

Independent review of the NDIS Act

December 2015



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The Hon. Christian Porter, MP 18 December 2015
Minister for Social Services
Parliament House
Canberra ACT 2600

Independent review of the NDIS Act

Dear Minister,

In accordance with section 208 of the *National Disability Insurance Scheme Act 2013 (Cth)* (NDIS Act), EY was commissioned to undertake an independent review of the NDIS Act. I am pleased to present you with that review.

Our review has been informed by feedback from government agencies (across the Commonwealth, States and Territories), peak bodies and other representative organisations, providers, and the broader public. Our key findings, in summary, are:

- By and large, the legislative framework is enabling government to further the objects and principles of the NDIS Act
- There is a need to amend elements of the NDIS Act and NDIS Rules to provide greater clarity on the policy intent of governments and how the Scheme should be administered in practice
- There is also scope to amend the NDIS Act to enhance the efficiency and effectiveness of NDIS administration.

We are grateful for the administrative support provided to us by the Department of Social Services, the guidance of the members of the Steering Committee and, most importantly, the valuable contributions made by stakeholders to the review.

Yours sincerely,

Andrew Metcalfe AO
Partner

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Glossary

Abbreviation	Description
AAT	Administrative Appeals Tribunal
ALRC	Australian Law Reform Commission
CALD	Culturally and Linguistically Diverse
Carers' Act	<i>Carer Recognition Act 2013 (Cth)</i>
CEO	Chief Executive Officer
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disability
DSS	Department of Social Services
EY	Ernst & Young
IAC	Independent Advisory Council
IGA	Intergovernmental Agreement for the National Disability Insurance Scheme Launch
ILC	Information, Linkages and Capacity Building
Legislative Framework	Comprising the NDIS Act and the NDIS Rules
LGBTI	Lesbian, gay, bisexual, transgender and intersex status
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Act	<i>National Disability Insurance Scheme Act 2013 (Cth)</i>
NDIS Rules	Legislative instruments made under the NDIS Act
NIIS	National Injury Insurance Scheme
Non-protected SCV	Non-protected Special Category Visa
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013 (Cth)</i>
Privacy Act	<i>Privacy Act 1988 (Cth)</i>

Executive summary

In July 2015, the Australian Government (in consultation with State and Territory governments) commissioned Ernst & Young (EY) to conduct an independent review of the *National Disability Insurance Scheme Act 2013 (Cth)* (NDIS Act). It is a requirement under section 208 of the NDIS Act that such a review be undertaken two years after the commencement of the National Disability Insurance Scheme (NDIS).

The purpose of the review is to assess the operation of the NDIS Act, as well as to consider whether or not any amendments can be made to better enable government to further the objects and principles of the NDIS Act.

Key findings

Broadly speaking, the legislative framework (comprising the NDIS Act and the NDIS Rules) is enabling government to further the objects and principles of the NDIS Act. An important caveat to this statement is that the NDIS is still relatively young and evolving. As transition to full Scheme accelerates over the coming years, the legislative framework will be exposed to more participants, more locations and more sources of stress. It is for this reason that one of our key recommendations is that government should conduct another review of the NDIS Act in two-to-three years. The learnings from this review will help government ensure that the legislative framework is ‘fit for purpose’ for full Scheme.

The above notwithstanding, we have identified four broad areas where we believe the legislative framework could be improved.

Firstly, there is a need to provide greater clarity on the intent of government policy and how the NDIS should be administered in practice. Key aspects requiring more clarity include:

- The scope and purpose of Information, Linkages and Capacity Building (ILC)
- How the disability requirements (section 24) are intended to operate for people with chronic health conditions
- How the NDIA should determine whether or not support for a participant represents value for money (section 34[1][c]) and will be, or is likely to be, effective and beneficial for the participant (section 34[1][d])
- The rights of participants to request a review of their plan (under section 48)
- The purpose of NDIA registration during the period leading up to full Scheme
- The intent of section 127(2)(a), in terms of it encompassing ‘lived experience with disability’ as a field to determine eligibility for Board membership.

Secondly, implementation of the Scheme during trial has indicated there is scope to amend the NDIS Act to enhance the efficiency and effectiveness of NDIS administration. Key aspects where improvements could be made include:

- The decision by a participant to revoke their participant status (section 29)
- The timeframes relating to access requests in the context of bilateral agreements and the phasing rules made under section 32A
- The considerations of the CEO in determining what it is reasonable to expect families, carers, informal networks and the community to provide (section 34[1][e])
- The powers of the CEO to obtain information and the NDIA to collect personal information (sections 55 and 60)
- The possibility of allowing for a probationary form of NDIA registration
- The duplicative use of the term ‘review’ (in relation to ‘review of plans’ and ‘review of decisions’)
- The links between the Board and the Independent Advisory Council (IAC)
- The timeframes relating to the production of Quarterly Reports (section 174)
- The recovery of payments made in relation to deceased participants (section 182)
- The considerations of the Minister in making NDIS Rules (section 209).

Thirdly, there is scope to amend the wording of the NDIS Act (including through the introduction of new principles) so that the legislative framework better reflects government policy, the reality of the Scheme’s operation and the lived experience of people with disability. Key examples of possible wording changes include:

- Amending section 5(d) to reference lesbian, gay, bisexual, transgender and intersex status
- Adding a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design

Lastly, amendments to the NDIA Act are required to operationalise the bilateral agreements that have been signed between the Commonwealth and the States and Territories, and the recommendations from other key reviews (specifically, the recommendations made by the Australian Law Reform Commission in its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*).

Recommendations

1. Amend principles that directly reference carers so that they align with the ‘recognise and respect’ terminology of the *Carer Recognition Act 2010 (Cth)*.
2. Amend section 5(d) to reference lesbian, gay, bisexual, transgender and intersex status.
3. Amend relevant principles to remove moderating language (e.g., ‘to the extent of their ability’ and ‘to the full extent of their capacity’).
4. Add a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design.
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.
6. Provide greater definition on ILC in the legislative framework.
7. Clarify the intent of section 17A (relative to sections 4 and 5).
8. Amend the legislative framework to include principles on how the disability requirements are intended to operate for people with chronic health conditions.
9. Remove section 24(1)(e) (unless this requirement is amended to support recommendation 8).
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.
11. Amend the legislative framework to align the access request process with bilateral agreements and the phasing rules made under section 32A.
12. Remove ‘where possible’ from section 31(d).
13. Amend the Supports for Participants Rules to provide further guidance on how value for money could be determined.
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.
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’.
16. Amend the legislative framework to provide greater guidance on the rights of participants to request a review of their plan.
17. Consider amending section 55 to broaden the powers of the CEO to obtain information to ensure the integrity of the NDIS.
18. Add a new provision to section 60 authorising the NDIA to collect information that would satisfy the NDIS Act definition of protected information.

19. Amend the legislative framework to provide greater clarity on the purpose of NDIA registration during the period leading up to full Scheme.
20. Consider the feasibility of amending the legislative framework to allow for a probationary form of registration.
21. Operationalise the ALRC recommendations relating to the NDIS.
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.
23. Amend the legislative framework to limit the term 'review' to 'review of decisions'.
24. Amend section 104(3)(f) to reference carers.
25. Amend section 118 to reflect the functions of the NDIA in relation to ILC.
26. Clarify the intent of section 127(2)(a) in terms of it encompassing 'lived experience with disability'.
27. Amend the legislative framework to require the Principal Member of the IAC to be a Board member as well.
28. Consider the legislated timeframes related to the production of the quarterly reports.
29. Amend the NDIS Act to replace the 'National Disability Insurance Scheme Launch Agency' with the 'National Disability Insurance Agency'.
30. Amend section 182(2)(c) to exclude from its application, payments relating to approved supports that have already been delivered.
31. Conduct a further review of the NDIS Act in two-to-three years.
32. Amend section 209(3) to reference the objects and principles of the NDIS Act.
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.

1. Introduction

1.1 Purpose and scope of the review

In July 2015, the Australian Government (in consultation with State and Territory governments) commissioned EY to conduct an independent review of the NDIS Act. It is a requirement, under section 208 of the NDIS Act, that such a review be undertaken two years after the commencement of the NDIS.

The purpose of this review is to assess the operation of the NDIS Act, as well as to consider whether or not any amendments can be made to better enable government to further the objects and principles of the NDIS Act. Box 1 outlines the terms of reference for the review.

Box 1: Terms of reference for the review

The terms of reference for this review, as agreed by Ministers, require that the review consider:

1. The operation of the NDIS Act in furthering its objects and principles
2. If the NDIS Act can be simplified
3. If the NDIS Act can be amended to increase the efficiency of the NDIS's administration, including providing greater clarity around access requirements
4. If the NDIS Act can be amended to ensure that NDIA has the required capacity to control costs
5. Whether parts of the NDIS Act could be refined, removed or replaced for the purposes of more effective regulation (including deregulation, where appropriate)
6. If the NDIS Act can be amended to ensure it interacts appropriately with other legislation, including State and Territory legislation
7. Any interim or final recommendations for legislative change from other reviews
8. Any other matter relevant to the general operation of the NDIS Act

There are two key issues to note in relation to the scope of the review. Firstly, the review is focused on the NDIS Act and its subordinate legislative instruments (i.e., the NDIS Rules). The Operational Guidelines published by the National Disability Insurance Agency (NDIA) do not fall within the scope of the review. These guidelines represent the NDIA's interpretation of the NDIS Act and the NDIS Rules. They are not legislative instruments in their own right.

Secondly, the review is focused on the operation of the NDIS Act. More specifically, on how the NDIS Act and the NDIS Rules (through their conferral of powers and functions, and imposition of duties and obligations) enable government to further the objects and principles of the NDIS Act. Issues relating to policy (i.e., the design and parameters of the NDIS) or practice (i.e., how the NDIA has chosen to administer the legislation or operate the Scheme) do not fall within the scope of this review.

During consultations, stakeholders raised a range of policy and practice issues. For purposes of transparency, we have noted these issues in the review. However, we have not sought to validate these issues, nor incorporated them in our findings and recommendations.

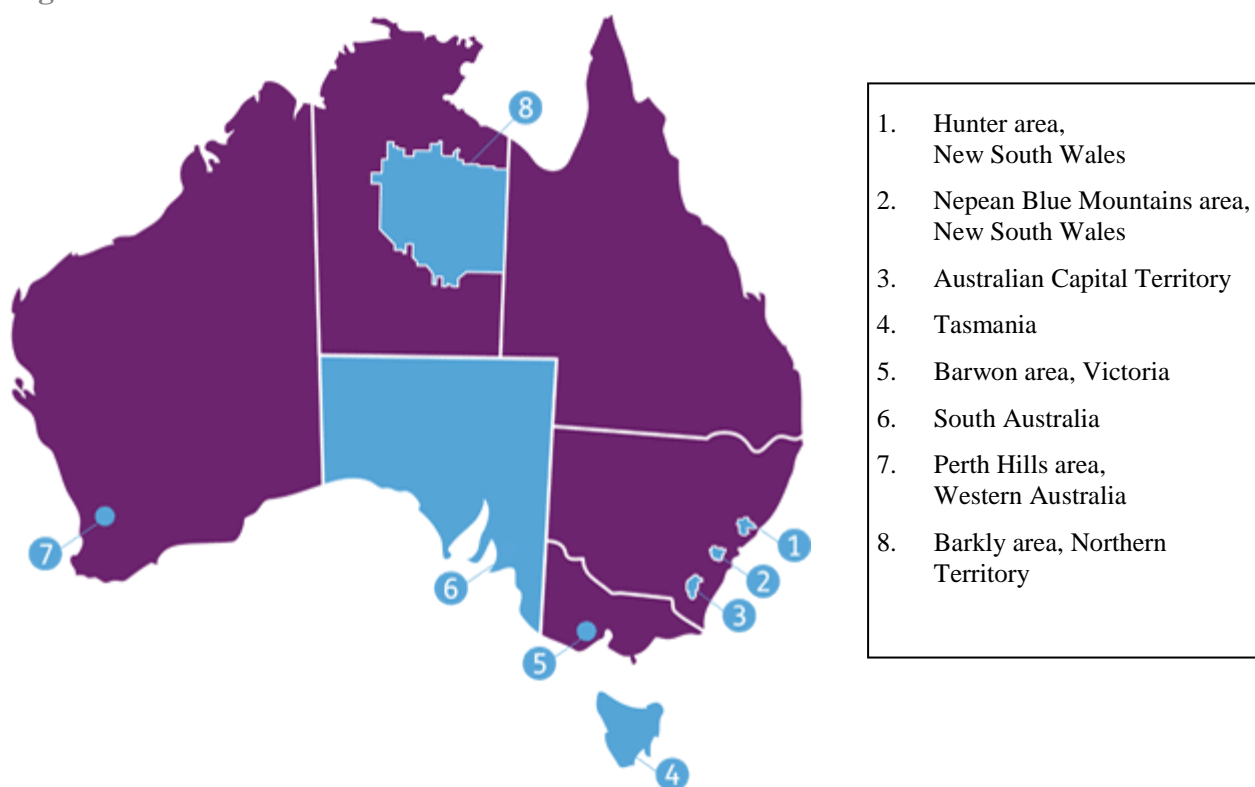
1.2 Background and context

The NDIS is a social insurance scheme that provides individualised support for eligible people with permanent and significant disability, their families and carers. It will progressively replace the existing disability arrangements in the States and Territories participating in the NDIS and the Commonwealth.

The NDIA is responsible for administering the NDIS. It is an Australian Government agency and a Corporate Commonwealth Entity under the *Public Governance, Performance and Accountability Act 2013 (Cth)* (PGPA Act).

The implementation of the NDIS is the largest social reform in Australia since the introduction of Medicare in 1975. Since July 2013, the NDIS has commenced in eight trial sites (Figure 1). Roll-out of the full Scheme in New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory will start progressively from July 2016.

Figure 1: NDIS trial sites



Source: NDIA (2015), 'NDIS Access checklist', available at: <http://www.ndis.gov.au/ndis-access-checklist>.

As of 30 June 2015, the NDIS has had 19,817 participants¹, 17,303 of which have received an approved plan.² Overall, \$952.8 million has been committed for participant support costs to date. It is estimated that 50 per cent (\$479.9 million) of this committed support was

¹ This includes both active and inactive participants. Active participants are those who are currently eligible, are not deceased and have a client status of 'Active'. Inactive participants are all other participants, including participants who are now deceased or have chosen to exit the Scheme, as well as participants who have had their eligibility revoked.

² NDIA (2015), *Report on the Sustainability of the Scheme: 1 July 2013 to 30 June 2015*.

provided in 2014-15.³ When the NDIS has been fully rolled out in 2019-20, it is anticipated that the Scheme will have approximately 450,000 participants and an annual cost of \$22 billion.

The NDIS Act is the legislation which establishes the NDIS and the NDIA.⁴ The NDIS Act is relatively non-prescriptive and principles-based. For instance, a key object of the NDIS Act is that participants are provided 'reasonable and necessary supports'. The NDIS Act does not prescribe the types of supports that would be considered 'reasonable and necessary' across all participants. Rather, it outlines the broad criteria that the NDIA should apply in determining what constitutes 'reasonable and necessary supports' in the context of individual participants.

Under the NDIS Act, the Commonwealth Minister may make NDIS Rules.⁵ These set out the more detailed operation of the NDIS. For instance, the Supports for Participants Rules provide greater detail on the 'assessment and determination of the reasonable and necessary supports that will be funded and the general supports that will be provided for participants under the NDIS.' The NDIS Rules have the same legal force as the NDIS Act. While the NDIS Rules are not passed directly by both Houses of the Commonwealth Parliament, either House can disallow (or veto) them. There are currently 18 NDIS Rules.⁶

1.3 Our approach to conducting the review

The review was governed by a Steering Committee, comprising representatives from the Department of Social Services (DSS), the NDIA and the State and Territory governments.

We utilised a four-step approach to review the NDIS Act. Firstly, we developed a framework for the review. This identified the key questions we would seek to answer as part of the review and the data we would need to collect to answer these questions. To develop the framework, we undertook preliminary interviews with representatives from DSS and the NDIA, and we received feedback from the Steering Committee. We revised the framework during the course of the review to reflect the new information emerging from our research and consultations.

Secondly, we conducted desktop research. Key data sources that we explored include:

- Publicly-available reports, published by governments, peak bodies and researchers. Examples of such reports include:
 - The Australian Law Reform Commission's (ALRC's) *Equality, Capacity and Disability in Commonwealth Laws*
 - The consultation paper on a *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*

³ *Ibid.*

⁴ *In the NDIS Act, the NDIA is referred to as the National Disability Insurance Scheme Launch Transition Agency.*

⁵ *Section 209 of the NDIS Act sets out the process by which the Commonwealth Minister may make NDIS Rules. This process (including the level of State and Territory approval required) varies depending on the section of the NDIS Act to which a NDIS Rule applies.*

⁶ *A list of the NDIS Rules can be accessed via ComLaw at: <https://www.comlaw.gov.au/Series/C2013A00020/Enables>.*

- *Mental Health and the NDIS: A literature review*, conducted by the Centre for Mental Health at the University of Melbourne
- Published Administrative Appeals Tribunal (AAT) decisions relating to the NDIS
- NDIS statistics and data.

Thirdly, we consulted with stakeholders. Our engagement with stakeholders was centred on a public submission process. For this, we developed a Discussion Paper, which was published on the NDIS website. We also distributed the Discussion Paper to over 300 stakeholders nominated by members of the Steering Committee. In all, we received 86 submissions. To supplement the public submission process, we conducted targeted interviews with over 100 representatives from the Australian Government, State and Territory governments, and national peak bodies. Appendix A provides greater detail on how we engaged with stakeholders to inform the review.

Lastly, we analysed the data collected through our research and consultations and transformed our findings and recommendations into a review report. As part of the reporting process, we reflected the feedback provided by the Steering Committee on a draft version of the report.

1.4 Report structure

The structure of the report aligns with the broad structure of the NDIS Act. Specifically, chapters 2-8 of our report explore the seven chapters of the NDIS Act. Chapter 9, meanwhile, explores the various issues raised by stakeholders that do not neatly fit within the existing structure of the NDIS Act.

2. Chapter 1: Introduction

Chapter 1 outlines the formal matters of the NDIS Act. Its key parts include Part 2 (Objects and Principles), Part 4 (Definitions) and Part 5 (Ministerial Council).

Stakeholder feedback, in relation to Chapter 1, focused overwhelmingly on the objects and principles of the NDIS Act. Broadly speaking, stakeholders expressed support for the objects and principles and the role they play in giving effect to Australia's obligations under the United Nations Convention on the Rights of Persons with Disability (CRPD). This notwithstanding, stakeholders made a number of suggestions as to how the objects and principles could be enhanced. These suggestions are outlined below, grouped in terms of whether or not they relate to an existing object or principle, a new object or principle or government accountability.

2.1 Suggested amendments to existing objects and principles

Social and economic participation

Section 3(1)(c) states that an object of the NDIS Act is to 'support the independence and social and economic participation of people with disability.' Section 3(1)(h), meanwhile, states that an object of the NDIS Act is to 'raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability.'

In its submission to the review, Occupational Therapy Australia proposed modifying both these objects 'to take into account other forms of participation' – namely, cultural participation. In our view, the current focus on 'social and economic participation' in sections 3(1)(c) and 3(1)(h) adequately reflects the policy intent of government in relation to the purpose of the NDIS. For instance, in its landmark inquiry report, the Productivity Commission stated that a key function of the NDIS would be to 'maximise the social and economic participation of people with disability'.⁷ Likewise, the *Intergovernmental Agreement for the National Disability Insurance Scheme Launch* ('the IGA') states that, under the NDIS, 'people with disability will be supported to participate in and contribute to social and economic life to the extent of their abilities.'⁸ Thus, we do not believe that there is a need to amend sections 3(c) and 3(h) to reflect other forms of participation.

Choice and control

Section 3(1)(e) states that an object of the NDIS Act is to 'enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports'. In its submission to the review, the Australian Association of Social Workers suggested amending this object to 'acknowledge the impact of intellectual disability and cognitive impairment on the principles of choice and control, and commit to specialised access and planning support for these participants.'⁹ In our view, it would not be appropriate to focus on a particular type of disability or impairment in the objects and principles of the NDIS Act; lest it give the impression that certain disabilities or impairments are more or less equal than others. Accordingly, we do not believe section 3(1)(e) requires amendment.

⁷ *Productivity Commission (2011), Disability Care and Support, Report no. 54.*

⁸ *COAG (2012), Intergovernmental Agreement for the National Disability Insurance Scheme Launch.*

⁹ *Australian Association of Social Workers, submission.*

National consistency

Section 3(1)(f) states that an object of the NDIS Act is to ‘facilitate the development of a nationally-consistent approach to the access to, and the planning and funding of, supports for people with disability.’ Some stakeholders questioned the utility of this object, noting that the term ‘nationally-consistent’ allows for variation on how the NDIS is delivered across jurisdictions. Jackson Ryan Partners, for instance, recommended deleting reference to ‘nationally-consistent’ and mandating ‘a single system, a single approach, a single safeguarding framework, all underpinned by a single piece of legislation applicable to all jurisdictions, with no variation.’¹⁰

In our view, the question of whether or not the NDIS should be underpinned by a nationally-consistent or a single approach to the access to, and the planning and funding of, supports for people with disability, fundamentally relates to the design of the Scheme. Furthermore, the available evidence suggests that the current wording of section 3(1)(f) is consistent with the broader government policy on NDIS design. For example, Principle 4 of the *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (agreed by all Australian Governments in April 2013) states that:

‘There should be a nationally-consistent approach to the supports funded by the NDIS and the basis on which NDIS engages with other systems, noting that, because there will be variation in non-NDIS supports funded within jurisdictions, there will need to be flexibility and innovation in the way the NDIS funds and/or delivers these activities.’¹¹

Accordingly, we have made no finding or recommendation in relation to section 3(1)(f) and the concept of national consistency, except to note the issue for the broader consideration of government.

High quality and innovative supports

Section 3(1)(g) states that an object of the NDIS Act is to ‘promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community.’ This object is supported by section 4(15), which states that ‘innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability, are to be promoted.’

In its submission to the review, the Australian Federation of Disability Organisations maintained that section 3(1)(g) should, at a minimum, be retained, if not ‘strengthened, to indicate the priority of innovative supports.’¹² Given that the current wording of section 3(1)(g) is consistent with the IGA¹³ and the CRPD¹⁴, we agree that the object should be retained, though not amended.

¹⁰ Jackson Ryan Partners, submission.

¹¹ COAG (2013), *Principles to Determine the Responsibilities of the NDIS and Other Service Systems*.

¹² Australian Federation of Disability Organisations, submission.

¹³ *That the NDIS should ‘promote innovation in services and the services system’ is a high-level design principle agreed by governments. See: COAG (2012), Intergovernmental Agreement for the National Disability Insurance Scheme Launch.*

¹⁴ Under Article 4 of the CRPD, a general obligation of States Parties is ‘to undertake or promote research and development of, and to promote the availability and use of new technologies, including information and

Population education

Section 3(1)(h) states that an object of the NDIS Act is to ‘raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability.’ Occupational Therapy Australia recommended that this section ‘be amended to include the phrase “population education”’, in reflection of the ‘fundamental need ... to increase public awareness of the issues and everyday challenges faced by people with disabilities, and therefore change societal attitudes towards disability.’¹⁵ In our view, section 3(1)(h) is sufficiently worded to address the need identified by Occupational Therapy Australia (given the object’s focus on raising community awareness, and facilitating greater community inclusion). Accordingly, we do not believe section 3(1)(h) requires amendment.

Physical, social, emotional and intellectual development

Section 4(1) states that a guiding principle of the NDIS Act is ‘people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.’ In its submission to the review, Enable maintained that this principle is limited as it is ‘silent on the aspect of psychological potential which, if not considered, may impact on wellbeing and potentiate psychiatric disability.’¹⁶ Thus, it suggested amending section 4(1) to recognise ‘psychological development’.

We understand that ‘psychological’ relates to the mind or mental phenomena. Thus, we feel that ‘psychological development’ is sufficiently captured under ‘social, emotional and intellectual development’ (as section 4[1] is currently phrased).

communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost’. See: United Nations (2006), Convention on the Rights of Persons with Disabilities and Optional Protocol.

¹⁵ Occupational Therapy Australia, submission.

¹⁶ Enable, submission.

Social and economic life

Section 4(2) states that a guiding principle of the NDIS Act is ‘people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.’ In its submission to the review, the Physical Disability Council of NSW maintained “‘political life” needs to be inserted into the phrase “social and economic life” as an additional example of community expectations.’¹⁷

While we recognise the importance of political life to people with disability, we do not agree that section 4(2) requires amendment. The reasons for this are twofold. Firstly, the use of ‘social and economic life’ in section 4(2) is aligned with the language of section 3(1)(c) - a key object of the NDIS Act. Secondly, as discussed above, the focus on ‘social and economic participation’ in section 3(1)(c) reflects the policy intent of government in relation to the purpose of the NDIS.

Pursue any grievance

Section 4(7) states that a guiding principle of the NDIS Act is ‘people with disability have the same right as other members of Australian society to pursue any grievance.’ In its submission to the review, the Physical Disability Council of NSW stated: ‘the general principle 4(7) refers to the ability to pursue a grievance, but lacks further detail about how this is to be implemented. [Physical Disability Council of NSW] recommends that this detail is specified in the General Principles.’¹⁸

Given that the purpose of section 4 is to outline the general principles that should guide action under the NDIS Act, we do not believe it is appropriate to include additional provisions in this section to detail how specific principles will be implemented. We also note:

- Sections 47-50, sections 72-3 (supported by the Registered Providers of Supports Rules) and sections 99-103 confer powers and impose obligations in relation to a number of avenues that people with disability can use to pursue grievances (namely, review of participant plans, complaints handling by registered providers of supports, and reviewable decisions)
- Governments are currently developing a national quality and safeguarding framework for the NDIS. Once developed, this framework will likely introduce new avenues that people with disability can use to pursue grievances. These new avenues may require amendment to the NDIS Act.

Reasonable and necessary supports

Section 4(11)(c) states that a guiding principle of the NDIS Act is ‘reasonable and necessary supports for people with disability should: ... develop and support the capacity of people with disability to undertake activities that enable them to participate in the mainstream community and in employment.’ A number of stakeholders suggested that this principle is too narrow. For instance, Occupational Therapy Australia recommended adding ‘vocational education and

¹⁷ *Physical Disability Council of NSW, submission.*

¹⁸ *Physical Disability Council of NSW, submission.*

training’ after ‘employment’.¹⁹ Likewise, representatives from the Queensland disability sector proposed adding ‘education’ before ‘employment’.²⁰

In our view, education is already implicitly covered in section 4(11)(c) – that is, as an ‘activity that enables’ participation in the mainstream community and in employment. Thus, we do not believe that there is a need to amend the principle, as proposed by stakeholders.

Carers

Stakeholders raised two issues in relation to how the objects and principles of the NDIS Act reference carers. Firstly, Carers Australia noted that there are inconsistencies in how the principles frame the interaction between the NDIS and carers.²¹ For instance:

- Section 4(12) – ‘the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected’ (emphasis added)
- Section 5(e) – ‘[in relation to acts or things done by, or in relation to, a person with disability], the supportive relationships, friendships and connections with others, of people with disability should be recognised’ (emphasis added)
- Section 5(f)(iii) – [in relation to acts or things done by, or in relation to a person with disability who is a child], the best interests of the child are paramount, and full consideration should be given to the need to: ... strengthen, preserve and promote positive relationships between the child and the child’s parents, family members and other people who are significant in the life of the child’ (emphasis added)
- Section 31(c) (Principles relating to plans) ‘the preparation, review and replacement of a participant’s plan, and the management of the funding for supports under a participant’s plan, should, so far as reasonably practicable: ... where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant’ (emphasis added).

To address this inconsistency, Carers Australia proposed amending the NDIS Act to reflect terminology from the *Carer Recognition Act 2010 (Cth)* (‘the Carers’ Act’) – specifically, principle 6 of The Statement for Australia’s Carers: ‘the relationship between carers and the persons for whom they care should be recognised and respected’ (emphasis added).

In our view, given that the NDIS Act already has regard for the Carers Act²², there is merit in amending the principles that directly reference carers (i.e., sections 4[12] and 31[c]) so that they align with the ‘recognise and respect’ terminology of the Carers’ Act. We do not believe, however, that sections 5(e) or 5(f)(iii) require amendment. The former principle is intended to cover a wider range of relationships than those referenced in sections 4(12) and 31(c) (i.e., ‘families, carers and other significant persons in the lives of people with disability’). In this less formal context, ‘recognise’ (rather than ‘recognise and respect’) is appropriate. The wording of the latter principle, meanwhile, serves a specific purpose in upholding the best interests of people with disability who are children (consistent with Australia’s obligations under the United Nations Convention on the Rights of the Child [CRC]).

¹⁹ *Occupational Therapy Australia, submission.*

²⁰ *Representatives from the Queensland disability sector, submission.*

²¹ *Carers Australia, submission.*

²² *s. 3(3)(c)(ii), National Disability Insurance Scheme Act 2013 (Cth)*

Recommendation 1: Amend principles that directly reference carers so that they align with the ‘recognise and respect’ terminology of the *Carer Recognition Act 2010 (Cth)*.

The second issue noted by stakeholders was in relation to the provision of supports for carers. In its submission to the review, Alzheimer’s Australia raised concerns about the level of support being offered to carers of participants with dementia through the NDIS. To address this concern and ‘ensure a more holistic approach to the formal and informal supports required to see the best outcomes for the person living with dementia’, Alzheimer’s Australia proposed amending section 4(12) from ‘the role of families, carers and other significant persons in the lives of the people with disability is to be acknowledged and respected’ to ‘acknowledged, respected and supported’ (emphasis added).²³

We note that, while supports for carers are not referenced in either section 4 (General principles guiding actions under this Act) or section 5 (General principles guiding actions of people who may do acts or things on behalf of others), they are referenced in section 31 (Principles relating to plans). Specifically:

(31) The preparation, review and replacement of a participant’s plan, and the management of the funding for supports under a participant’s plan, should so far as reasonably practicable:

(d) where possible, strengthen and build the capacity of families and carers to support participants who are children; and

(da) if the participant and the participant’s carers agree — strengthen and build the capacity of families and carers to support the participant in adult life

Thus, we do not believe that there is a need to amend section 4(12) to make specific reference to carer supports.

²³ *Alzheimer’s Australia, submission.*

Promote positive personal and social development

In its submission to the review, National Disability Services proposed ‘remov[ing] unnecessary repetition in the objects and principles, to make them more readable.’²⁴ It highlighted section 4(16) – ‘positive personal and social development of people with disability, including children and young people, is to be promoted’ – as a superfluous principle that could be deleted.

In our view, section 4(16) is not redundant. While a number of other sections make reference (either explicitly or implicitly) to personal and social development, only section 4(16) focuses on the promotion of positive personal and social development, particularly in the context of children and young people.

Taking account of cultural and linguistic circumstances, and gender

Section 5(d) states that a guiding principle of the NDIS Act, in relation to the actions of people who may do acts or things on behalf of others, is ‘the cultural and linguistic circumstances, and the gender of people with disability, should be taken into account.’ In its submission to the review, Carers Queensland proposed expanding this provision to include reference to ‘lesbian, gay, bisexual, transgender and intersex status [LGBTI].’²⁵

We believe that there is merit in amending section 5(d) to reference LGBTI. In our view, the purpose of section 5(d) is to recognise the intersections between disability and other forms of marginalisation. The available evidence suggests that - like culture, language and gender - sexual orientation, gender identity and intersex status can exacerbate the challenges faced by people with a disability. As the ALRC recently stated:

‘[LGBTI] people with disability often face intersectional discrimination and may have to disclose both their sexual orientation, gender identity or intersex status as well as their disability, resulting in what has been referred to as a ‘second coming out’. Broadly, the social exclusion and isolation, as well as mental health issues which are experienced by many LGBTI people, may be exacerbated for those who also have disability, and access to services which cater for the needs of LGBTI people with disability can be difficult.’²⁶

We also note that amending section 5(d) to reference LGBTI would be consistent with the CRPD, notably the preamble, which highlights the ‘difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.’²⁷

Recommendation 2: Amend section 5(d) to reference lesbian, gay, bisexual, transgender and intersex status.

Terminology of the principles

Some stakeholders questioned the general terminology of the principles outlined in sections 4 and 5. For instance, according to Disability Council NSW:

²⁴ National Disability Services, submission.

²⁵ Carers Queensland, submission.

²⁶ ALRC (2013), *Equality, Capacity and Disability in Commonwealth Laws, Issues Paper, December*.

²⁷ United Nations (2006), *Convention on the Rights of Persons with Disabilities and Optional Protocol*.

‘Wording in section 4 of the [NDIS] Act appears to suggest that the objects and principles are ideals, rather than things that can be practically realised. For example, the use of the word “should” and the qualifiers “to the extent of their ability” and “to the extent of their capacity” suggest that the principles are aspirational and may not be possible to achieve. It would be preferable to replace the word “should”, wherever it occurs, with something more unequivocal and positive like ‘must’, and to remove unnecessary qualifiers to the principles of the [NDIS] Act.

‘Council considers that section 5 of the [NDIS] Act (General principles guiding actions of people who may do acts or things on behalf of others) is weak and can be strengthened. The use of the words “should” and “should be taken into account” must be replaced with more unequivocal language.’²⁸

We do not favour amending sections 4 and 5 to replace the word ‘should’ with ‘must’. As their titles indicate, sections 4 and 5 are intended to guide the actions of those administering, and operating under, the NDIS Act. In this context, the use of ‘should’, rather than ‘must’, is appropriate.

This being said, we do favour amending sections 4 and 5 to remove moderating language (e.g., ‘to the extent of their ability’ and ‘to the full extent of their capacity’). If the intent of these sections is to guide the actions of relevant peoples, then it is not clear why such guidance should be qualified.

Recommendation 3: Amend relevant principles to remove moderating language (e.g., ‘to the extent of their ability’ and ‘to the full extent of their capacity’).
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2.2 Suggested new objects and principles

ALRC recommendations and supported decision-making

In 2014, the ALRC released *Equality, Capacity and Disability in Commonwealth Law*. In this report, the ALRC made a number of recommendations in relation to the NDIS Act, including its objects and principles. During our consultations, many stakeholders voiced their support for the ALRC recommendations. We discuss the ALRC recommendations, as well as the broader issues of nominees and supported decision-making, on page 64.

Centrality of people with disability and co-design

In its submission to the review, the Australian Federation of Disability Organisations maintained that the principles of the NDIS Act ‘should explicitly state that people with disability are at the centre of the NDIS.’²⁹ It also stated that the NDIS Act ‘must explicitly make a statement about co-design – that people with disability are included in the systemic decision-making of the NDIS.’³⁰ This latter view was shared by National Disability Services, which noted in its submission that, ‘given the extent of collaboration between people with disability, families and carers, disability service providers and governments to create the

²⁸ *Disability Council NSW, submission.*

²⁹ *Australian Federation of Disability Organisations, submission.*

³⁰ *Ibid.*

NDIS, the inclusion of a principle that gives ongoing commitment to co-design is warranted.’³¹

We note that the concepts of the centrality of people with disability and co-design are already evident in the operational practices of the NDIA. For instance, in the NDIA’s *Strategic Plan 2013-2016*, the Chairman and CEO state:

‘People with disability are at the centre of the NDIS, and the Board and management of the [NDIA] are committed to working with stakeholders — participants, their families, carers, governments, providers, business and community — to build a world-leading disability system.’³²

Likewise, the NDIA’s *2015-2019 Corporate Plan* notes:

‘As a popular reform designed to benefit people with disability, their families and carers, the formal governance structure for the [NDIS] reflects only part of the authorising environment for the Agency. Consistent with the principle of “nothing about us without us”, people with disability are at the heart of designing how the Scheme is carried out.’³³

Given this, and our judgment that the concepts of the centrality of people with disability and co-design complement the broad thrust of the existing principles in sections 4 and 5, we recommend that the NDIS Act be amended to include a new principle that reflects the concepts of the centrality of people with disability and co-design.

Recommendation 4: Add a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design.

Accessible communication

During consultations, a number of stakeholders raised concerns about whether or not the NDIA is communicating in a manner that is appropriate and effective, relative to the needs and backgrounds of people with disability. Some stakeholders suggested that the objects and principles of the NDIS Act could be amended to address this issue. For example, the Australian Federation of Disability Organisations, while acknowledging the reference to communication in section 4(9), maintained that the NDIS Act ‘should explicitly state that the NDIS must communicate in the most accessible way for a given individual.’³⁴

In our view, there is currently not a case to amend the NDIS Act in accordance with the above suggestion. The reasons for this are twofold. Firstly, the NDIS Act already imposes a clear obligation on the NDIA (and other relevant parties) to communicate with people with disability in an appropriate and effective manner. Namely, section 7 requires that:

(1) The contents of any notice, approved form or information given under this Act, the regulations or the National Disability Insurance Scheme rules to a person with disability must be explained by the giver of the notice, approved form or

³¹ *National Disability Services, submission.*

³² *NDIA (2013), Strategic Plan 2013-2016.*

³³ *NDIA (2015), 2015-2019 Corporate Plan.*

³⁴ *Australian Federation of Disability Organisations, submission.*

information, to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand.

(2) An explanation given under subsection (1) must be given both orally and in writing, if reasonably practicable.

Secondly, beyond the anecdotal evidence provided by stakeholders, we do not have access to sufficient data on the communication activities of the NDIA that would allow us to determine whether or not the obligation imposed under section 7 is sufficient in practice, or needs to be strengthened.

Given the level of stakeholder concern about NDIA communication, there would be value in revisiting this issue as part of the next review of the NDIS Act.

Importance of employment

In its submission to the review, the Australian Association of Social Workers maintained that the ‘references to economic participation in the current legislation have proven to be too vague to drive increased employment for people with disability.’³⁵ This view was shared by National Disability Services, which highlighted that only 1 per cent of funding in participant plans since 2013 has been for ‘assistance to access or maintain employment’.³⁶ To enhance employment outcomes for people with disability, both the Australian Association of Social Workers and National Disability Services proposed amending the objects and principles of the NDIS Act to make more explicit reference to employment.

In our view, there is currently not a case to amend the NDIS Act in accordance with the above suggestion. The reasons for this are twofold. Firstly, the guiding principles of the NDIS Act (specifically, section 4[11][c]) already make specific reference to employment.³⁷ Secondly, it is not clear that the relatively-low funding allocated to supported employment to date is due to a lack of focus on employment outcomes, rather than being reflective of the nature of the participant cohort in trial sites. We note that, as at 30 June 2015, 54 per cent of participants were aged 14 years or younger (compared to 23 per cent for the general Australian population aged under 65 years), while 30 per cent were aged between 25 and 64 years (compared to 62 per cent for the general Australian population aged under 65 years).³⁸

The above notwithstanding, given the centrality of improved employment outcomes to the original vision of the NDIS, there would be value in revisiting the need to strengthen the references to employment in the objects and principles as part of the next review of the NDIS Act.

Quality and safeguards

A number of stakeholders proposed expanding the objects and principles of the NDIS Act to provide better protections for people with disability. For example:

³⁵ Australian Association of Social Workers, submission.

³⁶ National Disability Services, submission.

³⁷ This principle states that ‘reasonable and necessary supports for people with disability should: ... develop and support the capacity of people with disability to undertake activities that enable them to participate in the mainstream community and in employment.’

³⁸ NDIA (2015), *Quarterly Report to COAG Disability Reform Council*, 30 June; Australian Bureau of Statistics (2015), ‘Australian Demographic Statistics, March 2015’, cat. no. 3101.0.

- The Health and Disability Services Complaints Office (Western Australia) suggested adding a principle ‘that articulates the rights of people with disability to complain, and have access to a complaint process, where they are dissatisfied with service providers’³⁹
- Disability Council NSW proposed inserting a new principle in section 5 ‘that requires people acting or doing things on behalf of others to disclose any conflicts of interest to the NDIA’.⁴⁰

We note that:

- Governments have agreed to the development of a national approach to quality and safeguards as part of the NDIS.
- Development of this national approach is still ongoing. A Consultation Paper in relation to the NDIS Quality and Safeguarding Framework was released for comment in early 2015. It is expected that a COAG Regulation Impact Statement will be completed and made available for consideration to Ministers in early 2016.
- Until the NDIS is fully-implemented, the existing quality and safeguarding arrangements of the Australian, State and Territory governments will remain in place.

In our view, amendments to the NDIS Act, relating to quality and safeguards, should only be made once governments have agreed what the national approach to quality and safeguards will look like, and how it will be implemented.

Universal access

A number of stakeholders recommended the addition of a principle in the NDIS Act that upholds the ‘concept of universal access’.⁴¹ As Vision 2020 maintained in its submission: ‘a principle should be added to the NDIS Act under [section 4] that states that people with disability will be supported regardless of age or other status, such as sex, race and religion.’⁴²

In our view, the concept of universal access clearly touches on the parameters of the NDIS. We also note that, under current government policy, the NDIS is intended not to be a universal scheme, but rather, one that:

- ‘Target[s] those people with disability who have a significant impairment to their functional capacity ... [and] the most unmet need’⁴³
- Complements other service systems (most notably, the aged care system).

Accordingly, we have made no finding or recommendation in relation to the concept of universal access, except to note the issue for the broader consideration of government.

³⁹ *Health and Disability Services Complaints Office (Western Australia), submission.*

⁴⁰ *Disability Council NSW, submission.*

⁴¹ *Occupational Therapy Australia, submission.*

⁴² *Vision 2020, submission.*

⁴³ *Explanatory Statement, National Disability Insurance Scheme (Becoming a Participant) Rules 2013.*

Rights and protections afforded to children

In its submission to the review, Children with Disability Australia maintained that ‘the objects and principles [of the NDIS Act] are more relevant to adults than children.’⁴⁴ Thus, it recommended adding new principles to ‘reflect the unique rights and protections afforded to children’, particularly in relation to Australia’s obligations under the CRC.⁴⁵ Children with Disability Australia highlighted the principles contained in the *Children, Youth and Families Act 2005 (Vic)* as a model of the types of principles that could be included in the NDIS Act ‘to ensure relevance for children and families.’⁴⁶

In our view, the current principles of the NDIS Act sufficiently reflect Australia’s obligations under the CRC, relative to the scope and purpose of the NDIS. We note that the NDIS Act is not intended to govern all interactions between government and children and their families. Rather, its purpose is to establish an insurance-based approach to the provision and funding of supports for people with disability (both adults and children). In this relatively-limited context, the key articles of the CRC that relate to the NDIS Act are Articles 3, 5, 9, 12, 18, 19 and 23. As we outline in Table 1, we believe that these articles are appropriately reflected in the current principles of the NDIS Act. Accordingly, we do not believe that the NDIS Act requires amendment to include additional principles relating to children and their families.

Table 1: Comparison between relevant articles of the Convention on the Rights of the Child and the principles of the NDIS Act

Articles of the CRC (simplified)	Principles of the NDIS Act
Article 3 - All organisations concerned with children should work towards what is best for each child.	Section 5(f) – [in relation to acts or things done by, or in relation to a person with disability who is a child], the best interests of the child are paramount.
Article 5 - Governments should respect the rights and responsibilities of families to guide their children so that, as they grow up, they learn to use their rights properly.	Section 4(12) - The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected.
Article 9 - Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.	Section 4(12) – <i>See above</i> Section 5(f)(iii) – [in relation to acts or things done by, or in relation to a person with disability who is a child], the best interests of the child are paramount, and full consideration should be given to the need to ... strengthen, preserve and promote positive relationships between the child and the child’s parents, family members and other people who are significant in the life of the child.
Article 12 - Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.	Section 5(a) – [in relation to acts or things done by, or in relation to a person with disability], people with disability should be involved in decision-making processes that

⁴⁴ *Children with Disability Australian, submission.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Articles of the CRC (simplified)	Principles of the NDIS Act
	affect them and, where possible, make decisions for themselves.
Article 18 - Both parents share responsibility for bringing up their children and should always consider what is best for each child. Governments should help parents by providing services to support them, especially if both parents work.	Section 4(12) – <i>See above</i> Section 5(f)(iii) – <i>See above</i>
Article 19 - Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.	Section 4(6) - People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation. Section 5(f)(i) - [in relation to acts or things done by, or in relation to a person with disability who is a child], the best interests of the child are paramount, and full consideration should be given to the need to ... protect the child from harm.
Article 23 - Children who have any kind of disability should receive special care and support so that they can live a full and independent life.	Section 4(1) - People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development. Section 4(2) - People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability. Section 4(16) - Positive personal and social development of people with disability, including children and young people, is to be promoted.

Housing

In its submission to the review, Occupational Therapy Australia recommended ‘affordable and accessible housing for people with disabilities be included in the objects and principles of the [NDIS] Act.’⁴⁷

In our view, the question of which types of supports should be provided under the NDIS, fundamentally relates to the design of the Scheme. We also observe that, under the mainstream interface principles agreed by all governments in 2013, the ‘provision of accessible and affordable accommodation options that meet the needs of people with disability, including community, social and public housing’, is listed as a support to be provided by other parties, rather than the NDIS.⁴⁸

⁴⁷ Occupational Therapy Australia, submission.

⁴⁸ COAG (2013), *Principles to Determine the Responsibilities of the NDIS and Other Service Systems*.

Accordingly, we have made no finding or recommendation in relation to the suggestion to include affordable and accessible housing in the objects and principles of the NDIS Act, except to note the issue for the broader consideration of government.

Articles 19 and 20 of the CRPD

In its submission to the review, the Attendant Care Industry Association noted that, while it supports the objects and principles of the NDIS Act, ‘the inclusion of statements similar to the wording of Articles 19 and 20 of the [CRPD] would create a stronger link between the implementation of the NDIS and Australia’s implementation of the [CRPD].’⁴⁹ Article 19 relates to the right of people with disability to live independently and be part of the community. Article 20, meanwhile, relates to ‘ensur[ing] personal mobility with the greatest possible independence for persons with disability’.⁵⁰

In our view:

- Article 19 of the CRPD is already adequately reflected in section 3(1)(g) of the NDIS Act (‘promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community), as well as section 4(11)(b) (‘reasonable and necessary supports for people with disability should: ... support people with disability to live independently and to be included in the community as fully-participating citizens’)
- Article 20 of the CRPD is adequately reflected in section 4(2) of the NDIS Act (‘people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability’), section 4(11)(a) (‘reasonable and necessary supports for people with disability should: ... support people with disability to pursue their goals and maximise their independence’) and section 4(11)(b) (‘reasonable and necessary supports for people with disability should: ... support people with disability to live independently and to be included in the community as fully-participating citizens’).

Diverse and sustainable market

In its submission to the review, National Disability Services maintained that ‘delivery of the NDIS requires the existence of a robust, diverse and sustainable sector of disability support providers.’⁵¹ As such, ‘the inclusion of a statement that the [NDIS] Act will facilitate the provision of high quality supports from a diverse and sustainable disability support sector, is warranted.’⁵²

We believe there is merit to this suggestion. Government has already acknowledged the importance of a diverse and sustainable disability support sector to the NDIS. For instance, the recently released *Integrated Market, Sector and Workforce Strategy* states that ‘it seeks to support the development of a NDIS market where people with disability exercise choice and control and have access to a full range of quality supports.’⁵³ To achieve this, the strategy centres on activities to:

⁴⁹ *Attendant Care Industry Association, submission.*

⁵⁰ *United Nations (2006), Convention on the Rights of Persons with Disabilities and Optional Protocol.*

⁵¹ *National Disability Services, submission.*

⁵² *Ibid.*

⁵³ *Senior Officials’ Working Group for the Disability Reform Council (2015), Integrated Market, Sector and Workforce Strategy.*

- ‘Enable people with disability to plan and develop goals for a life they value and to exercise choice and control over their supports
- ‘Develop a diverse and sustainable range of suppliers
- ‘Ensure there is a diverse and flexible workforce supply to support people with disability into the future’.⁵⁴

Likewise, the IGA makes frequent reference to developing the sector (at both a workforce and supplier level) so that it has the capacity to meet the needs of people with disability.⁵⁵ We also note that the disability support sector is the only major stakeholder of the NDIS not to have its role referenced in section 4 of the NDIS Act.

Recommendation 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.

Equal access to supports

A number of stakeholders suggested that the NDIS Act should be amended to include a principle affirming equal access to supports under the NDIS. The reasons given for such an amendment are twofold. Firstly, it was noted that Australia has an obligation under Article 3 of the CRPD ‘to ensure equality and opportunity for all people with disability.’⁵⁶ Secondly, stakeholders maintained that some people with disability can face additional challenges and burdens in accessing supports under the NDIS due to their backgrounds or circumstances. Particular groups highlighted by stakeholders include:

- People with disability living in rural and remote areas – who may be disadvantaged by lack of choice, due to shallow local markets for disability supports and mainstream services
- People with disability from Indigenous and Culturally and Linguistically Diverse (CALD) backgrounds. As Disability Council NSW noted:

‘Language and cultural differences make it more difficult for people with disability to understand information and successfully negotiate what are often complex systems of support. What is “reasonable and necessary” for one person who accesses the NDIS will not be the same for another, and it is important that participants are not disadvantaged because they need additional resources such as advocates or interpreters to access their “reasonable and necessary” supports.’⁵⁷

We note that the IGA highlights ‘ensur[ing] equity of access by addressing the needs of people in regional and remote Australia and people from Indigenous and [CALD] backgrounds’ as a design principle for the NDIS.⁵⁸ Furthermore, data published by the NDIA

⁵⁴ *Ibid.*

⁵⁵ *In Annex A, see Principle 1 (f and h) and Principle 4 (b, c and d). COAG (2012), Intergovernmental Agreement for the National Disability Insurance Scheme Launch.*

⁵⁶ *Disability Council NSW, submission.*

⁵⁷ *Ibid.*

⁵⁸ *COAG (2012), Intergovernmental Agreement for the National Disability Insurance Scheme Launch.*

does suggest that some groups are experiencing difficulties in accessing the NDIS. For instance, as of 30 June 2015:

- 4 per cent of participants with approved plans are classified as CALD. The proportion of CALD participants with approved plans is: lower than expected in New South Wales, Victoria, the Australian Capital Territory, the Northern Territory and Western Australia; in line with expectations in Tasmania; and higher than expected in South Australia
- 4 percent of participants with approved plans identify as Aboriginal and/or Torres Strait Islander. While noting that the NDIA has experienced some reporting issues in relation to Aboriginal and/or Torres Strait Islander status, the proportion of Aboriginal and/or Torres Strait Islander participants with approved plans is: lower than expected in New South Wales, Tasmania and South Australia; and in line with expectations in Victoria, the Australian Capital Territory, the Northern Territory and Western Australia.⁵⁹

The above notwithstanding, we do not believe that there is currently a need to amend the NDIS Act to include a principle affirming equal access to supports under the NDIS. This is because sections 4 and 5 already include a number of principles that, taken in combination, affirm equal access to supports under the NDIS. These principles include:

(4) General principles guiding actions under this Act

(4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.

(5) People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

(9) People with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.

(5) General principles guiding actions of people who may do acts or things on behalf of others

(d) the cultural and linguistic circumstances, and the gender of people with disability should be taken into account.

Nonetheless, if the equity issues noted by stakeholders and evident in data published by the NDIA continue to persist, there would be value in considering whether or not Chapter 1 requires a new provision obliging the Agency to ensure equal access to the Scheme as part of the next review of the NDIS Act.

2.3 Government accountability

In their feedback to the review, a number of stakeholders expressed their general support for the objects and principles of the NDIS Act. These stakeholders, however, raised concerns about whether or not implementation of the NDIS will match the intent of the objects and

⁵⁹ NDIA (2015), *Quarterly Report to COAG Disability Reform Council*, 30 June.

principles. Thus, they recommended that government be required to monitor and report on the alignment between the NDIS and the objects and principles of the NDIS Act.

In our view, the nature and extent of government reporting on the NDIS is ultimately an issue of Scheme design. We note that Part 5 of Chapter 6 of the NDIS Act sets out a range of reporting obligations for the Board, the NDIA and the Minister; and that the Board is also ascribed reporting requirements as an accountable authority under the PGPA Act. We also note that IGA sets out an Integrated NDIS Performance Reporting Framework. This framework comprises three levels: NDIS performance, quarterly NDIA performance reporting, and NDIS Activity in jurisdictions. The outcomes measured, as part of the Integrated NDIS Performance Reporting Framework, are aligned with, but do not cover all of the objects and principles of the NDIS Act.

Accordingly, we have made no finding or recommendation in relation to the suggestion to require government to monitor and report on the alignment between the NDIS and the objects and principles of the NDIS Act, except to note the issue for the broader consideration of government.

3. Chapter 2: Assistance for people with disability and others

The key purpose of the NDIS is to provide individualised support for eligible people with permanent and significant disability, their families and carers. The NDIS, however, also plays a broader role in providing general supports to people with disability, their families and carers. This general support, which was originally called Tier 2, but is now referred to as Information, Linkages and Capacity Building (ILC), includes:

- Strengthening mainstream services and supports and community capacity to be inclusive of people with disability
- Fostering continual improvement and innovation in disability support delivery
- Minimising the need for escalation of support
- Supporting carers
- Building and promoting individual capacity and peer support.⁶⁰

ILC is intended to complement the individually-funded supports available under Chapter 3 of the NDIS Act and to broaden the range of supports available to people with disability and their families, carers and communities.

The purpose of Chapter 2 is to provide the legislative foundation for ILC. As the nature and scope of ILC had not been agreed when the NDIS Act was drafted, Chapter 2 is both brief (comprising only five sections) and broad (in that its provisions are relatively wide-ranging in their application).

Potentially reflecting its brevity, we received little feedback from stakeholders on Chapter 2. The feedback we did receive focused on the need to give greater definition in the NDIS Act to ILC – particularly in terms of:

- What government intends to achieve with ILC
- How individuals can access ILC supports
- The basis on which government will target the provision of certain supports⁶¹
- What referral pathways will exist (if any) between ILC and individually-funded packages (and vice versa).

We note that, while the policy framework for ILC has now been finalised, government is continuing to work through how ILC will be operationalised and implemented in practice. Once this work has been completed, we believe that there would be value in providing greater

⁶⁰ NDIA (2015), 'A Framework for Information, Linkages and Capacity Building', August, available at: <http://www.ndis.gov.au/ilc-policy>.

⁶¹ 'People with disability (including those who also receive an [individually-funded package]), their families and carers and the broader community can benefit from ILC supports. Although there are no access requirements to be met under the ILC Policy Framework, some ILC supports will be targeted to certain groups of people' (emphasis added). See: NDIA (2015), 'A Framework for Information, Linkages and Capacity Building', August, available at: <http://www.ndis.gov.au/ilc-policy>.

definition on ILC in the legislative framework. This could be achieved by making NDIS Rules in relation to ILC under section 17 of the NDIS Act. In our view, making NDIS Rules is preferable to amending the NDIS Act in the short term, as the former would give government greater flexibility to adapt ILC as it is being implemented. Consideration should be given to whether Chapter 2 needs to be expanded as part of the next review of the NDIS Act.

Recommendation 6:	Provide greater definition on ILC in the legislative framework.
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4. Chapter 3: Participants and their plans

Chapter 3 outlines how people with disability become participants of the NDIS, and the subsequent process for developing personal, goal-based plans with the Agency and receiving individualised supports, which could include funded supports. It comprises three parts: Part 1A (Principles relating to plans), Part 1 (Becoming a participant) and Part 2 (Participants' plans).

4.1 Part 1A: Principles relating to plans

Section 17A sets out three principles relating to the participation of people with a disability. These are:

(1) People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.

(2) People with disability will be supported in their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised.

(3) The National Disability Insurance Scheme is to:

(a) respect the interests of people with disability in exercising choice and control about matters that affect them; and

(b) enable people with disability to make decisions that will affect their lives, to the extent of their capacity; and

(c) support people with disability to participate in, and contribute to, social and economic life, to the extent of their ability.

In our view, the principles outlined in section 17A are redundant, as they replicate (in some cases, word for word) a number of general principles outlined in sections 4 and 5.⁶² Accordingly, we believe government should clarify the intent of section 17A. If the principles in section 17A are intended to have a different legal effect to those in sections 4 and 5, then the legislation should be amended to make this clear. If the principles in sections 17A are not intended to have a different legal effect, then they should be removed.

Recommendation 7: Clarify the intent of section 17A (relative to sections 4 and 5).

4.2 Part 1: Becoming a participant

We have categorised our analysis of Part 1 of Chapter 3 in terms of issues relating to the access criteria and issues relating to the process of making an access request.

4.2.1 Access criteria

To become a participant in the NDIS, a person may make an access request to the NDIA. On receiving an access request, the NDIA will then determine whether or not the person meets

⁶² Specifically, sections 4(2), 4(8), 4(9) and 5(a).

certain access criteria. These criteria include age requirements, residence requirements and either the disability requirements or early intervention requirements outlined in Table 2.

Table 2: Access criteria

Access criteria	Description
Age requirements	<p>22 (1) A person meets the age requirements if:</p> <ul style="list-style-type: none"> (a) the person was aged under 65 when the access request in relation to the person was made (b) if the NDIS Rules, for the purposes of this paragraph, prescribe that on a prescribed date or a date in a prescribed period, the person must be a prescribed age - the person is that age on that date.
Residence requirements	<p>23 (1) A person meets the residence requirements if the person:</p> <ul style="list-style-type: none"> (a) resides in Australia; and (b) is one of the following: <ul style="list-style-type: none"> i. an Australian citizen; ii. the holder of a permanent visa; iii. a special category visa holder who is a protected special category visa (SCV) holder; and (c) satisfies the other requirements in relation to residence that are prescribed by the NDIS Rules. <p>Section 23(2) outlines the things that the CEO must have regard to in deciding whether a person resides in Australia (e.g. the nature of their accommodation, the frequency and purpose of their travel outside of Australia, etc.).</p>
Disability requirements	<p>24 (1) A person meets the disability requirements if:</p> <ul style="list-style-type: none"> (a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition; and (b) the impairment or impairments are, or are likely to be, permanent; and (c) the impairment or impairments result in substantially-reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities: <ul style="list-style-type: none"> i. communication; ii. social interaction; iii. learning; iv. mobility; v. self-care; vi. self-management; and (d) the impairment or impairments affect the person's capacity for social and economic participation; and (e) the person is likely to require support under the NDIS for the person's lifetime. <p>(2) For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the</p>

Access criteria	Description
	<p>person is likely to require support under the NDIS for the person's lifetime, despite the variation.</p>
<p>Early intervention requirements</p>	<p>25 (1) A person meets the early intervention requirements if:</p> <ul style="list-style-type: none"> (a) the person: <ul style="list-style-type: none"> i. has one or more identified intellectual, cognitive, neurological, sensory or physical impairments that are, or are likely to be, permanent; or ii. has one or more identified impairments that are attributable to a psychiatric condition and are, or are likely to be, permanent; or iii. is a child who has developmental delay; and (b) the CEO is satisfied that provision of early intervention supports for the person is likely to benefit the person by reducing the person's future needs for supports in relation to disability; and (c) the CEO is satisfied that provision of early intervention supports for the person is likely to benefit the person by: <ul style="list-style-type: none"> i. mitigating or alleviating the impact of the person's impairment upon the functional capacity of the person to undertake communication, social interaction, learning, mobility, self-care or self-management; or ii. preventing the deterioration of such functional capacity; or iii. improving such functional capacity; or iv. strengthening the sustainability of informal supports available to the person, including through building the capacity of the person's carer. <p>(2) The CEO is taken to be satisfied, as mentioned in paragraphs (1)(b) and (c), if one or more of the person's impairments are prescribed by the NDIS Rules for the purposes of this subsection.</p> <p>(3) Despite subsections (1) and (2), the person does not meet the early intervention requirements if the CEO is satisfied that early intervention support for the person is not most appropriately-funded or provided through the NDIS, and is more appropriately-funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or through systems of service delivery or support services offered:</p> <ul style="list-style-type: none"> (a) as part of a universal service obligation; or (b) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

4.2.1.1 Age requirements

We received considerable feedback on the age requirements – particularly section 22(1)(a). According to a range of stakeholders, limiting access to the NDIS to people aged under 65 years:

- Is discriminatory and not compatible with Australia’s obligations under the CRPD. As the Macular Disease Foundation Australia noted in its submission, the CRPD ‘makes no qualification or restriction relating to age and states that all people with disability should be treated equally in law’.⁶³
- Does not match the experience of people with disability. Drawing on data collected by the Australian Bureau of Statistics, a number of stakeholders highlighted that over 40 per cent of Australians with disability are aged 65 or greater.⁶⁴ This proportion is higher in the context of certain disabilities (such as people who are blind or vision impaired).⁶⁵
- Is based on false assumptions about the capacity of the aged care system to meet the needs of people with disability. As Vision 2020 stated in its submission, ‘the primary eligibility criteria of “frailty” in the new aged care system creates a substantial barrier for people who are blind or vision impaired to access the new Scheme. An individual seeking services for blindness or vision impairment, in order to maintain an active lifestyle, would not necessarily be “frail”’.⁶⁶
- Could lead to unequal outcomes. It was observed that, during transition to full Scheme, some people with disability, nearing the age of 65, may lose the opportunity to become a participant in the NDIS ‘because they live in areas that are entering the Scheme later than others’.⁶⁷

Stakeholders made a number of suggestions for how the legislative framework could be amended to address the perceived deficiencies of section 22(1)(a), including:

- Removing the age requirements from the NDIS Act altogether
- Amending the Becoming a Participant Rules to allow certain groups (e.g., people who are blind or vision impaired) to become participants of the NDIS under section 21(2) of the NDIS Act⁶⁸
- Amending the Becoming a Participant Rules to grandfather people with disability who turn 65 after 1 July 2016 and before their locality enters the NDIS.

⁶³ *Macular Degeneration Foundation Australia, submission.*

⁶⁴ *Australian Bureau of Statistics (2013), Disability, Ageing and Carers, Australia: Summary of Findings, 2012, cat. no. 4430.0.*

⁶⁵ *Blind Citizens Australia, submission.*

⁶⁶ *Vision 2020, submission.*

⁶⁷ *National Disability Services, submission.*

⁶⁸ *This section allows the CEO to grant access to individuals if they: (a) satisfy the residence requirements; (2) were receiving supports from a program, and during a timeframe, prescribed by the Minister; and (3) would no longer receive supports from the prescribed program if they became a participant in the NDIS. The purpose of section 22(2) is to ‘provide arrangements to ensure continuity of outcomes for people who meet the residence requirements ... but who do not meet the other access criteria.’ See: Revised Explanatory Memorandum, National Disability Insurance Scheme Bill 2013.*

In our view, the issue of who should (and should not) be eligible to become a participant in the NDIS is clearly one relating to the parameters of the Scheme. Accordingly, we have made no finding or recommendations in relation to section 22(1) and the age requirements, except to note the issue for the broader consideration of government.

4.2.1.2 Residence requirements

A number of stakeholders questioned the appropriateness of the residence requirements. It was maintained that section 23(1), by excluding certain groups (notably, asylum seekers and refugees on temporary visas, and New Zealanders holding a non-protected SCV) from accessing the NDIS, will lead to service gaps and increased burden on mainstream services and the community sector. To address this issue, stakeholders proposed amending the residence requirements ‘so that all people with the right to live and work in Australia, including holders of temporary visas, can apply to access the NDIS.’⁶⁹

In our view, the issue of who should (and should not) be eligible to become a participant in the NDIS is clearly one relating to the parameters of the Scheme. Accordingly, we have made no finding or recommendation in relation to section 23(1) and the residence requirements, except to note the issue for the broader consideration of government.

4.2.1.3 Disability requirements

Permanency

Section 24(1)(b) states that one of the disability requirements to access the NDIS is that a person’s ‘impairment or impairments are, or are likely to be, permanent.’ We received considerable stakeholder feedback on this requirement. The key issue raised was the perceived inadequacy of the concept of permanency in the context of mental illness. According to stakeholders:

- Permanency does not reflect the real life experiences of people with mental illness. It was noted that some mental illnesses (such as schizophrenia and bi-polar disorder) may not result in permanent impairments, but rather, fluctuating or episodic impairments.⁷⁰ Furthermore, stakeholders highlighted evidence suggesting that ‘people with mental health problems can and do recover’ (though noting ‘it is extremely difficult to predict who will recover and who will not, regardless of diagnosis’).⁷¹
- Permanency does not reflect ‘the “recovery” principle within which mental health services operate’.⁷² As the Royal Australian and New Zealand College of Psychiatrists stated in its submission:

‘In the mental health sector, consumers are supported to arrive at their own definition of wellbeing and recovery, using language and definitions that are meaningful to them. The language of empowerment, recovery and ability is

⁶⁹ Disability Council NSW, submission.

⁷⁰ Australian Lawyers Alliance, submission.

⁷¹ MI Fellowship, submission. MI Fellowship highlighted one of its commissioned studies, which found ‘a number of long -term (20 or more years) follow-up studies show more than half of people given a diagnosis of schizophrenia experience clinical recovery. At the individual level, more and more people are telling their idiosyncratic stories of recovery, in books, websites..., and in person. Recovery is emerging as much more common than previously understood.’ See: Mike Slade and Eleanor Longden (2015), *The Empirical Evidence about Mental Health and Recovery: How likely, how long, what helps?* Prepared for MI Fellowship.

⁷² Office of Public Advocate (Victoria), submission.

*emphasised over that of disability, impairment and illness. This is in contrast to the way level of need is conceptualised in the NDIS Act, which hinges on having a diagnosis that is permanent and severe.*⁷³

Because of the above, stakeholders maintained that the concept of permanency has the potential to reduce the effectiveness of the NDIS, in terms of:

- Dampening participation in the Scheme by people with mental illness. For instance, it was noted that ‘there is the risk that consumers with significant mental or intellectual disability will face exclusion from the NDIS because of the way they describe their situation, despite having high support needs.’⁷⁴ Likewise, stakeholders maintained that some ‘medical practitioners are reluctant to brand someone with mental illness as being “permanently disabled” because of the stigma and shame that such a label can carry’⁷⁵
- Hindering the impact of supports provided to participants with mental illness. As the MI Fellowship stated in its submission:

‘In order to get support, people must first agree that their psychosocial impairment is permanent, or likely to be permanent. The types of support they will then receive will be shaped by a pessimistic, rather than optimistic framework. The unintended consequences of this are that: □ People who sign up to the scheme may have their hope for recovery damaged... As a consequence, we are likely to see fewer people recover, which is likely to result in more people requiring more support for longer periods of time.’⁷⁶

Stakeholders proposed a number of amendments to address the perceived inadequacy of permanency in section 24(1)(b). These amendments include:

- Basing access to the NDIS on the current needs of people with disability, rather than on a judgment of whether or not their impairments are, or are likely to be, permanent. As the MI Fellowship noted, ‘this could include assessing a range of relevant factors that are known to contribute to psychosocial disability, such as level of mental and emotional distress, comorbid conditions, alcohol and drug use, unstable housing or homelessness, social isolation, loss of hope, poverty and other relevant factors’⁷⁷
- Focusing on the future needs of people with disability, but within the context of a more limited timeframe (e.g., over the next five years)
- Rewording section 24(1)(b) to reflect ‘an insurance-minded principle that is about reducing the need for potential permanent support, rather than just responding to permanent impairments.’ For instance, ‘the impairment or impairments are permanent, or are likely to be permanent without the person receiving recovery-oriented supports and services’ (emphasis added).⁷⁸

⁷³ Royal Australian and New Zealand College of Psychiatrists, submission.

⁷⁴ Ibid.

⁷⁵ Mental Health Council of Australia (2014), ‘Submission to the Australian Law Reform Commission issues paper on Equality, Capacity and Disability in Commonwealth Laws’, February.

⁷⁶ MI Fellowship, submission.

⁷⁷ Ibid.

⁷⁸ Ibid.

In our view, there is currently not a case to amend the NDIS Act to address concerns about the concept of permanency in the context of mental illness. The reasons for this are fourfold. Firstly, we note that the concept of permanency is neither minor nor tangential, but central to the design of the NDIS. In its landmark inquiry report, the Productivity Commission used permanence as a key factor in

determining who should be eligible to access the Scheme.⁷⁹ Extreme caution thus must be exercised in considering amendments to the permanency provisions, given the risk that such amendments could (even unintentionally) broaden the scope (and associated cost) of the NDIS beyond what was originally intended by government.

Secondly, we note that the permanency provisions of the legislative framework already accommodate some of the concerns expressed by stakeholders. For instance, section 24(1)(2) of the NDIS Act⁸⁰ and clause 5.5 of the Becoming a Participant Rules⁸¹ allow for impairments that fluctuate and vary in intensity. Clause 5.5 of the Becoming a Participant Rules also allows for the prospect ‘that the severity of the impact of the impairment on the person's functional capacity, including their psychosocial functioning, may improve.’

Thirdly, the available evidence does not suggest that the permanency provisions are dampening participation in the NDIS by people with mental illness. For instance:

- In its most recent reporting to the NDIA Mental Health Sector Reference Group, the NDIA noted that in the Barwon trial site (the data from which is the most complete), ‘access rates for people with a primary psychosocial disability align with the Productivity Commission estimates’⁸²
- In reporting on its deliberations regarding the responsiveness of the NDIS to people with disabilities associated with mental illness, the Independent Advisory Committee (IAC) observed that ‘ineligibility rates for applicants with a mental illness are significantly higher than those resulting from applications from people with physical, intellectual and sensory disabilities.’⁸³ The reasons for this, however, ‘are unclear and need further investigation.’⁸⁴

⁷⁹ ‘A person getting funded support from the NDIS would have a disability that is, or is likely to be, permanent. “Permanent” refers to the irreversible nature of the disability, even though it may be of a chronic, episodic nature.’ See: Productivity Commission (2011), *Disability Care and Support*, Report no. 54.

⁸⁰ ‘For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the National Disability Insurance [NDIS] for the person’s lifetime, despite the variation.’

⁸¹ ‘An impairment may be permanent, notwithstanding that the severity of its impact on the functional capacity of the person, may fluctuate’.

⁸² *NDIA Mental Health Sector Reference Group (2015), ‘Communique’, August*, available at: <http://www.ndis.gov.au/document/august-mental-health-sector-communique>.

⁸³ *Independent Advisory Committee (2014), ‘IAC advice on implementing the NDIS for people with mental health issues’, December*, available at: <http://www.ndis.gov.au/about-us/governance/IAC/iac-advice-mental-health>.

⁸⁴ *Ibid.*

Lastly, we observe that the NDIA has invested considerable effort in attempting to enhance the responsiveness of the NDIS to people with mental illness. Key NDIA activities include (but are not limited to):

- The development of the *NDIA Mental Health Work Plan*, which serves as ‘a statement of the Agency’s directions and priorities in improving how the NDIS responds to people with psychosocial disability.’⁸⁵ The NDIA reports to the Board on its progress in implementing the Work Plan through its *Annual Report on Scheme Data* and the *NDIA Mental Health Work Plan Report*.
- The establishment of the NDIA Mental Health Sector Reference Group. This group (which comprises representatives from the NDIA, DSS, State and Territory governments and the mental health sector) has been tasked with overseeing a number of mental health initiatives, including:
 - A review of the existing administration arrangements for access into the NDIS in relation to psychosocial disability
 - A project to design optimal packages of individual supports for people who have psychosocial disability associated with a mental illness
 - A project to determine appropriate psychosocial impairment severity indicators and/or functional assessments which could be used by the NDIA and assist in the development of reference packages for psychosocial disability.

Given our conclusions above, we believe there is merit in allowing the NDIA to continue its efforts to address concerns associated with the permanency provisions from an operational perspective – and for these efforts to be exhausted before determining whether amendments to the permanency provisions are required.

Noting the level of stakeholder interest in the issue, there would be value in revisiting the appropriateness and effectiveness of the permanency provisions as part of the next review of the NDIS Act.

Determining permanency

In the *Becoming a Participant Rules*, clause 5.4 states that (in relation to section 24[1][b] of the NDIS Act) ‘an impairment is, or is likely to be, permanent only if there are no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment.’ Likewise, clause 5.6 states:

‘An impairment may require medical treatment and review before a determination can be made about whether the impairment is permanent or likely to be permanent. The impairment is, or is likely to be, permanent only if the impairment does not require further medical treatment or review in order for its permanency or likely permanency to be demonstrated (even though the impairment may continue to be treated and reviewed after this has been demonstrated).’

In its submission to the review, Vision 2020 stated that it was ‘apprehensive that clauses 5.4 and 5.6 of the Rules in their current form, do not adequately provide coverage for conditions

⁸⁵ NDIA (2015), ‘IAC advice to the NDIA Board and Agency response’, available at: <http://www.ndis.gov.au/about-us/governance/IAC/IAC-advice-2015-NDIA-response#advice1>.

such as cataract, retinal detachment and diabetic retinopathy. While these conditions may result in significant vision loss, treatment and further assessment has the potential to take up to two years before a final determination can be made regarding the permanency of the condition.’⁸⁶ Vision 2020 thus recommended amending rules 5.4 and 5.6 ‘to include an exemption when there is demonstrable evidence of a presenting functional need and where treatment is likely to exceed six months.’⁸⁷

In our view, this amendment, by allowing persons to access the NDIS before the permanency of their impairment had been determined, would invalidate the concept of permanency underpinning section 24(1)(b) of the NDIS Act and, ultimately, the intended purpose of the NDIS. Thus, we do not believe that clauses 5.4 and 5.6 of the Becoming a Participant Rules should be amended as proposed by stakeholders.

Reduced functional capacity

Section 24(1)(c) states that one of the disability requirements to access the NDIS is that a person’s impairment or impairments result in ‘substantially-reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities: communication; social interaction; learning; mobility; self-care; self-management.’

Section 24(1)(c) was the focal point of a decision made by the Administrative Appeals Tribunal (AAT) in June 2014⁸⁸ that was subsequently set aside and remitted to the AAT for reconsideration by the Federal Court of Australia in June 2015⁸⁹. We do not believe that the judgment of the Federal Court has any implications for how the disability requirements are currently framed, as it is primarily related to the approach taken by the AAT in assessing evidence against section 24(1)(c). Nonetheless, government may need to reconsider section 24(1)(c), and how the NDIA interprets this provision after the AAT has released its new decision in relation to the *Mulligan and National Disability Insurance Agency*.

In its submission to the review, the Endeavour Foundation raised concerns that ‘some prospective applicants to the NDIS may have difficulty in meeting’ section 24(1)(c).⁹⁰ ‘For example, a person who has had a hearing impairment from an early age may be capable of meeting all of the listed functional activities under section 24(1)(c).’⁹¹

We note that it is not intended that all people with disability will become a participant in the NDIS. Rather, the Scheme is targeted at ‘those people with disability who have a significant impairment to their functional capacity. This functional definition of disability focusses on outcomes for the segment of the disability population that has the most unmet need.’⁹² Furthermore, we are aware of no evidence suggesting that section 24(1)(c) is preventing those

⁸⁶ *Vision 2020, submission.*

⁸⁷ *Ibid.*

⁸⁸ *Mulligan and National Disability Insurance Agency [2014] AATA 374 (13 June 2014).*

⁸⁹ *Mulligan v National Disability Insurance Agency [2015] FCA 544 (3 June 2015).*

⁹⁰ *Endeavour Foundation, submission.*

⁹¹ *Ibid.*

⁹² *Explanatory Statement, National Disability Insurance Scheme (Becoming a Participant) Rules 2013. We also note that in its landmark inquiry report, the Productivity Commission stated: (a) Tier 3 supports (i.e., the supports available to participants of the NDIS) ‘would be targeted at the much smaller group of people with significant care and support needs’, and (b) to be eligible for Tier 3 supports, a person would need either to ‘be in an early intervention group’ or ‘have significantly reduced functioning in self-care, communication, mobility or self-management and require significant ongoing supports.’ See: Productivity Commission (2011), *Disability Care and Support, Report no. 54.**

people with disability, who are intended to be participants of the NDIS, from becoming participants. Given the above, we do not believe that there is a need to amend section 24(1)(c).

Chronic health conditions

A number of stakeholders raised concerns that the legislative framework provides little guidance on how the disability requirements are intended to operate for people with chronic health conditions. It was noted that the NDIS Act does not define what constitutes a disability and makes no reference to health or medical conditions. Furthermore, as the NDIA stated, ‘the usual methods of legislative interpretation do not provide much clarity because of the way the drafting of section 24(1)(a) includes impairments as a separate element to the disability itself. This means that there is no clear distinction between disability ... and health conditions’⁹³

Stakeholders had differing perspectives on the nature of the problem associated with this lack of clarity. On the one hand, the NDIA highlighted that:

‘the Productivity Commission, in its report on Disability Care and Support, based the current funding model of the Scheme on 411,250 people with having permanent disability (as at 2009) (Tier 3). This figure did not accommodate for people with a constellation of impairments caused by chronic health conditions, such as diabetes and obesity, being accommodated in those calculations. A lack of clarity around the application of the disability requirement poses a real risk to the financial sustainability of the Scheme.’⁹⁴

Conversely, other stakeholders maintained that the lack of clarity on how the disability requirements are intended to operate for people with chronic health conditions is allowing the NDIA to draw too much of a distinction between disability and health conditions. It was noted that the Productivity Commission had not favoured a ‘blanket “yes” or “no” response to the question of whether individuals with chronic health conditions would be covered by the [S]cheme’, preferring instead an approach that focused on ‘whether the NDIS is the most appropriate system to meet the person’s needs.’⁹⁵

We agree with stakeholders that there is a need to provide greater clarity in the legislative framework on the intended scope of access to the NDIS in relation to chronic health conditions. Such clarity would help ensure that administration of the Scheme (including the management of financial risks) is aligned with government policy.

In its submission to the review, the NDIA suggested that one way to provide greater clarity would be to ‘[import] into the disability requirements, in section 24, the kind of principles around interfaces with other service systems set out in relation to reasonable and necessary supports in section 34(1)(f).’⁹⁶ We believe that there is merit in this suggestion, as it aligns with the general principles-based nature of the NDIS Act. Such principles are likely to be more appropriately included in the Becoming a Participant Rules. To achieve this, amendment would be required to section 27, which governs the NDIS Rules that can be made in relation to the access criteria.

⁹³ NDIA, submission.

⁹⁴ *Ibid.*

⁹⁵ Productivity Commission (2011), *Disability Care and Support, Report no. 54.*

⁹⁶ NDIA, submission.

Recommendation 8: Amend the legislative framework to include principles on how the disability requirements are intended to operate for people with chronic health conditions.

Section 24(1)(e)

Section 24(1)(e) states that one of the disability requirements to access the NDIS is that ‘a person is likely to require support under the NDIS for the person’s lifetime.’

In its advice to the review, the New South Wales Government questioned the appropriateness of this requirement. It stated that section 24(1)(e) conflates the question of whether a person should be granted access to the NDIS with the question of whether they are eligible to receive NDIS supports. This conflation is particularly problematic, given that section 33(2) allows for the possibility that ‘a person may meet the access criteria to become a participant in the NDIS, but not necessarily receive any funded supports’.⁹⁷ Thus, the New South Wales Government recommended removing section 24(1)(e) from the disability requirements.

We note that the concerns raised by the New South Wales Government in relation to section 24(1)(e) echo those of the AAT in its decision *Mulligan and National Disability Insurance Agency [2014] AATA 374*.⁹⁸

We agree that the purpose and value of section 24(1)(e) is unclear. We thus recommend removing this requirement, unless it is amended to support recommendation 8.

Recommendation 9: Remove section 24(1)(e) (unless this requirement is amended to support Recommendation 8).

4.2.1.4 Early intervention requirements

Developmental delay

Under section 25(1)(a)(iii), being a child who has developmental delay is listed as one of the early intervention requirements to access the NDIS. Section 9 provides a definition of developmental delay.⁹⁹

⁹⁷ *New South Wales Government, submission.*

⁹⁸ *For instance, the AAT noted that:*

‘It is not clear to us precisely what is needed in order to meet this requirement [i.e. section 24(1)(e)]. Neither the Act nor the Rules offers any guidance, and the Operational Guidelines do not refer to it. The NDIA says this disability requirement involves consideration of, among other things, whether supports of the kind that Mr Mulligan seeks would be funded or provided by the NDIS if he were to become a participant. We do not think that can be correct. Firstly, it is not clear why the meaning of “support” should be restricted to funded supports. Secondly, it is clear from s 33(2) that a person may become a participant in the NDIS without necessarily receiving funding for supports. Section 33(2) refers to a participant’s plan setting out matters including “the reasonable and necessary supports (if any) that will be funded” and “the general supports (if any) that will be provided”.’

See: Mulligan and National Disability Insurance Agency [2014] AATA 374 (13 June 2014).

In 2015, DSS commissioned a review on the effect of the developmental delay provisions in the NDIS Act on Scheme costs. This review concluded that:

- The definition in the NDIS ‘is stringent and sets a high hurdle for access to funded supports by reasons for developmental delay’
- There is ‘no evidence to support a conclusion that the provision for children with developmental delay might compromise Scheme sustainability’
- ‘The lack of understanding as to the difference between developmental delay and developmental disability/disorder (such as autism, cerebral palsy, chromosomal disorders) has resulted in a high rate of erroneous assignment of developmental delay in the NDIA data set and poses liability risks, as the costs associated with each group are quite different’.¹⁰⁰

Based on these findings, as well as the support we received from stakeholders for how section 9 defines ‘developmental delay’¹⁰¹, we do not believe that there is a need to amend the developmental delay provisions of the NDIS Act.

Functional capacity and informal supports

Section 25(1)(c) states that one of the early intervention requirements to access the NDIS is satisfying the CEO of the NDIA that the provision of early intervention supports for a person is likely to benefit the person (in terms of their functional capacity or the sustainability of their informal supports).

⁹⁹ *Developmental delay: a delay in the development of a child under six years of age that:*

- (a) *is attributable to a mental or physical impairment or a combination of mental and physical impairments; and*
- (b) *results in substantial reduction in functional capacity in one or more of the following areas of major life activity:*
 - (i) *self-care;*
 - (ii) *receptive and expressive language;*
 - (iii) *cognitive development;*
 - (iv) *motor development; and*
 - (v) *results in the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services that are of extended duration and are individually planned and coordinated.*

¹⁰⁰ *Dyson Consulting Group (2015), Review to provide evidence on the effect of the developmental delay provisions on Scheme costs prepared for the Department of Social Services, October.*

¹⁰¹ *In its submission, Early Childhood Intervention Australia stated: ‘the definition of developmental delay, as it is currently stated within the [NDIS] Act, should remain. While we understand the challenges associated with operationalising this, given diagnostic complexity, normal developmental variation, and particularly during transition from differing state models of support, the current definition allows for support as early as possible, while overall, the Scheme allows for flexibility in adjusting that support as participant needs change.’*

In its submission to the review, Children with Disability Australia maintained that section 25(1)(c) ‘does not capture the purpose of early intervention in relation to children’.¹⁰² Thus, it recommended amending this section ‘to include that early intervention for children aims to build personal capacity and skills, as well as facilitate development’.¹⁰³

Similarly, Vision 2020 maintained in its submission that section 25(1)(c) needs to take into account:

*‘whether the service delivers and builds transferrable skills or outputs that an individual can use to ameliorate the effect of their disability on their ability. This includes skill attainment at the time of service delivery and also into the future, so that an individual can perform functions such as moving around the community safely, maintain their employment or undertake activities of daily living to their desired level of independence, and also problem-solve through functional challenges in the future without necessarily requiring support from a specialist agency’.*¹⁰⁴

Thus, Vision 2020 proposed amending section 25(1)(c) to add: ‘the provision of early intervention supports of the person is likely to benefit the person through continuous skills development, above and beyond basic skills acquisition’.¹⁰⁵

In our view, the question of what the intended benefits of early intervention should be, and the supports funded or provided through the NDIS, ultimately relates to the parameters of the Scheme. We note that the current wording of section 25(1)(c) and its focus on functional capacity, aligns with the intended purpose of the NDIS.¹⁰⁶ Accordingly, we have made no finding or recommendation in relation to section 25(1)(c) and the intended benefits of early intervention support, except to note the issue for the broader consideration of government.

In addition to its comments on the intended benefits of early intervention supports, Children with Disability Australia maintained that section (25)(1)(c)(iv) (and its focus on ‘building the capacity of the person’s carer’) does not ‘recognise the important role of families in providing supports to children with disability’.¹⁰⁷ It thus recommended amending the section to include such recognition.

In our view, the NDIS Act already includes a broad recognition of the important role that families play in the lives of people with disability.¹⁰⁸ Furthermore, ‘carer’, as defined in the

¹⁰² Children with Disability Australia, submission.

¹⁰³ Ibid.

¹⁰⁴ Vision 2020, submission.

¹⁰⁵ Ibid.

¹⁰⁶ As we have noted elsewhere, the Scheme was designed to target ‘those people with a disability who have a significant impairment to their functional capacity. This functional definition of disability focuses on outcomes for the segment of the disability population that has the most unmet need.’ See: Explanatory Statement, National Disability Insurance Scheme (Becoming a Participant) Rules 2013.

¹⁰⁷ Children with Disability Australia, submission.

¹⁰⁸ A guiding principle of the NDIS Act is ‘the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected’. See: s 5(12), National Disability Insurance Scheme Act 2013 (Cth).

NDIS Act, is inclusive of familial relationships.¹⁰⁹ Thus, we do not believe that there is a need to amend section 25(1)(c)(iv), as proposed by stakeholders.

4.2.2 Access process

Perceived difficulty in making an access request

A number of stakeholders highlighted that the process of making an access request (and the access request form, in particular) can be difficult to understand and navigate. In our view, how the NDIA has chosen to operationalise the access request process is clearly a practice issue. We note that, under section 7, the NDIA has a general obligation to ensure that all approved forms are explained 'to the maximum extent possible to the person in the language, mode of communication and in terms which that person is most likely to understand.' Accordingly, we have made no finding or recommendation in relation to the perceived difficulty of making an access request, except to note the issue for the broader consideration of government.

Ceasing to be a participant

Section 29(1)(d) states that a person ceases to be a participant of the NDIS if the person notifies the CEO of the NDIA in writing that they no longer wish to be a participant. A number of stakeholders noted that some people with disability either 'exhibit poor impulse control'¹¹⁰ or 'fluctuate in their attitude to disability support'¹¹¹. It was thus suggested that the NDIS Act be amended either to include a 'cooling-off period' (during which a participant could reverse their decision to revoke their status) or to oblige the CEO to be satisfied that a participant's decision to revoke their status reflects their direct wishes and best interests.

As of 30 June 2015, 209 participants have either chosen to exit the NDIS or died. This is equal to 1 per cent of the 19,817 participants who have ever been found eligible for the Scheme.¹¹² We do not have access to data on the number of participants whose decision to exit the NDIS was not based on their direct wishes and best interests. This notwithstanding, we believe the proposed cooling-off period would provide a useful safeguard that should not impose an unnecessary burden on the administration of the NDIS. We prefer the cooling-off period obliging the CEO to be satisfied that a participant's decision to revoke their status reflects their direct wishes and best interests, as the former more closely aligns with the choice and control principle underpinning the NDIS Act.

Recommendation 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.

Timeframes between becoming a participant and plan approval

Under section 18 of the NDIS Act, any person can make an access request to the NDIA at any time. On receiving an access request, the CEO has 21 days to:

- Decide whether or not the prospective participant meets the access criteria, or

¹⁰⁹ See: s 9, *National Disability Insurance Scheme Act 2013 (Cth)*.

¹¹⁰ *Brain Injury Australia, submission*.

¹¹¹ *Australian Federation of Disability Organisations, submission*.

¹¹² *NDIA (2015), Quarterly Report to COAG Disability Reform Council, 30 June*.

- Request additional information, or for the prospective participant to undergo an assessment/examination.¹¹³

Once a person becomes a participant, the CEO is required to commence facilitating the preparation of their plan in accordance with the relevant NDIS Rules or, in the absence of such rules, as soon as reasonably practicable.¹¹⁴ The CEO is also required to approve a participant's plan as soon as reasonably practicable.¹¹⁵

Jurisdiction-specific NDIS Rules govern the plan's preparation process in trial. These rules stipulate the circumstances in, or period within which the NDIA must commence facilitating the preparation of plans for specific classes of participants. Participant classes are differentiated by such factors as location, age and place of residence.

During consultations, we received considerable feedback about the 'lag' between becoming a participant and plan approval. Stakeholders expressed frustration that some participants are waiting unconscionably long periods (e.g., up to 100 days) before the plan preparation process even begins. While we are unable to validate individual claims, we do note that, according to NDIA reporting, 58 per cent of plans were approved within 90 days of an access request being submitted during the third quarter of 2014-15; up from 47 per cent in the previous quarter.¹¹⁶ To address the lag between becoming a participant and plan approval, stakeholders proposed amending the NDIS Act to stipulate a timeframe by which either plan preparation must commence or a plan must be approved (relative to confirmation of eligibility).

According to the NDIA, stakeholder frustration with plan approval timeframes is driven, in part, by a misalignment between the 'timing for access requests' and the 'phasing arrangements for the preparation of participant plans.'¹¹⁷ In other words, while the NDIA is required to schedule the preparation of participant plans in accordance with the phasing rules, it is not able to schedule access requests in a similar manner.

*'This has meant that a person can make an access request, and the Agency must receive and determine that request, potentially well in advance of the timeframes identified in the phasing rules for the preparation of the person's plan. This misalignment has been a source of confusion for participants and their families who are in the situation of having access to the Scheme as participants but not access to any funded supports under the Scheme.'*¹¹⁸

To address this issue, the NDIA proposed amending the NDIS Act and relevant NDIS Rules so that, during roll-out of full Scheme, the Agency would only be required to determine an access request made by a person when the person is scheduled to be phased into the NDIS (in accordance with bilateral agreement and the phasing rules made under section 32A).

¹¹³ s 20, *National Disability Insurance Scheme Act 2013 (Cth)*.

¹¹⁴ s 32, *National Disability Insurance Scheme Act 2013 (Cth)*.

¹¹⁵ s 33(4), *National Disability Insurance Scheme Act 2013 (Cth)*.

¹¹⁶ NDIA (2015), *Quarterly Report to COAG Disability Reform Council, 30 June*.

¹¹⁷ NDIA, *submission*.

¹¹⁸ *Ibid.*

In our view, there is merit in amending the legislative framework as proposed by the NDIA. It is logical that the timing of the access request process should be aligned with the phasing rules governing the preparation of participant plans. It is also likely that amending the legislative framework to achieve such an alignment:

- Would generate administrative benefits for the NDIA
- Would provide greater certainty to both governments and people with disability, their families and carers
- Would not disadvantage any participant – as the amendment would only impact when requests for access would be determined, not when the preparation of plans would commence.

We do not favour amending the NDIS Act to stipulate a timeframe by which either plan preparation must commence or a plan must be approved during the roll-out of full Scheme. The current requirement on the NDIA to commence facilitating the preparation of participant plans ‘as soon as reasonably practicable’ provides the NDIA with the flexibility needed to accommodate the evolving nature of the NDIS and the large volumes of participants that have to be processed during transition.

This being said, given that a guiding principle of the NDIS is ‘people with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime’¹¹⁹, the next review of the NDIS Act should consider the costs and benefits of amending the legislative framework to stipulate a timeframe in relation to plan preparation.

Recommendation 11: Amend the legislative framework to align the access request process with bilateral agreements and the phasing rules made under section 32A.

Facilitating access

During consultations, two concerns were raised about how the NDIA is facilitating access to the NDIS. The first of these relates to the capacity of individuals to make an access request. Stakeholders noted that some people with disability (particularly those with an intellectual disability or psychosocial disability) will require considerable assistance to navigate the access request process. It was suggested that the legislative framework should be amended to allow for and require the NDIS to provide such assistance.

The second concern raised by stakeholders relates to section 26(1)(b). Under this provision, the CEO can request that a prospective participant undergo a particular assessment or examination, the findings of which would then inform the decision of the CEO whether the prospective participant meets the access criteria. Stakeholders maintained that making such a request could preclude some participants from accessing the NDIS, given that the cost of some assessments/examinations may be beyond the financial capacity of prospective participants to pay. Brain Injury Australia, for instance, stated that ‘neuropsychological assessments remain the standard for measuring cognitive disability post-[acquired brain injury] but can cost as much as \$2,500 to complete.’¹²⁰ Other stakeholders stated that requiring people with disability to be assessed by unfamiliar doctors or specialists could

¹¹⁹ s 4(3), *National Disability Insurance Scheme Act 2013 (Cth)*.

¹²⁰ *Brain Injury Australia, submission*.

cause ‘unnecessary distress’.¹²¹ Stakeholders made a number of recommendations for how these problems could be addressed, including:

- Amending section 26(1) to direct the NDIA to pay the costs associated with an assessment or examination requested by the CEO
- Amending section 26(1)(b) ‘so that the CEO must have regard to the impact, including financial and emotional impact, on the prospective participant of requiring that participant to undergo an examination at a particular place’.¹²²

The proposed amendments are not supported. We note that section 6 already gives the NDIA the power to ‘support people with disability to exercise choice and control in pursuit of their goals’ by providing ‘assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, [the NDIS] Act.’ We also note that the NDIA has already established a mechanism to facilitate access to the NDIS. Specifically, Local Area Coordinators (LACs) are tasked, among other things, with disseminating information on the access request process, and actively assisting people to access the NDIA.¹²³

4.3 Part 2: Participants’ plans

We have categorised our analysis of Part 2 of Chapter 3 in terms of issues relating to the plan principles, reasonable and necessary supports, and the planning and assessment process.

4.3.1 Principles relating to plans

Section 31 outlines a series of principles that are intended to guide the preparation, review and replacement of a participant’s plan, as well as the management of the funding for supports under a participant’s plan.

Our general observation is that, unlike the principles outlined in section 17A, the ‘principles relating to plans’ complement and supplement the general principles included in sections 4 and 5 of the NDIS Act.

In its submission to the review, Children with Disability Australia stated that many of the principles in section 31 are not ‘directly relevant to young children and infants’.¹²⁴ It also maintained that section 31(c) (‘where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant’) does not adequately ‘recognise the primacy of families in relation to participants who are children and young people.’¹²⁵ It thus recommended amending this section to recognise the importance of ‘working in partnership with families and ... the expertise of families regarding the support needs of children.’¹²⁶

We do not agree that section 31(c) should be amended as proposed by stakeholders. In our view, the current wording of this principle reflects general principle 12 in section 4 and is

¹²¹ *Disability Council NSW, submission.*

¹²² *Ibid.*

¹²³ *NDIA (2013), Operational Guideline – Gateway – Local Area Coordinators.*

¹²⁴ *Children with Disability Australia, submission.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

aligned with the ‘recognise and respect’ language of the Carers’ Act. Furthermore, we feel that amending the wording of section 31(c) to emphasise the ‘primacy’ of families would run counter to the general tenor of the objects and principles of the NDIS Act (particularly section 4(8), which states that ‘people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity’).

A number of stakeholders questioned the wording, ‘where possible’, in section 31(d) (‘where possible, strengthen and build capacity of families and carers to support participants who are children’). It was suggested that this qualifier is redundant, given [that] the statement ‘so far as reasonably practicable’ at the start of the section already provides a degree of conditionality. In our view, the argument made by stakeholders is logical. Thus we recommend removing ‘where possible’ from section 31(d).

In its submission to the review, the Australian Association of Social Workers proposed adding a principle to section 31 that would make an explicit commitment with respect to cultural differences, including the requirement that participant plans and the services/supports provided be responsive and appropriate to the cultural background of the participant.’¹²⁷ We do not believe that adding such a principle to section 31 is necessary, given that section 5(d) already states that people who may do acts or things on behalf of others should take into account ‘the cultural and linguistic circumstances, and the gender, of people with disability.’

Recommendation 12: Remove ‘where possible’ from section 31(d).
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4.3.2 Reasonable and necessary supports

Section 33 states that a participant plan must comprise the participant’s statement of goals and aspirations and a statement of participant supports. The latter must detail (among other things) the ‘general supports (if any) that will be provided to, or in relation to, the participant’ and ‘the reasonable and necessary supports (if any) that will be funded under the NDIS’.

Section 34(1) outlines the factors against which the CEO must be satisfied in determining the general supports that will be provided, and the reasonable and necessary supports that will be funded for each participant. These factors include:

- a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant’s statement of goals and aspirations
- b) the support will assist the participant to undertake activities, so as to facilitate the participant’s social and economic participation
- c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support
- d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice

¹²⁷ *Australian Association of Social Workers, submission.*

- e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide
- f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - i. as part of a universal service obligation; or
 - ii. in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

Generally speaking, stakeholders were supportive of how the legislative framework defines the concept of reasonable and necessary supports. Nonetheless, stakeholders did raise some concerns about elements of section 34. We discuss these concerns below.

Value for money

The AAT has made two decisions that touch directly on section 34(1)(c): *TKCW and National Disability Insurance Agency [2014] AATA 501* and *ZNDV and National Disability Insurance Agency [2014] AATA 921*. In our view, neither of these decisions raise any implications for section 34(1)(c) or its supporting clause in the Supports for Participants Rules.

A number of stakeholders raised concerns that section 34(1)(c), by requiring the CEO to consider whether a support represents value for money, may prevent the funding of supports that are the most effective and/or appropriate relative to the needs of participants. It was thus proposed that section 34(1) be amended to ensure that cost considerations are secondary to participant needs. In our view, diluting the value for money provisions of the NDIS Act would not only threaten the financial sustainability of the NDIS, but also run counter to the intended design of the Scheme. We note that the Productivity Commission identified value for money (or cost effectiveness) as a key criteria in determining what a reasonable and necessary support should look like under the NDIS.¹²⁸ As such, the proposed amendment is not supported.

Some stakeholders suggested that section 34(1)(c) would benefit from an additional statement recognising ‘the different costs of providing services across the country’, particularly in remote areas.¹²⁹ In our view, the need for such an amendment is low. We note that the NDIA Pricing Guide:

- Is ‘structured to reflect’ the requirement in section 34(1)(c) that funded supports represent value for money¹³⁰
- Already recognises and takes account of differences in the costs of supports related to location (e.g., by using the Independent Hospital Pricing Authority loading for remote and very remote areas).

¹²⁸ *Productivity Commission (2011), Disability Care and Support, Report no. 54.*

¹²⁹ *Australian Association of Social Workers, submission.*

¹³⁰ *NDIA (2015), ‘Pricing and payment’, available at: <http://www.ndis.gov.au/providers/pricing-and-payment>.*

In its submission to the review, the NDIA maintained that, based on its ‘emerging experience during the trial period’, there would be benefit in amending the NDIS Act or NDIS Rules to allow the CEO to specify, in Operational Guidelines, ‘methods or criteria by which the decision-makers could determine that particular supports represent value for money for the purposes of section 34(1)(e).’¹³¹

We believe there is some merit in this suggestion. On the one hand, it is clear from our engagement with stakeholders that value for money remains a contentious and complex issue. Providing greater guidance on how value for money could be determined would thus give people with disability, their families and carers more certainty on how the concept informs considerations on what is a reasonable and necessary support. It would also provide the NDIA with a firmer basis for decision-making – leading, in turn, to better decision outcomes.

However, given the policy issues involved and the potential policy ramifications, we believe it would be more appropriate to provide further guidance on how value for money could be determined in the Supports for Participants Rules. Such guidance could then be subsequently operationalised and promulgated by the NDIA in Operational Guidelines.

<p>Recommendation 13: Amend the Supports for Participants Rules to provide further guidance on how value for money could be determined.</p>
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¹³¹ NDIA, *submission*.

Effective and beneficial and current good practice

In our view, section 34(1)(d), and its supporting clauses in the Supports for Participants Rules, do not provide sufficient guidance to enable effective decision-making. Drawing on observations made by the AAT¹³², stakeholders¹³³ and the NDIA¹³⁴, we note that:

- The NDIS Act and the NDIS Rules do not define key terms underpinning section 34(1)(d) (notably, ‘current good practice’)
- While clause 3.4 of the Supports for Participant Rules suggests the types of evidence the CEO should consider in making a decision under section 34(1)(d), it does not:
 - Limit the types of evidence that should be considered (which generates uncertainty about what is an appropriate basis for a decision)
 - Provide guidance on what weighting should be given to different evidence of the same type (e.g., should certain academic journals have greater standing than others?) and different types of evidence (e.g., how should decision-makers balance the lived experience of participants with expert opinion?).

Accordingly, we believe the legislative framework should be amended to provide greater guidance on how decision-makers should administer section 34(1)(d).

In its submission to the review, the NDIA maintained that, based on its ‘emerging experience during the trial period’, there would be benefit in amending the NDIS Act or NDIS Rules to allow the CEO to specify, in Operational Guidelines, ‘the matters, including evidence, that may be used for the purpose of deciding whether a support will be, or is likely to be, effective and beneficial for a participant under section 34(1)(d), including for the purpose of deciding what constitutes current good practice.’¹³⁵ Given the policy issues involved, we believe it would be more appropriate to provide such guidance in the Supports for Participants Rules. This guidance could then be subsequently operationalised and promulgated by the NDIA in Operational Guidelines.

¹³² *McCutcheon and National Disability Insurance Agency [2015] AATA 624.*

¹³³ *For instance, in its submission to the review, Children with Disability Australia noted: ‘The [NDIS] Act states that for supports to be provided through the NDIS, the CEO must be satisfied that “the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice.” “Effective”, “beneficial” and “good practice” are, however, not defined. This raises questions regarding what criteria and process exist to assess what constitutes “reasonable and necessary” support. See: Children with Disability Australia, submission.*

¹³⁴ *NDIA, submission.*

¹³⁵ *Ibid.*

Recommendation 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.

Reasonable family, carer and other support

During consultations, we received a range of complaints about the appropriateness of section 34(1)(e). It was suggested that the current provision does not take into account a number of important factors, such as: the impact of informal supports on participant independence, the additional demands placed on families of children with disability and the potential for carers and families to experience harm from participants. We note that all of these factors are covered in clause 3.4 of the Supports for Participants Rules. This clause outlines the matters the CEO must consider in deciding whether the funding or provision of a support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide.

In its submission to the review, Carers Australia maintained that ‘any additional caring responsibilities – other than for the NDIS participant – should also be taken into consideration when determining what a “reasonable” level of informal care is.’¹³⁶ It thus proposed adding the following statement to both (a) and (b) of clause 3.4: ‘the extent of any other caring responsibilities’. We believe that there is merit in this suggestion. We note that approximately 10-20 per cent of primary carers care for more than one person in need of ongoing assistance.¹³⁷ Furthermore, research suggests that having multiple caring relationships can significantly degrade the physical and mental capacity of carers.¹³⁸

Recommendation 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’.

Supports appropriately-funded or provided through the NDIS

Under section 34(1)(f), the CEO is required to consider whether a support is most appropriately-funded or provided through the NDIS or other service systems. The Supports for Participants Rules provide additional guidance on this issue, detailing (in Schedule 1) principles to assist decision-makers in determining what the NDIS is (and is not) responsible for, relative to other service systems.

A number of stakeholders questioned the appropriateness of the principles outlined in Schedule 1 of the Supports for Participants Rules. For instance:

¹³⁶ Carers Australia, submission.

¹³⁷ See: Australian Institute of Health and Welfare (2004), *Carers in Australia: Assisting frail older people and people with a disability*; Ben Edwards et al (2008), ‘The Nature and Impact of Caring for Family Members with a Disability in Australia’, Research Report no. 16, Australian Institute of Family Studies; Carers Australia (2014), ‘[Carers not happy with recommended changes to carer payments](http://www.carersaustralia.com.au/)’, Media release, available at: <http://www.carersaustralia.com.au/>.

¹³⁸ ‘Caring for more than one person with a disability and/or caring for a person or child with a disability while caring for other children, were associated with carers having significantly worse mental health and vitality and higher rates of depression. Moreover, carers aged 18 to 50 - the age when they would most likely be caring for children - had the worst mental health and vitality and the highest rates of depression. These data suggest that carers raising children (both with and without a disability) or those caring for multiple family members with a disability, are under significant stress.’ See: Ben Edwards et al (2008), ‘The Nature and Impact of Caring for Family Members with a Disability in Australia’, Research Report no. 16, Australian Institute of Family Studies.

- The Western Australian Association for Mental Health recommended removing the reference to ‘recovery’ in paragraph 7.7(a) of Schedule 1 (‘The NDIS will not be responsible for: (a) supports related to mental health that are clinical in nature, including acute, ambulatory and continuing care, rehabilitation/recovery’)¹³⁹
- The Australian Lawyers Alliance argued that ‘excluding clinical treatment of health conditions from “reasonable and necessary” supports [see paragraph 7.5 of Schedule 1] creates unnecessary complexity, leading to inequitable outcomes and undermines the principles of the [NDIS] Act’¹⁴⁰
- The Commonwealth Ombudsman highlighted participant views that the principles in Schedule 1 wrongly assume other service systems are capable of meeting the needs of, and are accessible to, people with disability. ‘People providing this feedback expressed the view that refusing access to particular supports, in light of inadequate systems elsewhere in government, undermined the NDIS’s focus on supporting independence and social and economic participation for people with disability.’¹⁴¹
- The Council for Intellectual Disability questioned the assumptions underpinning paragraph 7.25(c) of Schedule 1 (‘The NDIS will not be responsible for: (c) general programs for the wider population, including programs to prevent offending and minimise risks of offending and re-offending and the diversion of young people and adults from the criminal justice system’).¹⁴²

In our view, the issue of what should be the responsibility of the NDIS, relative to other service systems, clearly relates to the design and parameters of the Scheme. We note that the principles in Schedule 1 of the Supports for Participants Plan align with the *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (agreed by all Australian governments in April 2013). Accordingly, we have made no finding or recommendation in relation to the appropriateness of the principles in Schedule 1 of the Supports for Participants Rules, except to note the issue for the broader consideration of government.

Other issues

During consultations, some stakeholders questioned whether section 34(1) should be amended to require the CEO to consider the allocated budget of the NDIS in determining whether a support should be funded or provided under the NDIS. In our view, the need for such an amendment is low. The objects and the principles of the NDIS Act (notably, sections 3[3][b] and 4[17][b]) already place a broad obligation on the Minister, the Board and the CEO to have regard for ‘the need to ensure the financial sustainability of the NDIS’ in performing their functions.

Paragraph 5.1 of the Supports for Participants Rules outlines general criteria to determine supports that will not be funded or provided under the NDIS. In relation to paragraph 5.1(a) (‘it is likely to cause harm to the participant or pose a risk to others’), Carers Australia proposed adding ‘or negatively impacts on the sustainability of informal care.’¹⁴³ In our view,

¹³⁹ *Western Australian Association for Mental Health, submission.*

¹⁴⁰ *Australian Lawyers Alliance, submission.*

¹⁴¹ *Commonwealth Ombudsman, submission.*

¹⁴² *Council for Intellectual Disability, submission.*

¹⁴³ *Carers Australia, submission.*

the need for such an amendment is low. It is unclear what types of supports would be classified as ‘negatively impacting on the sustainability of informal care’, but not classified as ‘posing a risk to others’.

4.3.3 Planning and assessment process

Participant’s statement of goals and aspirations

Under section 33(1), a participant’s plan must include a participant’s statement of goals and aspirations. This is prepared by the participant (potentially with the assistance of others), and specifies the goals, objectives and aspirations of the participant, and the environmental and personal context of the participant’s living.

During consultations, some stakeholders questioned the purpose and value of the participant’s statement of goals and aspirations. They viewed the process of articulating goals, objectives and aspirations as contrived (particularly in the context of children with disability) and demeaning. It was thus suggested that section 33(1) either be removed or amended to make the participant’s statement of goals and aspirations voluntary.

In our view, the question of whether a participant’s plan should include a participant’s statement of goals and aspirations is one that relates to the design of the NDIS. We note that the Explanatory Statement for the *National Disability Insurance Scheme Bill 2013* identified the ‘articulation of the goals and aspirations of [S]cheme participants’ as ‘an integral part of a formal plan to manage ongoing supports.’¹⁴⁴ Accordingly, we have made no finding or recommendation in relation to section 33(1) and the participant’s statement of goals and aspirations, except to note the issue for the broader consideration of government.

¹⁴⁴ *Explanatory Statement, National Disability Insurance Scheme (Becoming a Participant) Rules 2013.*

CEO approval of plans

Section 37(1) states that a ‘participant’s plan comes into effect when the CEO has: (a) received the participant’s statement of goals and aspirations from the participant; and (b) approved the statement of participant supports.’ A number of stakeholders raised concerns with this provision. It was maintained that it is inappropriate for the CEO to have the ‘final say’ on the supports that are to be included in a participant’s plan¹⁴⁵ (particularly given that an object of the NDIS Act is to enable people with disability to exercise choice and control). Stakeholders thus suggested amending section 37(1) so that a plan comes into effect when it has been approved by both the CEO and the participant (or their nominee).

While this amendment would provide participants with greater choice and control, it is unlikely that this benefit would outweigh the costs associated with requiring plans to be approved by both participants and the CEO. These costs include:

- Increased complexity in the planning and assessment process (e.g., what would happen in those circumstances where the NDIA and a participant could not reach agreement on a plan?)
- Increased incentives for non-cooperative behaviour (threatening, in turn, the effectiveness of the planner-participant relationship)
- Increased risks to the financial sustainability of the NDIS (as participants would not be bound by the same obligations as the NDIA to manage the financial sustainability of the Scheme).

Accordingly, we do not support amending section 37(1) as proposed by stakeholders.

Review of participants’ plans

Division 4 of Chapter 3 of the NDIS Act outlines three mechanisms by which a participant’s plan can be reviewed (and potentially changed):

- The participant can request the NDIA to conduct a review of their plan (which they can do so at any time). The NDIA, however, can decide not to conduct the review
- The NDIA can initiate a review of the participant’s plan (which it can do so at any time)
- The participant’s plan can prescribe a date by which, and the circumstances in which, a review of the plan must be conducted.

Stakeholders raised three issues in relation to the review and replacement of participants’ plans provisions. Firstly, it was suggested that either the NDIS Act or the NDIS Rules should be amended to stipulate how often plans must be reviewed (e.g., every 12 months). This suggestion is not supported. It would seem preferable for the NDIA to retain the flexibility to determine plan review timeframes that reflect the context of each participant.

Secondly, some stakeholders noted that section 49 requires ‘the NDIA to review the whole plan, rather than only review a single decision or subset of decisions in the plan. This leads to additional complexity, additional time and considerable stress and anxiety for participants.’¹⁴⁶

¹⁴⁵ *Disability Council NSW, submission.*

¹⁴⁶ *ACT Disability, Aged and Carer Advocacy Service, submission.*

Thus, it was recommended that the NDIS Act be amended to allow for partial reviews of plans. This recommendation is not supported. We note that the process of determining what supports to include in a plan is conducted holistically, so that a decision to provide or fund a support is interrelated with the decisions to provide or fund other supports. Thus, a partial review of a plan is unlikely to give sufficient consideration to the interdependencies between the decisions underpinning the plan.

Thirdly, a number of stakeholders raised concerns with section 48(2) (which allows the CEO to deny requests from participants to review their plans). Some stakeholders maintained that this section disempowers participants, is in conflict with the object of the NDIS Act to enable people with disability to exercise choice and control and thus should be removed. Other stakeholders noted that the legislative framework provides insufficient guidance on the factors the CEO should consider in determining whether or not to accept or deny a plan review request.

In our view, there is a need to bind the right of participants to request reviews of their plans; otherwise this right could be misused (impacting, in turn, the administrative efficiency of the NDIS). For instance, if participants had an unlimited right to request reviews of their plans, it is possible that some participants could repeatedly request reviews as a means of attempting to compel the NDIA to provide different and/or more supports.

We also believe that, given the level of stakeholder angst over section 48(2), there would be value in amending the legislative framework to provide participants with greater guidance on their rights to request a review of their plans. This 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. We note the *Operational Guideline – Monitoring and Review of a Participant’s Plan – Review of the Plan* already outlines some factors that could be elevated to the NDIS Rules for this purpose.

<p>Recommendation 16: Amend the legislative framework to provide greater guidance on the rights of participants to request a review of their plan.</p>

Practice issues

During consultations, stakeholders raised a number of issues relating to the planning and assessment process that we believe are ultimately practice issues (and thus outside the scope of the review). For purposes of transparency, we have listed these issues below. We have not, however, sought to validate the issues, nor incorporated them in our findings and recommendations.

- Some stakeholders questioned the capacity of planners to apply the legislative framework in the context of particular disabilities
- Some stakeholders raised concerns that planners are interpreting the legislative framework inconsistently
- Some stakeholders argued that, to enhance the effectiveness and efficiency of the planning and assessment process, planners should actively seek information from a broader range of sources when developing participant plans (including family members, carers, providers, schools and support workers)

- A number of stakeholders noted that, while they support the legislative framework, they are concerned that the intent of the NDIS Act is not adequately reflected in the Operational Guidelines and other NDIA material
- In its submission to the review, Living My Way maintained that ‘a user-friendly version of NDIS policy, legislation and rules is required to assist individual participants, nominees, registered plan management providers, staff of the NDIA, and service providers to more easily understand, navigate, and comply with the program’,¹⁴⁷
- In its submission to the review, Carers Australia proposed that the NDIA should, at a minimum, refer ‘those who provide significant unpaid support to a NDIS participant ... to supports for themselves outside the NDIS.’¹⁴⁸

¹⁴⁷ *Living My Way, submission.*

¹⁴⁸ *Carers Australia, submission.*

5. Chapter 4: Administration

Chapter 4 outlines the administrative structure for the NDIS. It comprises six parts: Part 1 (General Matters), Part 2 (Privacy), Part 3 (Registered Providers of Supports), Part 4 (Children), Part 5 (Nominees) and Part 6 (Review of Decisions). For the purposes of our analysis, we have grouped Parts 1 and 2, and Parts 4 and 5.

5.1 Parts 1 and 2: General matters and privacy

Part 1 of Chapter 4 obliges prospective participants and participants to notify the CEO of certain information and gives the CEO the power to obtain information to ensure the integrity of the NDIS (from prospective participants and participants, and other persons). Part 2, meanwhile, sets out the measures that must be taken for the protection of personal information that the NDIA may obtain in the course of performing its functions and gives the CEO the power to disclose protected information in certain circumstances.

Information collection

A number of provisions in the NDIS Act give the NDIA the power to collect and receive information. Key among these are section 55(1) (which gives the CEO the power to obtain information from other persons in relation to matters prescribed in section 55[2]) and section 60(1) (which creates a power for a person to collect protected information for the purposes of the NDIS Act).

In its submission to the review, the NDIA indicated that, ‘from an implementation perspective, [sections 55 and 60] have been problematic because [their] drafting ... limits their application.’¹⁴⁹ More specifically:

- ‘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. A conservative reading of this section suggests that the Agency could not use section 55(2)(k) to gather information, for example, on people who have not yet made an access request.’¹⁵⁰
- ‘Section 60 is similarly problematic because it allows a person to collect protected information for the purposes of the [NDIS] Act; however, the definition of protected information relates to information that is already held in the records of the Agency. In practice, this means that section 60 cannot be used by the Agency to cover collection of information.’¹⁵¹

To address these issues, the NDIA recommended that the information-gathering provisions be ‘amended to provide explicit coverage for the Agency to collect information for the purposes of the [NDIS] Act and to carry out its functions.’¹⁵²

We agree with the NDIA’s interpretation of the drafting limitations associated with sections 55 and 60. With reference to section 55, we agree that this section should be amended if it unduly limits the power of the CEO to obtain information necessary to ensure the integrity of the NDIS. Information on individuals, who it is expected will eventually become participants

¹⁴⁹ NDIA, *submission*.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

of the NDIS¹⁵³, but who have yet to make an access request, seems like a type of information that: (1) would help the CEO ensure the integrity of the NDIS; and (2) cannot be currently obtained under section 55. Given its coercive nature, however, we do not favour amending section 55 to broaden its applicability in a general sense. Rather, we recommend broadening section 55 by adding specific matters to section 55(2), where such matters are deemed necessary.

With reference to section 60(1), we would not recommend amending this provision, as it currently services a legitimate purpose in allowing non-NDIA entities (e.g., DSS and universities) to collect protected information for policy development and research. Rather, we propose adding a new provision to section 60 that would authorise the NDIA to collect information that would satisfy the NDIS Act definition of protected information.

Recommendation 17: Consider amending section 55 to broaden the powers of the CEO to obtain information to ensure the integrity of the NDIS.

Recommendation 18: Add a new provision to section 60 authorising the NDIA to collect information that would satisfy the NDIS Act definition of protected information.

Information sharing – access to participant plans

Sections 60 and 66 of the NDIS Act (supported by the Protection and Disclosure of Information Rules) set out the circumstances under which the NDIA may disclose protected information. One of these circumstances (as outlined in section 60[2][d][iii]) is when the disclosure of protected information is made ‘with the express or implied consent of the person to whom the information relates’.

During consultations, a number of stakeholders raised concerns that, under section 60(2)(d)(iii), a provider delivering supports to a participant can only access the participant’s plan if they receive the participant’s consent to do so. It was argued that this arrangement has led to providers not being able to access participant plans and, as a result, is hindering the ability of providers to coordinate care and tailor supports to the stated goals and aspirations of participants. To address this issue, stakeholders proposed amending the legislative framework to allow a provider to access a participant’s plan unless the participant prohibits such access.

The proposed amendment is not supported. The reasons for this are twofold. Firstly, based on available data, we are unable to validate the magnitude of the problem identified by stakeholders – in terms of how many participants have not granted providers access to their plans, and the extent to which a lack of access to a participant’s plan impacts the quality of supports provided to the participant. Secondly, allowing the NDIA to disclose a participant’s information, without the consent of the participant, would seemingly contravene the objects and principles of the NDIS Act (particularly sections 3[1][e], 4[4], 4[8] and 4[10]), as well as the obligations placed on the NDIA by the *Privacy Act 1988 (Cth)* (‘Privacy Act’)¹⁵⁴.

Information sharing – carers

Some stakeholders raised concerns that section 60(2)(d)(iii) can restrict how much information the NDIA provides the carers of participants. This was seen as problematic, particularly when the participant ‘is unwell and lack[s] capacity to appreciate their own

¹⁵³ For example, because they are currently receiving supports through a government-funded disability programme.

¹⁵⁴ cl 6.1, Schedule 1 – Australian Privacy Principles, *Privacy Act 1988 (Cth)*.

needs, or who is actually helping them, and do[es] not have a sound appreciation of factual circumstances.’¹⁵⁵ In their joint submission to the review, Mental Health Carers Arafmi Australia and MHC ARAFMI NSW Inc. highlighted the example of the *Mental Health Act 2007 (NSW)* as a potential model for how the NDIS Act could better treat families and carers as partners in care. Under the *Mental Health Act 2007 (NSW)*, a ‘designated carer’ is ‘entitled to certain information about a consumer’s care and treatment, and is entitled to be notified of certain events’.¹⁵⁶

We do not recommend amending the NDIS Act to align it with the approach of the *Mental Health Act 2007 (NSW)* and to share information with carers. As we note above, diluting the control that participants have over their information would be at odds with the objects and principles of the NDIS Act, as well as the obligations placed on the NDIA by the Privacy Act. We also note that the NDIS Act already allows for the disclosure of protected information to carers under certain circumstances. For instance, section 66(3) gives the CEO the power to disclose protected information relating to a participant to the participant’s nominee. Section 60(1)(e), meanwhile, allows a person to disclose protected information if they ‘believe on reasonable grounds’ that such a disclosure ‘is necessary to prevent or lessen a serious threat to an individual’s life, health or safety’.

Information sharing – mandatory reporting

In its advice to the review, the New South Wales Government noted that ‘there may be a conflict between the mandatory reporting requirements of the *Children and Young Persons Care and Protection Act 1998* and Chapter 4, Part 2 – Privacy, of the NDIS Act, making it an offence to disclose the personal information of NDIS participants.’¹⁵⁷ This issue was also raised by other State and Territory stakeholders during consultations. The New South Wales Government suggested that, ‘to remove any doubt about the concurrent application of the NDIS Act and State and Territory child welfare legislation ... relevant State and Territory child welfare laws [should be] prescribed under [section] 207(2) of the NDIS Act.’¹⁵⁸

In our view, the need for such an amendment is low. We note that, under section 60(2)(e), a person may disclose protected information (as defined by the NDIS Act) to any person if the person believes, on reasonable grounds, that such disclosure ‘is necessary to prevent or lessen a serious threat to an individual’s life, health or safety.’ This power should allow persons who are not NDIA officers (e.g., providers delivering supports to a participant) to satisfy mandatory reporting requirements imposed by State and Territory child protection legislation. While NDIA officers are not subject to State and Territory mandatory reporting requirements, the Agency has procedures in place to facilitate the disclosure of protected information to relevant authorities, where such disclosure is seen as meeting the conditions set out in section 60(2)(e).¹⁵⁹

The above notwithstanding, there may be value in the NDIA clarifying, in its guidance to registered providers of supports, how the NDIS Act interacts with child protection legislation. This could be achieved by adding an additional text to the ‘Confidentiality’ section of the Agency’s *Terms of Business for Registered Support Providers*, as well as amending

¹⁵⁵ *Mental Health Carers Arafmi Australia and MHC ARAFMI NSW Inc., submission.*

¹⁵⁶ *Mental Health & Drug & Alcohol Office (2010), Mental Health Act Guide Book, Fourth edition.*

¹⁵⁷ *New South Wales Government, submission.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *See: NDIA (2014), Operational Guideline – Information Handling – Serious Threat to Life, Health or Safety.*

Operational Guideline – Responding to Abuse, Neglect and Operational Guideline – Information Handling – Serious Threat to Life, Health or Safety.

5.2 Part 3: Registered providers of supports

Part 3 of Chapter 4 details how a person or entity can become, and cease to be, a registered provider of supports under the NDIS. A person or entity can be registered to manage the funding for a participant's supports under plans and/or provide supports to participants. As at 30 June 2015, there were 1,957 providers registered with the NDIA.¹⁶⁰

National quality and safeguarding framework

Australian governments are currently developing a national quality and safeguarding framework for the NDIS. In developing this framework, governments are considering options relating to:

- NDIA provider registration
- Systems for handling complaints
- Ensuring staff are safe to work with participants
- Safeguards for participants who manage their own plans
- Reducing and eliminating restrictive practices in NDIS-funded supports.

It is likely that, in order to implement the national quality and safeguarding framework, changes will be required to be made to the NDIS Act. The nature and extent of these changes, however, will not be known until the framework is finalised. This is expected to occur in 2016.

Given that the development of the national quality and safeguarding framework is being informed by a separate consultation process, we have not reflected the feedback provided to us that relates to the 'future state' of quality and safeguarding in the NDIS.

Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability

Section 4(15) states that a guiding principle of the NDIS Act is 'innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted.' A general observation from stakeholders was that the NDIS Act does little to further this principle, with the exception of stating that a function of the NDIA is 'to develop and enhance the disability sector, including by facilitating innovation, research and contemporary best practice in the sector.' To address this issue, stakeholders proposed amending the legislative framework to:

- Require the NDIA (or another body) to monitor the effectiveness of supports provided to participants, and to disseminate information on supports effectiveness
- Empower the NDIA (or another body) to assume a market steward role, responsible for upholding the competitiveness and general health of the market for disability supports (akin to the role played by the Australian Competition and Consumer Commission).

¹⁶⁰ NDIA (2015), *Quarterly Report to COAG Disability Reform Council*, 30 June.

While we believe that there is some merit in these suggestions, we note that they are being considered as part of the national quality and safeguarding framework. This framework is expected to be finalised in 2016.

Purpose of provider registration

It was clear from our engagement with stakeholders that there is no consensus on what the purpose of NDIA registration should be during the period leading up to full Scheme. On the one hand, the NDIA stated its ‘understanding, informed by bilateral agreements between government, is that the registration process facilitates payment under the Scheme for Agency-managed plans, but is otherwise not intended to interfere with choice and control by participants.’¹⁶¹

Other stakeholders, meanwhile, maintained that NDIA registration should serve a more expansive purpose. For instance, some State and Territory stakeholders argued that it would be more efficient if the NDIA registration process was more aligned with, and supported, jurisdictional quality and safeguarding regimes. It was noted that, under current arrangements, it is possible for the States and Territories to invest resources in processing an application from a new provider that has already secured NDIA registration; to only later determine that the provider does not meet jurisdictional quality and safeguarding arrangements. Likewise, some disability sector stakeholders maintained that NDIA registration should be used more actively to manage quality and risk (primarily by broadening the requirement for the types of providers that need to be registered with the NDIA¹⁶²).

In our view, the lack of consensus on what the purpose of NDIA registration should be is enabled, in part, by a lack of guidance in the legislative framework. We note that, while the Registered Providers of Supports Rules imply that the registration process is intended to be minimal¹⁶³, neither the NDIS Act nor the NDIS Rules state what the purpose of registration is and how it ‘fits’ in the broader administration of the NDIS. Furthermore, the NDIS Act does not place firm boundaries on the scope of the registration process. Section 73 gives the Minister relatively broad power to prescribe the breadth and depth of information the NDIA should consider in deciding whether to register a person or entity (including in relation to ‘compliance with prescribed safeguards’ and ‘compliance with prescribed quality assurance standards and procedures’).

Accordingly, we believe that there would be value in amending the legislative framework to provide greater clarity on the purpose of NDIA registration leading up to full Scheme. This could be achieved either through the addition of principles at the start of Part 3 of Chapter 3, or through expanding paragraph 1.8 of the Registered Providers of Supports Rules.

Recommendation 19: Amend the legislative framework to provide greater clarity on the purpose of NDIA registration during the period before the introduction of the national quality
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¹⁶¹ NDIA, submission.

¹⁶² For instance, in its submission to the review, National Disability Services proposed amending the NDIS Act to ensure ‘support that is personal or requires disability support skills (such as personal care, community participation, behaviour support and early intervention therapies) should only be sourced from registered providers. See: National Disability Services, submission.

¹⁶³ ‘These Rules also are intended to give effect to the principle that regulation should minimise the administrative and regulatory burden on registered providers of supports and prospective registered providers of supports, and to reduce barriers to entry to the NDIS.’ See: National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013.

and safeguarding framework.

Revocation of approval as a registered provider of supports

Section 72 sets out the circumstances in which the CEO may revoke approval as a registered provider of supports. During consultations, a number of stakeholders maintained that section 72 limits the flexibility of the NDIA to manage the impacts of failures in quality and safeguards. It was noted that, in some cases, it may be inappropriate or impractical to revoke a provider's approval as a registered provider of supports. For instance, if an employee of a provider is the subject of an adverse action by a responsible authority, but the circumstances surrounding the adverse action are arguably isolated to the employee in question, or if a provider is the sole provider of a types of supports in a community. To address these complex cases, it was suggested that the NDIS Act should be amended to allow for a probationary form of registration.

We believe there is merit in the concept of a probationary form of registration. Greater consideration is required, however, on how this concept would be operationalised, and its practicality during transition.

Recommendation 20: Consider the feasibility of amending the legislative framework to allow for a probationary form of registration.

Regulatory burden

The feedback we received from stakeholders suggests, to the extent that the registration process is imposing a burden on providers, this burden is being driven by how the registered providers of supports provisions are being administered by the NDIA, rather than the provisions themselves.

5.3 Parts 4 and 5: Children and nominees

Part 4 of Chapter 4 applies to children who are participants of the NDIS. It sets out who may make decisions or do things on behalf of children under the NDIS Act, and their duties in doing so. Part 5, meanwhile, sets out the functions and responsibilities of nominees under the NDIS Act, and how they can be appointed and cancelled or suspended.

We have categorised our analysis of these Parts in terms of issues relating to the recommendations made by the ALRC, issues relating to nominees and other issues.

5.3.1 ALRC recommendations in relation to nominees

Background and context

The NDIS is based on the presumption that people with disability have capacity to make decisions which affect their own lives. The legislative framework recognises, however, that 'there may be circumstances where it is necessary for a person to be appointed as a nominee of a participant, and to act on behalf of, or make decisions on behalf of, a participant.'¹⁶⁴

The NDIS Act gives force to two types of nominees:

- A plan nominee – who can undertake all activities that a participant would undertake under the NDIS, including the preparation, review or replacement of the participant's plan, and/or the management of the funding for supports in the participant's plan. A plan

¹⁶⁴ *National Disability Insurance Scheme (Nominees) Rules 2013.*

nominee, however, cannot undertake activities on behalf of a participant that may be outlined when the plan nominee is appointed.

- A correspondence nominee – who can undertake all activities that a participant would undertake, except for the preparation, review or replacement of the participant’s plan, and/or the management of the funding for supports in the participant’s plan. ‘The acts that a correspondence nominee is able to do include making requests to the Agency (for example, requests for information) and receiving notices from the Agency on behalf of the participant.’¹⁶⁵

Under the NDIS Act, a nominee can be appointed either at the request of the participant or at the initiative of the CEO of the NDIA. With reference to the latter, the Nominees Rules state that:

- ‘If the participant has not requested that a nominee be appointed’, the CEO is to have regard to the ‘principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards’.
- ‘In appointing a nominee in such circumstances, the CEO will have regard to the participant’s wishes and the participant’s circumstances (including their formal and informal support networks).’¹⁶⁶

The NDIS Act requires that, in appointing a nominee, the CEO ‘must have regard for whether there is a person who, under a law of the Commonwealth, a State or a Territory:

- ‘Has guardianship of the participant’

OR

- ‘Is a person appointed by a court, tribunal, board or panel (however described), who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee’

The NDIS Act requires nominees ‘to ascertain the wishes of the participants and to act in a manner that promotes the personal and social wellbeing of the participant.’ This requirement, however, is based on the reasonable judgment of the nominee. For instance, Section 80(3) of the NDIS Act allows nominees to refrain ‘from doing an act if, at the relevant time, the nominee reasonably believes that:

- ‘He or she has ascertained the wishes of the participant in relation to the act
- ‘Not doing the act promotes the personal and social wellbeing of the participant’

ALRC recommendations

In August 2014, the ALRC released the Final Report from its review of equal recognition before the law and legal capacity for people with disability.¹⁶⁷ As part of the review, the ALRC developed a decision-making model and national decision-making principles, which

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ ALRC (2014), *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, August.

provide a foundation for supported decision-making for people with disability. The decision-making model is based on the twin concepts of:

- Supporters – a person appointed by a person requiring decision-making support to: (1) support them in making decisions; (2) develop their decision-making capacity; and/or (3) support them in expressing their will and preferences. ‘Where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support.’¹⁶⁸
- Representatives – a person who either assists a person requiring decision-making support to make decisions or, where necessary, makes decisions on their behalf. In a situation where a person requiring decision-making supports is unable to make a decision, representatives are required to make a decision for the person based on what the person would likely want and, in the least, with consideration to the human rights relevant to the situation.

The national decision-making principles, meanwhile, are outlined in Figure 2.

¹⁶⁸ *Ibid.*

Figure 2: ALRC national decision-making principles

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Source: ALRC (2014), Equality, Capacity and Disability in Commonwealth Laws, ALRC Report 124, August.

The ALRC also made a number of recommendations regarding the treatment of decision-making under the NDIS Act, the NDIS Rules, the *Social Security (Administration) Act 1999 (Cth)* and the *Aged Care Act 1997 (Cth)*. The recommendations relating to the NDIS legislative framework include:

- 5-1 Amending the objects and principles of the NDIS Act to ensure consistency with the national decision-making principles
- 5-2 Amending the NDIS Act and NDIS Rules to include provisions dealing with supporters, consistent with the decision-making model
- 5-3 Amending the NDIS Act and NDIS Rules to include provisions dealing with representatives, consistent with the decision-making model
- 5-4 Amending the NDIS Act ‘to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the [NDIA] in appointing representatives. These provisions should make it clear that the CEO’s powers are to be exercised as a measure of last resort, with the presumption that an existing [S]tate or [T]erritory appointee will be appointed, and with particular regard to the participant’s will, preferences and support networks’¹⁶⁹
- 5-5 Amending the NDIS Act ‘to provide that, before exercising the power to appoint a representative, the CEO of the [NDIA] may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.’¹⁷⁰

We broadly support all of the ALRC recommendations that relate to the NDIS. The reasons for this are threefold. Firstly, in their conversations with us and submissions to the review, stakeholders expressed near-universal support for the ALRC recommendations. This feedback

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

builds on the extensive consultation that underpinned the ALRC report. Secondly, implementing the recommendations (particularly recommendations 5-1, 5-2 and 5-3) would further shift the underlying mindset of the NDIS from one focused on ‘do people with disability have legal capacity or not?’ to one focused on ‘what supports do people with disability need to exercise their right to make decisions?’ Such a shift is not only desirable from a moral perspective, but would also help to align the NDIS Act more closely with the CRPD.¹⁷¹ Lastly, echoing observations made by the NDIA and others, the concepts of ‘supporters’ and ‘representatives’ would likely better reflect the continuum of decision-making capability – and, in turn, engender greater acceptance from participants, their families and carers.

Operationalising the ALRC recommendations will require consideration of a range of complex issues, including:

- What a ‘will and preferences’ model will look like in the context of the NDIS
- How to align the NDIS Act with other pieces of legislation that have already adopted the ALRC’s decision-making model¹⁷², and how changes to the NDIS Act could be used as a potential model for other pieces of legislation
- How best to align the representative appointment process with State and Territory guardianship and administration legislation, and to maximise safeguards for participants.

Given such complexities and the broader importance of supporters/representatives to the NDIS, there would appear value in implementing the ALRC recommendations through a co-design process with people with disability, and in close collaboration with State and Territory governments.

Recommendation 21: Operationalise the ALRC recommendations relating to the NDIS.
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5.3.2 Other issues

Supported decision-making for prospective participants

In its advice to the review, the New South Wales Government highlighted the example of a Juvenile Justice client in the Hunter area who experienced difficulties in completing the access request process because they did not have a court-appointed guardian and their parents were absent or unable to assist their child in the application process. To address the issues raised by this example, the New South Wales Government proposed that the NDIS Act be amended ‘to allow the NDIA to nominate a “responsible adult” during the application process and/or recognise the role of child protection and Justice agencies, and kinship arrangements that do not proceed through court arrangements.’¹⁷³

¹⁷¹ Article 12 of the CRPD states: ‘2. States’ Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States’ Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ See: United Nations (2006), *Convention on the Rights of Persons with Disabilities and Optional Protocol*.

¹⁷² *The Health Legislation Amendment (eHealth) Bill 2015* (which recently passed both houses of Parliament) sought to implement recommendations made by the ALRC in relation to the *Personally-Controlled Electronic Health Records Act 2012* (Cth).

¹⁷³ *New South Wales Government, submission*.

In our view, the example highlighted by the New South Wales Government raises practice, rather than legislative issues. We note that, under the NDIS Act and the Children Rules:

- A child's representative can complete an access request form on behalf of the child¹⁷⁴
- 'The child's representative will normally be the person who has, or the persons who jointly have, parental responsibility for the child'¹⁷⁵
- 'However, in exceptional circumstances, the CEO might be satisfied that this is not appropriate ... In such circumstances, the CEO may determine that the child's representative should be a different person, or a different group of persons. A person determined by the CEO in this way need not have parental responsibility.'¹⁷⁶

Accordingly, we have made no finding or recommendation in relation to the example highlighted by the New South Wales Government, except to note the issue for the broader consideration of government.

Cancellation or suspension of appointment of nominees

Section 90 outlines the circumstances in which the CEO may cancel or suspend the appointment of nominees. In its submission to the review, the NDIA proposed expanding this provision 'to allow the CEO to remove or suspend a nominee if that person ceases to be the guardian of the participant.'¹⁷⁷ We believe that this would be a useful amendment, as it would more closely align the NDIS Act with jurisdictional guardianship regimes.

¹⁷⁴ s 74(1), *National Disability Insurance Scheme Act 2013 (Cth)*.

¹⁷⁵ p 3.2, *National Disability Insurance Scheme (Children) Rules 2013*.

¹⁷⁶ p 3.3, *National Disability Insurance Scheme (Children) Rules 2013*.

¹⁷⁷ NDIA, *submission*.

Recommendation 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.

5.4 Part 6: Review of decisions

Part 6 of Chapter 4 outlines what decisions made by the NDIA are reviewable decisions, and the process of administrative review (including both internal review by the NDIA, and external review by the AAT). As at 30 June 2015:

- The NDIA had received 302 requests for an internal review of a decision. Of these, 50 (17 per cent) were affirmed (i.e., the original decision was confirmed), 113 (37 per cent) were set aside and 58 (19 per cent) are pending¹⁷⁸
- The AAT had received 37 requests for an appeal of an internal review decision. Of these, 14 (38 per cent) were varied (i.e., the participant won the appeal), 12 were dismissed, withdrawn or affirmed (32 per cent) and 11 (30 per cent) are pending.¹⁷⁹

Duplicative terminology

Participants can seek two types of review under the NDIS Act: a review of their plan (in accordance with section 48) and a review of a decision (in accordance with Part 6 of Chapter 4). Some stakeholders maintained that this twin use of ‘review’ confuses some participants, which, in turn, is potentially hindering their rights to pursue a merits review of Agency decisions that affect them. It was thus recommended that the NDIS Act be amended so that ‘review’ has only one meaning.

Given concerns over the double meaning of ‘review’ in the NDIS Act have been raised by the AAT¹⁸⁰, the NDIA¹⁸¹ and disability peak organisations¹⁸², we believe there is merit in the proposed amendment. One way it could be implemented is to reframe ‘review of participant’s plans’ as ‘reconsideration of participant’s plans’.

Recommendation 23: Amend the legislative framework to limit the term ‘review’ to ‘review of decisions’.

Reviewable decisions

Section 99 lists the decisions of the CEO that are ‘reviewable decisions’ (and thus can be subject to merits review). In its submission to the review, Disability Council NSW argued that the decisions listed under section 99 are too narrow, which hinders, in turn, the transparency and accountability of NDIA decision-making. To address this issue, Disability Council NSW proposed:

- Amending section 99 to make every CEO decision a reviewable decision, or, at the very least,

¹⁷⁸ The remaining 81 decisions are categorised as having no outcome recorded. See: NDIA (2015), *Quarterly Report to COAG Disability Reform Council*, 30 June.

¹⁷⁹ NDIA (2015), *Quarterly Report to COAG Disability Reform Council*, 30 June.

¹⁸⁰ *Burston and National Disability Insurance Agency [2014] AATA 456*.

¹⁸¹ NDIA, *submission*.

¹⁸² *Australian Federation of Disability Organisations, submission; Blind Citizens Australia, submission*.

- Adding the following decisions to section 99:
 - ‘Decisions made under sections 26, 36 and 50 that a participant must provide information and/or undergo an assessment or medical, psychiatric or psychological examination’
 - ‘A decision made under section 44 that a person cannot manage their funding’
 - ‘A decision made in relation to repayments of debts and recovery or non-recovery of debts under Chapter 7, Part 1.’¹⁸³

We do not favour amending section 99 to make every CEO decision under the NDIS Act a reviewable decision. As the Administrative Review Council has noted, while merits review plays an important role in improving the overall quality of government decision-making, not every decision made by government is suitable for merits review.¹⁸⁴

In terms of the specific decisions highlighted by Disability Council NSW:

- We do not favour adding decisions made under sections 26(1), 36 and 50 to section 99. In its guide on *What Decisions Should be Subject to Merit Review?*, the Administrative Review Council stated that preliminary or procedural decisions (i.e., ‘decisions that facilitate, or that lead to, the making of a substantive decision’) are generally unsuitable for merits review.¹⁸⁵ This is because: (1) the review of such decisions may ‘lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed’; and (2) preliminary or procedural decisions are intended to inform a substantive decision, not result in a substantive decision themselves.¹⁸⁶ In our view, decisions made under sections 26(1), 36 and 50 are procedural decisions, in that they are intended to inform further, substantive decisions (relating to access and participant plans).
- The CEO does not make a decision under section 44. Rather, section 44 outlines the circumstances to which the CEO must have regard in determining whether a participant or their nominee should manage the funding for supports under the participant’s plan. The CEO decision relating to plan management is made under section 33(2) (which is already listed in section 99).
- We note that section 99 already lists a number of decisions that relate to Part 1 of Chapter 7 (namely, sections 190, 192, 193, 194[3] or [4] and 195). In our view, the remaining CEO decisions in Part 1 of Chapter 7 are unsuitable for merits review because:
 - They are procedural decisions (e.g., a decision made under sections 186 or 187 to obtain information from or about a person who owes a debt to the NDIA) – as we note above, preliminary or procedural decisions are generally considered unsuitable for merits review; or

¹⁸³ *Disability Council NSW, submission.*

¹⁸⁴ *Administrative Review Council (1999), [What Decisions Should be Subject to Merit Review?](http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx) available at: <http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx>.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

- They are decisions to institute proceedings (e.g., a decision made under section 183 to institute legal proceedings) - as the Administrative Review Council noted, decisions to institute proceedings are generally considered unsuitable for merits review, as they are not a final decision;¹⁸⁷ or
- They are not decisions that affect the interests of participants – in that they relate to either the recovery of NDIS funds paid to the wrong account (section 185[1]) or the recovery of NDIS funds paid to a participant after they have died (section 185[2]).

Review timeframes

In its submission to the review, WA's Individualised Services argued that, since participants and their families experience 'heightened levels of stress and anxiety' during the merits review process, the legislative framework should stipulate a timeframe by which a merits review must be completed.¹⁸⁸ The proposed amendment is not supported. We note that section 100(6) requires the allocated reviewer to make a decision 'as soon as reasonably practicable'. In our view, this requirement places sufficient onus on the reviewer to make a decision in a timely manner, and also accounts for the vast range of decisions that can be subject to merits review under section 99.

Funding to pursue merits review

Under section 200A, the NDIA is prohibited from funding 'legal assistance for prospective participants or participants in relation to review of decisions'. During consultations, concerns were raised that this provision 'may unfairly disadvantage people with disability seeking a review.'¹⁸⁹ It was thus proposed that section 200A be amended (to allow the funding of legal assistance under certain circumstances) or removed completely.

In our view, the question of whether the NDIA should fund legal assistance for prospective participants or participants, in relation to review of decisions, relates to the design and parameters of the NDIS. We note the Disability Reform Council stated in April 2015 that 'systemic advocacy and legal review and representation will be funded outside of the NDIS.'¹⁹⁰ Accordingly, we have made no finding or recommendation in relation to section 200A, except to note the issue for the broader consideration of government.

Practice issues

During consultations, stakeholders raised a number of issues relating to the review of decisions that we believe are ultimately practice issues (and thus outside the scope of the review). For purposes of transparency, we have listed these issues below. We have not, however, sought to validate the issues, nor incorporated them in our findings and recommendations.

- In its submission to the review, Disability Advocacy NSW maintained that, 'in the course of assisting clients to seek internal reviews, [it] has observed that the vast majority of reviewable decision letters written by the NDIA do not provide an explanation as to the client's right to seek an internal review within the letter itself. Instead, such letters have

¹⁸⁷ *Ibid.*

¹⁸⁸ WA's *Individualised Services*, submission.

¹⁸⁹ *Disability Council NSW*, submission.

¹⁹⁰ Mitch Fifield (2015), '[COAG Disability Reform Council Communique](http://www.formerministers.dss.gov.au/15499/coag-disability-reform-council-communicu/)', *Media release, April*, available at: <http://www.formerministers.dss.gov.au/15499/coag-disability-reform-council-communicu/>.

simply enclosed a pamphlet which separately outlines the individual's right to review and the process involved. [Disability Advocacy NSW] has received feedback which suggests that clients affected by an unfavourable decision made by the NDIA often feel too dejected and/or overwhelmed to have to refer to additional material for an explanation of their review rights.'¹⁹¹

- A number of stakeholders noted that the NDIA does not provide participants with a written explanation on why supports requested during the planning conversation have not been included in the statement of participant supports (beyond a 'blanket statement to the effect that the requested support is not "reasonable and necessary"'¹⁹²). Disability Advocacy NSW maintained that the absence of such an explanation 'causes confusion for clients and ... can make the preparation of an effective application for internal review a challenging process.'¹⁹³
- Disability Advocacy NSW proposed that a request from a participant for an internal review should be regarded as a potential trigger for a review of the participant's plan – particularly for participants with an intellectual disability who, because of their disability, may struggle to pursue merits review without the assistance of a case worker or a support worker.¹⁹⁴
- Disability Advocacy NSW maintained that all statements of participant's support should state the date when the decision to approve the plan was made, so as to assist participants in determining whether they still have time to pursue an internal review (noting that, under section 100(2), prospective participants and participants have up to three months to request a review after receiving written notice of the decision).¹⁹⁵

¹⁹¹ Disability Advocacy NSW, submission.

¹⁹² WA's Individualised Services, submission.

¹⁹³ Disability Advocacy NSW, submission.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

6. Chapter 5: Compensation payments

Chapter 5 deals with the treatment of compensation payments, including from workers' compensation schemes or motor vehicle accident insurance schemes under the NDIS. This chapter plays an important role in underpinning the financial sustainability of the Scheme. Its purpose is to ensure that participants who are entitled to receive compensation do so, and that the NDIS does not pay for supports that ought to be funded out of a compensation amount.

Feedback from stakeholders on Chapter 5 focused on such issues as the National Injury Insurance Scheme (NIIS), the recovery of compensation not used for its intended purpose, the power of the CEO to require participants to take action to claim or obtain compensation and the complexity of the compensation provisions. We explore these issues below.

National Injury Insurance Scheme

In its landmark inquiry report, in addition to recommending the establishment of the NDIS, the Productivity Commission also recommended establishing a NIIS for catastrophic injuries caused by four types of accidents: motor vehicle accidents, workplace accidents, medical accidents and general accidents (occurring in the home or community). The intention of the NIIS is 'to ensure that all individuals who are catastrophically-injured in an accident will be entitled to lifetime care and support, regardless of whether or not they are able to prove that another party was at fault for their injuries.'¹⁹⁶ Australian governments are currently working together to develop the NIIS.

During consultations, a number of stakeholders questioned whether changes would be required to Chapter 5 to accommodate the NIIS. In our view, the development of the NIIS has the potential to impact the compensation provisions. The nature and extent of this impact, however, will not be known until the NIIS has been finalised. Accordingly, we have made no findings or recommendations in relation to the NIIS except to note the issue for the broader consideration of government.

Compulsion to seek compensation

Section 104 gives the CEO the power to require a prospective participant or participant to take an action to claim or obtain compensation with respect to a personal injury. The action must be reasonable and the CEO must be satisfied that the prospective participant or participant has a reasonable prospect of success. Section 105 sets out the consequences of failing to comply with a required action to claim or obtain compensation. These include plan suspension and suspending when a plan is to come into effect. If the required action relates to a claim not made under a Commonwealth, State or Territory compensation scheme, the CEO may take action to claim or obtain compensation in the name of the prospective participant or participant, or take over the conduct of an existing claim.

During consultations, a number of stakeholders questioned the appropriateness of sections 104 and 105. They noted that some prospective participants or participants will not have the capacity to pursue compensation. For instance, Brain Injury Australia maintained that 'many Scheme participants with traumatic brain injury ... from, for example, motor vehicle or workplace accidents, may be entitled to ... compensation, but will rightly find pursuing

¹⁹⁶ *The Treasury (2015), [National Insurance Injury Scheme – Workplace Accidents: Consultation Regulation Impact Statement](http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/NIIS-Workplace-Accidents), available at: <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/NIIS-Workplace-Accidents>.*

litigation themselves an onerous responsibility.’¹⁹⁷ To address this issue, stakeholders proposed amending Chapter 5 to allow the NDIA to provide support to prospective participants or participants that have been required by the CEO to take an action to claim or obtain compensation. As People with Disabilities (WA) argued:

‘There is a cost, both emotional and financial, which comes with undertaking legal cases for compensation. Unless the agency is prepared to support and assist the person to try and get compensation ... [t]hen no one should be forced to try and get compensation.’¹⁹⁸

In our view, the need for such an amendment is low. We note that:

- Under section 104(2), the CEO can only require a prospective participant or participant to take an action to claim or obtain compensation that is reasonable. In determining whether a required action is reasonable, the CEO must have regard (under section 104[3]) for such factors as the disability of the individual, any impediments the individual may face in recovering compensation, the financial circumstances of the individual and the impact of the required action on the individual and their family. In short, these provisions require the CEO to take into account the capacity of prospective participants and participants in deciding whether they should take a required action to pursue compensation.
- A decision by the CEO to require a prospective participant or participant to take an action to claim or obtain compensation is a reviewable decision under section 99. This provides prospective participants and participants a further layer of protection.
- In addition to the above, Section 6 already provides the NDIA with broad power to ‘provide support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, [the NDIS] Act.’

¹⁹⁷ *Brain Injury Australia, submission.*

¹⁹⁸ *People with Disabilities (WA), submission.*

In its submission to the review, Disability Council NSW maintained that, ‘given the difficulties which many people with disability may believe they face in accessing the justice system, the requirement to take action may be sufficient reason for some to be compelled to withdraw an access request.’¹⁹⁹ To mitigate the risk of this occurring, Disability Council NSW proposed that, ‘if the CEO requires an individual to take legal action, the [NDIS] Act should contain provisions to allow the individual to transfer their legal rights to the Agency, which may then act on their behalf.’²⁰⁰

The proposed amendment is not supported. The reasons for this are threefold. Firstly, the magnitude of the problem identified by Disability Council NSW is uncertain. While NDIA reporting indicates that 507 access requests have been withdrawn since Scheme commencement (comprising 2 per cent of the total)²⁰¹, it is unclear what proportion of these (if any) were as a result of a prospective participant being unwilling to undertake a required action to claim or obtain compensation. Secondly, it is reasonable to assume that, if they were required to take an action to claim or obtain compensation, the majority of prospective participants and participants would choose to transfer their legal capacity to the NDIA if they had the option of doing so. Thus, it is likely that the proposed amendment would impose an increased resource burden on the NDIA, threatening, in turn, its ability to deliver the Scheme. Lastly, as we noted above, the NDIS Act already includes provisions that:

- Require the CEO to have regard to the circumstances of prospective participants and participants in determining whether a required action to claim or obtain compensation is reasonable
- Enable the NDIA to provide support to prospective participants and participants in relation to meeting obligations under the NDIS Act.

In its submission to the review, the Attendant Care Industry Association maintained that section 104(3)(f) (‘the impact of the requirement to take the action on the participant or prospective participant and his or her family’) is limited, in that it does not take into account significant relationships a prospective participant or participant may have with non-family members (‘e.g., where a participant who [sic] has no family but has a friend who is a primary caregiver’).²⁰² Thus, the Attendant Care Industry Association proposed amending section 104(3)(f) as follows: ‘the impact of the requirement to take the action on the participant or prospective participant, his or her family, and significant others’.

We support this proposed amendment. However, instead of ‘and significant others’, we believe ‘and carers’ is more appropriate; as ‘carers’ is more commonly paired with ‘families’ throughout the broader legislative framework.

¹⁹⁹ *Disability Council NSW, submission.*

²⁰⁰ *Ibid.*

²⁰¹ *NDIA (2015), Quarterly Report to COAG Disability Reform Council, 30 June.*

²⁰² *Attendant Care Industry Association, submission.*

Recommendation 24: Amend section 104(3)(f) to reference carers.
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Legislative complexity

The terms of reference for the review ask us to consider whether there are any aspects of the NDIS Act that could be simplified. At first glance, Chapter 5 appears a prime candidate for simplification. The chapter is dense and complex. There was also a sense among stakeholders that the overwrought nature of Chapter 5 is not commensurate with the scale of the problem the compensation provisions are trying to address.

This notwithstanding, we do not favour simplifying Chapter 5, at least in the short term. Our reasons for this are practical. As we discussed above, governments are currently developing the NIIS. Once this process is complete, it is likely that the compensation provisions of the NDIS Act will require amendment. It would seem more efficient to tackle simplification and potential NIIS-related amendments at the same time. Particularly given that, based on the evidence available to us, the density and complexity of Chapter 5 do not appear to be hindering the application of the compensation provisions.

7. Chapter 6: National Disability Insurance Scheme Launch Transition Agency

Chapter 6 establishes the National Disability Insurance Scheme Launch Transition Agency, now known only as the NDIA, the Board of the Agency and the IAC, and details the functions of each body, as well as further administrative and governance arrangements for the NDIS. Importantly, as section 117(2)(a) establishes the Agency as a body corporate, the NDIA is therefore covered under the PGPA Act as a Commonwealth corporate entity, and is accordingly bound by the regulations and obligations detailed under that legislative framework.

We received considerable feedback on Chapter 6. We have categorised this feedback (and our analysis) in terms of the NDIA, the Board, the IAC and other issues.

7.1 National Disability Insurance Agency

Functions of the NDIA

Section 118 prescribes the functions of the NDIA. These functions relate to delivering the NDIS, managing the financial sustainability of the Scheme, developing and enhancing the disability sector, building community awareness, data collection and dissemination, and research.

Broadly speaking, stakeholders expressed their support for the prescribed functions of the NDIA. It was felt that these functions enable the Agency to administer the NDIS in a manner consistent with the objects and principles of the NDIS Act. Some stakeholders maintained, however, that there is a need to expand the prescribed functions of the NDIA. Suggested additional functions for the Agency include:

- ‘To negotiate interface areas with other service systems in the community, including early childhood services, education, health, et cetera’²⁰³ – it was maintained that, to ensure the NDIS is delivered effectively and as it was intended, the NDIA needs to play a more active role in delineating and coordinating the provision of services across the Scheme’s mainstream interface
- Policy development and research – it was maintained that the Agency requires a policy function to complement, support and guide its operational activities.

The former suggestion is partially supported. On the one hand, prescribing a function in section 118, related to the negotiation and coordination of services, would be consistent with the principles of the NDIA Act²⁰⁴ and reflect the expected role of LACs under the ILC framework²⁰⁵. We believe, however, that there would be greater value in prescribing all of the

²⁰³ *Children with Disability Australia, submission.*

²⁰⁴ *‘People with disability should be supported to receive supports outside the National Disability Insurance Scheme, and be assisted to coordinate these supports with the supports provided under the National Disability Insurance Scheme.’ See: section 4(14), National Disability Insurance Scheme Act 2013 (Cth).*

²⁰⁵ *‘LAC will ensure that people with disability, their families and carers, are able to make full use of the mainstream and other services (including diagnostic-specific information) available to them. LAC will also help to streamline their NDIS experience and assist them to navigate the variety of NDIS supports. At times, LAC support [can] link with other informal supports or service systems [and] may be the only support that a*

intended ILC functions of the Agency in section 118 (rather than just the single function). Such an amendment would provide greater certainty to stakeholders about ILC (and the role of the NDIA in delivering ILC supports), as well as recognise the importance of ILC to the overall design of the NDIS.

The latter suggestion is not supported. We note that section 118 already prescribes a research function for the NDIA. Furthermore, policy development relating to the NDIS is the responsibility of the Disability Reform Council (supported by the Senior Officials Working Group).

Recommendation 25: Amend section 118 to reflect the functions of the NDIA in relation to ILC.

7.2 Board

Functions of the Board

Section 124 sets out the functions of the Board. These include: (a) 'ensur[ing] the proper, efficient and effective performance of the Agency's functions'; (b) 'determin[ing] objectives, strategies and policies to be followed by the Agency'; and (c) 'any other functions conferred on the Board by or under' the legislative framework or any other law of the Commonwealth.

Broadly speaking, stakeholders felt that the functions of the Board, as set out in the NDIS Act, are clear and well understood. Furthermore, it was felt that there are few (if any) gaps or overlaps between the prescribed functions of the Board and the IAC.

Appointments to the Board – lived experience with disability

Section 127(2) states that, to be eligible for appointment as a Board member, the Minister must be satisfied that a person has skills, experience or knowledge in one of four fields: (a) the provision or use of disability services, (b) the operation of insurance schemes, compensation schemes or schemes with long-term liabilities, (c) financial management, and (d) corporate governance. Section 127(6), meanwhile, states that, 'in appointing the Board members, the Minister must ensure that the Board members collectively possess an appropriate balance of skills, experience or knowledge in the fields mentioned in subsection (2).'

We received considerable feedback on section 127. It was argued that: (1) it is vital people with disability are involved 'at all levels of the NDIS' and 'have genuine input into the developments that affect their lives'²⁰⁶; and (2) section 127, as currently drafted, places insufficient emphasis on involving people with disability in the decision-making of the NDIS. To address this issue, stakeholders proposed:

person or their carer needs.' See: NDIA (2015), 'A Framework for Information, Linkages and Capacity Building', August, available at: <http://www.ndis.gov.au/ilc-policy>.

²⁰⁶ *Vision 2020, submission.*

- Amending section 127(2) to include ‘lived experience with disability’ (or a like phrase) as an additional field, or
- Amending section 127 to stipulate that a certain number of Board members (ranging from one to a majority) must have ‘lived experience with disability’ (or a like phrase).

In our view, the need for the proposed amendments is not clear. We note that section 127(2)(a) (i.e., ‘the provision or use of disability services’ [emphasis added]) already references, in effect, ‘lived experience with disability’ as a field to determine eligibility for Board appointments. We also note that four of the current nine Board members either have a disability or have a family member with a disability.

The above notwithstanding, the level of stakeholder concern we received about the perceived lack of emphasis placed on involving people with disability in NDIS decision-making, suggests there would be value in clarifying the intent of section 127(2)(a). This could be achieved by adding a note to section 127(2), highlighting that section (a) encompasses ‘lived experience with disability’.

Recommendation 26: Clarify the intent of section 127(2)(a) in terms of it encompassing ‘lived experience with disability’.

Appointments to the board – other issues

In its feedback to the review, the Northern Territory Government highlighted the importance of ‘experience in rural and remote markets and service delivery’ to ‘the overall success of the [S]cheme in thin markets nationally.’²⁰⁷ It thus recommended amending section 127(2) to add ‘regional and remote market and service delivery issues’.²⁰⁸ The proposed amendment is not supported. To the extent that governments want to prioritise skills, experience or knowledge in regional and remote service delivery as a condition of Board membership, they can do so using the existing fields listed in section 127(2) (specifically, ‘the provision or use of disability services’).

Section 127(5) states that a person is ineligible to be a member of the Board if they are a member of parliament, a government employee or a full-time holder of a statutory office. A number of stakeholders proposed expanding this section to exclude:

- A person who is a Board member or holds a senior management position with a disability service providing organisation²⁰⁹
- A person ‘conducting a commercial consultancy business in disability matters’²¹⁰.

In our view, the need for the proposed amendments is low. We note that the NDIS Act already prohibits Board members from engaging ‘in any paid employment that, in the Minister’s opinion, conflicts or may conflict with performance of [their] duties.’²¹¹ Furthermore, as

²⁰⁷ Northern Territory Government, *feedback to the review*.

²⁰⁸ *Ibid.*

²⁰⁹ *Children with Disability Australia, submission.*

²¹⁰ *Civil Society Australia, submission.*

²¹¹ *section 132, National Disability Insurance Scheme Act 2013 (Cth).*

Commonwealth Officials, Board members are subject to a number of conditions imposed by the PGPA Act, including:

- A duty to exercise their powers, perform their functions and discharge their duties honestly, in good faith and for a proper purpose
- A duty not to use their position improperly (either for self-advantage or [to] the detriment of others)
- A duty to disclose all material personal interests.²¹²

In its submission to the review, the NDIA highlighted that having the Principal Member of the IAC as a Board member is an element of practice that has worked well in implementation and thus ‘could be considered for the legislation’.²¹³ We support this suggestion. In our view, requiring the Principal Member of the IAC to be a Board member as well should strengthen the links between both bodies, as well as give stakeholders greater certainty that IAC advice will be duly considered by the Board.

<p>Recommendation 27: Amend the legislative framework to require the Principal Member of the IAC to be a Board member as well.</p>

Conflicts of interest

In its submission to the review, Disability Council NSW proposed amending the NDIS Act to require Board members ‘to disclose any conflicts of interest, as is required by members of the NDIS [IAC].’²¹⁴ The proposed amendment is not supported. As we note above, as Commonwealth Officials, Board members are subject to a number of conditions imposed by the PGPA Act – including a duty to disclose all material personal interests.²¹⁵

Staggered appointments

During consultations, a number of stakeholders raised concerns that the NDIS Act seemingly does not allow for staggered appointments. This was seen to be contrary to principles of good governance.²¹⁶

In our view, stakeholder concern is misplaced. Under sections 128 and 148, the Minister can appoint (and reappoint) members of the Board and IAC for a period of up to, but no more than, three years. The Minister can use these existing powers to achieve staggered appointments in practice.

²¹² sections 25-29, *Public Governance, Performance and Accountability Act 2013 (Cth)*.

²¹³ NDIA, submission.

²¹⁴ Disability Council NSW, submission.

²¹⁵ section 29, *Public Governance, Performance and Accountability Act 2013 (Cth)*. The Board Register of Director Interests is available at: <http://www.ndis.gov.au/document/board-register-declared-interests>.

²¹⁶ For instance, in its guidance for not-for-profits, the Australian Institute of Company Directors states: ‘care should also be taken to help ensure that individual board terms are appropriately staggered, so that there is a continuity of appropriate knowledge, skills and experience on the board, as well as continuity on organisation and board-specific issues. This reduces the likelihood that multiple concurrent new appointments will impact adversely on the effectiveness of the board.’ See: Australian Institute of Company Directors (2013), *Good Governance Principles and Guidance for Not-for-Profit Organisations*.

7.2.1 Independent advisory council

Nature of the IAC

In its submission to the review, the Young People in Nursing Homes National Alliance maintained that, ‘given the States and Territories are part owners of the NDIS, it is important ... they have a structure where they can operate an engagement strategy that is formally linked to the NDIS.’²¹⁷ To achieve this, the Young People in Nursing Homes National Alliance proposed amending section 143 (which establishes the IAC) ‘to include provision for each State and Territory to have their own [IAC] that can provide advice and other input to the NDIS Board’.²¹⁸

In our view, whether there should be one or multiple IACs is ultimately a question that relates to the design of the NDIS. Accordingly, we have made no finding or recommendation in relation to the suggestion that the NDIS Act be amended to allow for State and Territory IACs, except to note the issue for the broader consideration of government.

Functions of the IAC

Under section 144, the primary function of the IAC is to provide advice to the Board about the way in which the NDIA performs its functions. The IAC can provide this advice either on its own initiative or at the request of the Board. Section 145 states that, on receiving advice from the IAC, the Board must: (a) ‘have regard to the advice in performing its functions’; and (b) ‘give the Ministerial Council a copy of the advice and a statement, setting out what has been done, or is to be done, in response to the advice’.

During consultations, some stakeholders questioned the effectiveness of sections 144 and 145; stating that there is little visibility of IAC advice and how this advice has been considered and actioned by the Board. To strengthen the provisions, it was suggested that they be amended to:

- Require greater accountability from both the IAC and the Board, in terms of IAC advice
- Stipulate timeframes within which the Board must respond to IAC advice.

In our view, there is currently not a case to strengthen sections 144 and 145. It is unclear the extent to which the concerns raised by stakeholders relate to a ‘weak’ legislative framework, rather than such factors as the communication practices of the NDIA and the IAC, and the new and evolving nature of the NDIS. This notwithstanding, there would be value in revisiting this issue as part of the next review of the NDIS Act.

Appointments to the IAC

Section 147(5) states that, in appointing the members of the IAC, the Minister must:

- (a) ‘Have regard to the desirability of the membership of the [IAC] reflecting the diversity of people with disability; and*
- (b) ‘Ensure that all members are persons with skills, experience or knowledge that will help the [IAC] perform its function; and*

²¹⁷ *Young People in Nursing Homes National Alliance, submission.*

²¹⁸ *Ibid.*

(c) *Ensure that:*

- i. *a majority of the members are people with disability; and*
- ii. *at least 2 of the members are carers of people with disability; and*
- iii. *at least one of the members is a person who has skills, experience or knowledge in relation to disability in rural or regional areas; and*
- iv. *at least one of the members is a person who has skills, experience or knowledge in the supply of equipment, or the provision of services to people with disability.'*

In its submission to the review, Blind Citizens Australia proposed amending section 147(5)(c) to require that a 'member of the [IAC] has a lived experience of blindness or vision impairment.'²¹⁹ The proposed amendment is not supported. Favouring one type of disability over others, in terms of IAC membership, would be inequitable. Broadening the membership of the IAC to allow representation by all types of disability would likely make the IAC unworkable.

In its submission to the review, Living My Way proposed amending section 147(5)(c) to stipulate that 'there should be two Registered Plan Management Provider representatives on the [IAC].'²²⁰ The proposed amendment is not supported. We note that the current membership of the IAC is consistent with what was originally recommended by the Productivity Commission.²²¹

7.3 Other issues

Reporting

Part 5 of Chapter 6 sets out the reporting requirements of the Board, the Agency and the Minister. During consultations, a number of stakeholders proposed expanding these reporting requirements. For instance, Disability Council NSW suggested that 'the [NDIS] Act include a reporting requirement to ensure the progress of the NDIS be benchmarked against the objectives of the National Disability Strategy.'²²² Likewise, Vision 2020 recommended that '[section] 172 be amended to include an explicit provision requiring the Board of the NDIA to monitor and report against obligations under the Convention on the Rights of Persons with Disabilities on an annual basis.'²²³

In our view, the nature and extent of government reporting on the NDIS is ultimately an issue of Scheme design. Accordingly, we have made no finding or recommendation in relation to the suggested additional reporting requirements for the NDIS, except to note the issue for the broader consideration of government.

²¹⁹ *Blind Citizens Australia, submission.*

²²⁰ *Living My Way, submission.*

²²¹ *'Recommendation 9.3 - State and [T]erritory governments, together with the Australian Government, should establish an advisory council. The council should provide the [B]oard of the NDIA with ongoing advice on its activities and effectiveness in meeting its objectives, from the perspectives of people with disabilities, carers, suppliers of equipment and services, and [S]tate and [T]erritory service providers.'* See: Productivity Commission (2011), *Disability Care and Support, Report no. 54.*

²²² *Disability Council NSW, submission.*

²²³ *Vision 2020, submission.*

In its submission to the review, Activ Foundation proposed amending the NDIS Act to strengthen the reporting relationship between the CEO and the Minister ('not just through the Board of the NDIA'). It was felt that this:

*'would assist to control the potential for any perceived conflict of interest within the NDIA. It would help reinforce the role and the authority of the Federal Parliament, via the Federal Minister, to act as a further oversight function for the Agency. It may assist to further safeguard and maintain the financial sustainability of the [S]cheme, as the CEO would be directly accountable to the Minister, who is directly accountable to the Federal Cabinet and the Prime Minister.'*²²⁴

We do not support amending the legislative framework to strengthen the reporting relationship between the CEO and the Minister, as such a strengthening would undermine, and call into question the purpose of the Board.

Under section 174, the Board is required to provide the Disability Reform Council with quarterly reports, detailing key statistics relating to the NDIS and other matters specified by the Minister. Section 174(1)(b) states that the quarterly reports are to be given 'to the Ministerial Council within [one] month after the end of the period to which the report relates.'

In its submission to the review, the NDIA stated that, in implementing the Scheme, it 'has found the timing of providing the Quarterly Report is problematic, given the availability of data and the depth of analysis needed to provide the best possible report.'²²⁵ Thus, the Agency recommended that 'the timing for delivery of the quarterly report to the [Disability Reform] Council, set out in section 174(1)(b), be extended to two months after the end of the period to which the report relates.'²²⁶

We are unable to validate the concerns raised by the NDIA in relation to the logistics of producing the quarterly reports. Nonetheless, we believe the Agency's request appears reasonable, and thus, is worth consideration by government.

Recommendation 28: Consider the legislated timeframes related to the production of the quarterly reports.

Nomenclature

To avoid confusion and provide greater clarity to stakeholders, we recommend amending the NDIS Act to replace 'National Disability Insurance Scheme Launch Agency' with 'National Disability Insurance Agency'.

Recommendation 29: Amend the NDIS Act to replace 'National Disability Insurance Scheme Launch Agency' with 'National Disability Insurance Agency'.
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²²⁴ *Activ Foundation, submission.*

²²⁵ *NDIA, submission.*

²²⁶ *Ibid.*

8. Chapter 7: Other matters

Chapter 7 sets out a number of ancillary matters necessary for the operation of the NDIS. These include: debt recovery for the NDIA, general prescriptions relating to the CEO and the NDIA, constitutional matters, legislative instruments and this review of the NDIS Act.

Stakeholder feedback on Chapter 7 was light. The feedback we did receive focused on: the issue of debts for a deceased participant, the need for another review of the NDIS Act and Ministerial considerations when creating NDIS Rules.

Debt recovery and deceased participants

Under section 182, a payment of a NDIS amount made after a participant has died is a debt due to the NDIA. A number of stakeholders raised concerns with this provision. It was argued that section 182, as currently drafted, does not take into account circumstances where a provider delivers approved supports to a participant, but the participant dies prior to payment by the NDIA.²²⁷ To address this issue, stakeholders proposed amending section 182(2) (c) ('the participant died before the payment was made') to exclude from its application, payments relating to approved supports that have already been delivered.

The proposed amendment is supported. While we do not have access to evidence demonstrating the magnitude of the problem identified by stakeholders, it would seem equitable to allow providers to claim payment for any support that was approved and delivered in accordance with any relevant conditions.

Recommendation 30: Amend section 182(2)(c) to exclude from its application payments relating to approved supports that have already been delivered.

In its submission to the review, National Disability Services maintained that the NDIS Act does not 'acknowledge the necessary and, in many cases, mandatory tasks that may be undertaken by a provider following the death of a participant'.²²⁸ Thus, it recommended amending the legislation to reflect arrangements that currently exist at the State and Territory level, allowing providers to claim funding 'to respond to a client death and undertake the tasks relevant to each circumstance.'

In our view, the nature of the activities for which providers should be able to claim funding from the NDIA, is an issue that relates to the design of the Scheme. Accordingly, we have made no finding or recommendation in relation to the issue raised by National Disability Services, except to note the issue for the broader consideration of government.

Review of the NDIS Act

Section 208 provides the legislative basis for this review. It requires the Minister to 'cause an independent review of the operation of this Act to be undertaken, commencing on the second anniversary of the commencement of Chapter 3.'

²²⁷ *Attendant Care Industry Association, submission.*

²²⁸ *National Disability Services, submission.*

The near-universal view from stakeholders was that the review of the NDIS Act was scheduled too early, and that government should commit to a further review of the legislative framework at a later date.

This view is supported. We believe that government should conduct another review of the NDIS Act. This review should be scheduled so that any recommended amendments can be made prior to full Scheme in 2019-20 (e.g. in the next two-to-three years).

Recommendation 31: Conduct a further review of the NDIS Act in two-to-three years.
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NDIS Rules

Section 209 gives the Minister the power to make NDIS Rules. Subsection (3) states that, when making NDIS Rules, ‘the Minister must have regard [for] the need to ensure the financial sustainability of the NDIS.’

A number of stakeholders questioned the appropriateness of this provision. As the Australian Lawyers Alliance stated in its submission, ‘we are concerned that the only consideration specified that the Minister “must have regard [for]” in the creation of NDIS Rules, is “need to ensure the financial sustainability of the National Disability Insurance Scheme”’.²²⁹ To address this issue, it was suggested that section 209(3) should be expanded to require the Minister, in making the NDIS Rules, to have regard for the objects and principles of the NDIS Act and such other factors as to meet Australia’s obligations under the CRPD and the best interests of children.

The proposed amendment is partially supported. We believe that amending section 209(3) to reference the objects and principles of the NDIS Act (rather than the financial sustainability of the Scheme) is logical (given that the purpose of the legislative framework is to further the objects and principles of the NDIS Act) and would not weaken the intent of the provision (as ensuring the financial sustainability of the NDIS is reflected in both the objects and principles of the NDIS Act).

Recommendation 32: Amend section 209(3) to reference the objects and principles of the NDIS Act.
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NDIS regulations

Section 210 permits the Governor-General to make regulations prescribing matters: (a) ‘required or permitted by this Act to be prescribed’; or (b) ‘necessary or convenient to be prescribed for carrying out or giving effect to this Act.’

In its submission to the review, the NDIA recommended ‘creat[ing] an explicit regulation-making power within section 210 where the Governor-General may allow the CEO to delegate their power to a class of person.’²³⁰ The Agency maintained that such a change:

‘recognises that certain functions could be delivered more effectively and better outcomes achieved by non-government bodies in certain circumstances; for

²²⁹ Australian Lawyers Alliance, submission.

²³⁰ NDIA, submission.

*example, where Local Area Coordination provided by community-based groups can yield better results within the community’.*²³¹

In our view, the question of whether the NDIA should be allowed to outsource certain functions and decision-making powers is one that relates to the design of the Scheme. Accordingly, we have made no finding or recommendation in relation to recommendation made by the NDIA, except to note the issue for the broader consideration of government.

²³¹ *Ibid.*

9. Other issues

In the course of the review, stakeholders raised a number of issues that did not neatly fit within the existing structure of the NDIS Act. We discuss these issues below.

Duty of care

In its submission to the review, the Australian Federation of Disability Organisations maintained that:

‘The primary overall gap in the [NDIS] Act is the lack of a specific “Duty of Care” to a person with disability. Currently, the [NDIS] Act does not prevent the NDIS from refusing to fund critical (e.g., health) supports that were part of a participant’s [S]tate or [T]erritory-funded plan without ensuring that alternative supports for the person with disability are in place.’²³²

The Australian Federation of Disability Organisations thus recommended that ‘the NDIA be tasked with a Duty of Care for a prospective participant or participant to ensure that they have access to vital supports, especially health.’²³³

In our view, the question of what supports the NDIS should provide clients of existing programmes is one that relates to the design of the Scheme. We note that, under the IGA, Australian governments committed to providing ‘continuity of support to people with disability currently receiving services, to ensure that they are not disadvantaged in the transition to [the] NDIS.’²³⁴ In practice, this means that, where the NDIS does not fund a support an individual previously received under another programme, the NDIA will ‘seek to identify alternative supports or refer [the person] to other systems with a view to ensuring [the person is] able to achieve substantially the same outcomes as a participant in the NDIS.’²³⁵ Accordingly, we have made no finding or recommendation in relation to ‘duty of care’, except to note the issue for the broader consideration of government.

Operationalising bilateral agreements

To allow and support transition to full coverage of the NDIS, the States and Territories will sign bilateral agreements with the Commonwealth. So far, bilateral agreements have been signed between the Commonwealth and the Governments of New South Wales and Victoria.

In its advice to the review, the New South Wales Government maintained that legislative change would be required to operationalise aspects of its bilateral agreement. These aspects include:

- Clause 18 of Schedule D (Continuity of Support Arrangements) – ‘the Parties agree that people who meet the age and disability access requirements and are currently receiving supports in Commonwealth and state-funded services, [but] do not meet the residency

²³² Australian Federation of Disability Organisations, submission.

²³³ *Ibid.*

²³⁴ COAG (2012), *Intergovernmental Agreement for the National Disability Insurance Scheme Launch*.

²³⁵ NDIA (2014), ‘[Principle of “no disadvantage” and the NDIS](http://www.ndis.gov.au/sites/default/files/documents/Fact%20sheet%20-%20Principle%20of%20No%20Disadvantage.pdf)’, available at: <http://www.ndis.gov.au/sites/default/files/documents/Fact%20sheet%20-%20Principle%20of%20No%20Disadvantage.pdf>.

requirements as defined in the NDIS Act 2013, will be supported as participants in the [S]cheme',²³⁶

- Streamlining 'transition arrangements for approximately 78,000 people from [the] existing NSW specialist disability system into the NDIS' (i.e., to ensure that existing clients 'will not have to apply to the NDIA to transition')²³⁷
- 'Under the NSW transition arrangements, legislative powers are required to bind NDIA registered providers and to monitor application of NSW quality assurance mechanisms and safeguards, including compliance with NSW Quality Framework, where these apply to providers registering with the NDIA to provide specialist disability supports.'²³⁸

With reference to the first two aspects, we agree that legislative change would be required. In our view, both aspects could be operationalised by creating new NDIS Rules or amending the Becoming a Participant Rules for the purposes of section 21(2) of the NDIS Act.

With reference to the last aspect, we believe that legislative change to the NDIS Act, in relation to quality and safeguards, should only be made once the national quality and safeguarding framework has been developed and agreed on by all governments.

Recommendation 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.

²³⁶ [Bilateral Agreement between the Commonwealth and New South Wales: Transition to a National Disability Insurance Scheme](https://www.coag.gov.au/node/525), available at: <https://www.coag.gov.au/node/525>.

²³⁷ *New South Wales Government, submission.*

²³⁸ *Ibid.*

Reasonable accommodation

In its submission to the review, the Office of the Public Advocate (Queensland) highlighted the importance of the concept of ‘reasonable accommodation’²³⁹ and Article 12 of the CRPD²⁴⁰. Drawing on these, it thus recommended that:

‘The NDIS legislative framework, including the principles (sections 4 and 5) should reflect the obligation on all parties interacting with disability as part of the [S]cheme to make necessary accommodations to assist people with disability to participate in decision-making, which will, in turn, facilitate their exercise of choice and control under the NDIS.

‘The NDIS legislative framework, including the principles, should recognise a person’s specific right to support in decision-making, a prerequisite to exercising choice and control for many people with impairments that affect their decision-making abilities’²⁴¹

It is unclear what specific changes to the legislative framework the Office of the Public Advocate (Queensland) believes are required to operationalise the above recommendations. The practical impact of any possible change is also uncertain, given that the NDIS Act already has a number of principles and provisions that relate to making accommodations to assist and support people with disability to participate in decision-making. These include:

- Section 3(1)(e) states that an object of the NDIS Act is to ‘enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports’
- Section 4(4) states that a guiding principle of the NDIS Act is ‘people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports’
- Section 4(5) states that a guiding principle of the NDIS Act is ‘people with disability should be supported to receive reasonable and necessary supports, including early intervention supports’
- Section 4(8) states that a guiding principle of the NDIS Act is ‘people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity’

²³⁹ Under the CRPD, “‘reasonable accommodation’ means necessary and appropriate modification and adjustments, not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’ See: United Nations (2006), *Convention on the Rights of Persons with Disabilities and Optional Protocol*.

²⁴⁰ Article 12 states (among other things) that ‘States’ Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’ and ‘States’ Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ See: United Nations (2006), *Convention on the Rights of Persons with Disabilities and Optional Protocol*.

²⁴¹ Office of the Public Advocate (Queensland), submission.

- Section 4(9) states that a guiding principle of the NDIS Act is ‘people with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs’
- Section 4(14) states that a guiding principle of the NDIS Act is ‘people with disability should be supported to receive supports outside the NDIS, and be assisted to coordinate these supports with the supports provided under the NDIS’
- Section 5(d) states that a guiding principle of the NDIS Act, in relation to actions of people who may do acts or things on behalf of others, is ‘the cultural and linguistic circumstances, and the gender of people with disability should be taken into account’
- Section 6 gives the NDIA broad power to ‘support people with disability to exercise choice and control in the pursuit of their goals’ by providing ‘support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, [the NDIS] Act’
- Section 7 states that ‘the contents of any notice, approved form or information given under [the NDIS] Act, the regulations or the [NDIS Rules] to a person with disability must be explained by the giver of the notice, approved form or information to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand.’

Advocacy

During consultations, some stakeholders argued that the legislative framework should be amended to provide greater clarity on how advocacy will be funded and provided to participants. Such an amendment is not supported at this time. We note that, while governments have provided some guidance²⁴², the broader policy on advocacy, in relation to the NDIS is yet to be finalised. Once governments have agreed to both the national quality and safeguarding framework and the revised National Disability Advocacy Framework, there may be a need to amend the NDIS Act to operationalise or provide greater clarity on advocacy policy directions.

²⁴² In April 2015, the Disability Reform Council ‘agreed that the NDIS will fund decision support, safeguard supports and capacity building for participants, including support to approach and interact with disability supports and access mainstream services.’ It also states ‘that systemic advocacy and legal review and representation will be funded outside of the NDIS.’ See: Mitch Fifield (2015), ‘COAG Disability Reform Council Communique’, Media release, April, available at: <http://www.formerministers.dss.gov.au/15499/coag-disability-reform-council-communiqu/>.

Appendix A Stakeholder consultation

To inform our review, we engaged with stakeholders through targeted interviews, focus groups and a public submission process.

Targeted interviews and focus groups

Over the course of several weeks, the review team met with representatives from the Commonwealth, the States and Territories, and peak bodies for disability services and/or advocacy. The full list of stakeholders is outlined in Table 3.

The interviews and focus groups were conducted either face-to-face or via tele/videoconference. The aim of these sessions was to gather feedback from a broad range of stakeholders with experience of the legislative framework and discuss their views on its operation. Focus group sessions also allowed for different stakeholder groups to discuss and workshop ideas, as well as for the review team to test comments and suggestions that had already been received with different groups.

Table 3: Targeted interviews and focus groups, stakeholder list

Stakeholder	Method of engagement
Australian Capital Territory Government representatives	Face-to-face
New South Wales Government representatives	Face-to-face
Northern Territory Government representatives	Teleconference
Queensland Government representatives	Teleconference
South Australian Government representatives	Teleconference
Tasmanian Government representatives	Teleconference
Victoria Government representatives	Face-to-face
Western Australian Government representatives	Videoconference
Alzheimers Australia	Face-to-face
Australian Advisory Board on Autism Spectrum Disorders	Face-to-face
Australian Federation of Disability Organisations	Face-to-face
Blind Citizens Australia	Face-to-face
Brain Injury Australia	Face-to-face
Carers Australia	Face-to-face
Children with Disability Australia	Face-to-face
Disability Advocacy Network Australia	Face-to-face
Early Childhood Intervention Australia	Face-to-face

Stakeholder	Method of engagement
Inclusion Australia	Teleconference
Mental Health Australia	Teleconference
National Disability Services	Face-to-face
National Ethnic Disability Alliance	Face-to-face
People with Disability Australia	Face-to-face
Physical Disability Australia	Teleconference
Young People in Nursing Homes Alliance	Face-to-face
NDIA Board Chair	Teleconference
Independent Advisory Council Principal Member	Teleconference
Administrative Appeals Tribunal	Face-to-face
Attorney-General's Department	Face-to-face
Department of Finance	Face-to-face
The Treasury	Face-to-face
External Merits Review Support Component (DSS)	Face-to-face

Public submissions

The public submissions process was used as a means of expanding the scope of consultation and collecting feedback from a broad range of stakeholders. As a part of this process, a Discussion Paper was developed based on some preliminary consultations with DSS and the NDIA, as well as desktop research and an initial analysis of the legislative framework. The Discussion Paper looked at the NDIS thematically and posed a selection of questions to stakeholders around each theme. The Discussion Paper was published online via the NDIS website, as well as distributed directly to a collection of stakeholders nominated by the State and Territory governments. We received a total of 86 submissions - 73 from organisations (see Table 4), 11 from private individuals and two from confidential sources.

Table 4: Submissions from organisations

Autism Asperger's Advocacy Australia	JacksonRyan Partners
Mental Health Carers Arafmi Australia	Law Society of New South Wales
Midland Information Debt and Legal Advocacy Service	Living My Way
ADACAS (ACT Disability Aged and Carer Advocacy Service)	Macular Disease Foundation Australia
Ability	Mental Health Australia
Activ	Mental Health Coordinating Council
Aeran	MI Fellowship
Alzheimer's Australia	Multicultural Disability Advocacy Association
Amana Living	Multiple Sclerosis Australia
Attendant Care Industry Association	National Disability Insurance Agency
Australian Association of Social Workers	National Disability Services
Australian Federation of Disability Organisations	National Ethnic Disability Alliance
Australian Lawyers Alliance	New South Wales Government
Australian Services Union	Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council
Australian Blindness Forum	Northern Territory Government
Blind Citizens Australia	Northern Territory Mental Health Coalition
Brain Injury Australia	Novita
Carers Australia	Occupational Therapy Australia
Carers Queensland	Office of the Privacy Commissioner NSW
CASS	Office of the Public Advocate (Queensland)
Children with Disability Australia	Office of the Public Advocate (Victoria)
Citizen Advocacy Perth West	People with Disabilities Western Australia
Civil Society Australia	Physical Disability Council of NSW
Commonwealth Ombudsman	Psychiatric Disability Services of Victoria
Council for Intellectual Disability	QLD Health
Dieticians Association of Australia	Queensland Advocacy Incorporated

Disability Advocacy NSW	Queenslanders with Disability Network
Disability Council NSW	Royal Australian and New Zealand College of Psychiatrists
Disability Services Commissioner Victoria	St John of God Accord
Down Syndrome Australia	TEAMHealth
Early Childhood Intervention Australia	Tendercare
Early Childhood Intervention Australia (Victorian Chapter)	Victorian Healthcare Association
Enable	Vision 2020
Endeavour Foundation	WA's Individualised Services
Guide Dogs Australia	Western Australian Association for Mental Health
Health and Disability Services Complaints Office (Western Australia)	Young People in Nursing Homes National Alliance
Information and Privacy Commission NSW	

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