10 September 2021

Ms Kathy McEwan

Director, Agency Policy

National Disability Insurance Agency

Via email: [agencypolicy@ndis.gov.au](mailto:agencypolicy@ndis.gov.au)

**RE: Consultation Paper – *Supporting you to make your own decisions***

Dear Ms McEwan

People with Disability Australia (PWDA) welcomes the opportunity to provide this submission responding to the National Disability Insurance Scheme (NDIS) consultation paper, *Supporting you to make your own decision.*

PWDA is a leading disability rights advocacy and representative organisation and the only national cross-disability organisation representing the interests of people with all kinds of disability. We are a not-for-profit and non-government organisation, and our membership is comprised of people with disability and organisations primarily constituted by people with disability.

PWDA is funded both as a national peak disability representative organisation to undertake individual advocacy and as the NSW peak body to undertake systemic advocacy. We have extensive experience in providing advocacy and outreach to people with disability, including people living in closed or hard to reach settings and deliver advocacy support through the National Disability Advocacy Program across New South Wales and parts of Queensland.

We welcome the National Disability Insurance Agency’s (NDIA) commitment to improving support for decision making in line with the Convention on the Rights of Persons with Disabilities (CPRD). However, we are concerned that the proposed policy fails to comply with the CPRD.

This submission outlines our recommendations, which seek to ensure that the NDIA’s policy is CPRD compliant and truly respects the will and preferences of participants.

## Non-voluntary nominee appointments

The NDIA currently has the power to appoint a nominee upon the request of a participant, and in rare and exceptional cases, without the request of a participant (non-voluntary nominee appointments).[[1]](#footnote-1) The proposed policy retains both types of nominee appointments.

We support the NDIA’s use of voluntary nominee appointments, as these reflect the will and preference of the participant to use a nominee. However, we do not support non-voluntary nominee appointments.

Non-voluntary appointments violate Article 12 of the CPRD. As explained in the Committee on the Rights of Persons with Disabilities’ *General Comment No.1 (2014)*, Article 12(2) does not permit the denial of legal capacity due to a perceived deficiency in a person’s decision-making skills.[[2]](#footnote-2) Instead, the Government must provide support to enable the person to exercise their legal capacity.[[3]](#footnote-3)

Where a person has been provided with all possible decision-making support and it is still not practicable to determine their will and preferences, the person’s decision(s) must be ascertained by reference to ‘the best interpretation of [their] will and preferences.’[[4]](#footnote-4)

To comply with the Article 12 of the CPRD, the NDIA must therefore cease non-voluntary nominee appointments. As the rights contained in Article 12 must be realised immediately, rather than progressively, non-voluntary nominee appointments must be ended as a matter of urgency.[[5]](#footnote-5)

**Recommendation 1:** To comply with Article 12 of the CPRD and the interpretation contained in the Committee on the Rights of Persons with Disabilities’ *General Comment No.1 (2014)*, the NDIA must immediately cease non-voluntary nominee appointments and only appoint nominees where this reflects the will and preferences of the participants.

## Safeguarding and nominee appointments

Nominee appointments that are made in accordance with a participant’s will and preferences must still be subject to appropriate and effective safeguards.[[6]](#footnote-6)

We recommend that the NDIA implements the following recommendations to strengthen nominee safeguards:

**Recommendation 2:** Rule 4.4 of the *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) should be amended to prohibit a participant’s carer from being appointed as their nominee.

This will help to prevent situations where the participant’s carer is the only person in their life and is able to perpetrate abuse or neglect without oversight by other people. It will also prevent situations where carers use their nominee powers to perpetrate abuse, such as requesting the cessation of services.

**Recommendation 3:** When developing processes toreview existing nominee appointments at key life stages and plan reviews (as outlined on page 27 of the Consultation Paper), the NDIA should ensure that the review includes speaking directly to the participant and determining whether continuing the nominee appointment still reflects their will and preference.

**Recommendation 4:** The NDIA must ensure that participants are aware of their right to request a review of a nominee appointment. This should involve ensuring that the participant and their other support people understand this right, reminding them of this right at all planning meetings and publishing accessible information about how to appeal a nominee appointment.

**Recommendation 5:** Participants must always retain the right to request changes to their plan without the nominee’s consent to avoid delay, especially in urgent situations such as needing to quickly change housing arrangements.

**Recommendation 6:** The NDIA must ensure that participants are included in all conversations and correspondence involving the nominee.

**Recommendation 7:** The proposed policy should provide more detailed information about undue influence and abuse. It should identify ‘red flags’, such as where a nominee requests the cessation of services to isolate the participant. The NDIA should consult with people with disability and their representative organisations to develop a comprehensive list of ‘red flags’.

## Support for decision making

The following two recommendations relate to support for decision making.

First, to enable decision supporters to perform their role, the NDIA must ensure that they are included in all communications, correspondence, and meetings. Where the NDIA does not include a decision supporter in meetings and correspondence, they are denying the participant their right to exercise legal capacity.[[7]](#footnote-7)

**Recommendation 8:** The NDIS Operational Guidelines are amended to ensure that the NDIA includes decision support people (where appointed by the participant) in all communications, correspondence, and meetings.

In addition, our advocates reported that some participants would benefit from therapeutic support to increase their involvement in decision making. They suggested that specific funding should be available for this support and guidance provided as to what evidence is required to access it.

**Recommendation 9:** Participants should be able to access specific funding to access therapeutic support to increase their involvement in decision making. The NDIA should set out the evidence required to access this support.

## Decision making capability framework

Australia is signatory to the Convention on the Rights of the Child (CRC), which contains rights relating to all children and rights relating specifically to children with disability. When drafting and finalising any policy that affects children with disability, the NDIA must ensure it complies with the CRC. In this regard, we recommend that:

**Recommendation 10:** The NDIA amends the ‘Strategies to Build Capacity’ row in Figure 3 in the Decision Making Capability Framework to provide Young People (13-17), as well as Young Adults, the opportunity to ‘explore and increase understanding of personal will and preference’. This ensures dignity and promotes self-reliance in accordance with Article 23 of the CRC.

**Recommendation 11:** In accordance with Article 12 of the CRC, the NDIA should ensure it has consulted with children and young people directly before finalising the Decision Making Capability Framework.

Should you wish to discuss this submission further, please contact my Senior Manager of Policy, Giancarlo de Vera on 0413 135 731 or at [giancarlod@pwd.org.au](mailto:giancarlod@pwd.org.au).We thank you again for the opportunity to provide feedback on the NDIA’s proposed support for decision making policy.

Yours sincerely

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Sebastian Zagarella

Chief Executive Officer

1. <https://www.ndis.gov.au/understanding/families-and-carers/guardians-and-nominees-explained> [↑](#footnote-ref-1)
2. Committee on the Rights of Persons with Disabilities, *General Comment No.1 (2014) Article 12: Equal Recognition Before the Law*, UN Doc CPRD/C/GC/1 (19 May 2014) [15]. [↑](#footnote-ref-2)
3. Ibid [16]. [↑](#footnote-ref-3)
4. Ibid [21]. [↑](#footnote-ref-4)
5. Ibid [30]. [↑](#footnote-ref-5)
6. *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (‘*CPRD*’) art 12(4). [↑](#footnote-ref-6)
7. CPRD (n 7) art 12(2). [↑](#footnote-ref-7)