



# National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

**Submission by  
Queensland Advocacy Incorporated**

**Senate Community Affairs Legislation Committee**

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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 Participant Service Guarantee must be 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.
2. Reasons for decisions must be of sufficient quality and must provide meaningful information that meets a certain 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.
3. The legislation should require the Agency to provide draft plans to all participants.
4. 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.
5. Plan variation powers must only be introduced and available in the circumstances articulated by the Tune Review. Further, plan variations must require the participant's consent. Principles of procedural fairness must be clearly articulated to people with disability and made available in accessible formats.
6. Clarify residual ambiguity regarding the status of section 48 reassessments that occur whilst a matter is before the AAT and legislate the recent Federal Court decision in *QDKH*.
7. 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.

8. 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.
9. Provide further clarity regarding the intended application of changes to the eligibility criteria for participants with psychosocial disability, for example by releasing the accompanying proposed NDIS Rules.
10. Remove 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.
11. Consider the representation of different disability types on the Board, such as intellectual disability, cognitive disability, psychosocial disability etc.
12. Address the recurring issue of participants wrongly being denied access to supports because the supports do not relate to the impairment upon which they relied to gain access. This stance, which is not a criterion in section 34 of the NDIS Act nor is it contained within the Supports for Participants rules, is a recurring error made by the Agency and is erroneously printed in several NDIS publications. The case of *McLaughlin* provides some guidance, however the issue requires legislative authority.

## 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). 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, while the proposed changes do not fundamentally alter the structure of the scheme, the volume of changes and associated material released for such a short period of consultation, undermines the Minister's commitment to co-designing scheme reform alongside people with disability. 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).<sup>1</sup> Yet denying people with disability and their supporters sufficient opportunity to understand and obtain support where necessary to respond to the proposed reforms arguably breaches Article 4(3) of the CRPD which requires States Parties to 'actively involve persons with disabilities' when developing policies that implement the Convention.<sup>2</sup>

Overall, QAI considers that many of the changes are positive. However, there is uncertainty regarding the extent of change that will occur as a result of the proposed legislative reforms. This is because the Bill provides

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<sup>1</sup> *National Disability Insurance Scheme Act 2013* (Cth) section 3(1)a

<sup>2</sup> Convention on the Rights of Persons with Disabilities, Article 4

increased scope for the National Disability Insurance Agency (the Agency) to create Rules that will govern how the legislation is to be applied in practice; Rules that have not been provided alongside this Bill. Increased discretionary power for the Agency is cause for concern. Whilst it facilitates greater flexibility on the one hand, it 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 stay true to its original purpose; that is, to support the independence of people with disability and ensure their full inclusion within society.

## **Schedule 1 - Participant Service Guarantee**

Whilst QAI supports legislating the Participant Service Guarantee, it remains unclear whether the 'new Category C NDIS Rules' that will give effect to the Guarantee are the same as those released during the Department of Social Services' recent consultation. QAI is primarily concerned that the NDIA is not sufficiently resourced to meet the requirements in the guarantee and that the complaint process for participants is time consuming and difficult to navigate. QAI also considers that the reporting obligations of the Commonwealth Ombudsman could be strengthened.

### ***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 26<sup>th</sup> June 2021. No response had been received as of 6<sup>th</sup> 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 will be 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 an avenue of 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 their families 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.

## *Reasons for decisions*

QAI welcomes the amendment that makes it mandatory for the Agency to provide written reasons for any reviewable decision made by the Agency. This responds to overwhelming feedback from people with disability regarding the need for increased transparency around the Agency's decision-making and reflects the recommendation in the Tune Review which said providing participants with an explanation of a decision should be a *'routine operational process for the NDIA.'*<sup>3</sup>

However, QAI has concerns regarding the quality of reasons that are and will be provided which at times, can be very poor. 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 completely inadequate. 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 for decisions must therefore be of sufficient quality and must provide meaningful information that meets a certain standard, such as providing an explanation as to why the person did not meet a certain criterion, including 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.'<sup>4</sup> This could help reduce the number of reviews that are pursued and the substantial funding that is allocated to the Agency's legal representation costs at the AAT as a result. Guidance as to the quality of reasons provided should therefore be provided within the new Category C Rules which give effect to the Guarantee.

## *Draft plans*

Similarly, QAI considers that the Agency should provide all participants with a draft plan. The recent consultation by the Department of Social Services released draft Participant Service Guarantee Rules that included a right for participants to *request* a draft plan. The current Bill does not reference this right and thus

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<sup>3</sup> *Ibid*, at 3.59 on page 52

<sup>4</sup> *Acts Interpretation Act 1901* (Cth), section 25D

it remains unclear whether this will be included in the new Category C Rules which will give effect to the 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.’*<sup>5</sup> 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 by the Agency earlier in 2021. 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, therefore they should be provided as a matter of routine.

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. Further, it would provide an 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.

QAI therefore considers this to be a vital amendment that should be included within the Bill. To refrain from including it misses a key opportunity to add momentum to 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.

### ***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:

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

The draft Bill should also:

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<sup>5</sup> David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, page 11

- provide that the report is to be published on the website (in the same way that section 20D of the *Ombudsman's Act 1976* (Cth) requires the report on the health funds to be published) 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.

### ***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 also supports renaming plan reviews to plan reassessments to avoid the confusion that arises from the multiple meanings for the word 'review'.

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'.<sup>6</sup>

Current wording in Item 23 of the Bill requires each variation to be 'prepared with the participant', however this does not explicitly require the participant's consent for the variation to occur. Whilst the explanatory memorandum states that 'the intention is that any variation will be for the benefit of the participant', this remains subjective and is vulnerable to inconsistent interpretation and application in practice.

Further, the Bill states that the 'CEO, may in writing, vary a participant's plan...in the circumstances prescribed by the National Disability Insurance Rules'.<sup>7</sup> The relevant Rules have not been published alongside this Bill. Proposed Rules that were released in the Department of Social Services' recent consultation contained alarming ambiguity as to the intended application of this power. The content of the previously proposed Rules left it unclear whether a certain scenario would result in a plan variation or a plan reassessment and was drafted in such a way that left 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,*

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<sup>6</sup> *National Disability Insurance Scheme Act 2013* (Cth) section 3(1)e

<sup>7</sup> Page 9 of Draft Bill

*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.<sup>8</sup>*

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. 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 consent. Participants should be secure in the knowledge that where supports have been approved for a period of time, those supports will not be removed at the CEO's discretion.

### ***Administrative Appeals Tribunal (AAT) jurisdictional issues***

QAI supports the amendments to section 101 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 statement of participant supports is varied or a new plan comes into effect, 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.

QAI further supports the amendments to section 103 which provides that 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. 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 concerned that the drafting of amended sections 48 and 103 potentially leaves residual ambiguity regarding the status of section 48 reassessments that occur whilst a matter is before the AAT. Whilst it is anticipated that in practice, the utilisation of section 47A powers will be more commonplace for a

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<sup>8</sup> David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, para 8.33 page 139

participant whose plan is before the AAT, the AAT's jurisdiction over a decision by the CEO to conduct a plan reassessment *under section 48* whilst a plan is before the AAT, requires clarification.

QAI had an experience recently where a client had a new plan issued by the NDIA but it 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.

Further, 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. Whilst the recent decision of the federal court in *QDKH*<sup>9</sup> has provided clarity to a certain extent, it nonetheless remains preferable for such matters to be clarified in primary legislation. 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, supports 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.

## Schedule 2 – Flexibility Measures

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 also supports the change in language that removes language that is patronising to people with disability and includes language that is inclusive of people with disability from the LGBTIQ+ community.

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<sup>9</sup> *QDKH, by his litigation representative BGJF v National Disability Insurance Agency* [2021] FCAFC 189

### ***Market intervention powers***

While QAI supports the principle of providing market intervention powers to the Agency under amended section 14, further context around the scope of this power would be beneficial. Market intervention powers would certainly enable the Agency to be flexible and creative when facilitating access to disability support services for participants who live in areas where there is a 'thin market', and this power has potentially positive implications for participants with complex support needs who, due to the market-based scheme, find it challenging to maintain long-term service agreements with providers. This is particularly problematic in the absence of a provider of last resort. However, further detail that explains the anticipated decision-making process of the Agency when determining whether to invoke this power is required. Whilst it is likely that such guidance will be provided in subsequent NDIS Rules, it is difficult to provide support for this legislative amendment in the absence of further information. For example, upon what data will the decision be based? 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.

Further, QAI considers this an opportunity to clarify and legislate the right of participants to engage 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***

Similarly, QAI supports 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 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 proposed independent assessments and the need to capture the unique support needs of individuals with episodic and fluctuating conditions.

However, amended section 27 states the NDIS Rules can now 'specify requirements that must be satisfied for an impairment to be considered permanent or likely to be permanent' as opposed to identifying 'circumstances in which, or criteria to be applied in assessing whether' an impairment is permanent or likely to be permanent. This could potentially make it harder for prospective participants with psychosocial disability to meet more narrowly defined access criteria. Further, information released by the Department of Social

Services during the recent consultation period revealed a level of ambiguity within the proposed accompanying NDIS Rules. In the absence of any accompanying rules to this Bill, it is once again difficult to provide support for this legislative change without understanding the full effect of its intended application. Greater information is therefore required.

### ***Scheme sustainability***

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 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.

### ***Payments***

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. QAI welcomes the clarification that 'the new direct payment system will be available as an *alternative* and will not prevent the use of unregistered providers by self-managed participants'.<sup>10</sup> 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.

### ***Board members***

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 suggests further consideration be given to the representation of different disability types on the Board, such as intellectual disability, cognitive disability, psychosocial disability etc.

## **Schedule 3 – Full Scheme Amendments**

QAI supports the amendments in Schedule 3 of the Bill.

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<sup>10</sup> *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021 Explanatory Memorandum, p44*

## Additional issue

QAI considers this Bill to be a critical opportunity to resolve another problem that has arisen for participants as a result of misinformation held by LAC's and planners – that is, participants wrongly being denied access to supports because the supports don't relate to the impairment upon which the participant relied to gain access to the NDIS. This stance, which is not a criterion in section 34 of the NDIS Act nor is it contained within the *Supports for Participants Rules*, is a recurring error made by the Agency and is erroneously printed in several NDIS publications.<sup>11</sup> A recent decision by the AAT has confirmed this position as inaccurate, however the issue requires legislative clarification in order to avoid further harm caused to people with disability who are erroneously being denied access to vital disability supports. The case of *McLaughlin*<sup>12</sup> confirmed that supports funded in a participant's plan are not limited to supports which relate to the impairment/s which qualified the person for access to the NDIS. This is because once a person becomes a participant of the NDIS, their function and needs are viewed as whole and their status as a participant is not qualified. That is, they are not a participant in relation to conditions A and/or B. They either are a participant, or they are not.

The issue of what supports may be funded is a separate issue, which must be determined with reference to section 34 and the *Supports for Participants Rules*. In particular, rule 5.1(b) states that a support will not be funded if it is not related to the participant's disability. However, 'disability' is not defined in section 9 of the Act; it is given a broad meaning. Part 8.1 of the *Access to the NDIS Operational Guidelines* states that the 'focus of 'disability' is on the reduction or loss of an ability to perform an activity which results from an impairment'. The reference to 'disability' in rule 5.1(b) therefore does not mean 'disability for which the participant gained access'. This rule simply means that the NDIS will not fund supports that don't relate to a participant's reduced ability to function as the result of (any) impairment. QAI therefore urges the Committee to include relevant provisions within the Bill to this effect, thereby ensuring participants have unimpeded access to reasonable and necessary supports and preserving scarce advocacy resources for matters not resulting from misinformation.

## Conclusion

QAI thanks the Senate Community Legal Affairs Committee for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

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<sup>11</sup> For example, <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/what-principles-do-we-follow-create-your-plan/what-principles-do-we-use-create-your-plan/fair-supports-your-disability-needs>

<sup>12</sup> *McLaughlin and National Disability Insurance Agency* [2021] AATA 496