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Department of Social Services
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To whom it may concern

RE: National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (Cth)

The Public Advocate, and the Disability Advocate, thanks the Department of Social Services (DSS) for the opportunity to participate in the consultation about proposed legislative amendments to the *NDIS Act 2013* and new and amended *NDIS Rules*. In providing this response consideration has been given to the exposure draft for the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (Cth)* and the exposure drafts for the new and amended *NDIS Rules*.

The Disability Advocate works closely with the Public Advocate and has consulted broadly with South Australians about their experience with the NDIS since late 2018. These consultations have provided a unique insight into the experience of people with disability, their families as well as a range of stakeholders as the NDIS has rolled out in South Australia.

The Public Advocate and the Disability Advocate raise the following issues:

Short consultation time

- The exposure draft for the *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (Cth)* and the exposure drafts for the new and amended *NDIS Rules* were made publicly available in September 2021.
- The consultation period for the public to comment on the proposed amendments runs from 9 September 2021 to 7 October 2021.
- This short window for public consultation and feedback seems contradictory to the principle of co-design espoused by the Bill; particularly considering the amount of time required to read, let alone understand, the numerous proposed amendments.

Lack of clear interpretation

- The content of the Bill and of the exposure drafts for the *NDIS Rules* amendments is quite complex. Although the associated explanatory documents provide some clarity, there are still some provisions which remain confusing.
- Additionally, without an understanding of how the proposed changes will be practically implemented, it is difficult, if not impossible, to accurately assess their impact.

Plan administration: variation, reassessment, review

- A key amendment to the NDIS Act found in Schedule 1 of the Bill is the introduction of the concepts of *plan variation* and *plan reassessment*.
- These concepts have been introduced to address the confusion caused by the multiple uses of the term 'review' within the existing NDIS Act.
- As noted at page 11 of the Explanatory Document (Explanation of proposed amendments to the National Disability Insurance Scheme Act 2013 (Cth)):
- 'Currently, participants can seek two types of review under the Act: a review of their plan (in accordance with section 48) and an internal review of a reviewable decision (in accordance with section 100). A third type of review is created when the participant appeals an internal review decision to the Administrative Appeals Tribunal'.
- The Bill inserts new section 47A, which empowers the CEO the NDIA to vary a participant's plan (except the participant's statement of goals and aspirations), without requiring the plan to be reassessed, or requiring a new plan to be created.
- The Bill also inserts new section 48, which empowers the CEO to reassess a participant's plan. As a result of the reassessment, the CEO must either vary the plan or prepare a new plan with the participant (Section 48(3)).
- Although this effort to reduce confusion over the term 'review' is commendable, the lack of criteria establishing circumstances when a plan will be varied, reassessed, or reviewed, or when no action will be taken, in effect creates more confusion.
- The proposed *Plan Administration Rules* set out matters which the CEO must have regard to when deciding whether to vary or reassess a participant's plan (Rules 10-12). However, we note that the matters which must be considered are the same for both plan variation and plan reassessment.
- More information is needed to understand how the new concepts of 'plan variation' and 'plan reassessment' will be practically used.

Preventing a provider delivering a support

- Rule 8 of the proposed amended Plan Management Rules empowers the CEO of the NDIA to prevent particular persons or providers from delivering a support to a participant. Sub-rule 8(1) prescribes circumstances in which it would be appropriate for the CEO to specify in a participant's plan that a particular person or provider must not provide a support to the participant. The overarching idea prescribed by sub-rule 8(1) is that where there is a risk to the participant's wellbeing, particularly in circumstances where the provider will adversely affect the participant's inclusion in the community or their ability to exercise choice and control.
- This power is intended to address recommendation 16(b) of the Tune Review, which recommended amending the NDIS Rules to 'outline circumstances in which it is not appropriate for the providers of support coordination to be the provider of any other funded supports in a participant's plan, to protect participants from provider's conflicts of interest.'
- However, the circumstances prescribed in sub-rule 8(1) appear to go beyond cases of clear conflict of interest.

- Additionally, as noted in the brief analysis of the Bill by Disability Services Consulting, it is not clear what will happen when the CEO's judgement of risk contradicts the wishes of the participant.
- The extent of the CEO's power to prevent particular persons or providers from delivering a support to a participant needs to be clarified so that it is clear how this rule will be implemented in practice.

Co-design

- Item 3 of Schedule 2 of the Bill amends the NDIS general principles (section 4) to include 'co-design' as a guiding idea:
'People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.'
- However, co-design is not defined in the Bill. Thus, it is unclear how the concept of co-design will be practically implemented.

Eligibility and inclusivity – amendments to the Becoming a Participant Rules

- The proposed amendments to the *Becoming a Participant Rules* provide separate requirements to establish permanency of an impairment, and substantially reduced functional capacity as a result of an impairment, for people with psychosocial disabilities and for disabilities other than psychosocial disabilities.
- For persons with psychosocial disabilities, an impairment may be considered permanent, or likely to be permanent, if:
 - the person is undergoing, or has undergone treatment for management of their condition, but the treatment has not led to substantial improvement in their functional capacity (rule 8(2)(a) of the amended *Becoming a Participant Rules*); or
 - no appropriate treatment is reasonably available (rule 8(2)(b) of the amended *Becoming a Participant Rules*).
- In contrast, for persons with disabilities other than psychosocial disabilities, an impairment may be considered permanent, or likely to be permanent, if there are no known, available and appropriate treatments that would be likely to remedy the impairment (rule 7(2) of the amended *Becoming a Participant Rules*).
- Rule 8 broadens the eligibility criteria for permanency of impairments attributable to psychosocial disabilities so that the focus is on the subjective experience of the individual.
- Rule 10 establishes a number of factors to be considered to determine whether a person with a psychosocial disability's functional capacity has been substantially reduced by an impairment. These factors must be considered holistically, with regard to the overall effect of the impairment over a period of time that is reasonable, considering the nature of the impairment – in particular considering whether an impairment is episodic or fluctuates (Sub-rule 10(3) of the amended *Becoming a Participant Rules*).
- Rule 10 is a welcome change, as it recognises that, with psychosocial disabilities, 'functional capacity can be cumulative and variable, even with symptoms that do not appear to be ongoing or permanent' – page 11 of the Explanatory Document (*Becoming a Participant Rules Amendment*). This rule is a step towards a more inclusive NDIS, as it allows prospective participants greater opportunity to explain and demonstrate the broader impact on their functional capacity.
- However, as noted in the brief analysis of the Bill by Disability Services Consulting it is unclear why the applicability of these changes is limited to individuals with psychosocial disabilities and does not extend to individuals 'who experience other fluctuating disabilities and disabilities with complex treatment pathways.'

Holding the NDIA to account – the Participant Service Guarantee

- The proposed *Participant Service Guarantee Rules* establish a number of engagement principles (and associated service standards) which apply to how the NDIA and other responsible persons are

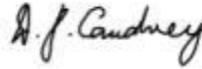
to engage with participants and prospective participants. These engagement principles are: transparency, responsiveness, respect, empowerment and connectedness (rule 5 of the *Participant Service Guarantee Rules*).

- Although the Rules provide service standards detailing how the engagement principles shall be upheld, these standards appear to be subjective, and thus it is unclear how the engagement principles will be upheld in practice, and how the NDIA (and other responsible persons) will be held to account to these principles.

We thank you once again for the opportunity to provide input into these proposed legislative amendments to the *NDIS Act 2013* along with new and amended *NDIS Rules* and advocate for South Australians. We look forward to future opportunities to collaborate to improve outcomes and the experience of South Australians with the NDIS.



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Public Advocate



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