

10 July 2024

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

Dear Committee Secretary

Submission to inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

The Justice and Equity Centre (formerly the Public Interest Advocacy Centre or 'PIAC') welcomes the opportunity to make this submission to the second inquiry of the Senate Community Affairs Legislation Committee ('Committee') inquiry into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 ('Bill').

This submission is intended to be read alongside our submissions to the Committee's previous inquiry into this Bill ('Previous Inquiry'), namely [submission 57 dated 17 May 2024](#) ('Previous Submission') and [supplementary submission 57.1 dated 14 June 2024](#) ('Previous Supplementary Submission').

This submission addresses matters raised by amendments proposed by the Government in its amendment sheet PA112 (revised) ('Revised Sheet PA112'), as well as other outstanding matters we consider are necessary to improve the Bill and protect the rights of participants. Previous amendments to the Bill (including those in amendment sheets PA110 and SK113) were addressed in our Previous Supplementary Submission.

Legislative incorporation for consulting on legislative instruments

We welcome the change proposed at item 18 of Revised Sheet PA112, which implements Recommendation 2 of the Previous Inquiry report and aligns with Recommendation 2 of our Previous Submission.

At section 2 of our Previous Submission, we noted the Bill gives the NDIS Minister several powers to make legislative instruments. We expect the proposed amendment would encourage the Minister to meaningfully engage with Disability Representative Organisations ('DROs') when developing all legislative instruments made under the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act'). The requirement for an expanded explanatory statement would overcome some of the deficiencies with the *Legislation Act 2003* (Cth) highlighted in our Previous Supplementary Submission, and so equip Parliament to more effectively conduct its oversight functions in the context of the NDIS.

Accordingly, we think this amendment reflects the Government's stated commitment to engage with the disability community in developing vital elements of the Scheme.

Funding participants at a 'whole of person' level

We, along with many in the disability community, have expressed significant concern that the Bill does not take a 'whole of person' approach to assessing and funding a participant's disability-related support needs.

Items 6-12 of Revised Sheet PA112 would address many of these concerns.

As the Bill is currently drafted, the needs assessment will only assess support needs in respect of impairments that meet the disability or early intervention requirements. Items 8-9 of Revised Sheet PA112 would amend the Bill to require a needs assessment to assess a participant's disability support needs. The Supplementary Explanatory Memorandum for Revised Sheet PA112 explains this would ensure 'a needs assessment will assess a person holistically, looking at all of their disability related support needs',¹ not simply those stemming from particular impairments. We welcome this proposed change, noting it adopts the NDIS Review's recommendation that 'a needs assessment should take account of all of people's disabilities'.²

Item 6 of Revised Sheet PA112 would amend the Bill to make clear funding in a reasonable and necessary budget can only be provided in respect of support needs for impairments that meet the disability or early intervention requirements. However, the Explanatory Memorandum makes clear this legislative language does not prevent the Scheme from providing funding in a way that accounts for the impact of other impairments or factors impacting upon these needs. Further, item 7 would insert new subsection 32K(3A) requiring the Minister, when making a determination about the budget, to be satisfied the determination adequately takes account of the variety of factors that may affect a participant's need for NDIS supports. A legislative note gives two specific examples of such factors:

...environmental factors, and a participant's need for NDIS supports arising from an impairment in relation to which the participant meets the disability requirements or the early intervention requirements being impacted by another impairment in relation to which the participant does not meet either of those requirements.

The specific acknowledgement in this note and the Explanatory Memorandum of the impacts of a participant's other impairments upon their support needs, and requirement for the budget-setting process to take account of these, would align the Bill more closely with the NDIS Act's objects. It also better implements the NDIS Review's recommendation that budgets be set at a 'whole of person' level. We welcome the Government's proposed amendments in this regard.

¹ Supplementary Explanatory Memorandum relating to amendment sheet PA112 (revised), 6.

² Commonwealth of Australia, Department of Prime Minister and Cabinet, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme* (Final Report Supporting Analysis, October 2023) 299.

We consider some technical amendments to these provisions could further ensure these provisions achieve their intended object, such as:

- inserting the contents of the legislative note as a part of the substantive section 32K;
- clarifying the extent to which a need for NDIS supports must be 'arising from an impairment' (such as 'arising, to any extent, from an impairment'); and
- aligning the references in the legislation to 'disability support needs' with the Explanatory Memorandum's terminology of 'disability-related support needs'.

Subject to consideration of these potential further changes, we support these proposed amendments as a meaningful step towards 'whole of person' assessment and funding.

Recording and revisiting impairments that meet access requirements

In tandem with the above, we maintain and emphasise Recommendation 5 from our Previous Submission: the Bill must require the NDIA to identify and inform a participant which of their impairment(s) the NDIA considers meet the disability and/or early intervention requirements. The NDIA does not presently provide this information to participants; requiring this more transparent approach would allow participants to understand the basis for their ongoing NDIS participation, fully engage with the needs assessment and budget-setting process, and avoid practical difficulties in administering the Scheme.

Once participants receive this information, they will also require the opportunity to engage with and correct it where necessary. The Bill should ensure that participants have clear rights to address errors in the NDIA's assessment of which of their impairment(s) meet the relevant criteria. This mirrors our Recommendation 27 from our Previous Submission (which we maintain): where the Bill requires the NDIA to notify participants whether they have been found to meet the disability requirements, early intervention requirements, or both, the Bill should also provide them with the opportunity to challenge this finding.

A participant should have the right to a replacement assessment

No amendments proposed or made to date give clear legislative definition of a participant's *right* to a replacement needs assessment. As explained by our Previous Supplementary Submission, proposed subsection 32L(7A) would allow NDIS Rules to govern when a replacement assessment should or should not be undertaken. As a needs assessment informs the funding for supports in an NDIS plan, covering a period of up to five years, it is crucial to provide a participant with procedural rights to ensure their assessment is accurate. This warrants the right to a replacement assessment being secured in the NDIS Act.

As set out at section 7.2 of our Previous Submission, the Bill must expressly provide a participant with the right to access one replacement assessment in relation to each NDIS plan developed for them. Following a replacement assessment, if a participant requests a further replacement assessment in relation to that same plan the CEO should have the discretion to arrange one where appropriate. We maintain Recommendations 25 and 26 from our Previous Submission.

Information-gathering powers

As outlined at section 5 of our Previous Submission, and in our Previous Supplementary Submission, the Bill gives the CEO three extensive powers to request information (located in proposed sections 30, 30A and 36). These powers are each linked to serious potential adverse consequences for participants who do not comply with these requests. As set out in our Previous Supplementary Submission, these risks were only partially ameliorated by amendments made to the Bill in the House of Representatives.

Revised Sheet PA112 proposes some further protections against overly broad use of these information-gathering powers.

Amendments made by items 2, 4 and 13 helpfully provide that information-gathering requests for each of these powers must be made in writing, while inserting a note that clarifies a request can be rescinded or varied once made. These clarifications are appropriate, and would provide participants and the NDIA with greater certainty on the operation of the powers.

Items 3, 5 and 14 would insert a matrix of factors the CEO must consider when deciding whether non-compliance with a request for information was reasonable. While we welcome these amendments, we do not consider they provide sufficient protection against harsh operation of these powers for several reasons:

- the factors would only apply to consideration of adverse consequences for non-compliance with a request; there are no proposed changes to limit the NDIA's power to issue a request in the first place. Participants may still feel obligated to comply with invasive, distressing or costly requests due to uncertainty over whether the NDIA would ultimately consider their non-compliance was reasonable;
- the factors listed would largely protect a participant against harsh operation of the powers in cases of inadvertent non-compliance, or where a participant had tried but failed to comply with the request. As such, they do not guard against cases where a participant is reluctant to comply with the request and/or chooses not to comply (such as where they consider the request is misconceived, or is unduly invasive, distressing or costly); and
- whether adverse consequences for non-compliance are imposed continues to depend on whether the non-compliance was 'reasonable'. This does not take account of situations where non-compliance was unreasonable, but there are good reasons not to impose consequences on the participant (see part 5.3 of our Previous Submission).

Given the above, there remains a need for further protections against the overly broad operation of these powers. We:

- maintain Recommendation 15 from our Previous Submission, together with relevant comments made in our Previous Supplementary Submission;
- maintain Recommendation 17 from our Previous Submission; and
- consider the amendments made in the House of Representatives per items 1-4 of amendment sheet PA110 should be extended to also apply to requests made under subsection 36(2)(b)(ii), in line with the full implementation of Recommendation 16 from our Previous Submission.

The Committee recommended in its Previous Inquiry, in response to the community's concerns about the potential impact of these and other new powers, that:

...adding more detail to when the powers are intended to be used would provide greater assurances to the disability community and the public on how these powers will and will not be used.³

We consider such further detail would be welcome, but would not be an adequate substitute for greater legislative limits to the NDIA's information-gathering powers.

Constraints to other new NDIA powers

The Bill also proposes new powers allowing the NDIA to:

- impose conditions on how a participant obtains supports;
- restrict spending of flexible funding in a participant's plan; and
- override a participant's plan management preferences.

As we observed above, the Previous Inquiry recommended the Government provide greater clarity and assurance about how it intends the NDIA to use these powers.

To date, no further amendments have been proposed to the Bill in relation to these powers. Further, while the Department of Social Services' website contains some information relating to these powers,⁴ we are not aware of any Government explanation of how the powers will be used operationally and/or what mechanisms would protect participants from them being used to restrict choice and control.

As we have previously argued, constraints on these powers are necessary to protect participants and rebuild trust between the NDIA and the disability community. We maintain Recommendations 20-23 from our Previous Submission, which would improve the technical language of the Bill and place appropriate limits on the use of these NDIA powers.

Debt-recovery powers

The Bill proposes new circumstances for invoking the NDIA's debt-recovery powers, including where a person other than a participant acquires or provides supports that are not NDIS supports or do not comply with requirements in the participant's plan.

As we expressed in evidence to the Previous Inquiry on 14 June 2024, further safeguards are required to protect participants from having debts raised against them. In this regard, we endorse recommendations 32-34 in the submission made by National Legal Aid (Submission 81 to the Previous Inquiry) dated 17 May 2024.

³ Senate Community Affairs Legislation Committee, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]* (Report, June 2024) [2.174].

⁴ Department of Social Services, 'The NDIS Amendment Bill – questions and answers', *Department of Social Services*, (8 July 2024), <<https://www.dss.gov.au/the-ndis-amendment-bill-questions-and-answers>> at 'New CEO powers'.

Conclusion

We are pleased to see the amendments proposed in Revised Sheet PA112 respond to several priority issues with the Bill. However, a number of outstanding recommendations from our Previous Submission would further improve the Bill and promote the rights of participants. As set out above, we maintain Recommendations 5, 15-17, 20-23 and 25-27 from our Previous Submission (extracted in **Appendix A** to this submission), as well as the technical amendments we suggest above that would improve the approach to 'whole of person' funding.

We thank the Committee for the opportunity to provide this submission and would be pleased to provide any additional information to assist the Committee's inquiry into the Bill.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'E. Tilbury', written in black ink.

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Appendix A

Recommendation 5 – The NDIA identify and record eligible impairment(s)

The Bill should require the NDIA to identify and record the impairment(s) for which a participant is found to meet the disability and/or early intervention requirements for access to the Scheme.

Recommendation 15 – Information-gathering powers be limited to information that would not be unduly burdensome for a participant to produce

Each of proposed sections 30(3), 30A(5) and 36(2) should be amended to require that the CEO may only make a request for information where compliance would not be unduly burdensome for a participant.

This requirement should direct attention to the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

Where a request for information is made and the request is subsequently shown to be unduly burdensome within the terms above, the Bill should require that the request be withdrawn.

Recommendation 16 – Requests for a participant to undergo a medical, psychiatric, psychological or other examination should be subject to tight constraints

Each of proposed subsections 30(3)(b)(ii), 30A(5)(b)(ii) and 36(2)(b)(ii) should be amended to require that the CEO may only make a request for a participant to undergo an examination where the CEO is satisfied that:

- there is no other reasonable means to obtain the necessary information; and*
- the examination would not cause undue harm, distress or upset to the participant.*

Where a request is made and the request is subsequently shown not to meet either of the terms above, the Bill should require that the request be withdrawn.⁵

Recommendation 17 – All consequences for non-compliance with a request for information be discretionary, rather than mandatory

Each of proposed subsections 30A(5) and 36(2) should be amended to provide that consequences for non-compliance with an information request are at the discretion of the CEO.

⁵ Items 1-4 of amendment sheet PA110 amended proposed subsections 30(3)(b)(ii) and 30A(5)(b)(ii), in line with our Recommendation 16. However, to fully implement this Recommendation, further amendments are necessary, including to apply the changes from amendment sheet PA110 to proposed subsection 36(2)(b)(ii).

The Bill should provide that, in the exercise of such discretion, the CEO must consider all the circumstances of the participant.

Recommendation 20 – The conditions potentially imposed under proposed section 32H be limited

Proposed subsection 32H(1) should be amended to replace the words ‘in relation to’ with the word ‘for’.

Proposed subsection 32H(2) should be amended to remove the words ‘Requirements specified under subsection (1) may include the following’ and instead insert the words ‘For the purposes of subsection (1), the requirements are as follows’.

Recommendation 21 – Requirements under proposed section 32H only be imposed where it is not unduly burdensome to do so

Proposed section 32H should be amended to require that the CEO may only impose a requirement on a participant’s use of funding where it is necessary to achieve a specific purpose consistent with the objects of the Scheme and to do so would not be unduly burdensome for a participant.

In imposing a requirement, the NDIA should consider the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

Recommendation 22 – Proposed subsections 32F(7)(b) and 43(2C)(b) be amended to raise the threshold of non-compliance required before consequences are imposed

Amend each of proposed subsections 32F(7)(b) and 43(2C)(b) to the following:

Intentional and repeated non-compliance with section 46 (acquittal of NDIS amounts) in relation to the plan or any of the participant’s previous plans.’

Recommendation 23 – The Explanatory Memorandum be amended to explain the intention behind Rules to be made concerning flexible funding and plan management

Amend the Explanatory Memorandum to incorporate the policy purpose the Government intends to achieve by the Rules proposed in subsections 32F(7)(c) and 43(2C)(c), and explain how the Government will engage with the disability community to ensure the community’s perspectives are reflected in those Rules.

Recommendation 25 – Proposed subparagraph 32L(7) provide rights for participants to obtain and/or request a replacement assessment

Proposed subsection 32L(7) should be amended to provide:

- *participants with the right to obtain one replacement assessment in relation to each statement of participant supports (‘second assessment’) where they do not agree with the first needs assessment; and*

- *participants with the right to request an additional replacement assessment ('subsequent assessment') – the CEO must consider this request, and decide whether to order the subsequent assessment.*

Recommendation 26 – Section 99(1) provide a decision not to order a subsequent assessment is a reviewable decision

Section 99(1) of the NDIS Act should be amended to include a decision not to order a subsequent assessment (per Recommendation 25 above) as a reviewable decision.

Recommendation 27 – A decision about whether a participant meets the disability and/or early intervention requirements be reviewable

Subsection 99(1) of the NDIS Act should be amended to establish that a decision about whether a participant meets the disability requirements and/or early intervention requirements is a reviewable decision.