



Proposed NDIS legislative improvements and the Participant Service Guarantee

**Submission by
Queensland Advocacy Incorporated**

Department of Social Services

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About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland. The majority of QAI's Management Committee are persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our three advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law, non-legal advocacy support with the Disability Royal Commission, the justice interface and education, and social work services); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); and the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS).

Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

QAI's recommendations

1. The Commonwealth Ombudsman's report to the Minister should include the number and type of investigations conducted and the systemic issues identified. It must also be made publicly available and published on their website.
2. The Participant Service Guarantee is implemented alongside an injection of additional resources to the Agency to ensure it is adequately positioned to meet its objectives. Without this, the feasibility of improved performance will remain elusive.
3. The Participant Service Guarantee is amended to require the Agency to provide draft plans to all participants and reasons for their decisions for all reviewable decisions at the time the decision is made, not just upon request.
4. The Participant Service Guarantee is amended to ensure the quality of reasons provided meets a minimum standard. For example, providing an explanation as to why the person did not meet certain criteria, including suggestions for information that may assist in changing the decision, ensuring all correspondence is in writing and not just hearsay and referencing the evidence upon which the delegate has based their decision.
5. Regarding giving effect to AAT decisions, amend section 11 of the Participant Service Guarantee Rules so that subsection (3) applies to decisions referred to in subsection (1) as well as subsection (2).
6. QAI supports the introduction of plan variation powers, but only in the circumstances articulated by the Tune Review. Plan variations should only occur with the participant's consent. More clarity is required as to how plan variations will occur in practice. Principles of procedural fairness must be clearly articulated to people with disability and made available in accessible formats, both for variations under the new s47A and the existing s48.

7. Clarify remaining jurisdictional issues of the AAT, such as whether section 48 plan reassessments can occur whilst a matter is before the AAT and if so, whether the AAT has jurisdiction specifically over section 48 reassessments. Clarify the matters raised in the case of QDKH. The Tribunal should be able to consider all matters associated with a participant's supports.
8. Provide further detail as to how the proposed market intervention powers will be exercised and in what circumstances. Market intervention powers must be exercised with caution as they encroach upon the choice and control of participants, frequently heralded as one of the fundamental principles of the scheme.
9. Further consider the implications of section 8 of the Plan Management Rules which permit a statement of participant supports to specify that a support must *not* be provided to the participant by a particular person. This does not directly address issues regarding unsatisfactory service providers and erodes participant choice and control in the process.
10. Legislate the exceptional circumstances listed in the operational guidelines that outline when participants can engage family members to provide support. This will bring much needed clarity and make these decisions reviewable.
11. Provide further clarity regarding the terminology that relates to the eligibility of participants with psychosocial disability.
12. Provide a definition of 'lived experience' in relation to the eligibility criterion to become an NDIA Board member.
13. Clarify that the introduction of an additional payment method for self-managing participants is optional only and not mandatory.
14. Consider the implications of requiring NDIS service providers to maintain records of service provision for 5 years when some unregistered service providers may be unaware of a participant's status as an NDIS participant.
15. Provide a version of the legislation in plain English.

Introduction

QAI supports the underlying intention behind many of the proposed reforms contained in the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (the Bill) and associated Rules. The move towards improving participant outcomes, reducing 'red tape' and increasing the flexibility of a notoriously rigid and bureaucratic scheme is extremely welcome. Further, QAI acknowledges that the proposed reforms do not include mandatory independent assessments following the extensive advocacy efforts of the disability sector. However, the Minister's commitment to co-designing scheme reform alongside people with disability is undermined by the very short consultation period. Whilst the proposed changes do not fundamentally alter the nature of the scheme, the volume of changes and associated explanatory material makes four-weeks in which to provide considered, balanced and informed feedback, woefully inadequate. Further, one of the primary objects of the *National Disability Insurance Scheme Act 2013* (Cth) is to give effect to Australia's obligations under the Convention on the Rights of Person's

with Disability (CRPD).¹ Denying people with disability and their supporters sufficient opportunity to understand and obtain support where necessary to respond to the proposed reforms breaches Article 4(3) of the CRPD which requires States Parties to ‘actively involve persons with disabilities’ when developing policies that implement the Convention.²

QAI’s submission will focus on the following amendments: the Participant Service Guarantee, plan variation and reassessment powers, changes to the Plan Management Rules and amendments to the eligibility criteria for people with psychosocial disability. It will then conclude with brief comments on some of the other proposed changes. Overall, QAI considers that many of the changes are positive. However, the drafting could be improved to ensure consistency in practice and certain changes represent a missed opportunity to realise the transparency and accountability that supposedly underpin the Participant Service Guarantee. Increasing the discretionary powers of the National Disability Insurance Agency (the Agency), whilst facilitating greater flexibility on the one hand, begins to erode the choice and control of participants on the other. This must remain at the heart of the scheme if the NDIS is to remain true to its original purpose; to support the independence of people with disability and ensure their full inclusion within society.

Participant Service Guarantee

Whilst QAI supports legislating the Participant Service Guarantee and the proposed timeframes and engagement principles contained within the rules, we remain concerned that the NDIA is not sufficiently resourced to meet the requirements in the guarantee and the complaint process for participants is time consuming and difficult to navigate. The Commonwealth Ombudsman’s report should also be publicly available.

Commonwealth Ombudsman

The Commonwealth Ombudsman’s role in monitoring the Agency’s compliance with the Participant Service Guarantee is appropriate and the opportunity for the Commonwealth Ombudsman to initiate its own motion investigations where systemic issues are identified, is a welcome safeguard. However, QAI recommends that the Commonwealth Ombudsman’s report to the Minister must:

- include the number and type of investigations conducted by the Commonwealth Ombudsman during the financial year, and
- detail any systemic issues identified.

Section 204A of the draft Bill should also:

- provide that the report is to be published on the website (in the same way the Ombudsman’s Act requires the report on the health funds to be published in s20D) at the same time as it is given to the Minister, and
- place a positive obligation on the Agency to promptly provide documents required by the Ombudsman in the preparation of their report.

¹ *National Disability Insurance Scheme Act 2013* (Cth) section 3(1)a

² Convention on the Rights of Persons with Disabilities, Article 4

Practical implications of legislated timeframes

Legislated timeframes for decision-making and specified service standards for the Agency's engagement with participants are only meaningful when they are realistic, achievable, and effectively enforced. Through our NDIS Appeals and Decision-Support Programs, QAI has become acutely aware of significant resourcing issues at the Agency. Current timeframes, such as 21 days for an access decision or 28 days in which to action decisions of the Administrative Appeals Tribunal (AAT) are routinely not met. The progress of internal and external reviews is frequently frustrated by the seemingly limited number of decision-makers at the Agency.

QAI is currently supporting a participant with an internal review that was lodged on 26th June 2021. No response has been received as of 6th October 2021 despite several follow up attempts. On one occasion, the advocate spent over an hour on the phone to the Agency and after being transferred three times, the call was cancelled after 'hello'.

Legal representatives of the Agency, whilst generally responsive, are powerless to act without instructions from a delegate. Sometimes, the issue is as simple as changing the language in a draft letter to an expert, but this can take up to two weeks to obtain. The timeframes stipulated in the Participant Service Guarantee are therefore meaningless if the Agency fails to adhere to them. Maintaining a positive reputation seems an unlikely source of motivation to comply with the Participant Service Guarantee given the actions of the Agency in more recent times.

Whilst the avenue for complaint to the Commonwealth Ombudsman is available to aggrieved participants, this places the burden of upholding the Participant Service Guarantee onto the shoulders of people with disability and fails to provide the timely decision-making and certainty that the Participant Service Guarantee is meant to facilitate. Further, many people with disability require assistance to navigate complaints processes, yet do not have informal support or access to advocacy to assist them through what is typically a cumbersome process. The aims of the Participant Service Guarantee will therefore only be realised if it is accompanied by an injection of additional resources that will ensure the Agency is adequately positioned to meet its objectives. Without this, the feasibility of improved performance will remain elusive.

QAI specifically recommends an increase in the number of delegates who are able to provide instructions in review proceedings, providing they attend all relevant case conferences and conciliations in a matter so that timely instructions can be provided.

Draft plans and reasons for decisions

QAI welcomes the inclusion of the right to request a draft plan and request reasons for a decision in the new Participant Service Guarantee Rules. It is hoped that this mechanism will go some way to address situations where the Agency mischaracterises a section 100 request for an internal review as a 'change of circumstances' request in the absence of any transparent information as to why a certain decision was made, therefore rendering an entire plan vulnerable to review (and consequently reduction) and keeping participants in a loop that prevents them from pursuing an external review at the AAT.

However, QAI strongly contends that this should be strengthened and amended to state that the Agency will provide a draft plan to all participants and reasons for all reviewable decisions at the time the decision is made, not just upon request. To refrain from doing so misses a key opportunity to bring about the cultural change within the Agency that is required if the engagement principles of the Participant Service Guarantee

are to be realised in day-to-day practice. That is, that the Agency will *'keep participants and prospective participants informed about the progress of decision-making processes under the Act that affect them'*, as promised under the transparency service standard in the Participant Service Guarantee.

In relation to draft plans, the Tune Review stated that *'the provision of a whole draft plan is an important mechanism to ensure decision-making processes are transparent and for keeping the participant at the centre of the planning process.'*³ There is no plausible reason as to why a draft plan should not be provided to all participants, and indeed was included as a measure in previous reforms proposed earlier in the year. The complexity of the scheme and reality of people's lives are such that not all participants will be aware of their right to request a draft plan, let alone feel sufficiently empowered to action it given the inescapable power imbalance that exists between participants and the Agency.

The provision of a draft plan will help to reduce confusion, improve communication, and increase transparency of decision-making, particularly given that many participants complete a planning meeting with a Local Area Coordinator as opposed to a delegate of the Agency, increasing the number of people involved and therefore opportunities for miscommunication. It may also result in a reduction to the number of internal reviews initiated by participants who receive plans that are markedly different to what was discussed at the planning meeting. It would provide an important opportunity for the participant to provide additional, outstanding information so that they can receive the supports that they need. It would also help to reserve scarce advocacy resources for more complex situations as opposed to scenarios that have manifested because of poor communication.

Regarding reasons for decisions, if the Agency is mandated to provide reasons for all reviewable decisions, not just upon the request of a participant, this would similarly prevent unnecessary misunderstandings and would remove needless barriers to people with disability accessing essential disability support services. Decision-making regarding the allocation of government resources requires adequate documentation to ensure government departments remain accountable to Parliament. Agency staff are therefore likely to already be documenting their decisions anyway. For some decisions, they also already provide reasons, such as in Internal Review Outcome Decision Letters. Extending this practice to all reviewable decisions would therefore not constitute a significant change in practice yet has the potential to markedly improve the transparency of the Agency's actions and avoid participants unnecessarily fighting to obtain information just to understand their plan. It is also in line with the actual recommendations of the Tune Review which said providing participants with an explanation of a decision should be a *'routine operational process for the NDIA.'*⁴

QAI has witnessed participants receiving new plans which include a substantial decrease to the amount of funding allocated in their previous plan, with no reasons or explanation provided for the reduction in support. The changes can have immediate and significant implications for people with disability and their families, such as having to cease vital therapy programs and reducing support worker hours, often at the cost of trusted relationships with workers that have been built over time. If the Agency provided reasons for their reviewable decisions as a matter of practice, this would have numerous benefits, including educating participants about what is and what is not reasonable and necessary under the scheme, improving the quality and accuracy of information provided at the internal review stage and reducing the number of appeals that reach the AAT.

³ David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, page 11

⁴ *Ibid*, at 3.59 on page 52

The numbers of appeals to the AAT have increased significantly in recent months and are extremely costly and stressful for all involved.

The quality of information provided by the Agency in relation to their decisions can at times, be very poor, and therefore should also be addressed within the Participant Service Guarantee. Quoting sections of the legislation verbatim and in isolation of personalised information is not helpful nor adequate. A prospective participant deemed not to have met access receives a template letter which has no personalised information as to why they did not meet access and often includes mistakes. Internal Review Outcome Decision Letters can also be unclear and fail to provide adequate information as to why certain supports have been refused for a particular individual. A client of QAI recently received the following correspondence from the Agency:

"Evidence provided (item 4) confirms that you require support with domestic, self-care, daily and social activities to improve your health that is a result of your immobility (wheelchair bound), chronic pain and obesity. This is not related to your disability. Hence providing additional funding does not meet this rule. Because Rule 5.1 prevents the NDIS from funding this support, I have not considered whether this support meets the reasonable and necessary criteria in Section 34 of the NDIS Act."

For a client who is wheelchair bound with significant and complex impairments, this paragraph is difficult to understand. In this case, the client was left without any formal supports and was unable to carry out fundamental self-care tasks for a period of several months; a matter which is ongoing.

Reasons given for decisions should therefore provide meaningful information that meets a certain standard, such as providing an explanation as to why the person did not meet a certain criterion, suggestions for information that may assist in changing the decision and ensuring all correspondence is in writing and not just hearsay. The participant must at the very least, be told that the delegate has had regard to all available evidence. As per section 25D of the *Acts Interpretation Act 1901*, 'where an Act requires a tribunal, body or person making a decision to give written reasons for the decision...the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.'⁵ This could help reduce the number of external reviews that are pursued and the associated substantial amount of funding that is allocated to the Agency's legal representation costs at the AAT. Placing the responsibility to request reasons for decisions onto participants and, in the event of inadequate reasons, assuming the participant will exercise their right to review, presupposes participants are able and willing to engage in review processes and does little to redress the power imbalance inherent in these situations.

Finally, regarding the amendments that relate to the CEO giving effect to certain AAT decisions as contained within section 11 of the Participant Service Guarantee Rules, QAI suggests that the caveat included in section 11(3), that is, that '*...the 28-day period in subsection (2) for the CEO to take measures to reconsider the matter is subject to any directions or recommendations of the Tribunal given when the Tribunal remits the matter*' should also apply to decisions referred to under subsection (1). In other words, AAT decisions that vary or are in substitution for an internal review decision must be given effect to by the CEO within 28 days after the day the CEO is notified, *subject to any directions or recommendations of the Tribunal* which may, for example,

⁵ *Acts Interpretation Act 1901* (Cth), section 25D

request that the decision is given effect to within a shorter period of time. This amendment would assist to ensure consistency and provides additional legislative backing for decisions made by the AAT.

Plan Variation and Reassessment

QAI is supportive of enabling plan variations where simple changes can be made without the participant needing to undergo a full plan review, in circumstances where it is clear a support or change is reasonable and necessary and where it reflects an agreement reached between the participant and the Agency. This will help to circumvent unnecessary bureaucracy, such as time-consuming remittal processes, and will remove administrative barriers that prevent people with disability from accessing the services that they need.

QAI supports the renaming of plan reviews to plan reassessments to avoid the confusion that arises from the multiple meanings for the word 'review'. QAI also supports the amendments to section 101 and 103 regarding the effects of later decisions before reviews are completed. Namely, if a review has been sought of a statement of participant supports or a decision to vary a statement of participant supports, and before a decision on the review is made, a plan is varied or a new plan comes into effect under section 37, then the request is taken to be a request for a review of the decision to make the variation or approve supports in the new plan.⁶ And, if an application is made to the AAT for a review of a decision made by a reviewer and the decision relates to a statement of participant supports and, before a decision on the review is made and despite subsection 26(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), the CEO varies the plan or a new plan comes into effect under section 37, then the application is also taken to be an application for review of the decision to make the variation or approve the new plan.⁷ This is a welcome amendment that addresses many of the jurisdictional issues that have arisen due to plans being reissued or changed during lengthy review processes.

However, QAI is strongly opposed to the introduction of plan variation powers that can be exercised by the Agency without the participant's consent. To enable the Agency to make unwanted changes to a participant's plan without their permission, and to essentially force the participant to pursue arduous review mechanisms to change the variation is unfair, inequitable and in breach of the objects of the NDIS Act which seeks to 'enable people with disability to exercise choice and control in the...planning and delivery of their supports'.⁸

Plan variations must not become 'light touch review' tools, circumventing requirements of procedural fairness and affording the Agency greater discretionary power to alter (and therefore reduce) aspects of a participant's plan without their input or consent. Plan variations initiated by the CEO and in the absence of a request by a participant must be for a proper purpose. Participants should be secure in the knowledge that that where supports have been approved for a period of time, those supports will not be removed at the CEO's discretion.

More detail is also required as to the intended application of this power. For example, how will participants be notified of the Agency's intent to vary their plan? Will they be provided an opportunity to have input? How much notice will they be given? These matters require clarification. The principles of procedural fairness must be clearly articulated to people with disability and made available in accessible formats.

⁶ Page 13 of the Exposure Draft: National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021.

⁷ *Ibid*, page 14

⁸ *National Disability Insurance Scheme Act 2013* (Cth) section 3(1)e

QAI supports the observations made by the Public Interest Advocacy Centre who raise concern regarding the broad nature of the variation powers and the non-exhaustive list of matters to which the CEO must have regard when deciding whether to exercise the power.⁹ The proposed amendments make it unclear whether a certain scenario will result in a plan variation or a plan reassessment, and is drafted in such a way that leaves open the number of situations in which the power could be exercised, contrary to what was recommended by the Tune Review. Indeed the Tune Review recommended plan variations occur only in ‘certain limited circumstances’ where it was clear that changes to be made could be considered in isolation from other supports in a plan. It stated that these circumstances would be:

- a. if a participant changes their statement of goals and aspirations*
- b. if a participant requires crisis/emergency funding as a result of a significant change to their support needs and the CEO is satisfied that the support is reasonable and necessary*
- c. if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of the support is reasonable and necessary (for example, for assistive technology and home modifications)*
- d. if the plan contains a drafting error (e.g. a typographical error)*
- e. if, after the completion of appropriate risk assessments, plan management type is changed*
- f. for the purposes of applying or adjusting a compensation reduction amount*
- g. to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT*
- h. upon reconciliation of an appeal made to the AAT*
- i. to implement an AAT decision that was not appealed by the parties.¹⁰*

QAI supports the enactment of plan variation powers, but only in the circumstances articulated by the Tune Review as above. To allow broad discretionary powers that enable the Agency to make unsolicited alterations to a participant’s plan, in numerous situations and without their consent, risks undermining the improved participant experience that these reforms are supposedly trying to achieve and will further entrench rather than remove, inconsistent decision-making by the Agency.

Moreover, QAI notes that the wording of amended section 48 does not include reference to reassessments of a participant’s plan as initiated by the participant, instead only referencing reassessments on the CEO’s initiative. QAI considers it vital that this is changed to avoid any doubt and to ensure participants have the legislative grounds upon which to request a plan reassessment.

Finally, QAI considers that these amendments represent an opportunity to clarify residual jurisdictional issues regarding appeals to the AAT. Firstly, there remains the potential for plan reassessments under section 48 to occur whilst a participant’s matter is before the AAT. The drafting of section 48 and 103 does not explicitly address the issue of section 48 reassessments occurring whilst a matter is before the AAT, nor how they should

⁹ PIAC, Submission to Department of Social Services: Proposed NDIS legislative changes, 7th October 2021

¹⁰ David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, para 8.33 page 139

operate alongside section 26 of the *Administrative Appeals Tribunal Act 1975*. Whilst it is anticipated that in practice, this may be avoided with the utilisation of section 47A variation powers and the new wording of section 103, it requires clarification to avoid any ambiguity.

QAI has had one experience recently where a new plan issued by the NDIA did not follow the terms of a section 42D remittal agreement. When this occurred, no reasons were given by the Agency as to why the terms of the remittal agreement were omitted from the new plan and the participant was forced to submit another internal review of the replacement plan, in the absence of the AAT having jurisdiction to consider the new plan. Whilst it appears that the intention of section 103 is to address this scenario, further clarity regarding its operation alongside section 48 reassessments is required.

Secondly, QAI considers that these amendments represent a timely opportunity to provide legislative clarity regarding the AAT's jurisdiction over supports that were not originally requested or relevant at the time of the participant's internal review application, as per the case of QDKH.¹¹ QAI considers that if a decision letter or request for an internal review is silent on a particular matter, that this should not prevent the AAT from having jurisdiction over it or deny the AAT from standing in the shoes of the decision-maker (the Agency) to make a decision as to whether a support is reasonable and necessary.

The AAT was always intended to have full merits review powers. The reality of people's lives and participant's disability support needs is such that circumstances can and do change. If a participant, in the course of a lengthy external merits review process during which their disability related support needs are under intense scrutiny, makes a request for a support which was not listed in their internal review request, and this support is reasonable and necessary taking into consideration all available evidence, then the AAT should have jurisdiction to consider and make a decision as to the newly requested support. It is often the case that participants request internal reviews prior to seeking advocacy support and/or do so at times of elevated stress where they may not have the ability or foresight to include requests for potentially required supports in their section 100 application.

Enabling the AAT to have jurisdiction over these matters and preventing participants from becoming consumed by rigid bureaucratic processes that force them to go back to the Agency to apply for a plan variation or reassessment and then proceed to a new internal and external review if required, undermines one of the fundamental objectives behind these reforms: to remove unnecessary red tape and bureaucracy. It would also provide equity to the AAT's new jurisdiction that allows it to consider changes to a participant's plan *made by the Agency* that were not in existence at the time of the internal review request.

Plan Management Rules

QAI supports the principle of providing market intervention powers to the Agency so that they can be flexible and creative when facilitating access to disability support services for participants who live in areas where there is a 'thin market'. This is particularly necessary given the absence of a service provider of last resort. However, further detail regarding the anticipated decision-making process of the Agency when determining whether it is 'reasonably practicable for the participant to access the support or class of supports through the NDIS market'¹² is required. For example, will plan utilisation rates be considered? If so, what are the safeguards

¹¹ QDKH and National Disability Insurance Agency [2021] AATA 922

¹² Proposed new Plan Management Rules, section 6(5), page 4

around this, as data is vulnerable to manipulation and there could be many reasons why plan utilisation rates, for example, are low in a particular area or at a particular time. Market intervention powers must be exercised with great caution. They encroach upon the choice and control of participants which is frequently proclaimed as one of the fundamental principles of the scheme.

Similarly, QAI is wary of the amendments to section 8 of the Plan Management Rules which permit a statement of participant supports to 'specify that a support must *not* be provided to the participant by a particular person'.¹³ Whilst this enables the Agency to prevent inappropriate or unsatisfactory service providers from providing supports without needing to change the participant's plan management type to agency-managed, it does not directly address the issue and erodes the participant's choice and control in the process. Further, casting judgment about whether a support is likely to 'substantially improve outcomes' or whether another person is likely to 'provide better outcomes for the participant' is arguably an overreach of the Agency's mandate. In the event that such judgments are made, the Agency must be informed by external expert opinion to remove potential conflicts of interest. Though it may facilitate increased protection of participants against unethical service providers, this objective could instead be achieved via direct communication and action between the Agency and service provider of concern. This would preserve the participant's choice and control over who provides their supports whilst ensuring participants do not become entangled in situations where a disgruntled service provider, having been excluded from a participant's plan, exerts undue influence over the participant to seek a review of the decision to omit them from their plan. It would be preferable if the service provider's focus was demonstrating their effectiveness and appropriateness directly to the Agency and NDIS Quality and Safeguards Commission, rather than channelling their interests via the participant's plan. QAI acknowledges that this is a difficult balance to strike, however the proposed amendment has the potential to be exercised in an overly paternalistic way and once again, does not require the consent of the participant.

QAI is also concerned about the potential for this power to be exercised by the Agency to prevent participants from engaging family members to provide supports under their plan. Currently, there is no legislative reason why a participant cannot fund family members to provide certain supports where this is reasonable, necessary, and entirely appropriate, yet the Agency has created its own operational guideline that stipulates it will 'only fund family members to provide supports in exceptional circumstances', despite there being no legal basis upon which the Agency grounds this position. Decisions as to who a participant can and cannot engage as a service provider are not reviewable decisions. This means that participants who are 'informed' by the Agency that they cannot engage family members have no ability to initiate an internal review of this incorrect and unsubstantiated 'decision'. The only recourse available to participants is to initiate an internal review in the event that the Agency, in a bid to retain control over who the participant chooses to engage to provide their supports, changes their plan management type to agency-managed. QAI has advised several clients in this situation, yet many participants are unaware as to lack of legislative basis for the Agency's position. QAI therefore recommends that the exceptional circumstances contained within the operational guideline are legislated in order to provide clarity and ensure these decisions are reviewable.

Psychosocial disability

QAI agrees with the move to broaden the eligibility criteria for people with psychosocial disability seeking access to the NDIS. Psychosocial disability can be episodic and fluctuating in nature yet still be permanent and

¹³ Ibid, section 8(1), page 4

cause substantially reduced functional capacity. This is a welcome recognition of the significant challenges encountered by many people with psychosocial disability since the rollout of the NDIS and cessation of Commonwealth funded mental health support programs, such as Partners in Recovery. It is also compatible with the recovery-based framework adopted in the mental health sector and endorses many of the concerns raised regarding independent assessments and the need to capture the unique support needs of individuals with episodic and fluctuating conditions.

QAI also supports the acknowledgement that ‘appropriate treatment should be reasonable and manageable for the person given their psychosocial disability and biological reactions, and their level of access to treatment services. The effects of treatment...should be manageable for a person to allow them to reach a state of personal, social and emotional wellbeing.’¹⁴ It is hoped that this statement recognises the need for treatments to be acceptable to the individual and reflective of personal preferences. Many mental health treatments can be severe and carry significant risk to the individual, so their opinion as to their ‘appropriateness’ is important. However, we note that this statement is included in the explanatory material rather than the proposed new Rules, and therefore recommend this is included in the proposed rules.

However, QAI notes that ambiguity remains regarding the meaning of specific terms used in the proposed amendments. For example, what will constitute ‘appropriate’ treatment for the purposes of ‘managing’ the condition? What is a ‘reasonable’ period of time in which to await a substantial improvement? Further clarity is needed regarding how these terms will be applied in practice, otherwise there is risk that the definitional ambiguity could be used by the Agency to deny people with psychosocial disability access to the scheme. Further clarity is especially warranted given that such questions situate on the boundary between what is appropriately funded by the health system, and what constitutes disability related supports. Such interface issues regularly cause challenges for people with disability who become entangled in funding disputes between the Commonwealth and State/Territory governments, each seeking to avert their responsibility for providing the support in question.

Further clarity could be achieved in a variety of ways, including via the legislation and rules, or operational guidelines. Whilst clarifying terms within the legislation and rules provides greater accountability and certainty for participants, it risks narrowing the diverse situations people with psychosocial disability face. Alternatively, further detail in operational guidelines will facilitate greater flexibility, though may result in a lack of certainty for participants and may be subject to more frequent change. Either way, there needs to be transparency, clarity and accountability whichever avenue is chosen to ensure people with psychosocial disability do not continue to encounter barriers that deny them from accessing the supports they need.

Other feedback

- QAI supports the amendment that recognises the importance of having individuals with lived experience of disability on the NDIA board by including lived experience as a stand-alone criterion of eligibility for appointment as a Board Member. However, QAI is curious as to the definition of ‘lived experience’ to be used. QAI suggests further clarification as to whether this means a person with disability, a person who is a current or former NDIS participant, or whether this extends to a family

¹⁴ Explanation of the National Disability Insurance Scheme (Becoming a Participant) Rules 2021, page 9

member of a person with disability. QAI also suggests further consideration of representation of different disability types on the Board, such as intellectual disability, cognitive disability etc.

- QAI supports the change in language that will ensure the legislation and associated rules are inclusive of people with disability from the LGBTIQ+ community. QAI also supports the abandonment of language that is patronising to people with disability.
- QAI supports the amendments that strengthen the objects and principles of the Act to acknowledge the important role of people with disability in co-designing scheme reform and the need to respect the relationships between participants and their families and carers.
- QAI supports the introduction of an additional payment method for self-managing participants which will enable the Agency to pay providers directly, without self-managing participants paying for the support up front and then seeking reimbursement in situations where this is not the participant's preference. Whilst representatives from the Department of Social Services have indicated that this is not intended to become mandatory for all self-managing participants, QAI recommends amending the wording to ensure this change is an option for participants only and is not mandatory. Many self-managing participants prefer to pay for their services up front and have valid reasons for doing so, such as wanting to protect their privacy as an NDIS participant when their status as a person with a disability is irrelevant to their service provision. For example, when self-managed participants engage independent contractors for cleaning services or gardening maintenance. The drafting of this amendment should ensure participants are clear that they retain the right to continue to pay for their services upfront, if this is their preference.
- Similarly, QAI notes the provision in the new Plan Administration Rules that requires NDIS providers to retain a record of each purchase of supports for a period of 5 years beginning on the day on which the goods are delivered or services provided.¹⁵ Again, this raises potential issues for self-managed participants who choose to remain private regarding their status as an NDIS participant when engaging the services of an unregistered service provider who may therefore be unaware of this requirement.
- QAI is concerned about the reference to scheme sustainability in amended section 209(3) which requires the Minister to have regard to the financial sustainability of the NDIS when making rules. People with disability undoubtedly have the biggest interest in ensuring the sustainability of the scheme so that it endures into the future. There are many aspects of the scheme's implementation that represent a waste of precious funding, such as the exorbitant costs of the Agency's legal representation fees in AAT matters and the inflated prices charged by allied health professionals under the scheme's price guide. However, continuing to reference the scheme's financial sustainability throughout the legislation raises the risk that the Minister for the NDIS will use this as justification to prevent participants from accessing certain disability related supports that have been deemed to be reasonable and necessary by the AAT, such as sex therapy or gym memberships.
- QAI recommends that the legislation is drafted in plain English in order to be accessible for people with disability.

¹⁵ Proposed new Plan Administration Rules, section 9(2).

Conclusion

QAI thanks the Department of Social Services for the opportunity to contribute to this consultation process. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.