

## COAG response to the independent Review of the National Disability Insurance Scheme Act 2013

With the agreement of the Disability Reform Council in July 2015, the Minister for Social Services commissioned Ernst & Young to conduct an independent review of the *National Disability Insurance Scheme Act 2013* (Cth). It is a requirement under section 208 of the *NDIS Act 2013* that such a review be undertaken two years after the commencement of the National Disability Insurance Scheme (NDIS). The purpose of the review was to assess the operation of the *NDIS Act 2013*, as well as to consider whether or not any amendments can be made to better enable the Government to further the objects and principles of the *NDIS Act 2013*.

The independent Review of the *NDIS Act 2013* found that there are opportunities to provide greater clarity to the legislative framework and provided recommendations for consideration. Recommendations included strengthening the Objects and Principles of the Act, providing a more detailed definition of Information, Linkages, and Capacity Building (ILC) within the Act, addressing technical inadequacies of the legislation, and conducting another review in two to three years.

COAG has considered the review's recommendation and provides the response, set out below.

COAG also notes that, as part of the development of the NDIS, further consideration will be given to how participants rights and review avenues under State and Territory laws are impacted by the transition to the NDIS, including through work on the quality and safeguarding framework.

Recommendation	COAG response
1: Amend principles that directly reference carers so that they align with the 'recognise' and 'respect' terminology of the <i>Carers Recognition Act 2010</i> (Cth).	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's findings that there are inconsistencies in how the <i>National Disability Insurance Scheme (NDIS) Act 2013</i>'s principles frame the interaction between the NDIS and carers, and agrees that there is merit in amending section 4(12) and section 31(c) to align with the 'recognise' and 'respect' terminology of the <i>Carers Recognition Act 2010</i>.</p>
2: Amend section 5(d) to reference lesbian, gay, bisexual, transgender and intersex (LGBTI) status.	<p><b>Agreed.</b></p> <p>COAG agrees that section 5(d) should be amended to reference lesbian, gay, bisexual, transgender and intersex (LGBTI) status.</p> <p>COAG also notes that similar provisions are provided under the <i>Sex Discrimination Act 1984</i> and the <i>Aged Care Act 1997</i>. Amending section 5(d) of the <i>NDIS Act 2013</i> to reference LGBTI status would be consistent with existing legislation and serve to enhance the section's purpose of recognising the intersections between disability and other forms of marginalisation.</p>
3: Amend relevant principles to remove moderating language (e.g. 'to the extent of their ability' and 'to the full extent of their capacity').	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's findings that there is some ambiguity in the language of section 4 and section 5 of the <i>NDIS Act 2013</i>. As such, COAG agrees that there is merit in amending sections 4 and 5 to remove moderating language and replacing the use of qualifiers in section 5 with unequivocal language.</p> <p>COAG also notes that while the principles in sections 4 and 5 are not enforceable of themselves, they are used to inform interpretation of provisions of the <i>NDIS Act 2013</i> where there is some ambiguity. COAG therefore believes there may be some merit in either distinguishing these principles from the principles in section 17A or considering the same amendments to be made to section 17A.</p>
4: Add a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design.	<p><b>Agreed.</b></p> <p>COAG agrees that centrality of people with disability and co-design are integral elements of the NDIS, and therefore agrees that a new principle should be added to section 4 that reflects them. COAG also notes that the review found that these concepts are already evident in the operational practices of the NDIA and complement the broad thrust of the existing principles in sections 4 and 5 of the <i>NDIS Act 2013</i>.</p>

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<p>5: Add a new principle to section 4, reflecting the importance of a diverse and sustainable market that provides choice and control and high quality supports to people with disability.</p>	<p><b>Agreed.</b></p> <p>COAG agrees that the disability market and sector is a critical factor in the delivery of the NDIS and should be included in section 4 of the <i>NDIS Act 2013</i>. COAG also notes the review's findings that the importance of a diverse and sustainable disability support sector is acknowledged through the Integrated Market, Sector and Workforce Strategy and Intergovernmental Agreement for the National Disability Insurance Scheme Launch.</p> <p>Additionally, COAG notes that section 4(15) references that innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted. A diverse and sustainable disability market and sector is necessary in order to realise this principle and the principle could be strengthened through direct reference to a diverse and sustainable market.</p>
<p>6: Provide greater definition on ILC in the legislative framework.</p>	<p><b>Agreed.</b></p> <p>COAG agrees that the legislative framework should be amended to provide greater definition on Information, Linkages and Capacity Building (ILC), formerly Tier 2. Chapter two of the <i>NDIS Act 2013</i> currently provides authority to the NDIA to fund supports to, or in relation to, people with disability who are not participants. A policy framework for the NDIA to implement ILC was agreed by Disability Ministers in April 2015. COAG agrees that Chapter 2 of the <i>NDIS Act 2013</i> should be amended to ensure that principles established through this policy, as agreed by Disability Ministers, are reflected in the <i>NDIS Act 2013</i>.</p> <p>Additionally, the NDIA are currently developing an ILC Commissioning Framework, which will detail the approach the NDIA will take in implementing the policy guidance. This work is expected to be completed in mid-2016.</p>
<p>7: Clarify the intention of section 17A (relative to sections 4 and 5).</p>	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation to clarify the intention of section 17A (Principles relating to the participation of people with disability) relative to section 4 (General principles guiding actions under the <i>NDIS Act 2013</i>) and section 5 (General principles guiding actions of people who may do acts or things on behalf of others) of the <i>NDIS Act 2013</i>.</p> <p>COAG notes that whilst there is some duplication between the principles in section 17A and those in sections 4 and 5, the principles highlighted in section 17A are specific to the actions undertaken in Chapter 3 and provide important emphasis on the role of people with disability in decision making and determining their own best interests.</p>
<p>8: Amend the legislative framework to include principles on how the disability requirements are intended to operate for people with chronic health conditions.</p>	<p><b>Agreed.</b></p> <p>COAG agrees to the recommendation that the legislative framework be amended to provide clarity on how the disability requirements are intended to operate for people with chronic health conditions. The review found that this could be achieved through amendment to the <i>NDIS Act 2013</i> by reflecting a similar intent as per existing early intervention and reasonable and necessary provisions in the <i>NDIS Act 2013</i> (sections 25(3) and 34(1)(f) respectively). COAG agrees that adding this provision to section 24 would be consistent with the Productivity Commission's comments on chronic health conditions where it indicated it does not favour a blanket 'yes' or 'no' response as to whether individuals with chronic health conditions would be covered by the NDIS. The PC noted instead that the answer should be informed by whether the NDIS is the most appropriate system to meet the person's needs.</p> <p>This amendment to the <i>NDIS Act 2013</i> would also address the Administrative Appeals Tribunal's remarks made in Mulligan and National Disability Insurance Agency [2015] AATA 974 where it was noted that currently, whether potential reasonable and necessary supports for a person with a chronic health condition are most appropriately funded by the NDIS or are more appropriately funded by the general health system is not a legitimate consideration for section 24(1).</p>
<p>9: Remove section 24(1)(e) (unless this requirement is amended to support Recommendation 8).</p>	<p><b>Agreed.</b></p> <p>COAG agrees that section 24(1)(e) could be removed and replaced with the amendments noted for recommendation 8.</p>

Recommendation	COAG response
10: Amend section 29 to include a 'cooling off period', during which a participant's decision to revoke their participant status (under section 29(1)(d)) could be reversed.	<p><b>Noted.</b></p> <p>COAG notes the recommendation to amend section 29 to include a 'cooling off period', following a decision by a participant to revoke their participant status under section 29(1)(d). COAG agrees that there is merit to implementing a 'cooling off period', but amending the legislative framework for this clause is not necessary, given the operational nature of the amendment.</p> <p>Rather, COAG encourages the NDIA to consider incorporating the recommendation into the Operational Guidelines – Access – When a person stops being a participant. These guidelines more appropriately deal with the operational circumstances and processes of revoking a participant's status.</p>
11: Amend the legislative framework to align the access request process with bilateral agreements and the phasing rules made under section 32A.	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation to align the access request process with the bilateral agreements under the NDIS Facilitating the Preparation of Participant Plans Rules, as this will enable the NDIA to process access requests in timely alignment with phasing rules.</p> <p>Amendments to the NDIS rules are required for transition to full scheme commencing 1 July 2016. Alignment with bilateral agreements will be ensured in this process.</p>
12: Remove 'where possible' from section 31(d).	<p><b>Agreed.</b></p> <p>COAG agrees with the Review's finding that the wording 'where possible' in section 31(d) is redundant and should be removed because the statement 'so far as reasonably practicable' at the start of section 31 already provides a degree of conditionality.</p>
13: Amend the Supports for Participants Rules to provide further guidance on how value for money could be determined.	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation that the <i>NDIS (Supports for Participants) Rules 2013</i> be amended to provide further guidance on how value for money could be determined in relation to supports.</p> <p>The <i>NDIS (Supports for Participants) Rules 2013</i> currently provides some detail on the matters the CEO must give consideration to, in determining value for money. However, COAG agrees that further guidance in this rule would assist the NDIA to make appropriate decisions that reflect the intent of the NDIS.</p>
14: Amend the Supports for Participants Rules to provide greater guidance on the matters that may be used for the purposes of deciding whether a support will be, or is likely to be, effective and beneficial for a participant.	<p><b>Agreed.</b></p> <p>COAG agrees the recommendation that the <i>NDIS (Supports for Participants) Rules 2013</i> be amended to provide greater guidance on how matters that may be used for the purposes of deciding whether a support will be, or is likely to be, effective and beneficial for a participant.</p> <p>The <i>NDIS (Supports for Participants) Rules 2013</i> currently provides some detail on the available evidence the CEO must give consideration to, in determining the effectiveness of the support. COAG agrees that further guidance in this rule would assist the NDIA to make appropriate decisions that reflect the intent of the NDIS and which support the division of responsibilities between the NDIS and health systems, in relation to delivery of supports.</p>
15: Add a statement to clause 3.4 of the Supports for Participants Rules to require the CEO to consider 'the extent of any other caring responsibilities'.	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's findings that cite the Australian Institute of Health and Welfare's data that 10-20 per cent of primary carers care for more than one person in need of ongoing assistance, and that having multiple caring relationships can significantly degrade the capacity of carers. As such, COAG agrees that there is merit in adding a statement to clause 3.4 of the <i>Supports for Participants Rules</i> to take any additional caring responsibilities – other than for the NDIS participant – into consideration when determining what a 'reasonable' level of informal care is.</p>

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<p>16: Amend the legislative framework to provide greater guidance on the rights of participants to request a review of their plan.</p>	<p><b>Agreed.</b></p> <p>COAG agrees that there is value in amending the legislative framework to provide greater guidance on the rights of participants to request a review of their plan. COAG also notes stakeholders' feedback that section 48(2) disempowers participants and is in conflict with the object of the <i>NDIS Act 2013</i> to enable people with disability to exercise choice and control. COAG further notes that some stakeholders argue that the legislative framework provides insufficient guidance on whether or not to accept or deny a plan review request.</p> <p>COAG acknowledges the Review's finding that greater guidance on the rights of participants to request a review of their plan could be achieved by prescribing in the NDIS Rules the factors the CEO should consider in determining whether or not to review a plan under section 48. COAG also acknowledges that the <i>Operational Guideline – Monitoring and Review of a Participant's Plan</i> provides some factors that could be elevated to the NDIS Rules for this purpose.</p>
<p>17: Consider amending section 55 to broaden the powers of the CEO to obtain information to ensure the integrity of the NDIS.</p>	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's finding that section 55 could suggest that the Agency cannot use section 55(2)(k) to gather information (for example, on people who have not yet made an access request) – which could unduly limit the power of the CEO to obtain information necessary to ensure the integrity of the NDIS. However, this issue should be balanced with the principle that personal information should only be obtained with the consent of a person about whom it relates, particularly those people with disability who have not yet made an access request. COAG notes that the NDIA indicated in its submission to the Review that 'the drafting of section 55 is very specific until the final power that allows the CEO to request information relating to functions of the Agency.'</p> <p>COAG agrees with the Review's recommendation to consider amending section 55 to broaden the powers of the CEO to obtain information to ensure the integrity of the NDIS.</p>
<p>18: Add a new provision to section 60 authorising the NDIA to collect information that would satisfy the NDIS Act definition of protected information.</p>	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's finding that section 60 is problematic because while it allows a person to collect protected information for the purposes of the <i>NDIS Act 2013</i>, the definition of protected information relates to information the NDIA already has. As a consequence, the NDIA is unable to collect personal information for the purposes of actuarial analysis, research and policy development.</p> <p>To address this, COAG agrees that a provision should be added to section 60 which authorises the NDIA to collect personal information that would, once it becomes a record of the Agency, satisfy the <i>NDIS Act 2013</i> definition of protected information.</p> <p>COAG agrees with the Review's suggestion that section 60(1) should not be amended as it currently services a legitimate purpose in allowing non-NDIA entities to collect protected information for policy development and research.</p>

Recommendation	COAG response
<p>19: Amend the legislative framework to provide greater clarity on the purpose of NDIA registration during the period leading up to full Scheme.</p>	<p><b>Agree in principle.</b></p> <p>COAG agrees in principle with the recommendation that the legislative framework be amended to provide greater clarity on the purpose of NDIA registration during the period leading up to full Scheme.</p> <p>COAG notes that the <i>NDIS (Registered Providers of Supports) Rules 2013</i> provides detail on how the registration process supports the Objects and Principles of the <i>NDIS Act 2013</i> and on the purpose of the registration process. This is supported by the Operational Guidelines – Registered Providers of Supports, which also provides information on the purpose of provider registration in the context of ensuring provider competence and integrity during the transition to a demand-driven and market-based approach to disability support services. COAG agrees to review the <i>NDIS (Registered Providers of Supports) Rules 2013</i> in relation to the recommendation.</p> <p>Governments are currently developing a national approach to quality and safeguards as part of the NDIS. Once this approach is finalised, amendment to the legislative framework may be necessary to enact it. However, COAG considers that it would not be appropriate to undertake amendments to the legislative framework in relation to the provider registration process until the national approach to quality and safeguards is finalised.</p>
<p>20: Consider the feasibility of amending the legislative framework to allow for a probationary form of registration.</p>	<p><b>Agree.</b></p> <p>COAG agrees to consider the feasibility of amending the legislative to allow for a probationary form of registration in the context of a provider failing to maintain the requirements for registration.</p> <p>Governments are currently developing a national approach to quality and safeguards as part of the NDIS. It would be appropriate to consider this recommendation through this process. Therefore, COAG agrees that there is merit in not undertaking amendments to the legislative framework in relation to the provider registration process, until the national approach to quality and safeguards is finalised.</p>
<p>21: Operationalise the Australian Law Reform Commission (ALRC) recommendations relating to the NDIS.</p>	<p><b>Noted.</b></p> <p>COAG notes the recommendation that the NDIS legislative framework be amended to operationalise the ALRC recommendations relating to the NDIS. COAG also notes that the principles suggested by the ALRC are already broadly established or reflected in the NDIS legislative framework.</p> <p>COAG agrees that any amendments to the legislative framework should occur at the time other similar legislation, such as the <i>Social Security (Administration) Act 1999</i>, is amended to ensure consistency of amendments relating to the ALRC recommendations.</p> <p>COAG also notes that this recommendation should be considered in the context of development of a National NDIS Quality and Safeguards Framework and related legislation.</p>
<p>22: Amend section 90 to allow the CEO to cancel or suspend a nominee appointment if the nominee ceases to be the guardian of the participant.</p>	<p><b>Agreed.</b></p> <p>COAG agrees with the Review's finding that section 90 is currently limited in its outline of the circumstances in which the CEO may cancel or suspend the appointment of nominees. COAG also notes stakeholder feedback cited in the report findings which proposes expanding section 90 'to allow the CEO to remove or suspend a nominee if that person ceases to be the guardian of the participant.' COAG agrees that creating this amendment would align the <i>NDIS Act 2013</i> more closely with state and territory guardianship arrangements.</p>
<p>23: Amend the legislative framework to limit the term 'review' to 'review of decisions'.</p>	<p><b>Agreed.</b></p> <p>COAG agrees with the Review's finding that the twin use of 'review' in section 48 (review of plan) and Part 6 of Chapter 4 (review of a decision) of the <i>NDIS Act 2013</i> may confuse some participants. COAG therefore agrees to amend the legislative framework to limit the term 'review' to 'review of decisions'. This amendment would better ensure participants are able to understand their rights to pursue a merits review of NDIA decisions that affect them.</p>

Recommendation	COAG response
24: Amend section 104(3)(f) to reference carers.	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's finding that section 104(3)(f) does not take into account significant relationships a prospective participant or participant may have with non-family members. COAG agrees with the Review's recommendation that referencing family and carers would broaden the scope of section 104(3)(f) – e.g. to include participants who have no family but have a friend who is a primary caregiver – and align it with the broader legislative framework of the <i>NDIS Act 2013</i>.</p>
25: Amend section 118 to reflect the functions of the NDIA in relation to ILC.	<p><b>Agree.</b></p> <p>COAG notes the recommendation to include the functions of the NDIA in relation to ILC in section 118 of the <i>NDIS Act 2013</i>.</p> <p>A policy framework for the NDIA to implement ILC was agreed by Disability Ministers in April 2015. The NDIA are currently developing an ILC Commissioning Framework, which will detail the approach the NDIA will take in implementing the policy guidance. This work is expected to be completed in mid-2016.</p> <p>COAG agrees to consider amending section 118 of the <i>NDIS Act 2013</i> following finalisation of ILC implementation.</p>
26: Clarify the intent of section 127(2)(a) in terms of it encompassing 'lived experience with disability'.	<p><b>Agree.</b></p> <p>COAG agrees with the recommendation to clarify the intent of section 127(2)(a) in terms of it encompassing 'lived experience with disability', noting that the terms of any amendment will be determined in consultation with states and territories. COAG also notes that the current wording of the section, which refers to 'provision or use of disability services' could result in exclusion of people with certain types of disability, such as people with psychosocial disability.</p> <p>COAG also notes the report's findings that section 127(2)(a) '...use of disability services' can be interpreted as 'lived experience with disability' and that the report cites that four of the current nine Board members are either people with disability or have family members with disability.</p>
27: Amend the legislative framework to require the Principle Member of the Independent Advisory Council (IAC) to be a Board member as well.	<p><b>Noted.</b></p> <p>COAG notes the recommendation to amend the legislative framework to require the Principle Member of the IAC to also be a member of the NDIS Board. COAG agrees with the review findings that having a Principle Member who is also a Board member has worked well in implementation. COAG also notes that the ability to appoint the Principle Member of the IAC to the NDIS Board is not restricted under legislation, nor does the legislation discourage the practice.</p>
28: Consider the legislated timeframes related to the production of Quarterly Reports.	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation to consider the legislated timeframes related to the production of Quarterly Reports.</p> <p>The <i>NDIS Act 2013</i> currently requires that the NDIA provide the Ministerial Council with the Quarterly Report one month after the end of the period to which the report relates. COAG agrees that it will consider the timing of delivery for the Quarterly Reports after further consultation with the NDIA.</p>
29: Amend the NDIS Act to replace 'National Disability Insurance Scheme Launch Agency' with 'National Disability Insurance Agency'.	<p><b>Agreed.</b></p> <p>COAG agrees with the Review's recommendation that the <i>NDIS Act 2013</i> be amended to replace 'National Disability Insurance Scheme Launch Agency' with 'National Disability Insurance Agency.' This amendment would help avoid confusion and provide greater clarity to stakeholders in the lead up to full scheme.</p>
30: Amend section 182(2)(c) to exclude from its application, payments relating to approved supports that have already been delivered.	<p><b>Agreed.</b></p> <p>COAG acknowledges the Review's finding that section 182 does not take into account circumstances where a service provider delivers approved supports to a participant, but the participant dies prior to payment by the NDIA. COAG agrees with the Review's suggestion to allow providers to claim payment for any support that was approved and delivered in accordance with any relevant conditions.</p>

<b>Recommendation</b>	<b>COAG response</b>
31: Conduct a further review of the NDIS Act in two-to-three years.	<p><b>Agree in principle.</b></p> <p>COAG agrees with the recommendation to conduct a further review of the <i>NDIS Act 2013</i>. However, COAG also agrees that the Disability Reform Council give consideration to an appropriate timeframe for the review in the context of transition to full scheme.</p> <p>COAG also notes that amendments to the <i>NDIS Act 2013</i> are not limited to review processes and that amendments can be undertaken with agreement of the Ministerial Council and Commonwealth Parliament at any time as required.</p>
32: Amend section 209(3) to reference the objects and principles of the NDIS Act.	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation to amend section 209(3) to reference the objects and principles of the <i>NDIS Act 2013</i>. Currently, section 209(3) requires the Minister to have specific regard to the need to ensure the financial sustainability of the NDIS, when making NDIS rules. Specific reference to financial sustainability was intentional in the drafting of section 209.</p> <p>COAG notes that while the Minister must have regard to the objects and principles of the <i>NDIS Act 2013</i>, there is no specific reference to this in section 209(3) and that there would therefore be benefit in including such a reference.</p>
33: Consider what, if any, amendments to the legislative framework are required to support the operationalisation of the bilateral agreements between the Commonwealth and the States and Territories.	<p><b>Agreed.</b></p> <p>COAG agrees with the recommendation that legislative change could be required to operationalise aspects of its bilateral agreement. COAG agrees that some of the amendments could be operationalised through the creation of new NDIS Rules or amending the existing rules.</p>