Dear Sir/Madam,

5th October 2021

Thankyou for seeking responses to the proposed changes to the NDIS legislative framework.

I am responding to this consultation as a NDIS Participant, and carer of another NDIS participant who lives in regional NSW and who has spent more time at the AAT demanding the NDIA adhere to the NDIS Act, NDIS Act (Support for Participants) Rules, and the APS Code of Conduct in determining what are reasonable and necessary supports, than plans without appeal. Although the Participant Service Guarantee is a step forward there are numerous factors that need to be addressed, especially as the legacy of NDIA inefficiencies, inaccuracies and dishonesty can be exploited under these proposed changes.

Furthermore, given the questions asked in the feedback overlook particular word choice by the DSS, I believe the DSS is behaving dishonestly and in breach of the APS Act (Code of Conduct) by guiding vulnerable persons to answers questions they deem necessary while avoiding changes around Choice and Control, and the rights participants have for appeal and external merits review.

The recent backflip of the DSS and the NDIA with the intention to introduce Independent Assessments I am concerned that the proposed Legislation and Rules gives the CEO powers to force participants to participate in services that they do not have choice or control, especially in the provider, the type and the manner of delivery of the supports. The provisions within the proposed Rules and Legislation dilute the protections for participants to seek supports under their current Choice and Control protections. As has been identified in the ANAO report Decision Making Controls for Participants[1] the NDIA have low levels of compliance of internal policies and of the current NDIS Act requirements.

This identifies that the NDIS legislation is not the issue but there is a cultural paradigm within the NDIA to disregard the legislation and legislative Rules in the provision of reasonable and necessary supports and in its functions and how the NDIA interacts with participants. Based on the directed questioning and the announcement by the DSS that these proposed changes will increase participant flexibility I must question this and officially state that the actions by the DSS are in breach of the APS Code of Conduct. The DSS cannot reasonably state that these proposed changes will increase participants flexibility or Choice and Control when the proposed legislation is introducing rules that can potentially limit the scope of supports that NDIS Participants can access; and explicitly states *"that it is desirable for the participant to be able to exercise choice and control."* The choice of **"desirable"** directly and deliberately decreases the ability for participants to have Choice and Control as it practically gives the NDIA the ability to ignore a participants requirements for Choice and Control and give them a limited scope of what disability supports they require.

Given this change has been hidden from NDIS Participants in the bulk of the proposed legislation I do **NOT** trust the DSS in having meaningful consultation. Especially given that Disability advocacy groups requested 8 weeks for revision of these changes and the DSS only gave 4 weeks. This shows that the DSS has been contemptful and unwilling to engage with those with disability in a meaningful co-design capacity.

I wish to highlight numerous concerns with the proposed NDIS Plan Administration Rules, and Plan Management Rules, and the Amended NDIS Act that inter alia: overlook the underlying principles in the NDIS Act; overlook NDIS participants' Human Rights protected under the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol ratified by the Australian Government in 2008 and 2009; remove or dilute protections for NDIS participants seeking supports enabled under Australian Contract Law

and Australian Consumer Law; and overlook one of the main functions of the National Disability Insurance Agency.

Plan Administration Rules

Manner of paying NDIS Amounts

The addition of "*in instalments*" is open to exploitation as some participants, especially self-managed participants who employ their own support staff require funding available to pay wages, tax, superannuation and other business expenses related to their disability supports. If the NDIA were to force quarterly payments for NDIS participants as a blanket policy those in the disability workforce, and smaller independent employers would be unable to cover the costs of services they've provided and nor would self-managed participants be able to self-employee their support staff.

As it is currently proposed there are no protections or guarantees of which payments would be paid in instalments. Before this measure could get wider support the DSS needs to specify which payments will be paid in instalments and those which won't be, or the circumstances when payments would be paid by instalments. At the current time there is too little information and insufficient protections for participants who rely on care, and could be left to die if they are placed in a situation where they cannot pay for services. This is too open for exploitation and the DSS must revise this section to ensure the safety and wellbeing of participants and to reduce the ambiguity of the discretionary powers of the CEO.

Acquittal of NDIS Amounts

The proposed changes also decrease the financial sustainability of the NDIS through removing a participant's ability to have both choice and control in the delivery of their supports by removing the ability of participants to enter into sales contracts with suppliers of disability supports. This is explicitly where a discounted rate is provided for services that are

paid in advance as agreed under a sales contract. These agreements are legally binding sales contracts under Australian Contract law, with protections for consumers afforded through Australian Consumer Law. The omission of this type of sale agreement also breaches the NDIS Act 2013 in enabling participants Choice and Control; and Financial sustainability issues.

NDIS Act 2013 Section 3 (1)(e) states:

> *(1) The objects of this Act are to:*
> *(e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and*

NDIS Act 2013 Section 118(1)(a)(ii) states:

> *(1) The Agency has the following functions:*
>
> *(a) to deliver the National Disability Insurance Scheme so as to:*
>
> *(ii) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and;*

As an example, in my current NDIS Plan as a self-managed participant I have been able to enter into a legally binding Sales Contract with a provider of disability-related supports. The provider has agreed to provide disability-related supports over the life of my NDIS plan, and that by paying in advance I would receive 35% discount on services. This provider of disability supports is not breaching any laws, as there is an agreement between both parties with an intention to supply services for which they are able to. Given that I have paid in advance I have saved the NDIS approximately $5,000 in my current NDIS plan for reasonable and necessary supports.

If Australian Consumer Law, and Contract Law allows me to enter into sales contracts why does the proposed NDIS legislative framework not allow for the provision of services agreed under a sales contract – that are intended to be supplied in a specified time. This omission means that if the proposed framework is implemented the NDIA would be in breach of

general principles of the NDIS Act and a principal function of the agency under S118 would not be able to occur, nor would I be able to do something that someone without a disability is able to. An example of this type of sales contract that is legally recognised, is a prepaid mobile plan, where the retailer provides services of a specified time at a cheaper rate, than PAYG or post-paid mobile services.

Should Section 9(3) be implemented there, should be provisions to allow participants provide evidence of a sales agreement or sales contract, where there are agreed terms to the provision of future supports supplied over a specified time are to be provided, especially if a participant is audited during the time specified in the sales contract. This sort of contract is legal in Australia and consumers have protections under current Australian Consumer Law to ensure businesses provide these services. Therefore, there is no risk to the NDIS or to taxpayers that funds are being spent inappropriately. On the contrary it means that support funding is being used in a more conservative manner increasing the financial sustainability of the scheme by increasing the ‘value’ of supports in a participants’ plan.

If the NDIA does not include a provision for participants to enter into these sorts of contracts the NDIA and the Australian Government would be in breach Article 4(b)(c)(d)(e), Article 5(1), Article 12 (1)(2), Article 16 (1), Artcile 25(e) of the UNCRPD, as I would be prevented from entering these sorts of legally recognised sales contracts on the basis of my disability. It would also breach Section 3(1)(e), and S4(4) of the NDIS as it would remove my choice and control in the delivery of my supports and with how I would like to engage with the particular provider of supports. As stated above the NDIA would also not be able to achieve one of its main functions: enabling participants to exercise choice and control in the delivery of their supports (S118(1)(a)(ii)).

In addition, Section 9(3) should in relation to GST, should have “(if any)” included in (e) as not all supplies of reasonable and necessary supports include GST. A New Tax System (Goods and Services Tax) Section 38-38 and A New Tax System (Goods and Services Tax) (GST-free Supply—National Disability Insurance Scheme Supports) Determination 2021 state that certain NDIS supports can be GST-free. The categories identified in Schedule 1 state that reasonable and necessary supports can be both goods and services. Therefore, the legislative framework should allow provisions for GST-free supplies in the evidence required for acquittal.

Furthermore, should the proposed framework not include a provision for participants to enter sales contracts for disability supports paid in advance at a discounted rate the NDIA will also be in breach of Section 118(b)(ii) as they would not be identifying and managing the risks on the financial sustainability of the NDIS.

There are numerous other NDIS participants I have met at this non-NDIS-registered innovative community support provider. Based on the 10 other NDIS participants I have met there that now pay in advance under this discounted sales contract model enabled under Australian consumer law, the NDIA would have to increase ten plans by approximately $50,000 collectively to fund the same amount of services. The NDIA would not be able to increase participant engagement through innovative supports without allowing NDIS participants to enter into contracts for the delivery of their supports; especially for non-NDIS registered providers. In addition, the exclusion of a clause for these sales contracts would restrict market intervention in underserviced markets, especially in regional and remote Australia.

Plan Management Rules

The proposed Plan Management Rules the NDIS will be watering down their requirement for participants in exercising choice and control. When specifically looking at the language of the proposed legislation where “Choice and Control” is only **"desirable"** but is not essential in the delivery of supports there is great potential for exploitation. This will prevent participants from exercising choice and control as the framework is targeting supports specified in participants plans. However, with this introduction of specifications, the supports participants can choose **will** decrease, and so will choice and control. As stated above I question why the DSS have obscured this change among others and not identified that they are attempting to change Choice and Control provisions by directing participants in leading questions that do not identify this as a change.

The current legislation states supports can be specifically stated or generally described. However, the proposed changes now include 4 new rules that are open to be exploited:

1.Supports or classes of supports provided under agreement with Agency;

2. Supports or classes of supports provided by particular person or provider;

3. Supports or classes of supports provided in particular manner;

4. Market Intervention.

The first three rules will give an illusion of Choice and Control, but will fundamentally reduce Choice and Control of Participants, particularly without safeguards to confine their use. Although Market Intervention is most likely going to enable those of us in regional Australia to access innovative community supports the three prior rules could restrict this ability depending on the implementation of these initial 3 support class specification rules.

New Rules open to Exploitation

Rule 3 is highly concerning, especially as a participant who lives in regional Australia. At no point should a NDIA delegate be able to determine whether funding of supports should be funded in a certain specified manner. The Delegate is not a trained allied health professional and therefore should not be able to state whether allied health services should be provided face-to-face or as telehealth. This should be a determination made by a disability support provider based on their professional opinion within their scope of practice and based on the participants wishes.

If the NDIA does override an AHPRA registered allied health professionals recommendation of the manner in how supports are delivered I would need to lodge an official complaint with APHRA and the National Boards, and the Commonwealth Ombudsman about the conduct of the APS employee as they would be making a determination that only an APHRA registered professional could make as part of their professional title, and therefore the NDIA employee would be breaching National Laws for Performing a Restricted Act. There should be no circumstances in which an APS employee can determine the manner in which supports can be delivered.

Regardless of your choice and control in the delivery of your supports under S3(1)(e), S4(4), & S118(1)(a)(ii) the NDIA will be able to override these provisions if they specify under one of these categories.

Personally, the most concerning new rule is the inclusion of "Supports provided in a particular manner". This means those in regional Australia could be forced to have telehealth for a specific allied health professional without any say. This provision gives the CEO/NDIA

authority to refuse funding for face-to-face services in favour of telehealth and vice versa as there are no measures that restrict how this rule is implemented. This measure could also reduce workplace opportunities in regional Australia if the delegate determines that face-to-face therapy should not occur due to extensive waitlists.

The New Plan Management Rules will now state that:

1. "that it is desirable for the participant to receive essential supports;"

and,

2. that it is desirable for the participant to be able to exercise choice and control.

But not that choice and control is required or allowed to the full extent of their ability/capacity.

I believe the inclusion of these three rules are dishonest and restrict a participant from accessing the disability-related supports they require. It is an illusion for the DSS to state that the changes will increase Choice and Control and flexibility for participants. These changes could degrade NDIS participants Choice and Control, through the DSS attempting to control what type of supports the participant can access, who they can access the supports from, and the manner in which they are delivered. This is **NOT Choice and Control!** This is nothing more than an attempt to force participant to have decreased flexibility in their plan. A participant **cannot** exercise Choice or Control if the CEO is given powers to choose the type of support, the provider and manner in which supports are delivered.

It is unacceptable and in breach of the NDIS Act and the UNCRPD if the CEO has authority to override choice and control within a participants' plans. I do not trust the DSS has acted with honesty and integrity in this consultation process as the questions asked did not cover

these changes. It is unconscionable that the DSS has glossed over changes that will restrict NDIS participants self-autonomy and, Choice and Control over their supports and lives.

If a participant is Self- or Plan- managed they should have the right to choose the type of supports, who is the provider, and the manner in which supports are delivered. The NDIA has a duty of care to agency-managed participants and therefore if these rules are implemented should only be for those participants in which they have direct onus for (NDIA-managed participants).

Self-managed and Plan-managed participants will lose Choice and Control, and some will lose supports. These rules need to be specifically identified as who they are for; otherwise they can be exploited and will jeopardise NDIS Participant's lives, and the disability workforce who may not be registered providers of supports.

Part 3 – Unreasonable Risks to Participants-adult participant managing funding

The proposed inclusion of (e) is highly exploitative as written. It also dismisses the Tune Review statement 3.78[2]:

> *"It is essential that the NDIA continue to improve its information products to better equip people with disability to become informed consumers. On this basis, the Participant Service Guarantee should commit the NDIA to ensure all participants and prospective participants have access to information about the NDIS, their plans and supports, that is clear, accurate, consistent, up-to-date, easy to understand and in formats that meet their needs."*

The findings of the Tune Review found that the NDIA provides incorrect information and that NDIS Participants are poorly informed consumers. Submission 84[3] to the Joint Standing Committee for General Issues Around the Implementation and Performance of the NDIS, reviewed AAT and NDIS data between 2019-2020:

1. *Out of 18 NDIS cases that were decided by the AAT, 13 resulted in a variation to the NDIA's decision. That is, 72% of cases were at least partially in favour of the applicant; and*
2. *Out of 1,012 cases that were resolved by consent between the parties, 985 resulted in a variation to the NDIA's decision. That is, in 97% of cases that were resolved by consent, the NDIA itself agreed* to change its original decision at least partially in favour of the applicant.

Even recently AAT determinations such as: TYKL v NDIA (2021), SCHW v NDIA (2021), Nottle v NDIA (2021) all requested assistance animals and were denied by the NDIA, were varied by the AAT as the NDIA internal policy and decision makers have incorrect understanding of the legislation and provide incorrect information to participants about what their funding can be used on. Cases such as Burchell v NDIA (2019) which prior to this, the NDIA refused to consider Rule 5.2 of NDIS (Supports for Participants) Rules 2013 and subsequently has needed to change their operational guidelines and information on their website. However even now other parts of their website, and workforce continually contradict that the NDIS is responsible and funds, supports that enable participants with Dysphagia to swallow more safely.

The inclusion of (e) disregards the Tune Review finding that NDIA participants are ill-informed due to incorrect and confusing information that has been provided to them by the NDIA. The inclusion of this by default could force all participants into plan management. As it is written, it is open to exploitation as there are no protections for participants who did not know they were misapplying funds. The Auditor-General[4] and AUSTRAC[5] have both publicly stated that although there is fraud within the NDIS it is not conducted by participants but third-party providers of supports.

Proposed clause (e):

> *(e) whether the participant has misapplied the funding for supports under the participant's plan or a previous plan for the participant;*

Given the poor advice of the NDIA, the statements from the AG, and AUSTRAC a participant should not be punitively punished for an honest mistake, acting on incorrect advice or an incorrect determination of the NDIA. As has been seen by the variation rate of plans before the AAT, there is a significant variation of what is determined reasonable and necessary in 97% of cases settled outside of hearing, and 73% rate when a hearing is held. Before an NDIS participant has been found to have misapplied funds it should be determined by an independent third-party as the agency currently and historically provides incorrect information and poor decision-making outcomes. The ANAO in the Decision-Making Controls for Participants also stated that the NDIA admitted there was low internal compliance of internal policies; and that the staff and CRM system does not require completion of all required legislative processes in determining reasonable and necessary supports. Therefore, NDIS participants cannot reasonably trust the NDIA, or CEO to be able to determine whether they have misapplied their funding on disability supports. From this it is apparent that, any change of self-managing of funds should only apply to individuals who have knowingly, and intentionally misapplied NDIS funds, and where this has been established by an independent third party.

This new inclusion also raises concerns about the 'life' of such a ban from self-management. Will a participant be indefinitely banned? Will they receive support-coordination in their next plan, so they can learn about what is and is not covered under their plan, therefore reducing the risk they will misapply funds in the future. Given that (e) does not have an expiry this Rule is extremely open to exploitation. It also doesn't take into account any learning curves

the participant has had in subsequent plans if they misapplied funds in a prior plan, and therefore would be unfairly restricted for an honest mistake that would not occur in subsequent plans. This is a reasonable assumption given the Tune Review findings and recommendations that the NDIA provide accurate information. It highlights concerns that participants will be held accountable for the NDIA historically or currently providing incorrect information. Given that there have been numerous cases before the AAT that have sequentially found decision making for assistance dogs has been incorrect from the NDIA; the NDIA have either failed to update their information, or policies or honour the Commonwealth's Model Litigant Obligations[6].

The decision to vary a participants plan management should also be included as a reviewable decision under **S99**. Given the poor track record of the NDIA in providing accurate information, and the ambiguity around the definition of "unreasonable risk", a participant should be able to defend prior decisions or contest what represents an unreasonable risk. Given that the NDIA is only required to give accurate information once the Participant Service Guarantee comes into effect, it seems unfair to punitively punish participants by disallowing a review of the determination they cannot manage their own plan if requested. This also needs to be included to reduce bias that certain people with particular disabilities cannot manage their own supports; but also as a core function of the NDIS is to help people with disabilities live a normal life. The inclusion of this would also ensure the NDIA adhere to section 4(8) of the NDIS Act:

> *People with disability have the same right 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.*

Participant Service Guarantee

Variation of Plans – 47A

Giving effect to the NDIA's obligations to under the Commonwealth's Model Litigant Obligations to reduce litigation and prevent the exploitation of those with disabilities; and to adhere to the principles central to the Participant Service Guarantee, I question why there is no clarification to variation powers for the CEO for reviewable decision while at the AAT, prior to the Tribunal making a decision.

During the AAT appeals process when both parties (applicant and the NDIA) have agreed that the disputed participants support/s are reasonable and necessary during the case conferences, the plan should be varied accordingly. Given the NDIA has agreed the supports should be included in a plan, the 'Statement of Participants Supports' should be varied to include those supports. It is unfair, coercive and a breach of the Commonwealth's Model Litigant Obligations for the NDIA to agree that a participant should have a support funded in their plan, but refuse to include it. For example, in my current AAT case, supports that the NDIA agreed I met the reasonable and necessary criteria for, during the first case conference in March 2021, have not been varied in my plan. This is despite the NDIA having agreed to the supports in writing, stating that they are reasonable and necessary, and should be included in my plan even when no new evidence was provided and they reviewed what had been submitted initially. If the NDIA has the ability to vary my plan under the current legislation by changing the dates, they have the authority to vary the supports under dispute. This was supported by Holland v NDIA (2021) that the CEO does have authority to vary plans while at the AAT.

Deputy President J W Constance:

> *"53. I am unable to agree with the view put forward by Deputy President Forgie that the Chief Executive Officer does not have the power to consent to an alteration of the decision being reviewed by the Tribunal. While I agree that there is no* ***specific*** *power to consent to an alteration of the decision as to the supports to be provided, equally there is no* ***specific*** *power given to the CEO to request the matter be remitted to the Agency under section 42D for the same purpose. In fact, the Act is silent on the powers the CEO may exercise in relation to proceedings before the Tribunal."*
>
> *"54. Section 103 provides for a review process in the Tribunal. Although there are no express powers to take part in such proceedings, it must be implied that the CEO will have the necessary powers to enable the Agency to advance its interests before the Tribunal, including consenting to a variation of the decision under review when appropriate."*

If the Participant Service Guarantee is implemented, those who have sought external merits review will not be covered by this guarantee or the new defined 'Variation Rules' in their interactions with the NDIA solicitors, and subsequently the CEO will continue to exploit unknowing participants whose supports, should and can be varied while under review. It should not be on the request of a participant, or in response to the AAT remitting a decision back to the CEO after a directions hearing to enforce the NDIA to honour its own obligations. Given the Commonwealth's Model Litigant Obligations and the authority described in Holland v NDIA (2021) the Participant Service Guarantee Rules **should** have specified provisions for "*variation of supports under review*" at the tribunal.

48 Reassessment of participant's plan

I question the rationale for the Reassessment powers only to be applied on the CEO's own initiative. There would be circumstances, such a significant change to a participants life, including a new diagnosis, hospitalisation, bereavement, loss of informal supports which could support a request of reassessment. Assuming the CEO would need be notified of these changes before they can initiate the reassessment, wouldn't the notification process required for the CEO to be able to initiate a reassessment need to be based on the participant providing new information? It seems logical for this to include the participant requesting a plan reassessment as a formality. It is not necessary that the CEO agree with the participant, but there seems to be no reason to prevent a participant from requesting reassessment.

There is also no protections for participants that the NDIA will not reassess a plan in the weeks or months following an NDIA agreed outcome or Tribunal determination. Protections need to be included, including circumstances of the limitations of these variation and reassessment rules. It is public record that the trust in the NDIS is at all time low following the Independent Assessments push, and the issues identified in the Tune review, and the subsequent FOI that should the NDIA tampered with and altered numerous parts of the Tune review before its publication. Additionally, the DSS and NDIA made a joint submission to the Joint Standing Committee on Independent Assessments using inaccurate modelling and misquoted Dr Madden and Prof Glazier[7], and Prof Whitehouse and Dr Eapen[8] out of context to support their case – this is known as confirmation bias. The DSS and NDIA need to give NDIS participants, and the Australian Public legislation that is in the best interest of NDIS Participants that reduces potential for exploitation and increases public perception of the DSS and NDIA following their intentional dishonest acts that have thrown their respective departments into disrepute. Therefore, protections need to be afforded to NDIA participants

that align with the Participant Service Guarantee that specifically restrict the circumstances around when a reassessment or variation of a plan is to be initiated.

S99 – Reviewable Decisions

As noted above there should be inclusion in S99 for review of a change to plan management (NDIA-Managed, Plan-Managed or Self-Managed).

Another omission is the inability for a participant to appeal the provision of supports under a variation under 47A. Given that a plan under 47A is already in effect and it is a variation there is a potential for exploitation in that a participant has no appeal rights for the supports listed in the Statement of Participant Supports. Further clarification, or inclusion of appeal rights are required for a participant if the CEO has decided against a s48 and opted for a s47A. Does the changes in relation to 47A allow the participant to be entitled to appeal "a decision to approve the statement of participant supports in a participant's plan". A variation would constitute the CEO varying the statement of participant supports and therefore clarification is required to the extent of an participant's rights for external merits review in the interests of aligning with the new plan management Rules: *"that it is desirable for the participant to receive essential supports".*

Yours Sincerely,

Mr Bradley

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