Disability Intermediaries Australia

1 OCTOBER 2021

NDIS Act Review Consultations
GPO Box 9820
Canberra ACT 2610

Via email: NDISConsultations@dss.gov.au

To Whom It May Concern:

RE: PROPOSED NDIS LEGISLATIVE CHANGES

Disability Intermediaries Australia Ltd (DIA) is Australia's peak body for non-government disability intermediary service organisations and practitioners. Collectively, DIA members deliver Support Coordination and Plan Management services for Australians with all types of disability.

We provide the attached submission based on our experience and detailed understanding of the market operating environment within the Plan Management and Support Coordination sector.

Kind Regards,

Mr Jess Harper *GAICD, AGIA*
Chief Executive Officer
Disability Intermediaries Australia Ltd

CHANGES TO THE NDIS ACT

SUBMISSION

OCTOBER 2021

SUBMISSION BY
Disability Intermediaries Australia Limited.

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ACKNOWLEDGEMENT OF COUNTRY

Disability Intermediaries Australia respectfully acknowledges Australia's Aboriginal and Torres Strait Islander communities and their rich culture and pays respect to their Elders past, present and emerging. We acknowledge Aboriginal and Torres Strait Islander peoples as Australia's first peoples and as the Traditional Owners and custodians of the land and water on which we rely.

We recognise and value the ongoing contribution of Aboriginal and Torres Strait Islander peoples and communities to Australian life and how this enriches us. We embrace the spirit of reconciliation, working towards the equality of outcomes and ensuring an equal voice.

ACKNOWLEDGEMENT OF RIGHTS OF PEOPLE WITH A DISABILITY

Disability Intermediaries Australia acknowledges the objectives of the United Nations Convention on the Rights of Persons with Disabilities which affirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

Disability Intermediaries Australia embraces this Convention as we continue to support choice and control for all Australians with a disability.

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FORWARD

This submission is to the proposed changes to the NDIS Act, October 2021. The proposed changes to the NDIS Act were released for public consultation in September 2021.

Disability Intermediaries Australia (DIA) notes the described propose of these proposed changes to the NDIS Act are, generally, in response to the review of the NDIS Legislation by Mr David Tune AO PSM in 2019. Mr Tune's report found that the NDIS legislation was broadly fit for purpose but noted where improvements could be made to remove barriers that made processes difficult for participants and the National Disability Insurance Agency (NDIA).

The proposed changes involve the amendment of the NDIS Act with the majority of changes being implemented through amendments to the, or the creation of additional, NDIS Rules. In particular:

- Amend the NDIS Act;

- Create two new Rules:
    - for the Participant Service Guarantee;
    - for Plan Administration;

- Amend two NDIS Rules:
    - National Disability Insurance Scheme (Plan Management) Rules 2013;
    - National Disability Insurance Scheme (Becoming a Participant) Rules 2016; and

- Update three NDIS Rules:
    - National Disability Insurance Scheme (Children) Rules 2013
    - National Disability Insurance Scheme (Nominees) Rules 2013
    - National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020

DIA supports some of the proposed changes, namely those that give participants more choice and flexibility as well as those that are aimed at

giving better support to people with more complex needs, however, DIA raises concern and alarm about other proposed changes to the proposed legislation.

DIA, in principle, supports the introduction of a Participant Service Guarantee, which will hopefully raise the standards and shortens the amount of time it takes the NDIA to make decisions around access to the scheme, approving or amending a plan, and seeking reviews of decisions.

DIA notes that whilst the Participant Service Guarantee has not formally been brought into effect through changes to the NDIS Act, the NDIA has been working to implement the Participant Service Guarantee since early 2021 and to date has not achieved or reported on many of the areas of the Participant Service Guarantee.

Ultimately, what remains to be seen is how the NDIA and the NDIS Quality and Safeguards Commission (NDIS Commission) will interpret and operationalise the proposed changes to the NDIS Act. DIA notes that the explanation documents provided alongside the exposure draft do not contain a detailed understanding of how the NDIA and NDIS Commission have and plan to interpret the proposed changes to the NDIS Act, this in itself is likely to cause grave concern and alarm to the disability sector, NDIS participants and people with a disability.

Finally, DIA notes the exceptionally narrow window of time being provided to respond to the exposure draft, just 20 business days to make a submission, and for the Department of Social Services to review and consider each submission in detail before the proposed changes are put before parliament in late October, just 14 business days after submissions close.

Given the breadth of the proposed changes, Disability Intermediaries Australia Ltd (DIA) comments are primarily directed towards the rule changes for Plan Administration and Plan Management. DIA has not sought to respond to all of the proposed legislative changes, rather only those of direct relevance to DIA, our members, operation of the scheme, and of which it has specific knowledge and understanding.

ABOUT DISABILITY INTERMEDIARIES AUSTRALIA

DIA is Australia's peak body for non-government disability intermediary service organisations and practitioners. Collectively, DIA members deliver Support Coordination and Plan Management services for Australians with all types of disability.

DIA members (providers) deliver Support Coordination and Plan Management services to over 160,000 NDIS participants across Australia, or 1 in 3 NDIS Participants. DIA members represent more than 71 per cent market share of the Support Coordination and Plan Management markets.

INTERMEDIARIES

NDIS participants are able to engage highly skilled intermediary supports, Plan Management and Support Coordination, to assist in managing their NDIS budgets and the procurement and coordination of support arrangements with providers.

Intermediary organisations play a vital role in negotiating support costs with providers, making arrangements for support delivery and providing information and ongoing support to providers regarding the specific needs of their clients, to guide NDIS participants through the complexity of the scheme, to better inform participants and to assist administer where needed, payment arrangements.

In our view both Support Coordination and Plan Management service provision should ideally be separate from organisations who are also providing direct service provision, as they are guidance and support roles designed to assist in the identification and selection of service providers, this is in order to avoid conflicts of interest. In DIA's view, for service providers to legitimately provide the support coordination and plan management services with informed consumer choice, a clear separation is needed between all other service provision and intermediary supports (support coordination and plan management).

RECOGNISING THE CHALLENGES

The scope, scale and timeframe for establishment of the NDIS has made its development particularly complicated. This broad market of supports must cover all types of disability and enormous geographical spread, as well as other types of diversity (e.g., culturally and linguistically diverse communities and people experiencing poverty).

These challenges are becoming more evident as the NDIS matures. The NDIS has come a long way, some 'improvements' have been welcomed others overwhelming rejected. Many participants and their families are still reporting they are experiencing significant challenges accessing the NDIS, implementing their plan, maintaining and/or building capacity and are struggling to navigate the Scheme (JSC, 2018; DIA, 2020; IAC, Jul 2019).

Providers in many areas of the NDIS report they continue to struggle to: keep up with NDIS change cycle, maintain financial viability and meet administrative requirements all while delivering quality services. This has led to market segment volatility and a steady pace of market exit for certain services (Mathys & Randall, 2019; DIA, 2020; IAC, Oct 2019).

Some of these challenges are due to less-than-ideal implementation and/or transition of the Scheme, which is not unsurprising given the scale of this reform. However, DIA contends that many of these challenges have arisen because of NDIA's ever narrowing view of participant choice and control and dignity of risk. Despite the NDIA's public rhetoric their thinking in these critical areas have not evolved to meet the needs of people with a disability.

Across the spectrum of market-based social insurance schemes and human services (e.g. VET, Worksafe, Transport and Accident Insurance and Aged Care) it is evident that for people with multiple and often overlapping needs a markets based approach without trusted and skilled Intermediaries and Advocates engaged by and operating at the direction of a participant, is neither an effective nor an efficient means of service delivery (Muir & Salignac, 2017; Olney, 2016; Slasberg & Beresford, 2016; Yu & Oliver, 2015; Considine, et al., 2011; Carey, et al., 2017).

For many people, the complexity of navigating and negotiating their way to quality services can be an overwhelming burden (Dommers, et al., 2017; Needham, 2018). Yet despite this, public policy continues to overestimate the capabilities that people possess to navigate markets, and underestimate the capability required of both government and providers, to ensure markets truly address the needs of all people.

Participants must be empowered, supported, listened to and understood as an equal partner in the planning decisions. Far too often participants' views, requests for support funds and service types, are, in DIA's view, rejected without adequate consideration, process or communication.

Predictably, this pattern is playing out in the NDIS and are further exacerbated by the proposed changes to the NDIS Act. Many people with more complex support needs, culturally and linguistically diverse community and those from low socioeconomic background are disproportionately struggling to have their needs met in the NDIS (Hui, et al., 2018; JSC, 2018; Productivity Commission, 2017; DIA, 2020).

The NDIS has all of the necessary elements to be successful, but the proposed changes to the NDIS Act risk continuing the status quo: where the NDIA make decisions about what supports a participant is to engage and spend their NDIS funds on (a welfare model) rather than supporting the participants and deciding on a funding package which allows the participant to spend those funds in a manner that they choose to achieve their goals (an insurance model).

Without this no 'Service Guarantee' will make a meaningful long-term difference to the quality of a person's life and/or social and economic participation.

DIA SUBMISSION

1. PROPOSED CHANGES TO PLAN MANAGEMENT RULES

1.1. Do the Rules clearly set out the circumstances in which a support must be specifically identified in a plan?

Section 6 of the Rules.

Section 6 of the proposed Plan Management Rules set out the delegations for the determination (inclusion or exclusion) of the provision of supports to participants by service providers. This delegated power can effectively remove the participants "choice and control" of service provider as referenced in the Act.

The exposure draft is unclear how a participant may undertake an internal appeal and review of such delegated decisions.

In its current form, the first avenue of review appears to be an application to the Administrative Appeals Tribunal (AAT) which is onerous, costly and time-consuming particularly for participants. A decision made under this delegation should be classed as a Reviewable Decision.

The application of these rules in relation to existing and ongoing contractual arrangements is silent and potentially open to confrontation with Consumer Laws. Also, the reference to "choice and control" that a participant has under the Act would need to be qualified to articulate the delegated authority of the CEO to remove this right as per these proposed rules.

The proposed Plan Management Rules have significant practical implications for Registered Plan Management Providers. In particular thought needs to be given to the following:

- If a participant is subject to a delegated decision as described in Section 6 of the Plan Management Rules, the process, and equally importantly the timeframe, that a Registered Plan Management Provider is required to follow and meet in identifying non-

conformities requires significant attention and articulation before these rules can be practically used.

- If non-conformities are identified by a Registered Plan Management Provider, either evident or inferred, the process of informing the NDIA of such will need to be clearly defined and developed.

- There will be a requirement to review and define the legal framework and parameters that Registered Plan Management Provider's work within in context of a support being delivered in good faith by a provider, as agreed to by the participant, that is to be declined under these proposed rule changes. The inferred "accountabilities" of Registered Plan Management Provider's must be balanced and aligned with the documented authorities.

- It is recommended that the Agency provide further guidance and definition in relation to the intended practical meaning of the word "manner" in the context of the application of "supports or classes of supports (be) provided in a particular manner" and how a Registered Plan Management Provider is to recognise and respond if such a situation eventuates.

1.2. Do the Rules clearly set out the things the NDIA will consider in protecting participants from provider conflicts of interest and help them maximise the benefits of their NDIS funding?

Section 8 of the Rules.

1.2.1. Conflict of Interest

It is DIA's view that Intermediary service provision (Support Coordination and Plan Management) should be separate from organisations that also provide direct service provision such as Core, Other Capacity Building and Capital Supports.

At their core Intermediary roles provide navigation, guidance and support, capacity building, oversight and monitoring of the Participant's service providers. Intermediary services support

Participants with identification, selection and purchase of services from providers; this inevitably leads to substantial conflicts of interest when delivered by a provider that also delivers other supports to the same participant.

> *"…first principles would suggest that it is reasonable to expect that in most cases the provider of support coordination is not the provider of any other funded supports in a participant's plan"* (Tune, 2019).

DIA accepts this assertion, noting however that in DIA's view, such conflict does not exist to either the same extent or risk for intermediary supports (Support Coordination and Plan Management) being able to be delivered by the same provider to the same participant.

Whilst there may be a need in some small and bespoke cohorts of Participants for exemption, in DIA's view, for the vast majority of service providers to legitimately provide intermediary services with informed consumer choice, a clear separation is needed between all other service provision and intermediary supports (Support Coordination and Plan Management) for a participant.

This would result in current Conflict of Interest arrangements being inverted, where providers would, by default, not be able to deliver intermediary supports as well as other supports to the same participants with a small and robust set of exemptions.

Such exemptions may include:

- Service delivery in remote / very remote and thin market settings;
- Where cultural safety / competence is very relevant e.g., CALD, LGBTQIA+;
- Where thin markets exist, such as Aboriginal and Torres Strait Islander communities;

- Some psychosocial examples where people desire a very tight network of supports, mistrusting others and/or intense desire for privacy.

Such exemptions must require specific action by a provider to ensure adequate conflict of interest procedures, processes and development plan to locate alternative support arrangements to mitigate such conflict (i.e., independent supervision and/or alternate support provision).

It is worth noting that there is precedence for such controlled conflict of interest requirements, where under the NDIS, NDIA Partners (LACs) are precluded from delivering direct support to participants, in part, to ensure the conflict of interest is managed between their other functions including plan implementation.

DIA has seen worrying examples where conflicted providers who also offer core supports and/or day programs have utilised Support Coordination and Plan Management as "gateway" services to ensure the participant purchases the majority of the supports funded within their plan from themselves.

DIA recommends that the Rules be re-written to include a specific stand-alone clause in relation to Conflict of Interest. This should take on similar provisions that are outlined in the NDIS (Plan Nominee) Rules where 'conflict of interest' is clearly defined.

The Rules do not adequately state the practical framework in which the NDIA may determine a potential conflict of interest and how any such determination would lead to a decision that "supports may not be provided by particular providers".

Similarly, the process for the necessary evidencing, reviewing and remediation measures are not sufficiently articulated or clear. The explanatory example is focused on the role of intermediary services which, as DIA have publicly advanced, should be separate from the delivery of supports and services.

What is unclear from the documentation provided, is how 'on-selling', 'client capture' and 'one-stop-shops' are to be identified and subsequently monitored and regulated. Further, there appears to be a complete disregard for how 'potential concerns' are to be referenced and interfaced with the Code of Conduct and the NDIS Quality and Safeguards Commission.

1.2.2. Other Matters

There are several unclear and open-ended statements made in the Rules that require definition and articulation, notably:

- The definition of 'not likely to substantially improve outcomes…in the long term' requires articulation and the consideration of the provision of evidence, particularly from appropriate professionals;

- The definition of 'better outcomes' in Section 8(1)(b)(ii);

- The process and framework for participants to have a right of review, and if required appeal, in regard to these complex, but hopefully objective, determinations require careful consideration of a number of encompassing factors. Any intended linkage to evidence gathered as part of the proposed re-assessment changes needs to be clearly identified here; and

- Of particular concern is the subtle, but significant, reduction of participants rights under the Act in regard to 'choice and control' in terms of supports not to be provided by particular providers. Section 8(2)(i) and (ii) qualify 'choice and control' as 'desirable' which construes a reduction in relation to the intent of the Act.

1.3. The Rules set out the considerations taken into account when a participant or their representative request to self-manage their NDIS funding or use the support of a registered plan management provider. Is it clear how these considerations are designed to protect participants from unreasonable risk or harm?
Sections 9 and 10 of the Rules.

1.3.1. Overview

DIA acknowledges and supports the inclusion of safeguards and or risk mitigation strategies in participants' plans to reduce the occurrence of 'unreasonable risk'.

There are, however, several general points that DIA feel need to be given substantial consideration to ensure that the balance of participant risk mitigation is commensurate with the exercitation of choice and control and the participants right to take risk. DIA would make the following comments:

- The assumption that there is a level of greater inherent risk associated with 'non-registered' providers was an opinion expressed in the Tune Review. It should be noted that this was a view of the Tune Review rather than an empirical fact and that, as is unfortunately evident, abuse and neglect has manifested in multiple forms and regardless of registration status.

- It should be remembered that there was significant evidence of longer-term harm and dependency created by the support and delivery models of what we would now regard as the 'registered' market that led to the development of the National Disability Strategy and the NDIS Act itself.

- Given the known issues faced by people with disabilities (as well as aged persons) facing abuse and being in at-risk situations in institutionalized 'registered' service delivery models, a key reform has been the ability for greater choice and control over service delivery to be exercised from a wider array of service delivery providers and platforms.

- A particular focus on potential fraudulent practices and collusion needs to be clearly identified and set out in the Rules in relation to the application of 'unreasonable risk'. Participants face 'sharp practices' in both 'registered' and 'non-registered' markets and protection should be afforded without qualification.

DIA would encourage the adoption of a proactive 'market safety' approach that could include the licencing of sole traders, accommodation providers etc with appropriate clearances being held for the supports being delivered.

The reduction of perceived risk rather than reducing a participant's right to choice and control should be the focus of these proposed changes. Retrograde steps towards a pre-NDIS model should be consciously avoided.

1.3.2. Structure

Notwithstanding the content, the Rules need to be re-organised in order to provide greater clarity and understanding.

To improve transparency and avoid ambiguity, and the real risk of inconsistent application, it is imperative that the Rules are structured with separate sections pertaining to Agency Managed participants or their key people, one for Plan Managed participants or their key people and one for Self-Managed participants and their key people.

1.3.3. Risk Assessment

The introduction of a similar risk assessment for participants wishing to exercise choice and control in terms of having their funds managed by a Registered Plan Management Provider (Plan Managed) raises several issues that are not clearly articulated in the current proposed changes.

Unreasonable risk: It is not clear from the proposed Rules what the NDIA would consider an 'unreasonable risk', that would in turn preclude a participant, or key decision maker, in exercising their choice and control in how they manage their plan funding.

It is interesting to note that the introduction of 'unreasonable risk' into the Rules is being proposed before what constitutes 'reasonable' has been clarified.

> *"...no two people that I've talked to have the same understanding or have the same definition of what 'reasonable and necessary' actually is".*
>
> Minister Reynolds
> Monday 3rd May 2021
> Community Affairs Legislation Committee

It would, therefore, be a logical progression to determine what constitutes 'reasonable' before adding a risk assessment test to determine what is 'unreasonable'.

Cognitive Function: The explanatory document attached to the exposure draft states:
"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".

DIA notes that there has been no detail or drafting within the Rules as to what cognitive function and decision-making capacity will be required for the participant, nor by what means such capacity will be determined.

Exercising choice and making decisions about one's own life are important both to personal wellbeing and an individual's sense of identity (Brown & Brown, 2009; Nota, et al., 2007). In the last decade, service system reform, including the NDIS, has generated greater opportunities for people with disability, particularly those with more complex support needs, to participate in decisions about the services they receive and increase choice over all aspects of their lives (Bonyhady, 2016; Carney, 2013; Sims & Gulyurtlu, 2014).

In parallel, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) has been the catalyst for significant debate about decision-making rights of people with disabilities. Article 12 of the UNCRPD asserts that everyone has the right to make decisions about their own life, irrespective of cognitive ability, and to have the necessary support to do so (Bach, 2017; Series, 2015).

Supported decision making is the term used internationally and across Australia to describe the process of providing support to people to make informed decisions and remain in control of their lives. Supported decision making starts from the premise that everyone has the right to participate in decision making and everyone draws on some support at some time to make some decisions.

Current NDIA process assumes that LACs and planners are both able and capable to provide support for and determine a participant's ability to undertake decision making. In DIA's view, this is often not fulfilled. The lack of trust and familiarity in the relationships means that participants often do not actually make decisions that reflect their will and preferences and participants seldom have increased capacity to make decisions as a result of the interaction.

Support for decision making by a LAC or NDIA planner is limited by their superficial knowledge of a participant, their focus on high level NDIS decisions and for the planner, their responsibility and conflict in determining funding levels (IAC, Jul 2019).

Further there is no view or reference to where the participant is not the legal decision maker, or in what circumstances increase supports could be obtained by the participant to support their decision-making capacity and enjoy great choice and control, and self-determination.

Right to Appeal Decision: Given the significance of this potential CEO delegated power, DIA would expect that 'unreasonable risk' is clearly and transparently defined as well as the framework in which it is applied and the avenue in which this decision can be internally appealed.

As the proposed changes currently stand, the first avenue of appeal a participant would have is to the Administrative Appeal Tribunal (AAT) which, as a first avenue of appeal, is time-consuming and onerous. It is therefore DIA's recommendation that decisions made under Section 9 of the Rules must be a Reviewable Decision.

Plan Management and Price Arrangements and Limits: Under the current legislative framework, a participant can request that their plan funding be Plan Managed with this right not subject to a reasonable and necessary decision. Engaging with a Registered Plan Management Provider allows for participants to access both registered and non-registered service providers, however, all supports delivered to a Plan Managed participant must abide by the requirements set out in the prevailing Price Arrangements and Limits. Importantly, Plan Managers must be registered through the NDIS Quality and Safeguards Commission and are therefore required to meet the standards of their registration.

Plan Management enables participants to exercise greater choice and control, build capacity and effectively manage their funding in a registered and structured framework that by its structure provides a robust risk mitigation environment.

Subjecting Plan Management to the same risk assessment test as is applied to Self-Management, based on the ability to use non-registered providers, should therefore lead to the same market access and ability to negotiate support delivery i.e., Plan Managed participants should not be subjected to the limitations of the NDIS Pricing Arrangements and Limits.

It is unclear from the proposed changes if, after applying the same risk assessment, Plan Managed participants will be equally treated with Self-Managed participants and the access to markets this affords. This needs to be considered and clarified particularly noting that the explanatory document stating that "these amendments clarify that plan management is to be treated as a form of self-management".

1.3.4. Misapplied Funds

The inclusion of new language of 'misapplied funds' requires further consideration and clarification.

It is imperative that 'misapplied funds' is clearly defined (Section 9) so that actions defined under misapplied funds can be balanced with subsequent effects which can be clearly understood by participants.

It is extremely important that participants can distinguish between using funds flexibly in the pursuit of achieving their goals (as per the Act) as well as the application of dignity of risk and any potential consequences of a determination after the fact that funds have been 'misapplied'.

Of most concern, and requiring significant consideration, is the inclusion of an inherent retrospective assessment of 'misapplied funds' in Section 9(2)(c)(ii) and Section 10(e) of the Rules that relates to previous plans.

The retrospective application of such a statutory rule is subject to the complications of any retrospective implementation of legislation and, in this scenario, the added complication of implementation without clear definition.

It should also be noted that there are subsequent issues that arise from the introduction of a retrospective element in relation to 'misapplied funds' that are not covered by the proposed changes. In particular these concern the relationship with Section 46 and Section 182 (Debt Recovery) and as they relate to being 'in accordance with a participant's plan'.

With approximately 50% of the Scheme's participants currently exercising their right to have their plan funding Plan Managed, any application of a retrospective rule would, even at a small percentage of usage, impact a great number of participants.

Making the 'right' choices that are 'in line with the participants plan' in a complex market environment can be daunting and stressful. Participants that our members service tell us that they are overwhelmed by the amount of information they must process to find their way to services, not just in the first plan but in each plan. The situation is compounded for those who have complex needs requiring multiple and relational services, and/or those who are otherwise disadvantaged.

A skilled Support Coordinator function is a critical component of market infrastructure in other marketised service systems in Australia. Yet, the current arrangements assume that only the most disadvantaged require navigational support and capacity maintenance and/or building (as demonstrated by only about 40 per cent of NDIS participants being funded for support coordination), research which is echoed by the IAC and Tune Review, indicates this is not the case *(Tune, 2019; DIA, 2020; IAC, Jul 2019; Vincent & Caudrey, 2020; Robertson SC, 2020).*

Participants need reliable and clear advice about the options open to them, practical support navigating the system and advocacy when things go wrong. Without this investment, many participants struggle to find the way through a complex, loosely regulated market and may be exposed to increased financial and personal risk (Dommers, et al., 2017; BSL, 2019; Slasberg & Beresford, 2016; Yu & Oliver, 2015; Needham, 2018).

DIA would therefore strongly recommend that:

- Either Section 46 of the Act or Sections 9 and 10 of the Rules be reviewed to specifically exclude or specifically define any relationship that includes the concept of 'misapplied funds';

- The implications of 'misapplied funds' be clearly communicated to Scheme stakeholders, most specifically participants; and

- A clear definition of 'misapplied funds' to be included in Section 9 of the Act.

1.3.5. Harm

In the proposed Section 10 (Unreasonable risk - adult participant managing funding) of the Rules, the definition of "harm" encompassed in terms of 'physical, mental or financial harm or exploitation or undue influence' is unclear and poses a number of questions:

- Why is the definition not applied in Section 9 as well as Section 10?

- Why is the definition not aligned to the definitions of the NDIS Quality and Safeguards Commission?

- How does this proposed requirement interact with the NDIS Act (Improving Supports for At Risk Participants) Bill?

- Why the proposed Rules, to protect participants from harm, are formed in a narrow construct of the proposed changes to the Act by specifically limiting reference to the NDIS (Plan Administration) Rules and not the NDIS (Plan Administration) Rules (in particular the re-assessment criteria) and/or the Act more broadly?

2. SCHEDULE 1 – PARTICIPANT SERVICE GUARANTEE

2.1. Does the particular schedule clearly set out the key changes being made to improve participant experiences in the NDIS?

The introduction of a 'service guarantee' is, in general, welcomed by DIA. The introduction of these also facilitates Peak Bodies, the disability sector and providers to develop complementary service standards, see DIA's Professional Standards of Practice.

The relationship between providers and participants can further be improved to include increased levels transparency for participants. Additionally, as the NDIS moves forward, a focus and commitment on client outcomes constructed from the objects and principles of the NDIS Act would provide a solid foundation for the focus on positive outcomes which, importantly, should be valued by the NDIA.

2.2. Could the proposed amendments in this particular Schedule lead to any misinterpretation or unintended consequences; and are there any other changes which could improve the participant experience in the NDIS?

Looking at the proposed service guarantee along with the standards it sets, and how these may interact with other proposed changed, DIA notes that:

- Greater transparency is needed in relation to:
    - What constitutes triggers for Plan Variations and Re-assessment;
    - The criteria for "becoming a participant" is unclear and does not provide clarity to those seeking to become a participant within the NDIS; and
    - The review mechanisms available to participants, to ensure there is balance between the increased delegated authority available via the CEO of the NDIA and people with a disability to challenge such decisions.

Further to these improvements, DIA notes that Intermediaries are a key stakeholder in delivering increased responsiveness, such as alerting the NDIA to 'intervene early' in a situation that requires consideration or where increases in complexity or moments of crisis are being experienced.

The role of Intermediaries in regard to "data sharing arrangements" requires consideration and, for this Section, considering Intermediary Providers in the context of "responsible persons" could be explored especially in relation to participant vulnerability and safeguarding.

There is the potential for Intermediary providers to share joint learning and training with the NDIA to facilitate a joined approach to effectively drive positive participant outcomes. Such models of collaboration between Government Agencies and Intermediary type services exist within other Government Service Settings yet remain ill-defined within the NDIS, for example the role of Tax Agents to the ATO, which is very similar relationship as Registered Plan Management Providers to the NDIA.

3. SCHEDULE 2 – FLEXIBILITY MEASURES

3.1. Could the proposed amendments in this particular Schedule lead to any misinterpretation or unintended consequences?

Yes.

The exposure draft as tabled for consultation has many areas which are 'open to interpretation' and naturally this will lead to interpretations that might not align with the view of the Commonwealth.

DIA particularly highlights how the amendments interact with:

- Legacy clauses based on the 2013 assumptions of how the Scheme would function which are now largely redundant in practice; and

- Clauses which have taken on "new" or "additional" meanings by the NDIA since 2013 and would not have, arguably, had these new meanings at the time of being originally drafted. The changes proposed only add a further layer of uncertainty and ambiguity opening further avenues of interpretation.

3.2. Are there any other changes which could improve the participant experience in the NDIS?

This question can only be truly and genuinely answered by participants, their families and carers. DIA strongly encourages all participants actively and openly engage. DIA is disappointed to see that the presentation of these changes has not been done in a manner that hold 'participants at the centre of the NDIS'.

Whilst the accompanying easy read documentation is welcomed it glosses over and omits many areas of change.

DIA is extremely disappointed to see that, once again, the commitment to 'co-design' has fallen well short of expectations. The exposure draft and proposed changes appear to water down any future co-design commitment which falls well short of the expected "must".

> *After subsection 4(9)*
> *Insert:*
> *(9A) People with disability are central to the National Disability Insurance Scheme and **should** be included in a co-design capacity."*

DIA contends that any 'design' can and must only be considered to be 'co-design' when there is overwhelming engagement and design work undertake in partnership with people with a disability. The notion that any design or consultation process could be considered 'co-design' without out the substantial involvement and partnership with people with a disability and the sector is ludicrous.

Whilst it may be argued that this small wording changed does not indicated a change of intent or commitment to co-design, DIA would highlight, that there has been numerous recent examples where substantial work by the Commonwealth has been undertaken with little to no co-design, including Independent Assessments, where were only removed due do the substantial pushback from the section.

Further, it is evident that reduced co-design has been undertaken in regard to these proposed changes as evidenced by:

- The unreasonably short time frame set for public submissions;
- The breadth of the proposed changes and volume of documentation involved;
- The complexity associated with multiple interconnecting themes and clauses;
- The structure of the changes in the Schedules does not allow for chronological reading which increases complexity unnecessarily;

- The capacity for people with disability, or their key people, to fully engage having regard to the above commentary; and

- The substantial changes to sections and rules that impact service delivery without sector engagement. See changes to the Plan Management rules without any engagement or discussion with the Peak Body, DIA, that represents this part of the sector.

Co-design must be fundamental and at the centre of the NDIS, not just a box to check. This position is supported by independent research and studies (DIA, 2020; Cary, et al., 2018; IAC, Jul 2019; Mathys & Randall, 2019) that demonstrate true co-design leads to greater outcomes, more innovative services and a more sustainable NDIS.

From the perspective of Intermediaries, the roles, responsibilities and importantly the 'authority' or 'delegations' to implement the proposed changes (and the Act more broadly) remain undefined. This creates further ambiguity and inconsistency of the 'participant experience' and will likely give rise to an increase in disagreement between participants and the NDIA, resulting in escalations and reviews.

4. SCHEDULE 3 – FULL SCHEME

4.1. Does the Schedule clearly reflect the NDIS has moved into full scheme and is available across Australia?

The Schedule does reflect the Australia wide geographical footprint of the Scheme, however, critically the schedule does not clearly articulate 'full scheme availability'. This remains unclear particularly given the definition of, accessibility to, and interaction with mainstream services which differ greatly across each State and Territory, not to mention between a metropolitan, rural and remote context.

Much of the provider sector and all Intermediaries, have expressed views that they deliver unfunded capacity to fill gaps primarily created due to poor definition and agreement across Governmental layers about access and delivery of 'mainstream supports' (Carey, et al., 2019; Commonwealth Obudsman, 2018; Commonwealth Obudsman, 2020).

In DIA's view, these matters need to be clearly dealt with in the overarching legislation as opposed to leaving it open to interpretation and/or inter-governmental disagreement.

5. PARTICIPANT SERVICE GUARANTEE RULES

5.1. Are the proposed engagement principles and service standards that will underpin how the NDIA works alongside people with disability in delivering the NDIS appropriate? Are there additional particular types of consultation or engagement important to consider?
Sections 10,11 and 12 of the Rules.

There is an opportunity to conduct interface engagement and set principles and service standards between the NDIS, Providers, Intermediaries and Participants.

DIA recommends that co-design around the specific aspects of the service delivery design be undertaken to ensure a 'seamless' experience between participants and their family, carers, NDIS support providers, peer supports, community-based supports, mainstream services and the NDIS.

5.2. The Commonwealth Ombudsman will provide an annual report to Government on the NDIA's performance in delivering the Guarantee. The Rules set out what will be in that report. The Rules also set out the things the NDIA must report on in its quarterly report to Governments. Do the Rules clearly explain how both of those reports will ensure the NDIS delivers on the promises of the Guarantee?

The exposure draft does not provide clarity on what role the Commonwealth Ombudsman will have in relation to the NDIA and the participant guarantee.

As drafted the Rules seem to limit the authority to one of aggregate oversight and reporting.

Participants require more from the Commonwealth Ombudsman, as no level of reporting 'will ensure the NDIS delivers on the promises of the Guarantee'.

6. PLAN ADMINISTRATION RULES

6.1. Do the Rules clearly set out the circumstances in which a participant's plan can be varied, and the circumstances in which the NDIA would ordinarily first conduct a reassessment?

The proposed changes are heavily weighted to delegations, especially those pertaining to the NDIA.

It remains unclear, from these changes, the details behind the:

- Definition of 're-assessment';
- Definition of 'variation';
- Criteria for a 're-assessment';
- Criteria for a 'variation';
- Potential consequences of a 're-assessment' that a participant may face;
- Potential consequences of a 'variation' that a participant may face;
- Rights of appeal available to a participant who is subject to 're-assessment'; and
- Rights of appeal available to a participant who is subject to or rejected for a plan 'variation'.

In both instances, re-assessment and variation, the Rules are silent and unclear in relation to how Intermediary supports, which support a participant to implement, manage and utilise their plan, will be informed of any changes and required actions of such 're-assessment' and 'variation'.

6.2. The Rules include details on the responsibilities of persons receiving NDIS funding to keep records about how those funds were spent. Is it clear what their responsibilities are? Section 9 of these Rules.

There are several issues with this Section of the proposed Rules that have potentially large consequential ramifications for Registered Plan Management Providers.

> *Subsection 46(1)*
> *Repeal the subsection, substitute:*
> *(1) A participant who receives an NDIS amount, or a person who receives an NDIS amount on behalf of a participant, must spend the amount:*
> *(a) in any case—in accordance with the participant's plan; and*
> *(b) for a person who receives an NDIS amount on behalf of a participant—in accordance with the participant's requests.*
>
> *At the end of section 46*
> *Add:*
> *(3) The National Disability Insurance Scheme rules may make provision for and in relation to the retention of records by NDIS providers that receive NDIS amounts on behalf of participants, including requiring that prescribed records be retained for a prescribed period.*

Section 46 of the Rules fails to set out the specific responsibilities of Registered Plan Management Providers and there is a distinct lack of clarity in the language as to whether the obligations of 'a person who receives an NDIS amount on behalf of a participant' means or includes Registered Plan Management Providers.

Most importantly, if Registered Plan Management Providers are considered to be 'a person who receives an NDIS amount on behalf of a participant', then the proposed changes fail to set out the authority in which Registered Plan Management Providers practically ensure compliance with Section 46 of the Act.

There is a significant level of inferred accountability in the proposed changes for activities undertaken with plan funds, however, it is unclear how and by what authority a Registered Plan Management Provider is to deliver these 'assigned' responsibilities in equal measure.

Sections 9, 45 and 46 require re-drafting to articulate the intention of the proposed changes more clearly and to avoid misinterpretation and unintended negative consequences. A clear definition of what constitutes the 'purchaser' needs to be set and then carried through the Act.

Further, the proposed changes of what constitutes 'content' of a 'record' in the exposure draft is highly prescriptive and DIA would highlight that the Section is titled 'Acquittal of NDIS Amounts' and seems an extremely bazar area to include such content, this leads DIA to ask:

- Is it the intention of the NDIA that the acquittal process would be deemed to be in conflict with the legislation unless all NDIS providers (both registered and non-registered) submit and retain records at the proposed level of specificity?

- If this is to be the case, what are the implications for providers, participants and Registered Plan Management Providers if the acquittal record does not meet the level of the aforementioned specificity?

Section 45
Repeal the section, substitute:
45 Payment of amounts payable under the National Disability Insurance Scheme

(1) An amount payable under the National Disability Insurance Scheme in respect of a participant's plan is to be paid:

(a) to the person determined by the CEO; and

(b) either:

(i) in accordance with the National Disability Insurance Scheme rules prescribed for the purposes of this subparagraph; or

(ii) if there are no such rules—in the manner determined by the CEO.

(2) Paragraph (1)(b) extends to dealing with:

(a) whether amounts are to be paid in instalments or as lump sums; and

(b) if amounts are to be paid in instalments—the amounts of those instalments; and

(c) the timing of payments of amounts.

(3) The National Disability Insurance Scheme rules may provide that 18 an amount is not payable to a person until the person nominates a bank account into which the amount is to be paid.

Section 45, raises a number of unanswered questions:

- Is it the intention that the NDIA may, in circumstances not specified in the proposed changes to the Act or Rules, make payments directly to providers, both registered and non-registered?

- Is it the intention that the NDIA may, in circumstances not specified in the proposed changes, in regard to Section 54(2) release funds on a periodic basis in line with the proposed changes outlined in the Plan Flexibility consultation documents (23rd February 2021)?

If this is the case, then:

- It is unclear whether this has been adequately communicated to participants and providers in this consultation process;
- The anticipated adjustments for the participants and their providers to meet such a change are significant; and
- The anticipated business system adjustment changes for Registered Plan Management Providers are also likely to be significant. Again, DIA notes that there has been no consultation or engagement with DIA, Australia's peek body for Registered Plan Management Providers.

7. BECOMING A PARTICIPANT RULES

There is a high degree of uncertainty with regard to the scope of the changes presented. The limitation to participants with psychosocial disabilities is not explained and, by extension, whether a review of this scope would ordinarily result in a person / participant believing they are not impacted by these changes.

It is also unclear whether the criteria for "becoming a participant" would apply to "remaining a participant", for example after a re-assessment. If this is indeed the case, this would need to be clearly articulated and either the title of the rule changed accordingly or Section 48 enhanced to reference the criteria. This is of particular note for many participants given the increased delegation of the CEO to conduct a re-assessment without prior notice or engagement of the participant.

Whilst we hope that this is not the intent of the NDIA, it could pave the way for the NDIA to, without notice, conduct a 're-assessment' of the participant without seeking evidence or input from the participant, find the participant does not meet the criteria listed and exit the participant from the scheme. This could leave the participant to fight and appeal from outside the Scheme. This is not expressly ruled out within the legalisation or the accompanying explanatory document.

The important requirements, with accompanying and ensuing protections, for "Becoming a Participant" should be set out in the legislation (Act) rather than the statutory regulations (Rules).

The requirements presented represent a significant shift from the intention of Section 24 and Section 27, most specifically, but not in isolation, in relation to a person's ability as related to the purposes of the Scheme i.e., social and community participation.

The shift away from a significant impairment being contextualised in terms of inhibiting social and economic participation (the Principle of the Act) to a focus on 'clinical' functional capacity determinants (in terms of relevant but not specific activities) needs to be thoroughly reconsidered.

Likewise, a number of the Principles of the Act have been diminished that can be arguably seen as a reduced commitment to participants social and economic participation as well as their full involvement in decision making to the extent of their capacity. This is a concerning shift.

Principle 4 (2) of the Act is amended

Current Act

"People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability"

Proposed Act

"People with disability should be supported to participate in and contribute to social and economic life"

Principle 4 (8) of the Act is amended

Current Act

"People with disability have the same rights as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity".

Proposed Act

"People with disability have the same rights as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives".

Although subtle, the omitting "to the extent of their ability" and "to the full extent of their capacity" have significant impact as they arguably alter the full commitment of the NDIA to the human rights agenda that underpins the NDIS and, therefore by extension, the UN Convention on the Rights of Persons with Disabilities, to which Australia is a signatory.

DIA strongly recommend that these omissions be reversed such that the current Act remains unchanged.

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