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Senator Wendy Askew
Chair, Legislation Committee
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Delivered by email to community.affairs.sen@aph.gov.au

Dear Senator Askew

RE: NDIS Amendment (Participant Service Guarantee and Other Measures) Bill 2021

People with Disability Australia (PWDA) welcomes the opportunity to provide this submission to the Senate Community Affairs Legislation Committee's inquiry into the National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 (Cth) ('the Bill').

PWDA is a leading disability rights advocacy and representative organisation and the only national cross-disability organisation representing the interests of people with all kinds of disability. We are a not-for-profit and non-government organisation, and our membership is comprised of people with disability and organisations primarily constituted by people with disability.

Our organisation is funded both as a national peak disability representative organisation and New South Wales and regional Queensland peak body to undertake systemic advocacy on behalf of people with disability.

PWDA has extensive experience in providing individual advocacy and outreach to people with disability, including people living in closed or hard-to-reach settings and delivers advocacy support through the National Disability Advocacy Program across New South Wales and Queensland.

On 7 October 2021 we provided a submission to the federal National Disability Insurance Scheme Minister, Senator The Hon Linda Reynolds CSC, in response to proposed legislative changes. We are pleased that some of our recommendations were reflected in the revised Bill. While some of the recommendations we made were reflected in the revised Bill, we remain concerned about the following aspects of the proposed legislation, the:

- need for inclusion of people with disability in the co-design of any National Disability Insurance Scheme (NDIS) reforms
- need for people with disability to serve as National Disability Insurance Agency (NDIA) board members, making up at least 50 per cent of board membership, with an appropriate gender mix
- need for participants' informed consent around the exercise of the proposed CEO plan variation power, which the Bill intends to assign to the NDIS CEO in the Act
- opposition to the use of Category D for sections 14, 47A(6) and 48(5)
- scope for stricter (Rules-based) limitations on eligibility for access to the NDIS than required in the Act
- limitations on proposed changes to improve access to the NDIS for people with psychosocial disability
- the lack of reasons for internal review decisions and the need to follow the recent Federal Court of Australia determination on the AAT and the *QDKH* case
- apparent robodeclining and the Administrative Appeals Tribunal (AAT) jurisdictional issues that should now be addressed, and the
- overreliance on rules and what this means for shared governance of the NDIS.

The inclusion of people with disability in co-design and as board members

As the Australian Government is well aware, the United Nations *Convention on the Rights of Persons with Disabilities* (UN CRPD) outlines how Australia must protect and ensure the international human rights of people with disability on Australian shores.

Article 4(3) of the UN CRPD states that:

> In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties **shall** closely consult with and **actively involve** persons with disabilities, including children with disabilities, through their representative organizations [emphasis added].

PWDA commends the Australian Government as a state party to the UN CRPD for including in the Bill the planned insertion of a new section 4(9A) for the NDIS Act which states that '[p]eople with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.'

However, the language should be strengthened by changing the word 'should' to 'must'. For too long, people with disability have been left out of decision-making processes that affect our lives. The word 'should' indicates our involvement would be optional under the legislation, and therefore does not recognise our international human right under article 4(3) of the UN CRPD to be centrally involved in the NDIS. The word 'should' must be changed to 'must'.

We are similarly concerned about the language used in the planned amended subsection 127(6) for the Act, which states that NDIA Board members must 'collectively possess an appropriate balance of characteristics mentioned in subsection (2)'.

The Act's subsection 127(2) could include people with disability, people with lived experience with disability and people who have certain skills, experience or knowledge. The language used in the Bill, the 'appropriate balance of characteristics', is too subjective and vague to ensure that people with disability are included on the Board.

Instead, we believe the legislation should specify that a people with disability must sit on the Board and specify a minimum number of people with disability to be on the Board. We believe people with disability should make up at least 50 per cent of the board membership, and there should be an appropriate gender mix in those targets.

The planned CEO's plan variation power

PWDA remains concerned about the unconstrained plan variation power that is proposed to be given to the agency's CEO under the Bill's new section 47A for the Act, which is a power to vary plans at the CEO's own initiative. Section 47A(1) states that 'each variation must be prepared with the participant'. However, this does not guarantee that the participant consents to the changes.

We are also concerned about the proposed new section 47A's clause (9) which states that where a participant requests a variation, the CEO can make a variation that differs to the one requested. This is only appropriate if the variation is made with the consent of the participant. However, again, this is not guaranteed by new section 47A(1).

To ensure people with disability have choice and control, we therefore recommend that proposed section 47A(1) be amended to require that variations are to be prepared with and consented to by participants.

Many NDIS applicants are concerned at what they perceive as the lack of inclusion of medically-qualified persons in NDIS decision-making process. These applicants and participants have voiced their frustration at the absence of any medical 'triage' and object to not being permitted to know or speak to the person who decided the decline of their application.

In a similar vein, we note that the exercise of the CEO's plan variation power would be exercised by delegates of the CEO, such as planners. It is our experience that such delegates are already unable to consult people with disability effectively, and so we have grave concerns that this delegated decision-making power would increase the number of significant life-affecting decisions these delegates make on behalf of people with disability.

Our individual advocates also experience that NDIS staff are currently able to abuse their decision-making power as delegates of the CEO, without participant recourse or reliable consultation and consent. Therefore, our advocates are concerned that abuse of power by NDIS staff will increase with the broadening of their responsibilities as CEO delegates, if this plan variation power is introduced without mandating informed participant consent.

Introduction of Category D rules in Sections 14, 47A(6) and 48(5)

Like the Melbourne Disability Institute, PWDA believes 'the proposal to make the rules in sections 14, 47A(6) and 48(5) Category D rules [would give] the Commonwealth Minister almost complete control of the NDIS.' PWDA agrees with Melbourne Disability Institute that 'this proposal would completely undermine the shared governance of the NDIS.'

PWDA is significantly concerned the Category D rules in Section 47A(6) could be used and abused to fundamentally reshape or cut participant packages.

Sections 47A and 48 should be separated so that the only outcomes from a participant seeking a plan variation should be acceptance or rejection by the CEO.

PWDA also agrees 'legislative provision must be made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO. This is essential to ensure transparency and fairness and is consistent with accepted principles of natural justice.'

Stricter eligibility for access to the NDIS

On a similar note, PWDA is concerned that the new rule-making powers proposed to be introduced to section 27 of the Act will allow stricter rules for accessing the NDIS than are currently required by the Act.

We note the submission from the Public Interest Advocacy Centre (PIAC) to this inquiry, and like PAIC, we are concerned the phrasing of proposed sections 27(2) and (3) would give the NDIS Minister new powers to add 'requirements' to be met before a person's impairment is considered permanent. Therefore, we endorse PIAC's recommendations removing s 27(2) and (3).

We also endorse PIAC's recommendation to amend ss 24(3) and 25(1A) that clarifies that all episodic impairments should be considered to be permanent, regardless of if the impairment is attributable to a psychosocial or non-psychosocial disability.

Proposed changes for people with psychosocial disability

PWDA welcomes the Australian Government's acknowledgement of the need of people with psychosocial disability to have improved access to the NDIS. However, the Bill relating to this inquiry does not clarify whether the Rules contained in the NDIS Minister's recent exposure draft consultation have changed.

Therefore, we reiterate here our previous concerns in our submission to the exposure draft consultation regarding the proposed *National Disability Insurance Scheme (Becoming a Participant) Rules 2021* (the Rule)

We acknowledge psychosocial disability can be an extremely complex experience and, for many people, it is a lifelong impairment. While the proposed Rule acknowledges that there can be fluctuations in the experience of psychosocial disability, the measure of 'substantial improvement' can be difficult to ascertain depending on the nature and extent of the impairment.

Therefore, there is a real risk that by requiring people with psychosocial disability to be undergoing or have undergone appropriate treatment, and to demonstrate that the appropriate treatment has not led to 'substantial improvement', will lead to people with psychosocial disability not accessing supports that will further disable them.

We note also that this assessment of eligibility may also not consider the continued social disadvantages and negative effects people experience and, importantly, the future likelihood of psychosocial disability and need for supports at those times.

PWDA therefore recommends clear guidance on the definition of 'substantial improvement'.

Access to the NDIS for people with psychosocial disability has been an extremely vexed and arduous issue. In some cases, it has taken years for people to access appropriate supports, often time with periods of unstable income and homelessness.

Getting access to the NDIS for people who experience the cyclical nature of some mental health conditions is a matter of grave importance and should not be impeded by a nominal value judgment on the nature, scale and impact of their psychosocial disability.

Reasons for internal review decisions

PWDA commends the Government for the planned amendment to section 100(1) of the Act, requiring the NDIA to automatically provide reasons for reviewable decisions.

However, this requirement should also be extended to NDIS internal review decisions. Automatically providing reasons for decisions assists participants to:

- understand why a particular decision has been made
- determine whether they should appeal the decision
- assess whether they have been dealt with fairly
- understand whether key evidence is missing or if there are gaps in the NDIA's understanding of their case.

PWDA does not see why participants should be afforded these benefits for reviewable decisions but not for all internal review decisions.

Automatically providing reasons for all internal review decisions is particularly important, as participants must decide whether to appeal the decisions at the AAT after a section 100 review under the Act. Denying people with disability a reason for their adverse decision denies them natural justice, and could make it more difficult to decide whether they have grounds to appeal and delay their ability to start preparing their case by months.

Ensuring this clarification is built into law through a further revision to the Bill will also ensure the Australian Government continues to mandate all its agencies, including the NDIA, follows Commonwealth model litigant rules, including at tribunals such as the AAT.

Robodeclining and AAT jurisdictional issues must now be addressed

PWDA notes the Federal Court of Australia has now set aside the AAT's decision in the QDKH case, that the tribunal only had jurisdiction to consider decisions over supports that were put before an internal reviewer. We are pleased this decision will mean jurisdiction-limiting decisions made in cases still before the AAT will be reversed.

We strongly hope to see the AAT in future make appropriate decisions on participant supports using the information provided to the NDIA's internal reviewers ***and*** where relevant information was excluded, whether deliberately or unknowingly, the information that was ***not*** provided to internal reviewer(s) for consideration.

PWDA is very concerned that since last year, throughout most of 2021, evidence is either not being provided to internal reviewer(s) for assessment or is not being assessed by reviewers before a decision is taken to uphold an original decision.

Our individual advocates who support people with disability with NDIS appeals are concerned at the exceedingly swift sheer-numbers-of-decisions being upheld at the internal review stage, could mean that statistically a very large majority of decisions are being declined at internal review stage, and are unreasonably being declined in breach of people's human rights.

We question the skill and capacity of internal reviewers are who are making the decisions, and whether the agency is engaging in a 'robodecline' process of rudimentary computer systems–driven review-and-decline.

What we would like to see is full transparency provided for every internal review decision – on all the material that was provided to the internal reviewer – so it will be clear at the earliest opportunity, the basis on which decisions have been made. This would be a welcome change to the experience of the significant majority of the dozens of participants that PWDA has worked with this year, who only discovered three months into an often

successful (settled at conciliation) AAT appeal the basis for which their adverse decisions were upheld during the internal review process.

The Bill must force decision-making transparency in the internal review process so that advocates, the AAT and the Australian Government can ensure the NDIA and NDIS decision-makers are not engaging in a widespread cost-saving plan reduction and associated robodecline process for internal systems review, that is forcing people into the traumatic but often successful, AAT appeals process.

Our individual advocates report how traumatising seeking an NDIS appeal at the AAT is for people with disability, including the delay associated with appealing decisions, and so we recommend full transparency by ensuring the automatic provision of reasons for adverse decisions for all internal review decisions. This will prevent unnecessary trauma and delays in people with disability receiving reasonable and necessary supports.

In addition, not everyone will have the strength to appeal or go through the full process of a lengthy drawn-out AAT appeals process, so each person who cannot face an extended AAT appeal means they will not receive the full supports they require and may be legally entitled to. There also may not be adequate advocacy resources to support this many people through an appeals process.

Overreliance on rules

PWDA continues to be concerned about the Bill and NDIA's plan to overly rely on rules instead of making legislative reform.

As we wrote to NDIS Minister Linda Reynolds in our submission on 7 October 2021:

> PWDA is keenly aware of the scope and complexity of administering a Scheme such as the NDIS. It is a vast undertaking and as the Tune Review clearly identified, there is a lot of "red tape" to navigate for participants, NDIA staff and advocates.
>
> The NDIS is the most significant social program that Australia has undertaken in half a century. It is a very important scheme, as it not only upholds Australia's commitment to the CRPD, but it ensures that people with disability in Australia have access to the services and supports they need to live full lives as citizens.

> However, creating a Scheme that is heavily reliant on Rules, in particular Category D Rules, diminishes the objectives of the NDIS, by giving the Minister very broad reaching discretionary powers.
>
> The use of such powers over a participant's plan as to what can be purchased with allocated funding dilutes any semblance of "choice and control" that the participant had and to which the scheme was technically founded upon.

We continue to hold these concerns about the over-reliance on rules in the Bill's planned reforms for the NDIS Act.

As stated earlier, we share with the Melbourne Disability Institute's concerns that the reliance on 'rules [would give] the Commonwealth Minister almost complete control of the NDIS' and 'this proposal would completely undermine the shared governance of the NDIS.'

Recommendations

In summary, PWDA's recommendations are:

1. **Recommendation 1 –** That the proposed new section 4(9A) for the Act should read '[p]eople with disability are central to the National Disability Insurance Scheme and ***must*** be included in a co-design capacity.' This wording replaces the drafted word should with must
2. **Recommendation 2 –** That the proposed subsection 127(6) of the Act ensure the board 'collectively possess an appropriate balance of characteristics' by having specific targets such as at least 50 per cent of its membership having disability, and a gender mix of up to 50 per cent male and 50 per cent female, which also allows for non-binary people to serve on the board
3. **Recommendation 3 –** That if the CEO plan variation power is introduced, the proposed section 47A(1) be amended to require that all variations are to be prepared with and consented to by participants
4. **Recommendation 4 –** That sections 47A and 48 should be separated so that the only outcomes from a participant seeking a plan variation should be acceptance or rejection by the CEO

5. **Recommendation 5 –** That provisions must be made in section 48 to ensure participants have an opportunity to be heard during any reassessment which is initiated by the CEO

6. **Recommendation 6 –** That Rules should not be allowed to be used to introduce stricter than required limitations on eligibility for access to the NDIS than are found in the Act

7. **Recommendation 7 –** That the proposed subsections 27(2) and (3) should not be inserted into the Act by the Bill

8. **Recommendation 8 –** That the proposed subsections 24(3) and 25(1A) should be amended to clarify that all impairments which are episodic or fluctuating in nature may be taken to be permanent, regardless of whether the impairment is attributable to a psychosocial or non-psychosocial disability

9. **Recommendation 9 –** That if the proposed term 'substantial improvement' (used in relation to psychosocial disability) is to be used in relevant Rule, it is defined in the Act or in that Rule

10. **Recommendation 10 –** That the proposed section 100(1) should be amended to specifically acknowledge internal review decisions are included among the reviewable decisions the NDIA must automatically provide reasons for

11. **Recommendation 11 –** That the NDIA must provide the reasons for all internal review decisions

12. **Recommendation 12 –** That the AAT must follow the precedent set by the recent Federal Court of Australia determination on the *QDKH* case

13. **Recommendation 13 –** That the Australian Government ensures the AAT and NDIA follow Commonwealth model litigant rules, and;

14. **Recommendation 14 –** That sections 14, 47A(6) and 48(5) of the Bill should not be contained in Category D Rules, and instead be inserted in the Act.

Should you wish to discuss this submission further, please contact my Senior Manager of Policy, Giancarlo de Vera, on 0413 135 731 or at giancarlod@pwd.org.au. We thank you again for the opportunity to provide feedback on the Bill.

This submission is also endorsed by the Disability Council NSW, the statutory body that provides independent advice to the NSW Government.

Yours sincerely

Sebastian Zagarella
Chief Executive Officer
People with Disability Australia