While the Agency's Board is already reporting on many aspects of the Guarantee, the NDIS rules can require this additional information to be included in the quarterly report on the Agency's performance in delivering the Guarantee.

Additional reporting requirements will increase the Board's transparency on the performance and trajectory of the scheme. The flexibility to add new information into the quarterly report will allow the reporting to be responsive and adaptive to the sector and the NDIS generally.

### **Report by the Commonwealth Ombudsman**

The *Ombudsman Act 1976* (Ombudsman Act) sets out the Commonwealth Ombudsman's functions, which include investigating the administrative actions of Australian Government departments/agencies, including the Agency, and prescribed private sector organisations.

The Ombudsman Act also provides the Commonwealth Ombudsman with a range of powers which will facilitate the functions associated with the Guarantee. This includes the ability to investigate complaints, conduct own motion investigations and compel agencies to provide documentation or information.

The Ombudsman Act also gives the Commonwealth Ombudsman jurisdiction to investigate the actions of Commonwealth service providers as if the relevant department or authority had taken those actions.

It is intended that the Commonwealth Ombudsman will have capacity to investigate individual complaints about the Agency, based on the timeframes for decision-making set out in the Guarantee. As a part of this function, the Commonwealth Ombudsman will also monitor complaints with a view to identifying systemic issues. This will be done through data analysis of the complaints received, outreach activity, engagement with other organisations and agencies (such as advocacy organisations) and a range of other activities in order to determine the nature of the issue.

Additionally, it is intended that the Commonwealth Ombudsman will conduct ongoing monitoring and reporting of the Agency's performance against the service standards set in the Guarantee Rules. If systemic issues are identified, the Commonwealth Ombudsman could then decide whether to conduct an own motion investigation, which may include reviewing Agency practices and procedures.

Greater autonomy for the Commonwealth Ombudsman allows for transparency, more consistent feedback and increased accountability for the Agency.

The Australian Government has committed \$2 million over 4 years from 2020-21 to enable the Commonwealth Ombudsman to monitor the Agency's performance in delivering the Guarantee.

**Item 54** inserts new section 204A at the end of Part 2 of Chapter 7.

New section 204A provides that as soon as practicable after the end of each financial year, the Commonwealth Ombudsman must give the Minister a written report about some, or all, of the matters prescribed by NDIS rules for the purposes of section 204A.

The report by the Commonwealth Ombudsman must not include personal information within the meaning of the *Privacy Act 1988*. The Minister must cause a copy of the report to be provided to each House of the Parliament within 15 sitting days of that House after the Minister receives it.

The Commonwealth Ombudsman will continue to have his or her own powers under the Ombudsman Act, which they may exercise as though undertaking an investigation under that Act. The exercise of those powers for the purposes of the preparation of report under section 204A is taken for all purposes to be an exercise of those powers under the *Ombudsman Act 1976*. This provides various protections for the disclosure of information that may not have otherwise applied, amongst other things.

**Tune Review Recommendation 26:** the NDIS Act is amended to clarify the Commonwealth Ombudsman's powers to monitor the Agency's performance in delivering against the Participant Service Guarantee.

Tune Review recommendation 26 is implemented at **Item 54** – new section 204A.

### Variation and reassessment of plans

The word 'review' has multiple meanings in the Act. This has created confusion for participants, their families and carers, as well as Agency delegates as to what kind of review is being sought at any point in time.

Currently, participants can seek two types of review under the Act: a review of their plan (in accordance with section 48) and an internal review of a reviewable decision (in accordance with section 100). A third type of review is created when the participant appeals an internal review decision to the Administrative Appeals Tribunal (AAT).

Concerns over the multiple meanings of the word 'review' have been raised by participants, the AAT, the Agency and disability peak organisations on numerous occasions, dating back as far as 2015 when the first review of the Act was conducted.

Some stakeholders maintained the twin, if not triple use of the word 'review' is confusing participants, and, in turn, potentially hindering their rights to exercise their right of appeal of an Agency decision.

The Tune Review stated evidence suggests that a number of issues are being taken to the AAT, in part, because there is some confusion from participants, and at times the Agency, as to whether the applicant is seeking a review of the decision to approve their statement of participant supports under section 33(2), or the decision (deemed or otherwise) to not review a participant's plan under section 48(2). As both processes are called 'reviews' and the considerations are largely the same, there can be confusion by all parties as to what is actually being sought.

Internal review of decisions necessarily needs to use the word 'review' for reasons including matching the requirements of the AAT's empowering legislation.

Instead of using 'review' for the process of reassessing or varying a person's plan, either in response to a participant's request, on the CEO's own initiative or on a scheduled basis, the words 'vary' or 'reassess' will be substituted. The wording in certain sections is amended by the Act to provide clarity around when a participant's plan is being reassessed or varied rather than reviewed.

Currently, if a plan needs to be amended, the only mechanism by which to do this is to replace the plan or create a new plan after a review of the plan. The Tune Review identified that the inability to amend a plan without creating a new plan or requiring a plan reassessment was a key frustration for participants. These amendments address this frustration to improve the administration of the NDIS, and deliver improved participant experiences to complement the intent of the Guarantee.

For example, Justen is 46 years old and lives in Brewarrina NSW. Justen is a proud Ngiyampaa man who enjoys going to work, and in his downtime, enjoys seeing his family, watching rugby league and going to the movies. Justen has an intellectual disability and is an NDIS participant. Justen works as a casual employee at the local community health centre 2 days a week, and performs administrative support duties. The centre has been very busy and has asked Justen if he would like to transition to part-time employment, for 3 days a week, with longer hours. Justen would like to work more but is worried he does not have enough funding in his NDIS plan for the change. Justen met with his Local Area Coordinator to discuss his change of circumstances. The Local Area Coordinator suggested he request a plan variation. Following the request for a plan variation, the CEO decided to vary Justen's plan to include the increased supports. This allowed Justen to increase the hours in his plan for funded supports to travel to and from work to allow him to continue his economic participation. Plan variations made it possible for Justen to make this change without having to undergo an entire reassessment of his plan that would have required a review all of his needs and supports.



**Item 18** repeals subsection 37(2) to remove the existing prohibition on varying a plan.

**Item 22** inserts new section 47A. New section 47A empowers the CEO to vary a participant's plan (excluding the participant's statements of goals and aspirations), without requiring a plan reassessment to be undertaken, or a new plan to be created.

The CEO will be given the power to vary a participant's plan either on the CEO's own initiative or at the participant's request. An example of a variation on the CEO's own initiative would be to correct a technical mistake by the Agency found after the plan had been agreed.

Other examples under which a plan variation could be appropriate include: the participant requires crisis/emergency funding as a result of a significant change to their supports; if a plan management type is changed after an appropriate risk assessment; for the purpose of applying or adjusting a compensation reduction amount; or, to implement an AAT decision. However, where a participant has undergone a significant change in circumstances, encounters a change in their needed level of support or requires additional funding to achieve a new goal, then it is likely the participant will require a reassessment under new section 48.

If a participant requests a variation of their plan, the CEO will be required to make a decision:

- a) that the plan needs to be varied; or
- b) not to vary the plan and not to reassess the new plan under subsection 48(1); or
- c) not to vary the plan but to reassess the plan under new subsection 48(1) instead.

The CEO will be required to make such a decision within 21 days or, if the NDIS rules prescribe a lesser number of days, that lesser number of days. The requirement for the CEO to action a request by a participant within a maximum of 21 days will provide greater certainty to a participant who has requested a variation of their plan. Rules for this purpose will be category C rules (see **item 59**), as the prescribed time frame will be contained in the Guarantee Rules.

If the CEO does not make a decision on whether to vary a plan at a participant's request within the applicable timeframe, the CEO will be taken to have decided to reassess the plan instead of varying the plan, but this does not prevent the CEO from varying the plan as a result of the reassessment.

In deciding whether to vary a participant's plan, the CEO will be required to have regard to matters that are set out in the NDIS rules. The matters set out in the NDIS rules will assist in clarifying when a variation or reassessment of a participant's plan should occur. These rules will be category D rules, requiring the Commonwealth to consult with all states and territories prior to making or amending the rules (see **item 60**).

The CEO will be required to notify the participant of a decision on a request by a participant to vary their plan.

If the CEO makes a decision to vary a plan upon the request of a participant, the CEO will be required to vary the plan within the timeframe worked out in accordance with the NDIS rules. If there are no such rules, the CEO must vary the plan as soon as reasonably practicable having regard to any information or reports required pursuant to section 50. Rules for this purpose will be category C rules (see **item 59**), as the prescribed time frame will be contained in the Guarantee Rules. Category C rules require agreement by the Commonwealth, and a majority of the states and territories before they can be made (see subsection 209(8)).

A variation may be different to the one requested by the participant.

A plan variation will take effect on the day specified in the notice of variation, which must not be earlier than the day the variation is made. The Agency will be required to give a participant a copy of the varied plan within 7 days of the variation taking effect.

**Tune Review Recommendation 20:** the NDIS Act is amended to introduce a new Category D rule-making power that sets out the matters the Agency must consider when deciding whether to undertake an unscheduled plan review.

Tune Review recommendation 20 is implemented at **Item 22** – new 47A.

**Tune Review Recommendation 21:** the NDIS Act is amended to introduce a new Category D rule-making power giving the Agency the ability to amend a plan in appropriate circumstances.

Tune Review recommendation 21 is implemented at **Item 22** – new 47A(6).

### **Reassessment of a participant's plan**

To assist with addressing delays in CEO decision-making concerning reassessments, and to clarify how the process operates, section 48 will be amended. A key change in new section 48 is to replace the word 'review' with 'reassessment.' This will avoid confusion with a review of a decision.

**Item 23** repeals sections 48 and 49, and substitutes new section 48. Section 49 becomes redundant as a result of the amendments to section 48 of the Act.

New section 48 allows the CEO to initiate a reassessment of a participant's plan at any time, either on the CEO's own initiative, before the 'reassessment date' and/or in any circumstances that may be specified in a participant's plan, for example, if the participant was beginning their last year of school and indicated in their plan a wish to leave home to study at university.

NDIS rules will set out matters to which the CEO will be required to have regard in deciding whether to conduct a reassessment of a participant's plan on the CEO's own initiative. This will ensure consistency in decision-making. These rules will be category D rules, requiring the Commonwealth to consult with all states and territories prior to making or amending the rules (see **item 60**).

If the CEO conducts a reassessment, the CEO will be required to complete the reassessment, and either vary the plan pursuant to new section 47A, or prepare a new plan in accordance with Division 2 of the Act, including approving a statement of participant supports in the new plan.

The crucial improvement made by these provisions is that new section 48 enables the CEO greater options to either vary or prepare a new plan dependent on the reassessment, which allows for a more tailored response to the needs of the participant. Under the previous section 49, upon conducting a plan review, the CEO was empowered only to facilitate the preparation of a new plan.

This will need to be done within the timeframe worked out in accordance with the NDIS rules. If there are no such rules, the CEO will be required to complete the reassessment as soon as reasonably practicable having regard to any information or reports required pursuant to section 50 of the Act. Rules for this purpose will be category C rules (see **item 59**), as the prescribed time frame will be contained in the Guarantee Rules. Category C rules require agreement by the Commonwealth, and a majority of the states and territories before they can be made (see subsection 209(8)).

NDIS rules will be able to prescribe the period (if any) before which the CEO must commence the reassessment of the participant's plan prior to a reassessment date. Rules for this purpose will be category C rules (see **item 59**), as the prescribed time frame will be contained in the Guarantee Rules. Category C rules require agreement by the Commonwealth, and a majority of the states and territories before they can be made (see subsection 209(8)).

### **Consequential amendments to items 22 and 23**

**Items 12, 14, 16, 24-28, 30-32, 36** make consequential amendments by replacing the word 'review' with 'vary or reassess'.

**Tune Review Recommendation 22:** the NDIS Act is amended to remove the duplicate use of the word 'review'.

Tune Review recommendation 22 is implemented throughout Schedule 1, including **Items 12, 14, 16, 24, 25, 26, 27, 28, 30, 31, 32 and 36**.

**Items 17** adds a note to the end of subsection 37(1) of the Act to alert a reader that Division 4 deals with varying and replacing plans.

**Item 19** amends paragraph 41(2)(c) to provide that during a period of plan suspension, the participant is not entitled to make a request under subsection 47A(2) for a variation of the plan. Where a plan is suspended, paragraph 41(2) provides that a person is not entitled to be paid NDIS amounts, and the Agency is not required to provide or fund other supports. Allowing the participant to request a variation during a period of suspension when they are unable to receive any support under the plan would not be appropriate. This is consequential to **item 22** which makes amendments to allow a plan to be varied.

**Item 20** repeals and replaces the heading to Division 4 of Part 2 of Chapter 3 of the Act to Division 4—Varying and replacing participants' plans to reflect the flexibility to vary plans provided by new section 47A contained in **item 22**.

**Item 21** repeals the note at subsection 47(1) and substitutes two new notes that reference the requests a participant may make to vary a plan, and the decision the CEO may make to vary or reassess a plan by way of sections 47A and 48 respectively.

**Items 39 and 41** amend subparagraph 100(1A)(a)(ii) and subsection 100(5)(b) regarding a review of decision, to omit references to subsection 48(2), as this will no longer result in a deemed refusal.

**Item 38** inserts new table items 6 and 6A in subsection 99(1) to provide that a decision by the CEO to vary a participant's plan, or not to vary or reassess a plan, is a reviewable decision. A person affected by the decision may seek internal merits review of such a decision, and make a subsequent application to the AAT for external review.

### **Effect of later decisions before review is completed**

Current section 101 provides that if a decision is varied when a review of the decision has been sought, the review of decision is a request to review the varied decision. In the case of a review of a decision to approve a statement of participant supports in a plan, this has not been available, because a statement of participant supports could not be varied, and a new plan needed to be prepared instead. New section 47A will allow the variation of such a statement. Section 101 of the Act is then amended to ensure that where review has been sought of a statement of participant supports, and that statement is varied prior to the completion of the review, then the review is of the statement of participant supports as varied.

Under these circumstances a participant is also free to withdraw their request for review if they are satisfied with the variation or no longer wish to proceed with the review. This will improve participant experience and support the direction of AAT resources by ensuring that the participant and AAT do not have to continue with the review where the participant is satisfied with the variation.

**Item 44** repeals the heading to section 101 and substitutes “Effect of later decisions before review completed”.

**Item 45** makes a minor amendment to section 101 that is consequential to the amendments made by **item 46**.

**Item 46** inserts new subsection 101(2).

New subsection 101(2) applies if a participant makes a request for review of a decision to approve a statement of participant supports, or a decision to vary a statement of participant supports.

If, prior to the review decision being made, the CEO varies the plan in a way that changes the statement of participant supports, then the request for review is also taken to be a request for review of the decision to make that variation.

If, prior to the review decision being made, a new plan for the participant comes into effect, then the request for review is also taken to be a request for review of the decision to approve the statement of participant supports in the new plan.

**Item 47** makes a minor amendment to section 103 that is consequential to the amendment made by **item 48**.

**Item 48** inserts a new subsection 103(2).

New subsection 103(2) applies where an application is made to the AAT for review of a decision made by a reviewer relating to a statement of participant supports in a participant’s plan.

If, before a decision on the review is made, the CEO varies the plan and the variation is a change to the statement of supports, then the application is also taken to be an application for review of the decision to make a variation.

If, before a decision on review is made, a new plan for the participant comes into effect, then the application is also taken to be an application for review of the decision to approve the statement of participant supports in the new plan.

**Tune Review Recommendation 23:** the NDIS Act is amended to clarify the Administrative Appeals Tribunal's (AAT) jurisdiction, including the power for a plan to be amended while a matter is before the AAT.

Tune Review recommendation 23 is implemented at **Item 48** – new 103(2).

### **Categorisation of NDIS rules**

**Item 59** will provide that all new rule-making provisions in Schedule 1 in relation to the Guarantee, which will be inserted by this Bill will be Category C rules. Category C rules require the agreement of the Commonwealth and a majority of the states and territories.

The rule-making provisions of the Act are important to defining how and where further detail of the provisions can be found and used. Rules that define access, supports or have an interface with other systems require unanimous agreement (Category A) by states and territories. As the Guarantee rules are not of that nature, requiring a majority of jurisdictions to agree to any changes to these rules provides a more appropriate check and balance.

**Items 56 to 58** make minor and technical amendments to subsection 209(8) consequential to **item 59**.

**Item 60** inserts new paragraphs (caa) and (cab) in item 4 of the table at subsection 209(8).

This item prescribes that rules made for the purposes of new subsections 47A(6) and 48(2) are Category D rules. Category D rules cannot be made until the states and territories have been consulted on the rules (see subsection 209A(7)).

Subsection 47A(6) allows the rules to set out the matters to which the CEO must have regard to in deciding to vary a participant's plan and subsection 48(2) allows the rules to set out the matters to which the CEO must have regard to in deciding whether to conduct a reassessment of a participant's plan.

As these rules affect how the CEO will consider changing a participant's plan it is important that these matters can be adapted to the circumstances of individual participants and may need to be updated from time to time to ensure they are fit-for-purpose. Requiring changes to these rules to be performed alongside consultation with states and territories is an appropriate means of allowing jurisdictional oversight and flexibility.

### **Application and transitional provisions**

When provisions are amended, application and transitional provisions explain how the amended provisions work. Application provisions explain how the new provisions

apply and how the old provisions will cease to apply. Transitional provisions modify the effect of new provisions to provide how the new provisions might affect people or circumstances to which the old rules apply.

**Item 61** provides for the application provisions of amendments relating to requests.

The amendments of sections 20 and 21, subsection 26(1) and item 1 of the table in subsection 99(1) of the Act made by this Schedule apply in relation to an access request made on or after the commencement of this item.

The amendments of paragraphs 26(2)(b) and (3)(b) of the Act made by this Schedule apply in relation to a request made under subsection 26(1) of that Act on or after the commencement of this item.

**Item 62** provides application, saving and transitional provisions in relation to prospective participants or participants.

The amendments of sections 31, 50, 55, 78, 79 and 96 of the Act made by this Schedule apply in relation to a variation that is made under section 47A of that Act, or a reassessment that begins under section 48 of that Act on or after the commencement of this item.

Sections 31, 50, 55, 78, 79 and 96 of the Act, as in force immediately before the commencement of this item, continue to apply on and after that commencement in relation to a review that began under section 48 of that Act before, on or after that commencement.

The repeal of sections 32 and 32A of the Act, and substitution of section 32 by this Schedule, applies in relation to a person who becomes a participant on or after the commencement of this item.

The amendment of paragraph 33(2)(c) of the Act made by this Schedule, and paragraph 50J(a) of the Act as inserted by this Schedule, apply in relation to a participant's plan where the CEO approves the statement of participant supports on or after the commencement of this item.

The repeal and substitution of subsection 33(4) of the Act made by this Schedule applies in relation to a participant's plan where the CEO commences facilitating the preparation of the plan on or after the commencement of this item.

Paragraph 50J(b) and 47A of the Act as inserted by this Schedule, and the amendments of section 37 of the Act made by this Schedule, apply in relation to the following:

- a) a participant's plan that is in effect immediately before the commencement of this item;
- b) a participant's plan that comes into effect on or after that commencement.

Section 48 of the Act, as substituted by this Schedule, applies in relation to a reassessment that begins on or after the commencement of this item.

Subsections 48(1) to (3), section 49 and subsections 99(1) and 100(1A) and (5) of the Act, as in force immediately before the commencement of this item, continue to apply on and after that commencement in relation to a request for a review made under subsection 48(1) of the Act before that commencement.

Subsections 48(4), (5) and (6) and section 49 of the Act, as in force immediately before the commencement of this item, continue to apply on and after that commencement in relation to a review that began before that commencement.

Paragraph 50J(c) of the Act, as inserted by this Schedule, applies in relation to decisions of the AAT that are made on or after the commencement of this item.

A participant's plan that is in effect immediately before the commencement of this item, with a review date that is on or after that commencement, has effect on and after that commencement as if that date were the plan's reassessment date.

A participant's plan that is in effect immediately before the commencement of this item, that specifies the circumstances in which the plan must be reviewed, has effect on and after that commencement as if those circumstances were circumstances in which the plan must be reassessed.

**Item 63** provides application provisions for amendments relating to nominees.

The amendment of subsection 89(1) of the Act made by this Schedule applies in relation to a request referred to in paragraph 89(1)(b) of the Act that is made on or after the commencement of this item.

The amendment of subsection 89(3) of the Act made by this Schedule applies in relation to a cancellation under that subsection on or after the commencement of this item, where the CEO was informed under paragraph 89(3)(b) of that Act on or after that commencement.

The repeal and substitution of paragraph 90(3)(a) of the Act made by this Schedule applies in relation to a request made on or after the commencement of this item.

**Item 64** provides application provisions for amendments relating to review of decisions.

Subsections 100(1B) and (1C) of the Act, as inserted by this Schedule, apply in relation to a notice given under subsection 100(1) of the Act on or after the commencement of this item.

The amendment of subsection 100(6) of the Act made by this Schedule, and subsection 100(6A) of the Act as inserted by this Schedule, apply in relation to the following:

- a) a request for review that is made on or after the commencement of this item;
- b) a period applicable under paragraph 21(3)(a) or (b) of that Act that ends on or after that commencement.



Paragraph 101(2)(a) of the Act, as added by this Schedule, applies only in relation to a request for review made on or after the commencement of this item.

Paragraph 103(2)(a) of the Act, as added by this Schedule, applies in relation to an application for review made on or after the commencement of this item.

**Item 65** provides application provisions for reports.

The amendments of section 174 of the Act made by this Schedule apply in relation to a period ending on or after the commencement of this item.

Section 204A of the Act, as added by this Schedule, applies in relation to a financial year ending on or after the commencement of this item.

**Item 66** provides transitional provision for time frames for decision making by persons other than the CEO.

NDIS rules made for the purposes of subsection 204(2) of the Act, that are in force immediately before the commencement of this item, continue in force on and after that commencement as if they had been made for the purposes of section 204 of that Act.

## Schedule 2 – Flexibility Measures

### Overview

Schedule 2 makes amendments to strengthen the objects and principles of the Act to acknowledge the central role and rights of people with disability and the need to recognise and respect the relationship between people with disability and their families and carers.

This Schedule includes:

- updating language for people with psychosocial disability in the eligibility criteria, removing reference to the medicalised terminology of ‘psychiatric condition’ and replacing this with psychosocial disability;
- streamlining administrative processes and reducing red tape for participants; and
- clarity on decisions about plan management requests and extends the risk assessment process for self-management of funding to those using registered plan management providers, acknowledging there may be similar risks inherent in engaging an unregistered provider to deliver NDIS supports or services,

In addition to the above amendments responding to recommendations of the Tune Review, the amendments in this Schedule enable the Agency to pay service providers directly on behalf of participants, including self-managing participants, through a new payment platform (changes to section 45). This means that self-managing participants would no longer be required to pay for supports up front and then seek reimbursement.

Schedule 2 will also give effect to recommendations of an independent review of the NDIS Act in 2015. The Independent Review, commissioned by the Commonwealth Government in consultation with the State and Territory governments in 2015, made 33 recommendations to improve the operation of the Act. The majority of the amendments were minor or technical in nature to help manage risks proactively and ensure the NDIS continues to deliver positive outcomes for people with disability. Recommendations endorsed by all governments included strengthening the objects and principles of the Act, providing a more appropriate description of the purposes of funding the Agency may provide outside of participant plans to strengthen Information, Linkages, and Capacity Building and other general supports to people with disability, as well as addressing other technical inadequacies of the legislation.

The Schedule implements changes in line with the Government's response to the Tune Review which agreed to certain amendments recommended by the 2015 Independent Review of the Act.

**Tune Review Recommendation 27b:** the NDIS Act and Rules are amended to reflect agreed recommendations arising from the 2015 review of the NDIS Act.

Tune Recommendation 27b is implemented throughout Schedule 2.

## Schedule 2—Flexibility measures

### Notes on Clauses

#### ***National Disability Insurance Scheme Act 2013***

##### **Amendments to principles**

**Items 1, 2, 3, 4 and 5** amend section 4 of the Act, which sets out the general principles guiding actions under the Act. For information on **item 4** see the section on *Importance of carers and family*.

**Items 1 and 2** remove moderating language from section 4 referring to the capabilities of people with disability.

**Item 1** amends subsection 4(2) of the Act by removing the words ‘to the extent of their ability’.

**Item 2** amends subsection 4(8) of the Act by removing the words ‘to the full extent of their capacity’.

**Item 3** amends the general principles guiding actions under the Act inserting new subsection 4(9A) after subsection 4(9) to reinforce that people with disability are central to the NDIS, and should be included in a co-design capacity.

**Item 5** repeals subsection 4(15) and substitutes it with a new provision. The new subsection 4(15) adds a principle to guide actions under the Act, reinforcing the importance of a diverse, sustainable and well-developed NDIS market to enable people with disability to exercise their right to choice and control in obtaining disability supports.

**Item 6** amends paragraph 5(d) of the Act. Section 5 of the Act specifies the principles that must be followed when an act or thing is done in relation to a person with a disability by another person. Paragraph 5(d) requires that the gender of people with disability should be recognised. **Item 6** amends this by removing the word ‘gender’ and replacing it with ‘sex, gender identity, sexual orientation and intersex status’. This amendment requires the intersection between disability and sex, gender identity, sexual orientation and intersex status to be taken into account by persons that do an act or thing on behalf of others.

**Items 12 and 13** amend section 17A of the Act, which sets out the principles relating to the participation of people with disability in the Scheme.

**Item 12** clarifies the intended role of existing section 17A of the Act. This item inserts new subsection 17A(1A) to provide that the principles in section 17A are to apply to the CEO when performing their functions and exercising their powers under Chapter 3. That is, the CEO must have regard to the principles relating to the participation of people with disability in performing the CEO’s functions and exercising the CEO’s powers in Chapter 3 of the Act. Chapter 3 relates to participants and their plans.

**Item 13** inserts new subsection 17A(4) which provides that the principles in section 17A are in addition to the principles in section 4 of the Act. This makes it clear that the principles in section 17A add to those in section 4, rather than detract from them.

### **Importance of carers and family**

These amendments specifically recognise the importance of carers and family to participants.

**Item 4** inserts new subsection 4(12A) to the general principles guiding actions under the Act to specifically recognise and respect the relationship between people with a disability and their families and carers

**Item 23** amends section 31 of the Act which sets out principles relating to participant's plans. **Item 23** inserts new paragraph 31(ca) and requires, so far as is reasonable practicable, in the preparation, review and replacement of a participant's plan, and the management of funding for supports under a participant's plan, to recognise and respect the relationship between participants and their families and carers.

**Item 24** removes the words 'where possible' from paragraph 31(d). The effect of this amendment is to provide that in the preparation, review and replacement of a participant's plan, and the management of funding for supports under a participant's plan, a participant's plan should strengthen and build capacity of families and carers to support participants who are children.

**Item 43** amends paragraph 104(3)(f) of the Act to allow the CEO to consider the effect of requiring a participant to take action to obtain compensation upon the participant's carer, as well as the participant and their family. Section 104 of the Act sets out circumstances in which the CEO may require a person to take action to obtain compensation. This includes, at subsection (3), things the CEO must have regard to in deciding whether it is reasonable to require a participant or prospective participant to take action to claim compensation. Item 43 will have the effect of requiring the CEO to consider the impact of the requirement to take action on the carer of the participant or prospective participant in deciding whether it is reasonable to require the participant or prospective participant take action. This amendment recognises the importance of the role of carers by considering the impact of requiring a participant to take action on a carer.

### **CEO approval and publication of 'approved forms'**

The Tune Review found many respondents had asked for an improved online experience, with the ability to download and print forms and any other documentation they may need to apply for the NDIS, including an option to upload required evidence to support Agency decision-making.

**Item 7** amends section 9 of the Act by inserting a new definition of 'approved form'. This new definition provides that an 'approved form' means a form approved under section 9A of the Act.

**Item 8** inserts new section 9A into the Act. New section 9A enables the CEO to approve, in writing, approved forms for the purposes of a provision in the Act. It also requires the CEO to publish each approved form on the Agency's website. This amendment will ensure that approved forms are formally approved by the CEO and publically accessible on the Agency's website. The Act requires the following information to be in an 'approved form':

- a report of an assessment requested by the CEO from a prospective participant (section 26 of the Act);
- a report of an assessment, requested by the CEO, including a medical, psychiatric, psychological or other examination conducted by an appropriately qualified person (section 36(2) of the Act)
- a report of an assessment requested by the CEO, for the purposes of reviewing a participant's plan (section 50 of the Act).

This will ensure that participants and prospective participants can easily access forms required to do things under the NDIS, aiming to improve the participant experience.

### **Supporting participants to access disability supports**

**Items 9, 10 and 11** amend section 14 of the Act. Section 14 empowers the Agency to provide funding to persons or entities for specified purposes and provides clarity about the general supports that can be funded.

Amounts paid under section 14 are not 'NDIS amounts' for the purposes of the Act, and are not intended to be paid directly to participants (or their representatives).

A person or entity receiving a payment under section 14 will become an 'NDIS provider' for the purposes of the Act, and will be subject to the Code of Conduct and complaints mechanism as enforced by the NDIS Quality and Safeguards Commissioner.

New subsection 14(2) has been added to include the funding of persons or entities to provide early intervention supports. This provision will allow funding to be provided to Early Childhood Early Intervention (ECEI) Partners. ECEI Partners assist families, even if not NDIS participants, to understand the potential role of the NDIS and to guide them to other appropriate supports and to offer independent advice on providers of support most suited to their needs.

Funding ECEI Partners will assist families to start accessing approved early intervention supports while building their readiness to go through the planning process.

**Tune Recommendation 13:** the NDIS Act is amended to provide more flexibility for the Agency to fund early intervention support for children under the age of seven years outside a NDIS plan, in order to develop family capacity and ability to exercise informed choice and control.

**Tune Recommendation 27b:** reflect agreed recommendations arising from the 2015 review of the NDIS Act.

Tune Recommendation 13 is implemented at **Item 11** – new 14(2)(b).

Tune Recommendation 27b includes the amendment at **Item 10** – to paragraph 14(a)

**Item 9** makes a consequential amendment to section 14 to reflect that **item 10** and **item 11** restructure section 14 into a section consisting of subsection (1) and subsection (2).

**Item 10** repeals paragraph 14(a) and inserts new paragraphs (a), (aa), (ab) and (ac) which specify the Agency may provide funding assistance for an increased scope of purposes, including:

- enabling persons or entities to provide information in relation to disability and disability support services;
- enabling persons or entities to provide assistance in building capacity within the community in connection with the provision of goods and services to people with a disability and their families and carers;
- enabling persons or entities to assist people with a disability to realise their potential for physical, social, emotional and intellectual development; or
- enabling persons or entities to assist people with a disability, and their families and carers, to participate in social and economic life.

This measure came from recommendation 6 of the 2015 Review of the NDIS Act to provide greater clarity of the purposes of Information, Linkages and Capacity Building funding and other general supports for people with disability. It does this by increasing the purposes for which the Agency may provide funding to build the capacity of mainstream service and community programs to create connections between all people with disability and the communities in which they live.

**Item 11** adds a new subsection 14(2) and subsection 14(3) in the Act. New subsection 14(2) clarifies the Agency may provide funding to a person or entity, without limiting new subsection 14(1) (inserted by **item 10**) to:

- a. assist one or more participants to access supports; and
- b. assist a participant who is a child under 7 to access supported, before the child's plan comes into effect, in relation to the child's disability needs.

New paragraph 14(2)(a) funding assists participants to fully access supports in order to mitigate the impact of market challenges that may impede the participant from exercising choice and control. For example, providing combined funding to obtain occupational therapy services, in a remote area where there is a gap in the market, for a number of participants in a community.

New paragraph 14(2)(b) will enable funding to be provided for early intervention supports to children under seven as soon as possible. Any ancillary funding for capacity building supports proposed to be provided for children under seven for the purposes set out in paragraph 14(2)(b) will cease once a plan is approved for that child.

Paragraph 14(2)(b) assistance is intended for children who may not be ready to commence planning processes immediately. As with all funding under section 14, this funding is discretionary.

New subsection 14(3) provides that NDIS rules may set out matters to which the Agency must have regard in deciding whether to provide discretionary ancillary funding under subsection 14(2) of the Act.

**Item 51** makes a consequential amendment to subsection 209(8) as a result of **item 11**. Subsection 209(8) sets out the different categories of NDIS rules. **Item 51** inserts new paragraph (aa) in subsection 209(8) at table item 4, column headed “Description” to provide that the new NDIS rules created by new subsection 14(3), inserted by **Item 11**, are to be Category D rules. Subsection 209(7) of the Act provides the Minister must not make category D rules unless the States and Territories have been consulted about the rules.

### **Psychosocial disability**

**Items 14 to 18** amend sections 24 and 25 of the Act to update the language of the Act in respect of psychosocial disability. These amendments are in keeping with best practice approaches and recognise that psychosocial disability may be broader than the classification of psychiatric conditions.



**Tune Recommendation 8b:** the NDIS Act is amended to remove references to ‘psychiatric conditions’ when determining eligibility and replace with ‘psychosocial disability’.

Tune Recommendation 8b is implemented at:

- **Item 14** – amended 24(1)(a)
- **Item 17** – amended 25(1)(a)(ii)

**Tune Recommendation 8a:** the NDIS Act is amended to provide clearer guidance for the Agency in considering whether a psychosocial impairment is permanent, recognising that some conditions may be episodic or fluctuating.

Tune Recommendation 8a is implemented at:

- **Item 16** – new subsection 24(3)
- **Item 18** – new subsection 25(1A)

Section 24 of the Act sets out the disability requirements for the purposes of satisfying the access criteria contained in section 21 of the Act. Subsection 21(1) provides a person meets the access criteria if the CEO is satisfied:

- The person meets the age requirements; and
- The person meets the residency requirements; and
- The person meets either the disability requirements or the early intervention requirements.

Subsection 24(1) lists the criteria a person must satisfy to meet the disability requirements.

**Item 14** amends paragraph 24(1)(a) of the Act to remove the words ‘to one or more impairments attributable to a psychiatric condition’ from the disability requirements, and substitute with ‘the person has one or more impairments to which a psychosocial disability is attributable’.

**Item 15** amends paragraph 24(1)(c) of the Act to omit the reference to substantially reduced ‘psychosocial functioning’. Removing psychosocial functioning as a separate requirement clarifies that it is part of reduced functional capacity for the purpose of whether a person meets the disability requirements.

**Item 16** inserts new subsections 24(3) and 24(4).

Paragraph 24(1)(b) provides that in order to meet the disability criteria, the impairment, or impairments are, or are likely to be, permanent. Paragraph 24(1)(e) further provides that in order to meet the disability requirements, the person must be likely to require support under the NDIS for the person’s lifetime.

New subsection 24(3) clarifies that for the purposes of subsection 24(1), impairment or impairments to which a psychosocial disability is attributable and that are episodic or fluctuating may be taken to be permanent (for the purposes of paragraph 24(1)(b)) and that the person is likely to require support under the Scheme for their lifetime (for the purposes of 24(1)(e)).

New subsection 24(4) provides that subsection 24(3) does not limit subsection 24(2). Subsection 24(2) provides that an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the NDIS for the person's lifetime, despite the variation.

For example, Arjun is 28 years old and lives alone in an apartment in Fremantle. Arjun enjoys reading science fiction, playing sport and going to concerts with his friends. Arjun has a psychosocial disability. Due to the episodic nature of his psychosocial disability, Arjun experiences periods of wellness where he is able to do daily tasks such as cooking and cleaning. However in episodic periods where he is unwell, Arjun has difficulty getting out of bed and does not have the capacity to undertake tasks such as cooking, cleaning, doing laundry, and finds it hard to interact with other people. Due to the fluctuating nature of his disability, Arjun did not think he was eligible for the NDIS, however his current GP recommended that he apply. Arjun applied to the NDIS with supporting evidence from his GP that he has substantially reduced functional capacity which can be attributed to his psychosocial disability. The amended eligibility requirements now make it clear to prospective participants like Arjun that episodic or fluctuating impairments to which a psychosocial disability is attributable may be taken as permanent. Arjun was granted access to the Scheme.

**Item 17** repeals and replaces subparagraph 25(1)(a)(ii) of the Act.

Section 25 of the Act sets out early intervention requirements for the purposes of the access criteria contained in section 21. The effect of this amendment is that it updates the language in subparagraph 25(1)(a)(ii) to remove references to 'one or more identified impairments that are attributable to a psychiatric condition', and replaces it with the words 'has one or more impairments to which a psychosocial disability is attributable and that are, or are likely to be, permanent'.

**Item 18** inserts new subsection 25(1A) which clarifies when an impairment requiring early intervention may be permanent for the purposes of subparagraph 25(1)(a)(ii). New subsection 25(1A) provides that an impairment or impairments to which a psychosocial disability is attributable and that are episodic or fluctuating may be taken to be permanent, despite the episodic or fluctuating nature of the impairments.

**Item 21** makes a consequential amendment to paragraph 27(b) by omitting the words ‘or psychosocial functioning of a person in undertaking’. This amendment is consequential to **item 15**, and intended to remove psychosocial function as a separate requirement of reduced functional capacity.

### **National Disability Insurance Scheme rules**

**Item 22** inserts new subsections 27(2) and 27(3). Section 27 of the Act deals with the scope of National Disability Insurance Scheme rules that may be prescribed in relation to disability requirements and early intervention requirements.

Currently, section 27 of the Act allows the NDIS Rules to prescribe circumstances in which, or criteria to be applied in assessing specific matters outlines in the section including, for example, whether:

- impairments are, or likely to be, permanent for the purposes of satisfying the disability requirements contained in section 24 or the early intervention requirements in section 25; or
- impairments result in substantially reduced functional capacity for the purposes of the disability requirements contained in section 24.

New subsection 27(2) allows the NDIS rules to, for the purposes of paragraph 27(1)(a), to specify requirements that must be met for an impairment to be considered permanent or likely to be permanent. This power is subject to subsections 24(2) and (3), and 25(1A) of the Act.

New subsection 27(3) allows the NDIS rules to, for the purposes of paragraph 27(1)(b), specify requirements that must be met for an impairment to be considered to result in substantially reduced functional capacity.

The effect of the amendments to section 27 is that the NDIS Rules may now prescribe requirements that must be met for impairments to be considered: permanent, or likely to be permanent; and to be considered to result in reduced functional capacity. Prescribing definitive criteria in the NDIS Rules will provide more certainty in relation to satisfying the disability and early intervention requirements, and allow for more consistent decision-making.

**Item 19** is a consequential amendment to facilitate the insertions made by **item 23**.

**Item 20** makes a minor technical amendment to paragraph 27(a) to correct the paragraph’s reference to section 25, from ‘25(a)(i) or (ii)’ to ‘25(1)(a)(i) or (ii)’.

**Item 50** repeals and substitutes subsection 209(3) to require the Minister when making NDIS rules to have regards to the objects and principles of the Act, as well as to the need to ensure the financial sustainability of the NDIS. This was a recommendation from the 2015 NDIS Act Review also supported in the Tune Review as part of Recommendation 27(b).

## Plan Management

**Items 25 to 27** make amendments to sections 42 and 43 of the Act regarding plan management requests a participant may make, and the resulting outcome of the request having had regard to a participant's particular circumstances.

The options available to a participant in making a plan management request under subsection 43(1) are that the plan be managed wholly or in part by:

1. The participant, or plan nominee; or
2. A registered plan management provider nominated by the participant; or
3. The Agency.

Management by a registered plan management provider nominated by the participant is a form of self-management as is management by the participant themselves, or the plan nominee acting on the participant's behalf. Plan management may also be a combination of the available options.

**Tune Recommendation 19:** the NDIS Act is amended so a participant who requests to 'plan manage' their NDIS funding be subject to the same considerations that apply when a participant seeks to 'self-manage'.

Tune Recommendation 19 is implemented at **Item 28** – amended 43(3) to 43(5).

The Tune Review considered that there are potential risks for participants engaging unregistered providers through a registered plan manager without the same risk assessment that is currently required for self-managing participants. These concerns were raised on the basis that having access to an unregistered provider market, while providing greater choice over service offerings, arguably exposes participants to greater risk of abuse, neglect or exploitation. The additional protections put in place for registered providers, which are the only providers available to those who are Agency managed, are not currently required of unregistered providers.

**Item 25** amends paragraph 42(1)(a) to clarify that supports under a participant's plan refers to those supports that are chosen by the participant, as well as those specifically identified in the plan. This reflects that supports in plans may be also described generally and supports from that general category will then be chosen by the participant.

**Item 26** makes a minor amendment to paragraph 43(1)(c) to omit the words 'a person specified by'. In practice, if a participant makes a plan management request for the Agency to manage the supports under their plan, then it will be the Agency who is specified in the request, not a 'person specified by' the Agency.

**Item 27** repeals subsections 43(2) to (5) and replaces them with new subsections 43(2) to (7). Section 43 deals with providing choice for a participant in relation to plan management.

New subsection 43(2) provides that if a participant makes a plan management request (under subsection 43(1)), then the statement of participant supports must give effect to the request, except to the extent that new subsections 43(3) to (5) apply.

New subsection 43(3) applies to a participant making a request to self-manage (paragraph 43(3)(a)) or to self-manage using the support of a registered plan management provider they nominate (paragraph 43(3)(b)). If circumstances under section 44 apply, in which a participant must not manage a plan, the statement of participant supports in the plan must provide for the funding of supports under the plan to be managed by the Agency.

New subsection 43(4) provides that:

- a. if a participant has a plan nominee, and
- b. subsection 44(2A) does *not* apply in relation to the nominee, that is, there *are no* circumstances in which a nominee must not manage a plan, and
- c. the terms of the nominee's appointment deal with management of certain funding for supports under the plan,

then the participant's statement of participant supports must provide for the funding to be managed in accordance with the terms of the nominee's appointment.

New subsection 43(5) applies on the same basis as new subsection 43(4), except that there *are* circumstances in which a nominee must not manage a plan under subsection 44(2A). In these instances the statement for participant supports must provide for the funding in the plan to be managed by the Agency.

New subsection 43(6) provides that subsection 43(3) does not apply to funding to the extent that subsection 43(4) or 43(5) applies to the funding. This gives a hierarchy to plan management requests so that if a participant or a participant-requested registered plan management provider are unable to manage a plan due to circumstances in section 44 and they have a nominee, the nominee will be able to manage their plan, except where the nominee too contravenes section 44. In this instance the plan will be managed by the Agency.

New subsection 43(7) provides that if the participant does not make a plan management request, then the default position is that the Agency must manage the funding, and this is to be reflected in the statement of participant supports.

**Items 28, 29, 30 and 31** amend section 44, which deals with circumstances in which a participant must not manage their plan. These amendments clarify that plan management is to be treated as a form of self-management. As a result, appropriate safeguards and risk assessments apply to ensure that the participant or their nominee has the capacity and capability to ensure the management of funding delivers the maximum benefit to the participant.

These risk assessments also consider whether the use of a registered plan management provider to manage funding is appropriate when considering the participant's circumstances, including the participant's cognitive function and decision-making capacity.

**Item 28** repeals the heading to section 44, and replaces it with the new heading 'Circumstances in which persons must not manage funding'.

**Item 29** repeals and replaces subsections 44(1) to (2A) to provide for circumstances in which persons must not manage the funding under a participant's plan.

New subsection 44(1) provides circumstances in which the statement of participant supports must not provide for the participant to manage the funding for supports. The circumstances are:

- a. the participant is insolvent under administration; or
- b. the CEO is satisfied that the participant's management of the funding for supports would:
  - i. present an unreasonable risk to the participant; or
  - ii. permit the participant to manage matters that are prescribed by the NDIS rules as matters that must not be managed by the participant.

New subsection 44(2) provides that a statement of participant supports must not provide that a registered plan management provider is to manage the funding for supports under the plan if the CEO is satisfied that the provider's management of the funding would present an unreasonable risk to the participant.

New subsection 44(2A) provides circumstances in which the statement of participant supports must not provide for the plan nominee to manage the funding for supports. The circumstances are similar to those in subsection 44(1) except that consideration is undertaken in respect of the plan nominee, rather than in respect of the participant.

**Item 30** make a minor consequential amendment to subsection 44(3) to omit the words "either of", and substitute the words "any of", consequential to the insertion of new paragraph 44(3)(aa).

**Item 31** inserts new paragraph 44(3)(aa) to empower the NDIS rules to prescribe criteria the CEO is to apply, and matters to which the CEO is to have regard in considering whether a registered plan management provider managing the funding for supports under the plan would present an unreasonable risk to the participant.

### **Payments made under the NDIS**

**Item 32** repeals and substitutes section 45 of the Act to clarify how payments can be made under the NDIS scheme.

This amendment will enable the Agency to pay service providers directly on behalf of participants, including self-managing participants, through a new payment platform. Enabling direct payment to providers will benefit participants in several ways, including:

- Reducing the financial burden on participants with self-managed funding by paying providers of supports directly. Participants will no longer be required to fund the payment of supports up-front from their own funds before claiming payment from the NDIS as a reimbursement.
- Reducing administrative overhead by simplifying the claiming process, compared to manually claiming for payment from the NDIS through the Participant portal or mobile app, including receipt keeping and reconciling payments.
- Allowing the Agency to more closely see what participants are using their plan budgets for, helping provide vital data to inform what services and activities appear to be most effective in helping participants achieve their goals; as well as helping to identify where market supply of services may be lacking.

New subsection 45(1) provides that payments under the NDIS are to be paid to the person determined by the CEO; and either in accordance with the NDIS rules; or if there are no such rules, in the manner determined by the CEO.

New Subsection 45(2) clarifies that paragraph 45(1)(b) deals with how the payments can be made – specifically with relation to timing and whether amounts are paid as instalments or lump sum payments.

New subsection 45(3) provides that the NDIS rules may provide that an amount is not payable to a person until the person nominates a bank account into which the amount is to be paid.

For example, Sally is 32 years old, lives near Dubbo and self manages her own NDIS plan. At the moment, Sally has to use her own funds to pay for her fortnightly physiotherapy session, get a receipt from the physio, and make a claim via the myplace participant portal. In the future, Sally will be able to ‘tap and go’ at the physio using her smartphone – just like she does when she is using her private health care cover. Sally will no longer need to pay for her physiotherapy services from her own funds then claim a reimbursement back from the NDIA. Sally won’t have to use her own funds, store her receipts, make manual claims or track her expenditure against her plan, instead she will be able to make claims on the go, when she receives her services and supports and track her budget in real time. For claims made through the new Point of Sale (POS) system, Sally will not need to keep years of NDIS records and receipts, and there is no need for reconciliation or preparation for audits. Sally travels 100km to the nearest physio with hydrotherapy services. Using data captured by the POS system, the NDIA will be able to better identify and understand the impact of thin markets in regional areas compared to participants living in metropolitan areas. This allows the Agency to better understand supply and demand for certain supports and services in different parts of the country, and therefore improve the Agency’s ability to fulfil its market stewardship role.

### **Acquittal of NDIS amounts**

**Item 33** repeals and substitutes subsection 46(1) of the Act. Section 46 deals with the acquittal of NDIS amounts. New subsection 46(1) clarifies that a person who receives an NDIS amount on behalf of a participant must spend the money in accordance with both the participant's plan and the participant's requests.

This amendment reinforces that funds must be spent in accordance with the participant's plan ensuring any funding is spent in a way that will benefit a participant. This in-turn helps to ensure the integrity of the Scheme.

**Item 34** empowers the NDIS rules to prescribe requirements for NDIS providers that receive NDIS amounts on behalf of participants, to retain records including the retention of records for a specified period of time.

By making such requirements on NDIS providers, the scheme is able to be certain of an evidence base showing that NDIS funds are being delivered and used correctly. This also contributes to the broader set of provisions that ensure the financial sustainability and integrity of the scheme.

### **Variation of participants' plans**

These items are in addition to related items in Schedule 1 dealing with plan variations.

**Item 35** repeals and replaces the heading to section 47 of the Act such that section 47 provides for 'variation of participant's plans – changes of participant's statement of goals and aspirations'.

**Item 36** repeals subsection 47(2) and substitutes that the participant's plan is taken to be varied to include a changed version of a participant's statement of goals and aspirations, should the participant give such a changed version to the CEO. This removes the concept of the plan being replaced in its entirety by a new plan (as it was provided under previous subsection 47(2)) when all that has changed is the participant's statements of goals and aspirations. These amendments will allow for a participants' plan to be varied to include a revised statement of goals and aspirations where a participant gives the CEO a changed version of the participant's statement of goals and aspirations. Previously, where a participant provided a revised statement, the plan had to be replaced.

**Item 37** makes a consequential amendment to subsection 47(3) to refer to the 'varied plan' for the purposes of new subsection 47(2), instead of the 'new plan'.



## Information gathering

**Item 38** amends section 55 of the Act, which empowers the CEO to obtain information from other persons in relation to matters prescribed in subsection 55(2) of the Act. The matters listed in subsection 55(2) are relevant to ensuring the integrity of the NDIS and currently do not extend to information which may identify persons who may be eligible for the NDIS but who have not yet made an access request. The 2015 Review of the Act found that the current drafting of section 55 unduly limited the powers of the CEO to obtain necessary information to ensure the integrity of the NDIS, and recommended that section 55 be amended to broaden the powers of the CEO to obtain information on individuals that are expected to eventually become participants of the NDIS. The 2015 Review also recommended that section 55 not be broadened in a general sense, but rather specific matters be added to subsection 55(2). New paragraph 55(2)(aa) implements this recommendation and explicitly allows information to be gathered for the purposes of establishing whether a person with disability may be eligible for services or supports under the NDIS.

**Item 39** repeals subsection 60(1) of the Act. This subsection authorises the collection of 'protected information.' This subsection is being removed as it is unnecessary as information is only protected information after it has been collected by the Agency.

**Item 40** amends subsection 60(3) by omitting the words 'subsections (1) and (2), the collection, recording' and substituting it with 'subsection (2), the recording'. This is a consequential amendment as a result of the repeal of subsection 60(1) made by **item 39**.

**Item 41** then, as a consequential amendment, repeals section 61, which is an offence provision relating directly to subsection 60(1) and has no other application. Section 61 makes it an offence to collect protected information; however, information only becomes protected information after it has been collected and therefore section 61 has no application.

## Cancellation of nominee

**Item 42** inserts new subsection 90(3A) to allow the CEO to cancel the appointment of a nominee of a participant, where the person appointed as a nominee had guardianship of the participant, or was otherwise appointed by a Commonwealth, State or Territory body to make decision for the participant, and the person no longer has such guardianship or the power to make such decisions.

## Board members

**Item 44** amends subsection 127(2) to insert ‘lived experience of disability’ as an additional element of eligibility to consider when the Minister appoints a person as a Board Member.

Section 127 relates to the appointment of Board members and includes, at subsection (2), that a person is only eligible for appointment as a board member where the Minister is satisfied that the person has skills in one of a number of fields, for example, the provision or use of disability services, or financial management. This amendment will add lived experience of disability as a field for the appointment of Board members. This amendment was recommended in the 2015 Review of the NDIS Act and, while out of scope of the Tune Review, that Review noted it is broadly supported by governments, the Agency and the public.

**Item 45** amends subsection 127(6) of the Act to omit the words “in the fields” from the Minister’s consideration of the Board member’s balance of skills. This amendment is consequential to **Item 48** as there is an additional eligibility element outside the list of fields in subsection 127(2).

**Item 46** is a similar consequential amendment to subsection 129(4) of the Act to omit the words “in at least one of the fields” in respect of a person’s eligibility for acting appointments, assessed in accordance with subsection 127(2) of the Act.

**Item 47** inserts new subsection 147(3) relating to the appointment of members to the Independent Advisory Council, which has a legislated function to provide advice to the Board on the way the Agency performs its functions relating to the NDIS. In order to improve connectedness between the Council and the Board, the new subsection provides that the Minister must not appoint a person as the Principal Member of the Independent Advisory Council unless the person is also a Board member. **Item 48** is consequential to the amendment made by **item 47** and provides that the Minister may terminate the appointment of the Principal Member of the Advisory Council under subsection 155(2) if that person is not a Board member. This amendment was recommended in the 2015 Review of the NDIS Act, and while out of scope of the Tune Review, that Review noted it is broadly supported by governments, the Agency and the public.

## Debt after a person’s death

**Item 49** repeals and substitutes paragraph 182(2)(c) to clarify that an NDIS amount paid after a person’s death only becomes a debt if it was not a payment made in respect of supports provided to the participant funded under their plan before they died. This will ensure that payments made to participants under their plans prior to their death will not become debts even where the service was not provided. This provides clarity and certainty as to when an amount will be a debt.

## Application and savings provisions

When provisions are amended, application and transitional provisions explain how the amended provisions work. Application provisions explain how the new provisions apply and how the old provisions will cease to apply. Transitional provisions modify the effect of new provisions to provide how the new provisions might affect people or circumstances to which the old rules apply.

**Item 52** provides for the timeframes from which amendments under Part 2 are to apply in respect of participants and prospective participants

The amendments to sections 24 and 25 apply in relation to the following:

- a. an access request made on or after the commencement of this item;
- b. an access request that was pending immediately before that commencement;
- c. a revocation under section 30 of that Act made on or after that commencement.

The amendments to sections 43 and 44 of the Act made by this Schedule (made by **items 27-31**) apply in relation to a plan management request made on or after the commencement of this item.

Subsection 43(7) of the Act as substituted by this Schedule, applies in relation to a participant's plan where the CEO approves the statement of participant supports on or after the commencement of this item.

NDIS rules made for the purposes of paragraph 44(2)(b) of the Act and that are in force immediately before the commencement of this item continue in force on and after that commencement as if they had been made for the purposes of subparagraph 44(1)(b)(ii) of that Act.

The repeal and substitution of section 45 of the Act made by this Schedule applies in relation to an amount payable under the NDIS on or after the commencement of this item.

The repeal and substitution of subsection 46(1) of the Act made by this Schedule applies in relation to the receipt of an NDIS amount on or after the commencement of this item.

The repeal and substitution of subsection 47(2) of the Act and the amendment of subsection 47(3) of the Act made by this Schedule apply in relation to a changed version of a participant's statement of goals and aspirations given to the CEO on or after the commencement of this item.

**Item 53** provides for the application of the amendment in this Schedule relating to nominees. Subsection 90(3A) of the Act, as inserted by this Schedule, applies in relation to the cancellation of the appointment of a nominee on or after the commencement of this item (whether the nominee was appointed before, on or after that commencement).

**Item 54** provides for the application of the amendments in this Schedule relating to appointments. The amendments of sections 127, 129 and 147 of the Act made by this Schedule apply in relation to an appointment made on or after the commencement of this item. The amendment of section 155 of the Act made by this Schedule applies in relation to an appointment made before, on or after the commencement of this item.

**Item 55** provides for the application of the amendments in this Schedule relating to debts. The repeal and substitution of paragraph 182(2)(c) of the Act made by this Schedule applies only in relation to payments made on or after the commencement of this item.

## Schedule 3—Full scheme amendments

### Overview

This Schedule amends the Act to reflect the fact that the NDIS has now been implemented across Australia, to remove now redundant provisions and make technical amendments.

**Tune Review Recommendation 27a:** the NDIS Act and Rules are amended to remove trial and transition provisions.

Tune Review recommendation 27a is implemented throughout Schedule 3.

### Background

On commencement in July 2013, the Act established a legislative framework for the Agency to launch and operate the NDIS in five sites across Australia. Consequently, the Act contains provisions that state the NDIS is progressive in nature and uses language to reflect that the NDIS would be launched in stages, and implemented progressively, through arrangements funded and governed jointly by the Commonwealth and host jurisdictions. These transitional arrangements would be set out in inter-governmental agreements between the Commonwealth and host jurisdictions, including whether rollout would be by age cohort, as chosen by Tasmania and South Australia, or by geographic location, as chosen by all other jurisdictions, until there was full implementation of the NDIS across Australia.

The NDIS has been available across Australia and its external territories since 1 July 2020, with the last geographic rollout to Christmas Island and the Cocos (Keeling) Islands.

## Schedule 3 – Full scheme amendments

### Notes on Clauses

#### ***National Disability Insurance Scheme Act 2013***

##### Part 1 – Main Amendments

##### **Amending outdated terminology: ‘National Disability Insurance Scheme launch’**

**Item 10** repeals and replaces the definition of ‘National Disability Insurance Scheme’ in section 9 to mean that the NDIS is the arrangements set out in Chapter 2 and 3 of the Act.

**Item 11** repeals the redundant definition of ‘National Disability Insurance Scheme launch’. Jointly, **items 10 and 11** ensure there will be a single updated definition of ‘National Disability Insurance Scheme’ in the Act.

**Items 1, 12, 18, 25, 26, 27, 39, 46** are consequential amendments to **items 10 and 11**, as they amend all references to ‘National Disability Insurance Scheme Launch’ in the Act by removing the word ‘launch’. In effect, all these references become ‘National Disability Insurance Scheme’ – consistent with the new definition of ‘National Disability Insurance Scheme’ inserted by **item 10** (see also **item 55** and **item 56** which clarify how the amendments in item 18 apply to an access request).

**Item 57** provides that a person who is a participant of the National Disability Insurance Scheme launch is taken to be a participant in the National Disability Insurance Scheme. This does not limit section 29 or section 30 of the Act in relation to when a person ceases to be a participant.

##### **Repealing references to the progressive implementation of the Scheme**

**Item 2** repeals paragraph 3(3)(a). Paragraph 3(3)(a) requires regard to be given to the progressive implementation of the Scheme when giving effect to the objects of the Act. As the NDIS is available across Australia, this requirement is now redundant.

**Item 3** repeals and replaces subsection 14(7). Subsection 14(7) provides that it is the Parliament’s intention that the Ministerial Council, Minister, Board, CEO, the Commissioner and all other persons or bodies that perform functions or powers under the Act have regard to the progressive implementation of the NDIS and the need to ensure the financial sustainability of the NDIS. Item 3 removes the requirement to have regard to the progressive implementation of the NDIS as this is now redundant.

### **Amending outdated terminology: ‘National Disability Insurance Scheme Launch Transition Agency’**

**Item 37** repeals subsection 117(1), which established the National Disability Insurance Scheme Launch Transition Agency, and replaces it with a provision specifying that the National Disability Insurance Scheme Launch Transition Agency is now to be known as the National Disability Insurance Agency.

The following items in the Bill update the name of the Agency throughout the Act:

- **Item 4** repeals and replaces specific text in section 8 of the Act. Section 8 sets out a simplified outline of the Act and refers to the establishment of the Agency under Chapter 6 of the Act. Item 4 updates the simplified outline of the Act by removing the words ‘National Disability Insurance Scheme Launch Transition Agency’ and replacing them with ‘National Disability Insurance Agency’.
- **Item 6** repeals and replaces the definition of ‘Agency’ in section 9 of the Act. The effect of this amendment is that the definition stays largely the same but the term ‘National Disability Insurance Scheme Launch Transition Agency’ is replaced with ‘National Disability Insurance Agency’.
- **Item 7** repeals and replaces the definition of ‘Board’ in section 9 of the Act. The effect of this amendment is that the definition of stays largely the same but the term ‘National Disability Insurance Scheme Launch Transition Agency’ is replaced with ‘National Disability Insurance Agency’.
- **Item 34** repeals the heading of Chapter 6 of the Act from ‘Chapter 6 – National Disability Insurance Scheme Launch and Transition Agency’ and replaces it with ‘Chapter 6 – National Disability Insurance Agency’.
- **Item 35** repeals the heading of Part 1 of Chapter 6 of the Act from ‘Part 1 – National Disability Insurance Scheme Launch Transition Agency’ and replaces it with ‘Part 1 – National Disability Insurance Agency’.
- **Item 36** repeals the heading of section 117 of the Act from ‘Establishment’ and replaces it with ‘National Disability Insurance Agency’.

### **Amending outdated terminology: Board of the National Disability Insurance Scheme Launch Transition Agency**

**Item 38** repeals section 123 of the Act, which established the Board, and replaces it with a provision specifying that the body known as the Board of the National Disability Insurance Scheme Launch Transition Agency is now to be known as the Board of the National Disability Insurance Agency. A note to the provision alerts the reader that subsection 25B(1) of the *Acts Interpretation Act 1901* provides that a body whose name is altered by an Act continues in existence under the new name so that its identity is not affected.

**Item 58** provides that a person holding office as a member of the Board of the National Disability Insurance Scheme Launch Transition Agency continues to hold office as a member of the Board of the National Disability Insurance Agency for the balance of their term of appointment.

### **Repealing redundant provisions**

#### First Review of the Act

**Item 5** amends the simplified outline in section 8 of the Act by removing the reference to Chapter 7 providing for review of the Act. Simultaneously, **item 49** repeals Part 4 of Chapter 7 of the Act which sets out how the review is to be undertaken. Jointly, **items 5 and 49** remove the now redundant requirement for a review of the Act to be undertaken, as the first review has already occurred.

#### First quarterly report to the Ministerial Council

**Item 43** repeals subsection 174(5) of the Act, which provides for the Board preparing its first quarterly report for the Ministerial Council. However, as this report is now complete, subsection 174(5) of the Act is redundant. The Board continues to provide quarterly reports for the Ministerial Council under paragraph 174(1)(b).

#### Transitioning of staff

**Item 8** repeals the definition of 'FaHCSIA agreement' from section 9 of the Act. This definition was applicable to staff who were reassigned from the former Department of Families and Housing, Community Services and Indigenous Affairs (FaHCSIA) to the Agency on its establishment. Given that the Agency is now fully established, FaHCSIA no longer exists, and the FaHCSIA agreement is no longer in effect, this definition is redundant.

**Item 42** repeals section 171A of the Act, which provides that transitional provisions set out in Schedule 1 apply to staff of the Agency. This provision is no longer required. **Item 54** repeals Schedule 1.

#### Host and participating jurisdictions

The Act uses the term 'host jurisdiction' to designate the states and territories in which the NDIS applied while it was being rolled out, with the included states and territories mentioned in legislative instruments made by the Minister. From 1 July 2020 the NDIS operates across Australia and all states and territories are host jurisdictions for the NDIS. From this date, it was no longer necessary for the states and territories to be declared by legislative instrument. Instead, amendments propose defining this term in the Act.



Similarly, the operations of the NDIS Quality and Safeguards Commissioner were implemented progressively across Australia, with the Commission managing all states and territories from 1 December 2020. This was achieved using the defined term ‘participating jurisdiction’ with the participating jurisdictions prescribed by legislative instrument.

**Item 9** repeals the definition of ‘host jurisdiction’ in section 9 of the Act and replaces it with a definition that states each of the states, the Australian Capital Territory and the Northern Territory are a host jurisdiction. Simultaneously, **item 17** repeals section 10 of the Act which defines a ‘host jurisdiction’ as a State or Territory specified by the Minister as a ‘host jurisdiction’ in a legislative instrument.

**Item 50** repeals subsection 209(5) of the Act under which the Minister cannot create rules relating to the commencement of the facilitation of the preparation of plans of participants who are identified by reference to a host jurisdiction, without first obtaining the agreement of that host jurisdiction. It then inserts a new subsection 209(5) which provides the Minister must not make Category B NDIS rules relating to an area, law or program of a host jurisdiction unless the host jurisdiction has agreed to the making of the rules. This amendment removes the now redundant power to make rules regarding the facilitation of the preparation of plans of participants who are identified by reference to a host jurisdiction. As the NDIS is available across Australia, rules specific to a host jurisdiction are no longer required, but rather rules will apply to all states and territories.

**Item 13** repeals the definition of ‘participating jurisdiction’ from section 9 of the Act. Simultaneously, **item 17** repeals section 10A of the Act, which defines a ‘participating jurisdiction’ as a host jurisdiction specified by the Minister as a ‘participating jurisdiction’ in a legislative instrument.

**Item 32** repeals paragraph 73E(1)(b) of the Act, in effect removing the reference to an NDIS provider providing supports of services to people with a disability in a participating jurisdiction (see also **item 55** which clarifies the application of this amendment to applications made under section 73C of the Act).

#### Prescribed areas

As part of the progressive implementation of the NDIS, a person’s eligibility to participate in the NDIS was limited by a variety of factors, including their residence in a ‘prescribed area’. As the NDIS is now available across Australia, this is no longer required.

**Item 4** repeals and replaces specific text in section 8 of the Act. Section 8 sets out a simplified outline of the Act and refers to a person being able to access supports or services under the NDIS ‘depending on where a person with disability lives’. Item 4 updates the simplified outline of the Act by removing these words, as a person’s eligibility to participate in the NDIS is no longer limited by their place of residence.

**Item 14** repeals the definition of ‘prescribed area’ from section 9 of the Act. Meanwhile, **item 21** repeals paragraph 22(2)(a) and **item 24** repeals subsection 23(3). **Item 19**

repeals paragraph 21(2)(a) (as it refers to subsection 23(3), which is being repealed by item 24). Jointly, **items 10, 11, 14, 19, 21 and 24** remove references to 'prescribed areas' from the Act. Relatedly, **item 53** repeals subsection 209(8) (table item 2, column headed "Description", paragraphs (a) to (c)), which provide Category B National Disability Insurance Scheme rules can be made for the purposes of paragraph subsection 23(3). In effect, this removes the Ministers power to make Category B NDIS rules in relation to prescribed areas.

**Item 22** and **item 23** operate together to remove subparagraph 23(1)(c) of the Act, which provides a person meets the residence requirements if they (amongst other things) satisfy other requirements prescribed by the NDIS rules (these other requirements are those being repealed by **items 21 and 24**). **Item 51** repeals subsection 209(8)(table 1, column headed "Descriptions", paragraph (b)) which is a reference to subparagraph 23(1)(c) (repealed by **item 23**) (see also **item 55** which clarifies how amendments to section 21, 22 and 23 of the Act apply to access requests)

#### Registered provider of supports

The description 'registered provider of supports' was used in jurisdictions which were not yet subject to the oversight of the NDIS Quality and Safeguards Commission (NDIS Commission). Since 1 December 2020, the NDIS Commission has had oversight across Australia and this description is therefore redundant.

**Item 16** repeals the definition of 'registered provider of supports' from section 9 of the Act. Simultaneously, **item 30** repeals Part 3 of Chapter 4 of the Act which deals with and prescribed requirements for 'registered providers of supports'. Other references to 'registered provider of supports' are repealed from the Act as follows:

- **Item 15** repeals the reference to 'registered provider of supports' from the definition of 'registered plan management provider' in section 9 of the Act. In effect, only an NDIS provider who is registered to manage funding for supports.
- **Item 28** repeals the reference to 'registered provider of supports' from subsection 33(6) of the Act. In effect, supports can only be provided by a registered NDIS provider (see also **item 55** which clarifies when this amendment applies to a participant's plan).
- **Item 29** repeals paragraphs 55(2)(i) and (j) from the Act, in effect removing references to 'registered provider of supports' from the scope of the CEO's power under section 55 to obtain information from persons to ensure the integrity of the NDIS.
- **Item 31** repeals Division 1 of Part 3A of Chapter of the Act, in effect removing provisions dealing with how Part 3A of Chapter 4 applies to NDIS providers and registered providers of supports. This is because it is no longer necessary to clarify how Part 3A applies to both types of providers, since the NDIS Commission now has oversight of providers across Australia.
- **Item 33** repeals subsection 99(1) (table items 7 and 8), in effect removing decisions made under the Act in relation to a registered provider of supports from the list of reviewable decisions.

- **Item 40** repeals paragraph 144(3)(b), which provided the Independent Advisory Council should not provide advice on the approval or revocation of approval of a registered provider of supports.
- **Item 48** repeals paragraphs 203(1)(a) and (b) of the Act, which provides the Act applies to an entity that is a registered provider of supports.
- **Item 52** repeals subsection 209(8) (table item 1, column headed “Description”, paragraphs (ga) to (gc)), which provide Category A NDIS rules can be made for the purposes of section 70, subparagraph 72(1)(c)(i) and section 73 of the Act – all which relate to registered providers of supports.

#### First appointment of the CEO

**Item 41** repeals subsection 160(6)-(8) of the Act. These provisions provide that the first CEO of the Agency is to be appointed by the Minister, and the Minister must consult with host jurisdictions before making the appointment. As requirements pertaining to the appointment of the first CEO of the Agency are no longer required, these provisions are redundant.

**Item 45** repeals subparagraph 176(2)(a)(iii), a now redundant reference to the first CEO. **Item 44** is a related nomenclature amendment to remove the word ‘or’ from subparagraph 176(2)(a)(ii) given subparagraph 176(2)(a)(iii) is being repealed.

#### Reviewing actuary for first three years

**Item 47** repeals subsection 180D(5) of the Act, which deals with the nomination of a reviewing actuary by the Board for the first three years of the Agency’s existence. As this three year period has passed (1 July 2013 to 1 July 2016), this provision is redundant.

To ensure the launch of the NDIS stayed at manageable numbers, various provisions contemplated particular arrangements being put in place with jurisdiction-specific limitations relating to residence or age. For example, South Australia and Tasmania transitioned based on the age of existing clients and potential participants, the remainder of jurisdictions transitioned existing clients and potential participants based on the local government areas where they lived. With the end of transition, these provisions are redundant.

#### **Amending when a person ‘meets the access criteria’**

To ensure the launch of the NDIS stayed at manageable numbers, various provisions contemplated particular arrangements being put in place with jurisdiction-specific limitations relating to age and residence. After removal of these redundant provisions the only remaining flexibility for different access requirements remains at subsection 21(2), relating to transitioning persons receiving supports under a program prescribed by the NDIS rules, generally being a program of a particular state or territory and **Item 20**.

**Item 20** adds new paragraph 21(2)(d) to the Act. This provision will enable the CEO, if they are not satisfied that a person meets the access criteria under subsection

21(1), find that a person meets the access criteria if the CEO is satisfied the person satisfies requirements prescribed in the NDIS rules for the purposes of paragraph 21(2)(d). These will be Category B rules requiring the agreement of the Commonwealth Minister and a host jurisdiction.

**Item 53** repeals subsection 209(8) (table item 2, column headed “Description”, paragraphs (a) to (c)), which provide Category B NDIS rules can be made for the purposes of sections 22 and 23 in relation to age or residence requirements. It then inserts a new reference to paragraphs 21(2)(b) and (d) to include the new paragraph being inserted by **item 20** into the table of categories of NDIS rules set out in subsection 209(8) of the Act.

**Item 21** repeals and substitutes section 22, to prescribe age requirements for participants. Under the previous provision, some jurisdictions such as South Australia, had separate rules for access to the NDIS based primarily according to age. With transition in those jurisdictions complete this is no longer required. Under the new section 22, participants will meet the age requirements only if they are less than 65 years of age when their access request is made. There is no change to previous NDIS policy. The ability to make NDIS rules with different age requirements was necessary for those jurisdictions who rolled out the NDIS according to an age cohort. This is redundant now the NDIS is available across Australia.

## Application and transitional provisions

When provisions are amended, application and transitional provisions explain how the amended provisions work. Application provisions explain how the new provisions apply and how the old provisions will cease to apply. Transitional provisions modify the effect of new provisions to provide how the new provisions might affect people or circumstances to which the old rules apply.

**Item 55** clarifies that:

- (1) the following amendments made by this Bill, apply in relation to an access request made on or after the commencement of item 55:
  - amendments to section 8 of the Act (see **item 18**)
  - amendments to section 21 of the Act (see **items 19 and 20**)
  - repeal and substitution of section 22 of the Act (see **item 21**)
  - amendments to section 23 of the Act (see **items 22, 23, 24**).
- (2) The repeal and substitution of subsection 33(6) of the Act (see **item 28**) applies in relation to a participant's plan where the CEO approves the statement of participant supports on or after commencement of item 55.
- (3) The repeal of paragraph 73E(1)(b) of the Act (see **item 32**) applies to:
  - an application made under section 73C of the Act on or after commencement of item 55
  - an application made under section 73C that was pending immediately before commencement of item 55.

**Item 56** deals with pending access requests. A request made by a person under section 18 of the Act that was pending immediately before the commencement of this item has effect on and after that commencement as if it were a request by the person to become a participant in the NDIS. This means that prospective participants are not disadvantaged if a decision on their request under section 18 of the Act has not been finalised prior to the commencement of this item.

**Item 59** maintains the status of the CEO. The person holding office as the CEO of the National Disability Insurance Scheme Launch Transition Agency immediately before the commencement of this item continues to hold office as the CEO of the Agency for the balance of that person's term of appointment, as it remains immediately before commencement of this provision.

**Item 60** maintains the status of staff of the Agency. A person who was a member of the staff of the National Disability Insurance Scheme Launch Transition Agency immediately before the commencement of this item continues, on and after that commencement, as a member of the staff of the Agency.

**Item 61** empowers the Minister to make rules, by legislative instrument, prescribing matters of a transitional nature, including prescribing any saving or application provisions, relating to the amendments or repeals made by this Part 1 of Schedule 3 of the Bill. However, the Minister may not create transitional rules which:

- a) create an offence or civil penalty;
- b) provide powers of:
  - i. arrest or detention; or
  - ii. entry, search or seizure;
- c) impose a tax;
- d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in the Act;
- e) directly amend the text of the Act.

## Part 2—Consequential amendments

### ***Disability Care Australia Fund Act 2013***

**Part 2 of Schedule 3** makes consequential amendments to the *Disability Care Australia Fund Act 2013*.

**Item 62** consequentially repeals section 4 of the *Disability Care Australia Fund Act 2013*, which is the definition of National Disability Insurance Scheme Launch Transition Agency.