Spinal Cord Injuries Australia

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

Spinal Cord Injuries Australia

Policy and Advocacy Team Submission

November 2021

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Spinal Cord Injuries Australia

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Committee Secretary
Senate Standing Committees on Community Affairs
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Introduction

Spinal Cord Injuries Australia (**SCIA**) welcomes the opportunity to offer a submission to the Senate Standing Committees on Community Affairs on the proposed legislative package to reform the National Disability Insurance Scheme (**NDIS**).

This submission addresses provisions in the proposed *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (**the Bill**). This submission also contains commentary and recommendations related to the new *NDIS (Participant Service Guarantee) Rules 2021* and *NDIS (Plan Administration) Rules 2021*, amendments to *NDIS (Plan Management) Rules 2013* and *NDIS (Becoming a Participant) Rules 2016*, and updates to *NDIS (Children) Rules 2013*, *NDIS (Nominees) Rules 2013* and *NDIS (Specialist Disability Accommodation) Rules 2020* as published by the Department of Social Services (**DSS**) in its inquiry earlier in the year.[1] In order to understand the operation and impact of the Bill, it is important for the Committees to appreciate the framework of the proposed Rules and how the Bill's amendments may be implemented in practice. At this stage, it is unclear how the DSS consultation has impacted the drafting of the proposed amendments and introduction of Rules, and as such, this submission assumes that they remain, as yet, unchanged.

The NDIS is a transformative scheme and has positively impacted people with disability and their family and carers' lives. SCIA looks forward to strengthening legislative provisions and protections in the interests of current and future NDIS participants and fostering a well developed NDIS market.

About Spinal Cord Injuries Australia

SCIA is a for-purpose organisation working for people living with spinal cord injury (**SCI**) and other physical disabilities. SCIA was founded by people with SCI over fifty years ago; people with disability make up over 25% of our staff, and the majority of our Board live with SCI. SCIA is a national, member-based organisation that serves 2,500 members made up of people living with disability, their family, carers, researchers, and other professionals in the sector.

SCIA's Policy and Advocacy Team provides individual and systemic advocacy, and supports self-advocacy. Our team aims to ensure that people living with SCI and other disabilities do not face

[1] Department of Social Services, 'Proposed NDIS legislative improvements and the Participant Service Guarantee', DSS Engage, https://engage.dss.gov.au/proposed-ndis-legislative-improvements-and-the-participant-service-guarantee/ [accessed on 4 November 2021].

barriers in exercising their independence and realising their human rights. Our team strives to achieve inclusivity and change for people with disability, their family members and carers.

SCIA's Community Services Team provide support coordination and plan management services to NDIS participants across different states.

The recommendations collated in this submission are founded on feedback and reflections from SCIA members with personal experience with the NDIS, and SCIA individual advocates, plan managers and support coordinators who directly work with NDIS applicants and participants in NSW.

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Executive summary and recommendations

This submission outlines SCIA's position in relation to the positive developments in the legislative package, some possible areas of concern and recommendations to improve outcomes for NDIS participants, applicants, service providers and other stakeholders.

The major issues that require reconsideration in the legislative package relate to clarifying the specific circumstances triggering the CEO to vary or re-assess a plan; assessing reasonable risk when nominating plan management; and clarifying the circumstances in which the CEO can determine that a specific service provider should not provide supports to a participant.

Generally, the package represents a significant step forward in providing greater protections, flexibility and access to justice, however there is scope to take further steps to clarify persistent issues affecting participants and service providers.

Recommendation 1: *Delete ss 47A(1)(a) and (c), 47A(6) and 48(5) from Item 62 of the Bill and insert ss 47A (6) and 48(5) into Item 61 under table item 3 as Category C Rules.*

Recommendation 2: *Re-draft Sections 10, 11 and 12 of the Plan Administration Rules.*

Recommendation 3: *Re-draft Section 9(2) of the Plan Management Rules.*

Recommendation 4: *Re-draft Section 8(2) of the Plan Management Rules.*

Recommendation 5*: In Section 6(6) of the proposed Plan Management Rules 2021, amend subsection (a) to read "any preference expressed by the participant, or by another participant in the participant's local community, or by any other member of the participant's cultural community, in relation to the manner in which a support or class of supports is to be provided, or by whom a support or class of supports is to be provided, to the participant".*

Recommendation 6: *Item 18, and associated references in Sections 8, 10 and 12 of the Becoming a Participant Rules, should be amended and substituted with "an impairment or impairments to which a disability is attributable and that are episodic or fluctuating may be taken to be permanent".*

Recommendation 7: *The following sub-section should be inserted under Section 8(2) of the Becoming a Participant Rules, specifying "(c) Medical advice and evidence has been submitted by an appropriately qualified treating health professional in consideration of any determination made under sub-section (2) at the initiative of the applicant or the CEO". This sub-section should likewise be repeated and inserted under Section 9(2) as follows: "Medical advice and evidence has been submitted by an appropriately qualified treating health professional in consideration of any determination made under sub-section 2(b) at the initiative of the applicant or the CEO".*

Recommendation 8: *The new subsection (6B) should be inserted into Item 43 of the Bill that reads "If a person receives a notice of a decision in relation to subsection (6) made by the CEO, the CEO must give the person the reasons for the decision in addition to the notice".*

Recommendation 9: *Make an addition to Item 48 of the Bill to clarify that the AAT will have jurisdiction to holistically consider all of an NDIS participant's requests for additional supports following an appeal of a participant's statement of supports, including those that have not yet undergone a review by the NDIA.*

1. Positive developments in the legislative package

SCIA welcomes many of the reforms outlined in the Bill and its associated Rules. The guarantees afforded by the legislation of the Participant Service Guarantee (**PSG**)[2] and certainty surrounding timeframes for decision-making and service standards provide greater accountability mechanisms for all NDIS stakeholders. Additionally, annual additional reporting by the Commonwealth Ombudsman[3] provides another avenue to ensure additional oversight of the National Disability Insurance Agency (**NDIA**).

Amendments to the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (**Participant Rules**) will finally recognise the diversity of experience of disability for people with psychosocial disability and the need to re-consider the disability requirements under the eligibility criteria of the *National Disability Insurance Scheme Act 2013* (**the Act**). The clarification of the term 'review' is also a welcome development through Division 4 of the Bill provides better delineation between different types of decisions that have concurrently been referred to as 'reviews', causing much confusion for participants and advocates as reflected in findings from the Tune Review.[4]

Clarification of the Administrative Appeals Tribunal's (**AAT**) jurisdiction, when considering an NDIS appeal, under Item 49 of the Bill, aligns better with the foundation for a holistic merits review and ensures that participant supports may be varied or re-assessed without stalling before the AAT has reached hearing on a specific support.

Also, Items 1 to 10 of the Bill, improve the principles of the Act in recognising the needs for: removal of moderating language; co-design with people with disability; recognition of the role of families and carers and their ongoing connections to build their capacity and connection to social and economic activities; a well-developed, innovative NDIS market of disability supports defined by best practice and continuous improvement; and expanded understanding of communications accessibility to foster universal inclusion for all people with disability.

2. Public consultation

SCIA was disappointed to learn that the consultation period with the Department of Social Services (**DSS**) for this significant legislative package would only be open for four weeks and that this present inquiry would effectively be open for 10 days between the introduction of the Bill in the House of Representatives on 28 October 2021 and submissions being sought by 8 November 2021. In light of present working restrictions imposed by the COVID-19 pandemic on many people living across Australia, a four week and subsequent 10 day period are severely limited periods in which to closely deconstruct, understand and provide insightful recommendations on the introduction of a substantive Bill, and for the purposes of the DSS consultation a further seven legislative documents and their respective explanatory memoranda. For most members of the disability community without expertise in administrative law, it is a particularly daunting task to provide feedback on such a package and best understand how provisions may operate in practice.

It is also particularly concerning as the Minister for the NDIS and DSS received advice from the Independent Advisory Council (**IAC**) in July 2021 that an appropriate consultation period for the draft

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[2] *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021* (Cth) (**PSG Rules**).

[3] See Item 55 and insertion of s 204A of *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021* (Cth) (**the Bill**).

[4] David Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019, pp. 143-144.

legislation should be open for a 'minimum of 8 weeks' to allow "the disability community to meaningfully provide feedback and enhance transparency by making reform priorities explicit".[5] Choosing instead to limit the consultation to half of this recommended timeframe could create a sense of purportedly reduced transparency and foster mistrust, which the IAC had already signalled existed in much of its discussion in this report.

Additionally, considering the context surrounding the origins of this package of reforms in recommendations from the Tune Review,[6] which was a significantly lengthy report covering a vast range of issues, the length of time for consultation seems inadequate to allow time to properly map and understand how the review's recommendations were accounted for in the legislative provisions and whether other gaps exist.

Finally, it is important to reiterate that the Australian Government, having ratified the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) is bound by Article 4(3) to closely consult with and actively involve persons with disabilities, through their representative organisations, in the development and implementation of legislation and policies. The short timeframe for consultation may disenfranchise many across the disability community who are unable to commit sufficient time to providing a submission and this raises questions around compliance with Article 4(3).

3. Concerns

While the legislative package includes a wealth of welcome reforms, there are some areas for concern that require further clarification and consideration.

3.1. CEO powers and considerations

Many of the recommendations from the Tune Review have been acted on in this legislative package through the conferral of additional powers on the CEO and NDIA delegates via the introduction of new rules and amendments and updates to existing rules. However, in the drafting of relevant provisions, SCIA is concerned that many of these powers are 'principle' based, rather than 'circumstance' based, such that the CEO or NDIA delegates need only have consideration of certain matters before making decisions. This leaves considerable scope to the CEO and NDIA delegates to make highly subjective assessments, that may lead to inconsistency and unfairness when seen in the context across the whole of the NDIS.

While SCIA recognises the benefit of having an 'open list' of considerations for decision-makers to consider in light of unforeseen situations that may arise in the future, there are some circumstances in which powers should be exercised in a specific way and there should be legislative boundaries to provide for these. Without this legislative guarantee, there is a risk that the NDIA may institute Operational Guidelines that undermine NDIS applicants', participants' and other stakeholders' interests. It is also particularly concerning when Rules fall under Category D of s 209(7) of the Act and the Minister may make amendments following simple consultation with the states and territories, as this derogates from the power of states and territories to contribute to the decision-making process in the operation of the NDIS.

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[5] Independent Advisory Council to the NDIS, 'Strengthening Scheme Reforms to Access and Planning', July 2021, p. 8.
[6] David Tune, *Review of the National Disability Insurance Scheme Act 2013*, December 2019.

3.1.1. Plan variation and re-assessment

SCIA welcomes the introduction of the power to vary a plan on a participant's request or on the CEO's initiative under newly proposed s 47A and the re-assessment power under substituted s 48. However, there are a few open questions with the framing of Items 23 and 24 and Sections 10, 11 and 12 of *NDIS (Plan Administration) Rules 2021* (**Plan Administration Rules**). It is important to first reiterate the origins of this amendment power within the Tune Review and the circumstances in which the report recommended amendment of a plan to be appropriate. These include: minor administrative changes (typographical errors or updates to a participant's contact details), rectifying miscalculations in amounts, incorrect statement of goals, updates following decisions from reviews, change in plan management type and addition of new supports following receipt of a new quote.[7] The Tune Review also noted that in response to this issue the Agency were implementing 'light touch reviews' and conversations would be had with the participant or their nominee to inform them of the process and seek their agreement.[8] This process should likewise be reflected in the legislation, such that variations initiated on the CEO's initiative may only be made following consultation, or an attempt to consult, an NDIS participant or their nominee. As such, it is promising to note that Item 23 now includes a provision that a variation must be prepared with the participant.

SCIA welcomes amendments under Item 24 allowing participants to make a request for a plan re-assessment under s 48 as well as under s 47A. With trends toward granting longer plans, it is appropriate to allow participants to request plan re-assessments when their circumstances change. This may be due to a variety of reasons, including where they require additional supports due to the breakdown of a relationship and associated change in levels of informal supports available or when their condition is progressive or degenerative and their impairments unexpectedly change.

In light of the above, the matters affecting the CEO or NDIA's delegates' decision to vary or re-assess a plan should be differentiated under the Plan Administration Rules, particularly as under the Bill the CEO would retain the right to conduct a plan re-assessment in circumstances where a participant may have requested a plan variation under s 47A. SCIA feels that in drafting specific matters to regard for each, there are different factors affecting the decision-making process, there should be further consultation with NDIS participants and their representative disability organisations in re-drafting Sections 10, 11 and 12. This will allow better understanding of the circumstances in which a variation or a reassessment is more appropriate to achieve better outcomes for the participant.

The proposed categorisation of certain rules under s 209, under Item 62 of the Bill, will allow the Minister for the NDIS to make amendments to rules relating to matters to which the CEO should have regard when varying a plan or in considering whether to conduct a re-assessment of a plan. This would only require consultation with states and territories, rather than universal or majority agreement as specified under other categories in s 209. As discussed above, there are significant concerns around the administration of the CEO's power in considering whether to initiate a variation or re-assessment as the Rules are presently drafted. As such, we recommend that the rule-making power of the Minister as it relates to ss 47A(1)(a) and (c), 47A(6) and 48(5) should be made under Category C to ensure that states and territories retain majority power in the decision-making process and that there is recourse for political accountability for the disability community. This is particularly important while uncertainty remains about the use of these powers in practice by the CEO and NDIA delegates.

[7] David Tune, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, pp. 136 – 137.
[8] Ibid, p. 137.

***Recommendation 1**: Delete ss 47A(1)(a) and (c), 47A(6) and 48(5) from Item 62 of the Bill and insert ss 47A (6) and 48(5) into Item 61 under table item 3 as Category C Rules.*

***Recommendation 2:** Re-draft Sections 10, 11 and 12 of the Plan Administration Rules.*

3.1.2. Amendments impacting self-managed and plan-managed participants

The introduction of the 'unreasonable risk' test for plan-managed participants under Items 31 to 33 of the Bill amends Sections 43 and 44 of the Act, and as expanded on in Section 9 of *NDIS (Plan Management) Rules 2021* (**Plan Management Rules**). Unreasonable risk is not well elaborated on in Section 9, particularly when compared with Section 10 as it relates to assessing unreasonable risk for self-managed participants, which presents potential inequity in the CEO or NDIA delegates' assessment of unreasonable risk. Plan management is not a form or variation of self-management and participants' experiences under these two different management types should be differentiated.

We understand the recommendation from the Tune Review regarding the risk to participants engaging unregistered service providers through plan management,[9] but we also wish to highlight that choice and control for participants is increased due to greater service offerings provided by unregistered service providers. Also, with the national rollout of the NDIS Worker Screening Check, self-managed participants may require workers of unregistered service providers to undergo the check. Likewise registered plan managers should be empowered to require workers to undergo a check in the best interests of the participant.

In light of the observations above, it is important to consider re-drafting Section 9(2) of the Plan Management Rules in order to ensure that the CEO or NDIA delegates have regard to matters including, but not limited to: the participant's history with a specific registered plan management provider, the participant's preference for a particular plan management type and/or registered plan management provider, whether a plan management provider has been consulted and discussed possible safeguards and risk mitigation strategies to avoid an unreasonable risk to the participant.

***Recommendation 3**: Re-draft Section 9(2) of the Plan Management Rules.*

3.1.3. Market intervention powers

As discussed above in subsection 3.1.2., there is a similar lack of guidance and clarification provided in Sections 6 and 8 of the Plan Management Rules as it relates to the CEO and NDIA delegates' market intervention powers.

Under Section 8 of the proposed Plan Management Rules, the CEO and NDIA have a wide power in determining whether specific providers may be barred from providing certain supports if satisfied of one or more of the provisions outlined in s 8(1). On reviewing s 8(2), it is clear that without further clarification, this power could be exercised arbitrarily and unfairly disadvantage some service providers and participants. As above, this provision should be re-drafted following further consultation with NDIS service providers and participants, and there should be consideration of mandatory consultation of a service provider prior to exercising the power under s 8(1).

Also, under the matters for consideration in making a market intervention under Section 6(5), as listed under Section 6(6) of the Plan Management Rules, the CEO and NDIA delegates should have regard to specific circumstances, including whether the person identifies as belonging to a First Nations community or coming from a culturally and linguistically diverse background, which may be relevant

[9] David Tune, *Review of the National Disability Insurance Scheme Act 2013*, December 2019, p. 126.

considering different models of care, services and supports across different communities. A consideration for future reform under Section 6(6) may consider introducing a positive onus on the CEO and NDIA delegates to engage in localised market analyses to best understand the needs of the region, particularly in rural and remote areas, and how these powers could best be used, to promote the interests of all participants in these regions.

Recommendation 4: *Re-draft Section 8(2) of the Plan Management Rules.*

Recommendation 5*: In Section 6(6) of the proposed Plan Management Rules 2021, amend subsection (a) to read "any preference expressed by the participant, or by another participant in the participant's local community, or by any other member of the participant's cultural community, in relation to the manner in which a support or class of supports is to be provided, or by whom a support or class of supports is to be provided, to the participant".*

3.2. Access pathways

As discussed in Section 1 of this submission, amendments to s 24 of the *NDIS Act* under Item 18 of the Bill, in recognising the episodic and fluctuating nature of psychosocial disabilities is a welcome development and reflects a better understanding of the disability experience. However, this amendment should be expanded to recognise that many disabilities, beyond psychosocial disabilities, are, by their nature also episodic and fluctuating. Some of these conditions may include, but are not limited to, disabilities associated with diagnoses of multiple sclerosis, arthritis and fibromyalgia. In many cases, in light of the impact of these conditions a person should be considered as having a permanent disability as per the disability requirements under the Act. Likewise, they should be subject to the same Rules outlined under s 8 of the amended Becoming a Participant Rules.

The second primary concern that SCIA has in relation to amendments to the Becoming a Participant Rules involve the ambiguity and vagueness surrounding specific terms used in Sections 8 and 9 in determining when an impairment or impairments are likely to be permanent (psychosocial disabilities) and when other disabilities result in substantially reduced functional capacity. In Section 8, the terms 'substantial improvement', 'appropriate treatment', 'managing…the condition', 'period of time that is reasonable' and 'reasonably available' are vague. Likewise, in Section 9, the term 'no known, available and appropriate evidence-based clinical, medical or other treatments' is highly ambiguous. As outlined in Section 3.1 of this submission, the CEO and NDIA delegates should not be tasked with subjectively making assessments of a person's capacity and engagement with treatments without further guidance and clarification from the Rules. As presently drafted, this guidance is presently missing. If this were the case, delegates could effectively engage in providing subjective health advice on the efficacy of alternative treatments or therapies that an applicant may not yet have undergone, before they may be considered eligible for the NDIS.

The Explanation of the Becoming a Participant Rules provides better guidance as to how the CEO and NDIA delegates should interpret terms, however these should be explicitly referenced in the Rules themselves. In discussing Section 8, the Explanation specifies that in determining what a reasonable period of time is, the decision will be guided by an "appropriately qualified health professional and supported by medical evidence".[10]

[10] Department of Social Services, 'Explanation of National Disability Insurance Scheme (Becoming a Participant) Rules 2021', Australian Government, p. 9.

SCIA agrees that assessments under Sections 8 and 9 should be made on a case-by-case basis,[11] but in order to ensure that every case is decided based on clinical evidence in interpreting the above-mentioned terms, the Becoming a Participant Rule should further specify that determinations are based on supporting evidence from treating health professionals provided by the applicant. Additionally, organisations representing health professionals should be provided with opportunities to consult the NDIA and provide insight into consistent interpretation of these terms into the establishment of any future Operational Guidelines or amendments to the Rules.

Recommendation 6: *Item 18, and associated references in Sections 8, 10 and 12 of the Becoming a Participant Rules, should be amended and substituted with "an impairment or impairments to which a disability is attributable and that are episodic or fluctuating may be taken to be permanent".*

Recommendation 7: *The following sub-section should be inserted under Section 8(2) of the Becoming a Participant Rules, specifying "(c) Medical advice and evidence has been submitted by an appropriately qualified treating health professional in consideration of any determination made under sub-section (2) at the initiative of the applicant or the CEO". This sub-section should likewise be repeated and inserted under Section 9(2) as follows: "Medical advice and evidence has been submitted by an appropriately qualified treating health professional in consideration of any determination made under sub-section 2(b) at the initiative of the applicant or the CEO".*

3.3. NDIA reasons for decisions

SCIA welcomes the mandatory issuance of reasons for reviewable decisions as provided for by Item 40 of the Bill following feedback from the consultation led by DSS. This is a significant development as receiving reasons should not be limited to circumstances in which the participant or applicant makes a request of their own initiative. In circumstances where a participant or applicant's preferred method of communication is via letter in the post, their right to consider proceeding to a 'review' (internal review) may be limited if the time period of 3 months for request of a review is exceeded.[12] This may arise in circumstances where they must first await notice of the reviewable decision, then proceed to request reasons for the decision, await receipt of these reasons, give them appropriate consideration and then make a request for review in their preferred method, which may be a written request and subject to delay due to postal restrictions. As such, this amendment from the proposed draft is a significant development, however there is scope to build on this.

Additionally, while in practice NDIS applicants or participants may receive reasons for a decision made under s 100(6) of the *NDIS Act*, if Item 40 establishes a right to request reasons for an initial decision, there should be a statutory basis to receive reasons for a decision made under s 100(6). Again, this right is automatic and should not require the applicant or participant to make a separate request for reasons.

This amendment would better align with the principles underlying the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and good administrative decision-making foundations generally.

Recommendation 8: *The new subsection (6B) should be inserted into Item 43 of the Bill that reads "If a person receives a notice of a decision in relation to subsection (6) made by the CEO, the CEO must give the person the reasons for the decision in addition to the notice".*

[11] Ibid.

[12] As prescribed under s 100(2) of the *NDIS Act*.

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3.4. Jurisdiction of the AAT

While Item 48 of the Bill will allow the AAT to conduct an assessment of the entirety of a participant's varied or re-assessed plan, and not just the original statement of supports in question that may have been later varied or re-assessed by the NDIA, there remains a persistent issue surrounding the AAT's jurisdiction to consider additional supports that may not have been subject to an internal decision by the NDIA. In *QDKH*,[13] the AAT determined that there was not jurisdiction under the NDIS Act for consideration of 'additional supports' that may have been subsequently rejected by an NDIA delegate, but had not yet undergone an internal review. This decision has proved contentious and other AAT decisions have not followed *QDKH*'s reasoning.

As the Federal Court has now delivered its judgment in *QDKH*,[14] the Australian Government has the opportunity to affirm its orders and construction of the *NDIS Act* in conjunction with the *Administrative Appeals Tribunal Act 1975* (Cth). This will provide greater certainty to participants, ensure their timely access to justice and provision of supports as their circumstances may change or new supports become available to them.

Recommendation 9**:** *Make an addition to Item 48 of the Bill to clarify that the AAT will have jurisdiction to holistically consider all of an NDIS participant's requests for additional supports following an appeal of a participant's statement of supports, including those that have not yet undergone a review by the NDIA.*

4. Conclusion

SCIA is hopeful that this legislative package will bring significant protections and flexibility for participants and other NDIS stakeholders, however there needs to be more clarifications surrounding certain provisions to ensure the integrity of achieving better outcomes for people with disability is respected. With this additional clarification, it will ensure better access to justice, consistency and fairness for NDIS participants, applicants and service providers and provide clearer legislative basis to define the CEO and NDIA delegates' decision-making powers.

SCIA looks forward to working with stakeholders to ensure that in the administration and operationalisation of the legislative package, the interests of NDIS applicants, participants and other stakeholders, including service providers, are respected and promoted.

If the Committee requires further information or has any queries about the content of this submission, please do not hesitate to contact SCIA.

Kind regards,

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[13] *QDKH and National Disability Insurance Agency* [2021] AATA 922.

[14] *QDKH, by his litigation representative BGJF v National Disability Insurance Agency* [2021] FCAFC 189.