**Submission on the draft package of NDIS legislative reforms**

**Dr Darren O’Donovan, La Trobe Law School**

The author would like to commend the Department for committing to a process of careful co-design following the defeat of its recent NDIS reform proposals. Whilst this submission raises some specific concerns around the package, the following elements are undoubtedly welcome:

* Amendments to facilitate the implementation of tribunal decisions by overcoming long unremedied legislative problems mapped in matters such as *Williamson v NDIA*.
* The commitment to time limits for NDIA decisions.
* Amendments to facilitate longer plans, greater flexibility across the reasonable and necessary categories which will provide breathing room for participants to focus on generating outcomes rather than navigating Agency processes.
* The Participant Service Guarantee which provides a series of norms to anchor and structure Ombudsman engagement in the scheme. (It is important, though, to manage community expectations regarding the ‘soft’ law nature of these ‘customer’ standards)
* Improved market levers for the Agency to intervene to remedy thin markets, drive quality in services.
1. **General Principles for Improving the Draft Legislative Package**

There are number of cross-cutting recommendations that can be made about the design of these legislative:

1. **Need to properly structure and confine powers**

In too many instances (with own motion variation the most striking), the draft creates a broad, unconfined power in the primary legislation. The powers are then only informed by ‘bare’ relevant considerations provided in the rules. As the department’s own explanatory information indicates these supply guidance for the exercise of the power, but do not confine or channel the power towards clear, defined purposes and outcomes. The CEO will only be required to show ‘active, intellectual’ engagement with the listed factors, which generates significant, unstructured discretion. The generic relevant considerations constitute only waypoints for reasoning, not criteria to be applied towards defined purposes and situations.

Many of the proposals can be improved by simply:

* Specifying the purpose for which powers are to be exercised. The Tune Review clearly identified the animating logics and situations these powers were to be designed to achieve.
* Specifying criteria for the exercise of powers, not mere lists of vaguely worded considerations.
* Defining the situations in which a power will be used.

The drafting instructions should have emphasised the need for business processes such as own motion variation to be properly tied to the specific situations identified by the Tune Review. Such an approach will ensure that participants and the Agency have a genuine shared vision of how many of the new levers given to the Agency will be exercised in practice. The Agency should be allowed to focus on much needed implementation, with the Department taking on its proper role in relation to policy settings.

1. **Bare primary legislation/overreliance on modifying NDIS Rules**

These drafts continue the related trend of overreliance on broad rule making powers rather than targeted, principled amendment to the primary legislation. There is a continual tendency to provide for an unconfined power in the primary legislation, with limitations following in the rules. The proposed legislation is also replete with carve out provisions, allowing later rules, restrained only by the potential process of senate disallowance, to supplement, disapply or otherwise cut across the operation of the legislation.

This is inappropriate where rules are in effect superimposing requirements or limiting otherwise unconfined powers in the primary legislation. This is not delegated legislation that translates the ‘purposes’ or ‘principles’ of the original Act or informs the exercise of well structured powers. These are rules which can limit the scope of the legislation (e.g. who qualifies for the scheme) and actively cut across its otherwise intended operation. These are rules that provide the only limitations on otherwise unconfined powers. The rules are being used to address matters of principle usually dealt with by primary legislation.

1. **Remedying the Scheme’s legitimacy deficit**

The possibility of disallowance is not a panacea for effective oversight and governance. Community concerns about the need for greater co-design and democratic legitimation of executive decisions relating to the Scheme. Reliance on disallowance has an adverse impact on the ability of the cross-bench Senators from smaller states to effectively represent their electorates in our federal system. Reliance on disallowance accelerates the process of scrutiny to the prescribed sitting day time limits.

While Disability Reform Council, and the states, exercise considerable control over the NDIS rules, this must be matched by respect for the role of the Federal Parliament.

**2. Feedback on Changes to Scheme Access Criteria**

The new provisions relating to psychosocial disability effectively create a new pathway for qualification. A provision such as rule 9(2)(b) is in effect a clarificatory amendment to the NDIS Act sections 24 and 25. They should be placed into the primary Act and voted on by a majority of both houses of the Federal Parliament.

Such a move may indeed obviate the need for the expansive new rule making power in the legislation, which expands the rule making power from ‘criteria’ to rigid ‘requirements’. With the targeted amendment of the Act being an eminently available option, it is appropriate to query why the Department views the shift in rule making powers to ‘requirements’ as necessary? There is a sense where we are expanding rule making power to pass a new rule, rather than simply making provision in the Act.

1. ***Section 8, Becoming a Participant Rules: Unclear definition of Psychosocial Permanence Requirement***

The reference to ‘reasonably available’ treatment is a welcome recognition of the need to include at risk demographics in the NDIS. This will moderate prospective participants being refused access based on the abstract existence of unaffordable, inaccessible services. At the policy level, the Department should consider whether there are further cohorts to whom this should apply.

Unfortunately, however, the remainder of the section is imprecisely drafted with some key failings:

* No guidance on the new concept of ‘treatment with the purpose of managing a condition’. Instead of ‘will you recover?’, we are now asking ‘are you managing?’ If ‘management’ is the underlying goal of the treatment, this can colour what counts as a ‘substantial improvement’. Many people presenting in acute crisis may experience an improvement but still meet the current NDIS criteria. The period a person may be required to trial and test management options is difficult to predict without a clear statement of what ‘management’ is trying to ultimately achieve for the person.
* This interacts with failure to create *objective criteria* for judging, or a definition of, a ‘substantial improvement’. The improvement currently is one relative to the individual’s past, and no target outcome or end state is specified. The goal of a treatment should be to ensure the person no longer has substantially reduced capacity. If that goal is not available or is likely not available through the treatment, the person should progress to the NDIS.
* While a medical judgment will be central, the lack of any principles or other guidance about how to calculate the time period to form a judgment, aggravates the instability generated by the foregoing flaws.

The current drafts risks individuals being superficially dubbed ‘not treatment resistant’ or as ‘having options for management’. We need to firmly rule out people being asked to sit within the health or other non-NDIS system while being stalled out at a level below substantially reduced functioning. If people are being asked to delay entry to the NDIS to trial options, they need a clear principled statement of the point at which the treatment evaluation stage will end.

**Recommendation:**

**As the relevant statutory question is if the impairment is permanent, the evaluation must be anchored in a regular, evidence-based assessment of the projected trajectory of the person. There needs to be more clarity around when a person exits to the NDIS. The section should be amended to include, at a minimum, a provision such as:**

**“…A substantial improvement is one sufficient to evidence a substantial likelihood that, with continued treatment, the person will no longer have substantially reduced capacity in any affected activity domain in the future.”**

1. ***Amending the rules to emphasise forms of treatment that improve function (affects both section 8 and 9(2)(b) non psychosocial participants)***

The existing NDIS Act works hard to separate treatment from functional support.

Treatment is directed at substantially alleviating (remedying) the person’s *impairment*. Impairment refers to the *biomedical state* or *medical condition* which produces the loss of the function. The NDIS is not responsible for treatment.

Functional support aims to help the person achieve positive life outcomes in the community, to grow their functional capacity. The NDIS is responsible for functional support, including ‘appropriate’ early intervention.

The amendments to both the psychosocial and non-psychosocial pathway complicate the current division between treatment and support in the text. They emphasise that where a treatment is unable to alleviate/remedy the person’s underlying impairment, but may raise a person’s function above the substantially reduced threshold, that person may be rejected from the NDIS.

The overall aim of Australian disability policy will of course be met once a person gets the support their need. We are all cooperating in that end. What matters is that there is a clear assertion of responsibility and a clear plan for everyone, for every disability.

The difficulty here is produced by the fact there is no clear definition of ‘treatment’ in the Act. These amendments interfere with the process by which one has been inferred up to this point. When will something be an ‘other treatment’ which remedies substantially reduced capacity, and when will it be an NDIS support which restores functional capacity? The line between ‘other treatment’ and the type of capacity building supports the NDIS itself should offer is not clear.

Without further clarificatory provisions, the amendments threaten to bring forward ‘interface’ disputes into the handling of *some* access requests. Particular examples would be long established POTS, Ehlers Danlos, and chronic pain. These do not have ‘treatments’ which address the underlying condition, but strategies or supports which aim at improving day to day function. Are those ‘other treatments’ or supports available within the NDIS?

The Department and the Agency inaccurately drew the health/NDIS interface for a number of years until advocates corrected their misinterpretation of the relevant policy guidance and legal provisions.[[1]](#footnote-1) The expressed policy intention of this package of legislative reforms is to avoid controversial elements of the Tune Review, until a process of co-design is created, and sounder evidence base and strategy developed. These amendments unfortunately pre-empt broader debates about the interface of the scheme with the health system. It is best to detach them from the current proposals. They need to be rolled out carefully after a clear discussion of what is an ‘other treatment’ to grow function and what is a support to build capacity. The Department has not done the necessary work of communicating where people are being sent, and securing necessary assertion of responsibility regarding specific cohorts from state governments.

**Recommendations**

**These specific amendments be withdrawn from the current draft until broader policy work on the NDIS-general service interface is completed.**

**Alternatively, a definition of ‘other treatment’ is developed, which clearly draws the line between ‘other treatments’ directed at functional improvements, and NDIS supports directed at functional improvements. The process should be shaped by connecting individuals with actually existing functional supports within the health system.**

1. **Plan Variation and Appeal Rights**
2. **Own Motion Power Variation in section 47A and related rules**

The CEO’s power to conduct own initiative variations of participant plans needs to be confined, and more clearly linked to the specific situations carefully drawn up by the Tune Review, paragraph 8.33.

The provisions should be amended to make clear:

* **Variation should occur with the consent of the participant or their nominee, except where this is not practicable.**
* **Alternatively, own motion variation should be limited to beneficial situations.** There should be an express provision stating that any reduction in individual reasonable and necessary funding items cannot be implemented. This reflects the fact that any reduction would be cutting funding previously found to be *necessary*. Reductions to funding should only be permitted after careful reassessment.
* There should be an express prohibition on the use of variation power to enforce new policy positions on funding. It should made clearly impossible to perform a ‘line item review’.

These proposals would not be necessary if the own initiative variation power in section 47A was simply limited to the situations agreed upon in Tune. Unfortunately, as the legislation is relatively unconfined, it must be pinned down with defensive limiting rules. The current list of relevant considerations is remarkably generic and opaque

I do acknowledge that any court would construe the CEO’s variation power in line with the structure of the Act’s provisions taken as a whole. This means that the existence of a reassessment power itself operates to confine the variation power. But the decision to embark on an variation is not itself a reviewable decision. A judicial review to enforce a harmonious interpretation would be extremely unlikely to occur as a matter of practical reality. We just need to the text to be clearer about the boundaries and limits of what can be achieved through a variation.

1. **Ensuring Accessible, Efficient Appeals within the Scheme**

One omission from the legislative package is any measure to address the serious impacts of the Administrative Appeal Tribunal’s recent ruling in the QDKH v NDIA, and, even more recently, its decision in Oczenaschek and National Disability Insurance Agency [[2021] AATA 3511](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3511.html) (30 September 2021). These issues have split the AAT, and generated court litigation. They threaten to make pathways to resolving disputes with the Agency more cumbersome, bureaucratic and time consuming.

These decisions operate to impose a heavy evidential burden on participants to name the supports they are seeking during the planning meeting. They threaten to cloud the appeal process in time consuming, factual disputes about what was said, debated and considered in the planning or internal review phases. The scope of an individual’s appeal rights will actually be made dependent on internal record keeping of the Agency planner. Poor planning experiences, where the person is inadequately supported to identify possible supports will be harder to correct.

By contrast, the Tune Review aimed for access to justice within the scheme. With the arrival of longer plans, the goal should be to resolve a participant’s concerns in one go, to allow the participant to raise their current concerns in the forum available to them. These decisions may result in the participants being told to request unscheduled reviews, to run bureaucratic processes side by side. Their impact will be felt most by those who have limited awareness of the supports and possibilities within the NDIS. By those who don’t have access to support network or advocates until they take an appeal. The decisions do not reflect the policy intent for planning to be a collaborative, open process where people are supported by the Agency (and the Tribunal) to explore and identify which supports are out there that can help them achieve their goals.

**Recommendation: The NDIS Act should be amended to clarify that merits reviews extends to the inclusion of any support which may address the current goals and needs of the person, not just those ‘put before’ the planner in the original planning meeting (or in the review)**

**4. Plan Management Rules**

Sections 9 and 10 of the plan management rules replicate an existing unwelcome imprecision in the NDIS Act. Section 44(3) empowers the CEO to deny someone the right to self-manage their fund where ‘unreasonable risk to the participant’ exists. The rules are meant to clarify what the situations and circumstances in which such a risk arises.

The current proposals have not sufficiently grasped the nettle: unreasonable risk of what? We need to pin down the openness of this, with a clearer, agreed vision of what this power is trying to achieve. Unfortunately, the rules are again structured around ‘lists’ of relevant matters, rather than situations or harms to be prevented.

The provisions can at least be strengthened to refer to the right to choose and be supported to grow into the role of an effective consumer in the scheme. There should be a clearer yardstick for reasoning for instance, satisfaction that there is an established risk to the safety and well-being of the participant were they to self-manage

**Guidance on Market intervention**

Given the severe inequities around utilisation within the scheme, stronger normative guidance on circumstances meriting intervention in thin markets is required in section 6(5). The Department should consider pre-emptive amendments to provide clearer guidance to the CEO around when to provide market intervention. There should be an obligation to:

* Take into account the potential and gravity of harm to the participant in the event of services are not secured through market intervention or there is a delay or break in services while a solution is found.
* Value cultural safety/ensuring Indigenous Australians connection to country is preserved when considering whether market intervention is appropriate
* Consider the adverse impact on families and participants where they are forced to travel to receive services.

There should be some indicators or relevant considerations on what is considered ‘reasonably practicable’ in terms of travel, impact on families with other caring responsibilities. The rule is an opportunity to redress the exhausting and difficult experiences of some regional and rural Australians in particular go through to access the NDIS market.

1. The Department will be familiar with the Burchell litigation which forced a return to the actual boundary required by law, actions confusingly claimed to be a ‘reform’ by state and federal governments. [↑](#footnote-ref-1)