

14 June 2024

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Supplementary submission to inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]

We refer to the above Inquiry, and our previous public submission dated 17 May 2024 ('First Submission'). This submission is intended to be read alongside the First Submission and refers to its recommendations.

This supplementary submission addresses matters raised by the recent amendments made to, and some of the views expressed in debate on, the Bill in the House of Representatives on 5 June 2024. We refer to these amendments as they are numbered and described in amendment sheets SK113 and PA110.

'NDIS Supports' and APTOS

We welcome the changes made by amendment sheet SK113 at:

- item 5 and consequential amendments, which replaced the Bill's previous proposed section 10 and its definition of 'NDIS Supports'; and
- item 17 and consequential amendments, which removed the proposed use of the *Applied Principles and Tables of Support* ('APTOS') as a transitional measure.

As set out at Part 4 of our First Submission, these components of the initial Bill were inappropriate and would have led to serious legal and policy issues for the NDIS. The amendments largely address our Recommendations 10 and 13.

We note the statement in the Supplementary Explanatory Memorandum relating to sheet SK113 that '...[t]his transitional approach will provide an opportunity for deep engagement with the disability community on the future approach to NDIS supports'.¹ We anticipate this engagement process will assist Government to ensure the definition of 'NDIS supports' is not inappropriately narrow, as was our concern in Recommendations 11 and 12 of our First Submission and many of the other submissions from disability organisations to this Inquiry.

The effect of item 17 is to replace APTOS as a transitional measure with a transitional rule to be made by the Minister, which we understand would need to be issued concurrently with the entry into force of this legislation. The Minister should make public a draft of this transitional

¹ Supplementary Explanatory Memorandum relating to amendment sheet SK113, p3.

rule as soon as possible, in the interests of transparency and promoting genuine engagement with the disability community.

Statutory nomination of ‘extraordinary circumstances’ where payments may be made above existing funding limits

We also welcome the changes made by amendment sheet SK113 at item 10, which lists certain exceptional circumstances in which payments can be made to a participant despite that participant having exceeded their plan budget. These exceptional circumstances include cases of fraud or financial exploitation, to prevent or lessen imminent threats to a participant, or where a variation cannot be requested or finalised in time.

This amendment addresses issues we set out at [7.3.2] of our First Submission. We think this amendment is appropriate to address risks to participants of being left without funding.

Embedding co-design requirements for legislative instruments

Items 5 and 8 on amendment sheet PA110 are described as ‘ensur[ing] that the Minister explicitly has regard to the principle of co-design when making a legislative instrument’² for the purposes of establishing how needs assessments will be conducted and the method to be used in calculating a participant’s ‘reasonable and necessary budget’ for new framework plans.

These changes represent helpful statements of principle that underscore the importance of co-design to the philosophy and conception of the NDIS. However, the concerns expressed at [2.2] of our First Submission remain, and we maintain Recommendation 2.

In our view, the Government’s amendments could be easily circumvented by a Minister insufficiently committed to co-design. A Minister would simply be able to affirm they had regard to the importance of co-design in preparing the instrument, without any requirements to actually undertake a meaningful co-design process.

The Supplementary Explanatory Memorandum relating to sheet PA110 refers to paragraph 15J(2)(d) of the *Legislation Act 2003* as requiring an explanatory statement to a legislative instrument to contain a description of the nature of consultation that occurred in the making of that instrument. However, the Supplementary Explanatory Memorandum does not mention that:

- Subsection 15J(2)(d) of the *Legislation Act 2003* does not require an explanatory statement to outline the content of any feedback received through that consultation – simply the nature of the consultation that occurred. A Minister could therefore satisfy this subsection by stating words to the effect of ‘people with disability were consulted by the following methods...’, while neglecting to mention the views of those people with disability – even where those views were broadly critical of the instrument;
- Subsection 15J(2)(e) of the *Legislation Act 2003* provides that, where no such consultation is undertaken, the explanatory statement can simply explain why no such consultation was undertaken – meaning a Minister could simply decline to undertake consultation and provide a general statement as to why not;
- Section 19 of the *Legislation Act 2003* provides a failure to consult ‘does not affect the validity or enforceability of a legislative instrument’ – meaning a Minister would face no consequences for failing to consult.

² Supplementary Explanatory Memorandum relating to amendment sheet PA110, p6.

We maintain Recommendation 2 from our First Submission, particularly in relation to the requirement for the Minister to table a consultation statement setting out the views of Disability Representative Organisations ('DROs') on any proposed legislative instrument. This would ensure DROs are adequately engaged in the preparation of these vital components of the Scheme, and equip the Senate to conduct its vital oversight functions more effectively.

We note the Government's concern expressed in debate concerning the Bill that such requirements might create legal risk through ambiguity.³ We consider any such risk could be addressed through appropriate drafting of the requirements (such as by constraining the prospect of invalidity), and drawing upon well-established administrative law concepts of 'consultation'.⁴

Oversight of needs assessments and access to replacement assessments

We welcome the changes made by amendment sheet PA110 at:

- item 6, which confirms the need for the CEO to provide a participant with a copy of their needs assessment report; and
- item 7, which adds a clarifying note as to the scope for a reviewer to order a replacement needs assessment.

These clarifications explicitly establish basic procedural rights for participants during the needs assessment processes. We similarly welcome the clarification in the Supplementary Explanatory Memorandum relating to sheet PA110 that the legislation intends 'a participant's plan to be prepared with the participant' (emphasis in original), and that participants will have the 'opportunity to review the report and provide input and feedback before the CEO makes any planning decisions'.⁵

We also note the changes made by amendment sheet SK113 at items 7-8 and other consequential amendments, which clarify the duty for the CEO to consider whether a replacement needs assessment should be undertaken.

However, while these changes respond to concerns raised by many in the community (including PIAC in our First Submission) about adequate access to replacement assessments, we do not consider they provide sufficient rights for participants. This is because proposed subsection 32L(7A) would still allow NDIS Rules to govern when a replacement assessment should or should not be undertaken. Accordingly, these Rules could attenuate or exclude altogether some participants' right to seek a replacement assessment.

As explained at [7.2] of our First Submission, the crucial nature of a needs assessment warrants the right to a replacement assessment being secured in the NDIS Act. The amendments to date would not achieve this security. We maintain Recommendations 25-26 from our First Submission.

We note concerns raised by the Minister during debate in the House that establishing rights to a replacement assessment could contribute to 'doctor shopping'.⁶ While we agree this should be avoided, we consider the existing powers for the Minister to establish the nature and form of

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 June 2024, 45 (Bill Shorten, Minister for the NDIS).

⁴ See, for instance, those explained in Submission 56 to this Inquiry from Dr Darren O'Donovan, at p8-9.

⁵ Supplementary Explanatory Memorandum relating to amendment sheet PA110, p3-4.

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 5 June 2024, 45 (Bill Shorten, Minister for the NDIS).

needs assessments, and the qualifications and identities of the assessors, should be sufficient to address this concern.

Further, and as stated in our First Submission, as the replacement assessment would replace the previous assessment, including where the new assessment determined a lower assessment of a participant's support needs, we expect a participant would only request a replacement assessment where they took the view that a more appropriate result would be reached through obtaining that further assessment.

Constraints on NDIA powers

We welcome the changes made by amendment sheet PA110 at items 1-4, which constrain the power for participants to undergo mandatory medical assessments where the CEO is considering revoking their NDIS participant status, by providing that such assessments can only be required where the NDIA cannot otherwise reasonably obtain the information. These amendments recognise the potential for such assessments to be invasive and distressing for participants, and partially align with Recommendation 16 from our First Submission.

However, these amendments do not go far enough in protecting participants from the overly-broad operation of these powers. Specifically, they:

- do not provide similar constraints on the equivalent, identically-worded, power for the CEO to compel medical assessments for the purpose of preparing a participant's plan (as contained in subsection 36(2)(b)(ii)); and
- do not address other information-gathering powers that are not mandatory medical assessments, but may have similarly harsh operation and damaging consequences for participants (as outlined throughout Part 5, and Recommendations 15 and 17-19 of our First Submission).

We maintain those Recommendations, and consider the further constraints on these information-gathering powers are essential to prevent harm to NDIS participants.

Recommendation 15 proposed a threshold for making information-gathering requests, wherein such requests could only be made where compliance would not be 'unduly burdensome' for a participant. While this specific suggestion was not addressed in the House debate on the Bill, a similarly-worded amendment that would have applied an 'unduly burdensome' threshold test on NDIA powers to impose conditions on participant spending was moved by the Member for Kooyong, Dr Monique Ryan. In briefly outlining the Government's reasons for rejecting this amendment, Minister Shorten said 'we think that the test of "unduly burdensome" is difficult to apply' and so 'could defeat the purpose of the provision'.⁷

We consider a threshold of 'unduly burdensome' would appropriately balance the necessity for exercising the power against its impact on the participant, and would be sufficiently clear and intuitive for the NDIA to apply. However, other reasonable threshold tests could be developed to address any ongoing concerns held by the Government. While the precise wording of 'unduly burdensome' can be adapted, we maintain the need to limit the use of these powers based on their potential impact on participants.

Additionally, the amendments to the Bill have not addressed our concerns with the broad nature of several other powers it would confer on the NDIA, as outlined in Part 6 of our First Submission (Recommendations 20-23).

⁷ Ibid.

'Whole of person' supports for disabilities

We note items 5 and 10 of the amendment sheet circulated by the Member for Kooyong would have required funding decisions to take account of a participant's holistic disability support needs, without imposing distinctions as to disabilities which would meet the NDIS access criteria. As set out at [3.1.4] of our First Submission, this approach would better accord with the principles of the Scheme and avoid serious practical difficulties in its administration.

In explaining the Government's basis for rejecting those amendments, the Minister expressed concern the 'whole of person' approach would '[open] the floodgates for the health system to transfer their costs into the NDIS'.⁸ We consider any such concerns as to cost-shifting are appropriately dealt with through the NDIS Rules to be made pursuant to proposed section 10 of the Act, which are intended to define the interface between the NDIS and other government service delivery systems.

We further note these concerns about cost-shifting and service interface were before the NDIS Review when it considered this issue; the Review nonetheless recommended a position identical to the amendments proposed by the Member for Kooyong.⁹ In this regard, we maintain Recommendations 5-7 of our First Submission.

Conclusion

We consider the amendments made to this Bill in the House appropriately recognise several areas of concern with the draft legislation, and go some way towards addressing these issues. However, as outlined above, and in the outstanding Recommendations from our First Submission, further amendments are required; and we are pleased that this Inquiry provides opportunity for further scrutiny and recommendations to improve the Bill.

We thank you for the opportunity to provide this supplementary submission and would be pleased to provide any additional information to assist the Committee's consideration of the Bill. Please direct inquiries to Senior Solicitor Mitchell Skipsey at [mskipsey@piac.asn.au](mailto:mkipsey@piac.asn.au).

Yours sincerely,



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⁸ Ibid.

⁹ Independent Review into the National Disability Insurance Scheme, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme Final Report Supporting Analysis* (Final Report (Supporting Analysis), October 2023), p299.