public interest
ADVOCACY CENTRE

Submission to Department of Social Services

Proposed NDIS legislative changes

7 October 2021

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Section 48(1) should be amended to allow participants to request reassessments. This will empower participants to determine whether a plan variation or reassessment is required for them.

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Section 48(2) rules should be designated as Category A rules, in line with the current designation for rules under s 48. These rules concern the circumstances in which the CEO may undertake reassessments and are significant policy matters with potential financial implication for States and Territories.

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Proposed sections 7 to 10 of the Becoming a Participant Rules establish threshold requirements for access to the NDIS. This is a significant matter of policy which determines who can access the Scheme. They should be moved to the Bill.

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Guidance should be provided in the Rules to the definitions of 'appropriate treatment', 'managing' a condition, 'substantial improvement' and 'reasonably available'.

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Section 45 of the Bill should be amended to clarify that this change is not intended to remove the ability of participants to continue paying their service provider in the method of their choosing.

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The NDIA should publish information concerning the planned payments platform, including information as to data collection, use and disclosure of participants' personal information.

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Section 100(1B) and (1C) should be amended to require that all reviewable decisions made by the CEO be accompanied by reasons for the decision, without requiring a request to be made. This change is consistent with the recommendations from the Tune Review.

Recommendation 11 – Insert new s 100(6A) requiring reasons to be provided following internal reviews

A new s 100(6A) should be inserted into the Bill mirroring the requirement to provide reasons under s 100(1B) and (1C), for all reviewable decisions in respect of s 100(6) internal review decisions.

Recommendation 12 – Amend the Participant Service Guarantee Rules to strengthen the Engagement Principles and Service Standards

The Participant Service Guarantee Rules should be amended to:

- *Remove the words 'if requested' from item 4(d) of the Service Standards, to ensure all reviewable decisions are accompanied by reasons, without requiring participants to request them;*
- *Insert a Service Standard to require all reasons to be provided in an accessible, plain English format with appropriate references to the legislative framework and operational guidelines; and*
- *Change item 4(e) of the Service Standards to a new, substantive provision in the Rules to require the NDIA to provide draft plans in advance of final planning discussions and the approval of the statement of participant supports.*

Recommendation 13 – Amend the legislation to allow the Administrative Appeals Tribunal to consider all supports requested by a participant

The legislation should be amended to address the issue raised in QDKH and National Disability Insurance Agency [2021] AATA 922 *by providing jurisdiction to the Administrative Appeals Tribunal to consider all supports requested by a participant, regardless of whether the matter was expressly raised before the internal reviewer.*

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Department's consultation on the proposed reforms to the *National Disability Insurance Scheme Act 2013* (Cth) (the **Act**).

PIAC has lengthy experience in tackling barriers to justice and fairness experienced by people with disability. Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the NDIS for people with disability. This work has been done in close consultation with key peak disability organisations.

We are pleased to see several positive changes proposed in the reform package, which reflect a number of our longstanding concerns. In particular, we welcome proposals to:

- insert timeframes into the Act and Rules, including timeframes around access, participant plans and internal reviews;
- require annual reporting by the Commonwealth Ombudsman to review the NDIA's performance against the Participant Service Guarantee, as well as in relation to participant experience;
- clarify the language around the different types of 'reviews' which has caused confusion between participants and the NDIA;
- fix the Administrative Appeals Tribunal (**AAT**)'s jurisdiction when it comes to reviewing plans which have been varied or replaced by new plans over the course of the appeal; and
- improve the NDIS principles, including adding co-design with people with disability, and using more inclusive language.

We also welcome the commitment to the co-design of any future changes to the access and funding models under the NDIS.

However, we remain concerned by the expansion of rule-making powers and the use of broad discretionary powers for the administration of the NDIS. We also consider this a missed opportunity to resolve other existing problems with the AAT's jurisdiction, and with the complexity of the NDIS framework as a whole.

Our submission addresses three matters:

- our overarching concerns about the NDIS framework and the continued reliance on broad discretionary powers;
- our comments and recommendations in respect of particular proposed changes; and
- our recommendations on further changes that can and should be made in the current reform package.

2. Reliance on rules and discretionary powers

Our overarching concern with the reform package is the continued reliance on delegated legislation for significant aspects of the NDIS. This includes the adoption of two new proposed Rules and a number of new rule-making powers in the proposed Bill. Our concerns around this continued expansion of rule-making power are compounded by the expansion of discretionary

powers of the CEO. The combination of these aspects represents poor legislative and administrative practice and should be avoided.

Concerns about the overuse of delegated legislation are not new, and not unique to the NDIS. Delegated legislation should only be used for the purposes of administration, for instance to facilitate flexibility in frequently changing regulatory regimes or in providing technical detail to the Act. It should not be used for significant and substantive aspects of law-making.

The Senate Standing Committee on Regulations and Ordinances has recently raised concerns regarding the overuse of legislative instruments:[1]

> …the power to enact laws is a primary power of Parliament. Nevertheless, the Parliament frequently delegates its law-making powers to the executive government or specified bodies or office-holders. The committee considers it essential that the Parliament does not delegate legislative powers that should be exercised by the Parliament itself.
>
> The committee is particularly concerned that bills all too often leave significant matters of policy to delegated legislation. The committee considers that the Scrutiny of Bills committee plays an essential role in drawing bills which inappropriately delegate legislative power to the Senate's attention. However, despite the Scrutiny of Bills committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored, and legislation is enacted that leaves significant matters to delegated legislation, or allows delegated legislation to amend primary legislation. Once enacted, these powers are used to make legislative instruments which this committee considers contain matters more appropriate for parliamentary enactment. However, by the time this committee alerts the Senate to its concerns, it is effectively too late: the relevant primary legislation has already passed both Houses of Parliament.
>
> The committee considers that when government is developing primary legislation which seeks to delegate legislative power, it should pay close attention to the importance of ensuring adequate parliamentary oversight. In particular, government officials should consider the advice issued by this committee and by the Scrutiny of Bills committee as to when matters would be more appropriately included in primary legislation.

Parliamentary oversight of delegated legislation, through its power to disallow pieces of delegated legislation, is not sufficient when it comes to significant matters of policy. The Senate Standing Committee has stated:[2]

> in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation (despite the warnings of the Senate Standing Committee for the Scrutiny of Bills). While the committee draws its technical scrutiny concerns about delegated legislation to the Senate's attention, there is no consistent scrutiny of its policy implications.

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1 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of delegated legislation* (Commonwealth of Australia, 2019), [5.33]-[5.35].

2 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of delegated legislation* (Commonwealth of Australia, 2019), x.

In the context of the NDIS, there are a number of provisions in the Rules which are fundamental to the Scheme, and should be incorporated in the legislation. Sections 7 to 10 of the proposed Becoming a Participant Rules, for instance, establish 'requirements that must be satisfied' for access to the Scheme. These provisions are not technical administrative details, or matters that require administrative flexibility. Rather, they are fundamental provisions which create the conditions for access to the Scheme. The failure to meet any of these requirements means a person will not be able to access the Scheme. They are 'significant matters of policy' and ought to be set out in the Act, rather than in delegated legislation.

Laws which determine the eligibility of a person for access to the NDIS should be considered and made by Parliament, and not at the discretion of the Minister.

This inappropriate use of delegated legislation is made more concerning by the broad discretionary power given to the CEO in the rules. These powers, discussed further below with respect to the proposed Plan Administration Rules and Becoming a Participant Rules, embed one person – the CEO – with significant and unstructured decision-making power in respect of key aspects of a participant's NDIS plan.

This is especially inappropriate in the context of the NDIS legislation, the object of which is to give effect to obligations under the Convention on the Rights of Persons with Disabilities and to enable people with disability to exercise choice and control in pursuit of their goals.

An added consequence of the reliance on delegated legislation is the complexity of the NDIS framework. The reform package adds to this complexity, with a growing number of rules and principles found in disparate locations. For example, when making a decision about specialist disability accommodation (**SDA**) supports, the rules that need to be considered for that one decision include (at least):

- the 'reasonable and necessary supports' rules under ss 33 and 34 of the Act;
- the principles which underlie decision-making in the Act, including under ss 4, 5, 17A and 31;
- the Participant Service Guarantee Rules;
- the Support for Participants Rules;
- the SDA Rules;
- the Plan Management Rules;
- the Plan Administration Rules; and
- the NDIA's Operational Guidelines.

Many of these rules overlap and are not entirely consistent. This is unwieldy and at odds with the objects of the Scheme, making it impossible for participants to navigate and follow the process.

Our comments on the specific proposed changes below should be considered in the context of this overarching concern about the continued expansion of rule-making power and the use of broad discretionary powers.

3. Comments on specific changes

In respect of the specific changes being proposed, we raise concerns about five changes which should be improved before the reforms are taken further. These changes concern:

- the proposed ss 47A and 48 and the CEO's plan variation power;
- changes to the Becoming a Participant Rules;
- changes to the payment of supports;
- the proposed s 100(1B) and (1C) concerning reasons for decisions; and
- the Engagement Principles and Service Standards under the Participant Service Guarantee.

3.1 The CEO's plan variation and reassessment powers

Proposed s 47A of the Bill allows participant plans to be varied without a reassessment. We support the introduction of a plan variation power to allow for minor changes upon request by a participant, without requiring a participant to go through a full reassessment process. We also support the change in terminology, avoiding multiple uses of the word 'review'.

However, we have a number of concerns with the drafting of ss 47A and 48.

First, s 47A(3)(c) (and subsequent amendments) should be deleted. If the participant requests a variation of their plan, the CEO should only be able to decide to vary the plan, or not vary the plan. The CEO should not have the power to decline the plan variation and instead reassess the plan under s 48(1).

In effect, this power means the CEO can change a participant's request to vary a plan into a request for a reassessment. A participant should be able to request a plan variation without being concerned that their access to the Scheme and all of their existing supports are open for reassessment.

There may be circumstances where a participant would prefer to seek review of the decision not to vary, rather than proceed to reassessment.

For example, a participant may request a plan variation following settlement of an AAT appeal. Section 47A(3)(c) as drafted would allow the CEO to decline that variation request, despite having settled the appeal, and instead proceed to a reassessment.

In the event that a reassessment is necessary, the CEO retains the power under s 48 to reassess plans on their own initiative. Section 47A(3)(c) is therefore unnecessary and should be deleted.

Instead, s 48(1) should be amended to allow participants to request reassessments. This ensures participants are able to make decisions for themselves as to whether to request reassessments for major plan changes, or variations for minor changes. It will also ensure plan variation and reassessment remain distinct concepts.

Second, we oppose the unrestrained power given to the CEO to vary a plan on their own initiative under s 47A.

Section 10 of the proposed Plan Administration Rules provides a set of 'matters' that the CEO 'must have regard to' in deciding whether to vary a participant's plan on their own initiative.

The matters include whether the variation is to how a particular support is to be delivered, whether the variation relates to the cost of a particular support, or whether the variation increases the total funding for supports. These matters are broad and do not limit the use of this power. Nor do they point in a consistent direction as to how a decision is to be made. Rather, they provide the CEO with unstructured decision-making power in respect of whether to vary a participant's plan.

This leaves it open for the CEO to unilaterally make variations like changes to funding amounts and restrictions on how funding could be used by a participant, without consultation or consent from the participant and without a reassessment. It is not evident why the CEO needs or should have this broad power.

In the explanatory materials to the Plan Administration Rules, the example of 'Lin' is given as an appropriate use of the CEO's power to vary plans on their own initiative. The example shows that Lin's plan was approved in October and included an amount for an assessment by an occupational therapist for a mobility aid. Following the occupational therapist's recommendation, the CEO assessed the wheelchair as being a reasonable and necessary support, and varied Lin's plan on their own initiative.

It can be inferred in this example that Lin has, by providing the CEO with the occupational therapist's recommendation for the wheelchair, requested a plan variation to include the wheelchair. It is clear that Lin has consented to that change.

However, the current drafting would also allow the CEO to assess an *alternative, cheaper* wheelchair as being a reasonable and necessary support – that is, a wheelchair that is similar to, but which may not have the same features or design as that recommended by the occupational therapist. The CEO would have the power to vary the plan to include this cheaper wheelchair on their own initiative, without Lin's consent or request. This should not be the case.

The 'matters' listed in section 10 of the Rules are also not consistent with the Tune Review recommendation, set out at [8.33] of that Report. The Tune Review set out a list of circumstances where it would be appropriate for plan variations to be made. It was not a list of matters for the CEO to have regard to in exercising a discretionary power.

The use of this power on the CEO's own initiative should be limited to highly specific instances, as recommended in the Tune Review, or otherwise to be exercised with the consent of the participant. The power should be limited to the following circumstances:

- where a participant changes their statement of goals and aspirations;
- 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
- if a participant has obtained information, such as assessments and quotes, requested by the NDIA to make a decision on a particular support, and upon receipt of the information the NDIA is satisfied that the funding of that *specific* support is reasonable and necessary;

- where a technical mistake or drafting error is made in the plan;
- where, after completion of risk assessments in accordance with ss 43 and 44, the plan management type is changed;
- for the purposes of applying or adjusting a compensation reduction amount;
- to add reasonable and necessary supports if the relevant statement of participant supports is under review by the AAT;
- upon reconciliation of an appeal made to the AAT;
- to implement an AAT decision that was not appealed by the parties; and
- in any other instance, with the express consent of the participant.

These circumstances are consistent with those stated in the Tune Review, at [8.33].

Third, we are concerned by the use of broad Category D rules in setting out matters for consideration in the exercise of ss 47A and 48 powers.

In respect of rules under s 47A, s 10 of the Plan Administration Rules should be moved to the primary legislation. We submitted above that matters which represent significant matters of policy should be addressed in the legislation. Delegated legislation should be used only for technical detail and matters requiring flexibility.

The circumstances in which the CEO may vary a plan on their own initiative should not be subject to administrative flexibility. The CEO already has the power to vary plans on request, and to undertake reassessments on their own initiative under s 48. These powers provide sufficient flexibility. The limited circumstances we set out above are easily definable in the legislation, without requiring technical details in the rules. Limits on the CEO's power to vary plans on their own initiative should not be subject to change at the discretion of the Minister.

In respect of rules under s 48(2), we submit these should instead be designated as Category A rules. Rules in respect of the current s 48 are Category A rules. There is no reason why this should be changed to Category D. As the Tune Review states at [2.17a]:

> Category A rules are those that relate to significant policy matters with financial implications for the Commonwealth and states and territories, or which interact closely with relevant state and territory laws. The unanimous agreement of the Commonwealth and all states and territories is required for their making or amending

Rules about the circumstances in which the CEO may undertake reassessments are significant policy matters with financial implication for States and Territories. These rules may relate to the size of funding, and the allocation of funding decisions between the Commonwealth and States and Territories. It is appropriate that they remain Category A rules.

Finally, the Plan Administration Rules should set out procedural fairness requirements in the event the CEO exercises their power to reassess plans on their own initiative. These requirements should include matters such as the timing of notification periods for participants, the provision of information as to why such a decision has been made, information on the aspects of the plan that will be open for reassessment as well as the opportunities for participants to be heard in the reassessment process.

Recommendation 1 – Remove the power of the CEO to refuse a plan variation request and undertake a reassessment instead

Section 47A(3)(c), which allows the CEO to refuse to vary a plan but to undertake a reassessment under s 48(1) instead, should be deleted. This power is unnecessary given the CEO already has powers to undertake reassessments on their own initiative under s 48(1).

Recommendation 2 – Allow participants to request reassessments

Section 48(1) should be amended to allow participants to request reassessments. This will empower participants to determine whether a plan variation or reassessment is required for them.

Recommendation 3 – Amend s 47A of the Bill to limit the power of the CEO to vary plans on their own initiative

Section 47A should be amended to limit the power of the CEO to vary plans on their own initiative, in line with the circumstances set out at paragraph 8.33 of the Tune Review Report, or in any other instance with the express consent of the participant. These limits should be set out in s 47A of the Bill, and not in delegated legislation.

Recommendation 4 – Section 48(2) rules should be designated as Category A rules

Section 48(2) rules should be designated as Category A rules, in line with the current designation for rules under s 48. These rules concern the circumstances in which the CEO may undertake reassessments and are significant policy matters with potential financial implication for States and Territories.

Recommendation 5 – Procedural fairness requirements for CEO's exercise of power on own initiative

The Plan Administration Rules should set out procedural fairness requirements for the CEO's exercise of power to reassess plans on their own initiative. These requirements should include notification periods, the provision of information to participants as to why the decision has been made, the matters which will be open for reassessment and the opportunities for participants to be heard in the reassessment process.

3.2 Becoming a Participant Rules

We have submitted above that provisions of the Becoming a Participant Rules which establish thresholds for accessing the NDIS should be addressed in the Act, not in delegated legislation. While ss 7 to 10 of the Rules purport to clarify the terms 'permanent' and 'substantially reduced functional capacity', the fact that they establish 'requirements that must be satisfied' for access to the Scheme means they form part of the threshold requirements for access to the NDIS. They are a significant matter of policy determining who can access the Scheme, and ought to be considered by Parliament.

In addition to being moved to the primary legislation, we consider that the proposed changes require further clarification.

While we welcome the clarification around the meaning of 'permanent' impairment and 'substantially reduced functional capacity' in relation to psychosocial disability, the rules introduce new undefined terms and concepts.

Section 8 of the Becoming a Participant Rules provides that, to access the NDIS, a person must be undergoing or have undergone 'appropriate treatment' for the purposes of 'managing' their condition, and that the treatment has not led to a 'substantial improvement' in their functional capacity after a reasonable period of time. Alternatively, there must be no 'appropriate treatment' 'reasonably available' to the person. These terms in inverted commas are not defined.

In practice, it will be the CEO (and their delegate) considering in each instance what 'appropriate treatment', 'managing' a condition, 'substantial improvement' and 'reasonably available' means. This again gives broad discretionary power to the CEO over a fundamental aspect of the NDIS.

We consider it would be appropriate for guidance for these terms to be provided in the rules. The highly personal nature of the decisions involved in medical treatment requires guidance to ensure that subjective considerations are taken into account by the delegate in making these assessments.

For instance, 'appropriate treatment' should take into account matters such as a participant's risk appetite for treatments, and personal choices over medical procedures. 'Substantial improvement' should include subjective assessments of a person's functional capacity. There is also no guidance as to how a decision-maker determines whether improvement has met the 'substantial' threshold, and the indicators for that threshold. Guidance is important for both participants and decision-makers, to ensure consistency in the application of these vague terms.

Similar considerations apply in proposed s 9(2)(b) of the Rules, concerning non-psychosocial disabilities.

This provision requires that there are no 'known, available and appropriate evidence-based clinical, medical or other treatments' that would be likely to lead to a person's impairment no longer resulting in substantially reduced functional capacity. Again, the term 'appropriate' is vague and should include respect for bodily autonomy. 'Other treatment' is also vague – what non-clinical, non-medical treatment should a participant be required to undergo? Should those treatments in any case be funded under the NDIS – for example, as capacity building supports? These matters require further definition and guidance to ensure consistency in decision-making.

Recommendation 6 – Move ss 7 to 10 of the Becoming a Participant Rules to the Bill

Proposed sections 7 to 10 of the Becoming a Participant Rules establish threshold requirements for access to the NDIS. This is a significant matter of policy which determines who can access the Scheme. They should be moved to the Bill.

Recommendation 7 – Provide guidance in the Becoming a Participant Rules to new terminology and concepts

Guidance should be provided in the Rules to the definitions of 'appropriate treatment', 'managing' a condition, 'substantial improvement' and 'reasonably available'.

3.3 Payment of supports

PIAC does not oppose, in principle, the proposed amendments to s 45 of the Act. We understand from the explanatory materials that the intention of these amendments is to enable the NDIA to

pay service providers directly on behalf of participants, through a new payment platform. The new payment platform is intended to simplify the payment process for both participants and the NDIA.

We understand from briefings with the Department of Social Services that the intention is **not** to require all participants, including all self-managed participants, to utilise the payment platform. Participants may choose to continue paying their service providers in the manner which works for them. It is important that participants continue to be empowered in this manner.

We make two submissions on the proposed change.

First, proposed s 45 requires amendment to reflect the Government's intention that participants will not be *required* to utilise the payment platform. As presently drafted, the NDIS amount payable is to be paid 'to the person determined by the CEO' and either in accordance with the prescribed rules, or if there are no rules 'in the manner determined by the CEO'.

This allows the CEO to determine how the money is paid and to whom, without requiring them to take into account or adhere to a participant's choice. The Plan Administration Rules likewise do not require the CEO to follow a participant's request. If the intention is to allow participants to continue to choose, this provision ought to be amended to make that clear.

Second, we have been approached by a number of stakeholders and participants who are concerned about the proposed payment platform. We understand participants do not feel adequately consulted on the introduction of the payment app, and do not understand the privacy implications or data collection policies proposed. If the basis for the proposed amendments to s 45 is to allow the introduction of this payment platform, it is important for details of the platform to be released shortly, to allow consultation and co-design. This is critical in building trust with the disability community.

Recommendation 8 – Clarification of drafting in s 45 of the Bill

Section 45 of the Bill should be amended to clarify that this change is not intended to remove the ability of participants to continue paying their service provider in the method of their choosing.

Recommendation 9 – Publication of information concerning payments platform

The NDIA should publish information concerning the planned payments platform, including information as to data collection, use and disclosure of participants' personal information.

3.4 Reasons for decisions

PIAC supports the insertion of s 100(1B) and (1C) into the Act, allowing participants to request reasons for decisions made by the NDIA, prior to any internal review application. This is a welcome change, as it can empower individuals to understand decisions made about them at the initial stage – for example, initial decisions about access or participant plans – and can better inform participants as to whether an internal review is needed.

However, we recommend improving this in two ways.

First, the provision of reasons should not be on request by the participant. It should be given automatically, as a matter of course, for all participants when a decision is made about them. This is consistent with the Tune Review, which said (at [3.59]):

> Providing people with disability with an explanation of a decision should be a routine operational process for the NDIA when making access, planning and plan review decisions. However, in the event this does not occur, the Participant Service Guarantee should empower the person with disability to require the NDIA provide this information in a manner that is accessible to them.

This is important as it will enable all participants to receive reasons for decisions made about them, not just those who are willing or able to go through the further process of making a request.

Second, there is no corresponding requirement for reasons to be provided once a review of the reviewable decision has been made under s 100(6). In practice, we understand that reasons are often – but not always – provided in relation to internal reviews.

We consider that a provision should be inserted to make this a legislated requirement. That is, every decision made by an NDIA reviewer must be accompanied by a statement of reasons. Again, this is consistent with the intentions of the Tune recommendation, and with good administrative decision-making principles.

Recommendation 10 – Amend s 100(1B) and (1C) of the Bill to require reasons to be provided automatically

Section 100(1B) and (1C) should be amended to require that all reviewable decisions made by the CEO be accompanied by reasons for the decision, without requiring a request to be made. This change is consistent with the recommendations from the Tune Review.

Recommendation 11 – Insert new s 100(6A) requiring reasons to be provided following internal reviews

A new s 100(6A) should be inserted into the Bill mirroring the requirement to provide reasons under s 100(1B) and (1C), for all reviewable decisions in respect of s 100(6) internal review decisions.

3.5 Engagement Principles and Service Standards

The proposed Engagement Principles are largely appropriate, and we welcome the detail provided in the form of Service Standards.

However, some of these Service Standards should be amended and included as substantive and standalone provisions which require the NDIA to take certain actions.

Item 4(d) of the Service Standards provides that 'if requested, provide participants and prospective participants with a statement of reasons for all reviewable decisions about them'. Consistent with Recommendations 10 and 11 above, this should be amended to remove 'if requested'. It should be a 'routine operational process' for the NDIA to provide reasons for its decisions.

The Service Standards should also include a requirement that the reasons be provided in an accessible, plain English format, with appropriate references to the legislative framework and operational guidelines. This is consistent with the principle of empowering participants and prospective participants to navigate the NDIS system and participate in the process.

Item 4(e) should be amended and included as a substantive provision in the Participant Service Guarantee Rules. Item 4(e) requires responsible persons to:

> empower participants to request to see a draft plan in advance of:
> (i) final planning discussions; and
> (ii) the approval of the statement of participant supports to be included in the plan…

This Service Standard is meaningless. First, the issue is not that participants are disempowered to request draft plans – participants and their advocates have consistently requested draft plans be provided. The issue is that they are not provided. They must be empowered to *receive* those draft plans, not to request them.

Second, the NDIA 'empowering' participants to 'request' to see draft plans does not create any substantive change. The NDIA can continue to deny those requests to see draft plans.

The continued refusal to provide draft plans is also inconsistent with the principles of transparency and empowerment.

Instead, a new provision should be inserted in the Rules to require that draft plans be provided by the NDIA in advance of final planning discussions and the approval of the statement of participant supports.

Recommendation 12 – Amend the Participant Service Guarantee Rules to strengthen the Engagement Principles and Service Standards

The Participant Service Guarantee Rules should be amended to:

- *Remove the words 'if requested' from item 4(d) of the Service Standards, to ensure all reviewable decisions are accompanied by reasons, without requiring participants to request them;*
- *Insert a Service Standard to require all reasons to be provided in an accessible, plain English format with appropriate references to the legislative framework and operational guidelines; and*
- *Change item 4(e) of the Service Standards to a new, substantive provision in the Rules to require the NDIA to provide draft plans in advance of final planning discussions and the approval of the statement of participant supports.*

4. Further changes to be made

While we accept the intention of the current reform package is to address aspects of previous inquiry recommendations to streamline the administration of the NDIS, we consider there is a missed opportunity to fix a technical issue in relation to the jurisdiction of the AAT.

The issue concerns the AAT's jurisdiction to consider additional supports requested by the applicant during the AAT process, but which were not initially raised at the internal review stage.

Starting with the case of *QDKH and National Disability Insurance Agency* [2021] AATA 922, different AAT members have made different decisions about whether the AAT has jurisdiction to consider this or not.

In the five months since *QDKH* was decided, there have been 11 further AAT decisions which have considered this jurisdictional point. *QDKH* is now awaiting hearing in the Federal Court.

If the AAT does not have jurisdiction to consider a participant's full plan, the support requests that are not considered by the AAT would need to go back to the NDIA for a plan variation or reassessment. If the participant is still unhappy with it, they will need to go through internal review and the AAT all over again, for a matter that was already raised at the AAT.

This is a waste of time not just for the participant, but also for the NDIA, the AAT as well as lawyers and advocates. There is no benefit for the participant in going through this process. We do not understand the position that has been taken by the NDIA on this jurisdictional matter.

Fixing this issue would be consistent with the overall goals of the Tune Review in 'removing red tape'. The easiest way to resolve this is by legislative fix, to ensure that the AAT can consider all matters concerning a participant's plan on appeal.

Recommendation 13 – Amend the legislation to allow the Administrative Appeals Tribunal to consider all supports requested by a participant

The legislation should be amended to address the issue raised in QDKH and National Disability Insurance Agency [2021] AATA 922 *by providing jurisdiction to the Administrative Appeals Tribunal to consider all supports requested by a participant, regardless of whether the matter was expressly raised before the internal reviewer.*

5. Conclusion

PIAC supports a number of the proposed amendments, and seeks to work constructively with the Government to address the shortcomings of the other changes. However, we are concerned by the Government's continued practice of relying on delegated legislation and expansive discretionary powers for the administration of the NDIS. This reflects poor legislative and administrative practice.

More importantly however, is the missed opportunity to rebuild trust within the disability community. The Government is aware of the serious undermining of confidence in the NDIA following the attempts to introduce independent assessments without co-design. In this instance, the release of a large number of documents for consultation within a short four-week period, combined with this poor legislative and administrative practice, creates barriers for engagement with the reform process, and fails to address the trust and confidence issues.