

## **Ministerial responses — Report 5 of 2024<sup>1</sup>**

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**The Hon Bill Shorten MP**

**Minister for the National Disability Insurance Scheme  
Minister for Government Services**

Ref: MC24-005871

Mr Josh Burns MP  
Chair  
Parliamentary Joint Committee on Human Rights  
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Josh

~~Dear Chair,~~

Thank you for your email dated 16 May 2024 concerning the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill). I note the Parliamentary Joint Committee on Human Rights' (the Committee) request for additional information regarding the Bill and have responded below.

Since the introduction of the Bill, the Australian Government has listened to the concerns of the disability community and has reassessed the drafting of proposed new section 10, which provides for the definition of NDIS support.

To assist the Committee, a copy of the proposed parliamentary amendment and supplementary explanatory memorandum is enclosed. The supplementary explanatory memorandum provides additional information on the purpose and operation of the new definition that may be useful to the Committee's consideration of the Bill.

Subject to further comments from the Committee, I will update the explanatory memorandum and the statement of compatibility with human rights by way of addendum to reflect the information provided in this response.

Yours sincerely,

Bill Shorten MP

30/5/2024

Encl.

**Response to Parliamentary Joint Committee on Human Rights**  
**National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024**

**Definition of NDIS support**

*Rights of persons with disability; rights to an adequate standard of living, health and social security; rights of the child*

The Committee has asked for further information about the compatibility of the definition of NDIS support with the above rights. In particular, the Committee has asked for further information in relation to the following:

- (a) *of those items listed in the explanatory memorandum as not qualifying as NDIS supports, including holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods, which items, if any, are currently funded through the NDIS*

Funding provided under the National Disability Insurance Scheme (NDIS) may only be used for supports that are constitutionally supportable and appropriately funded by the NDIS. In order to be capable of being funded under the NDIS, the support or services must be needed by a participant as a result of their disability. Currently those supports must be ‘reasonable and necessary’ and meet the criteria under section 34 of the *National Disability Insurance Scheme Act 2013* (the Act).

The items listed in the explanatory memorandum are items that are not intended to be funded by the NDIS. However there have been instances where NDIS funds have been used to purchase items or supports that are not appropriately funded under the NDIS such as those listed in the explanatory memorandum. While in some instances this has been a purposeful misuse of NDIS funding, for the most part it arises as a result of a misunderstanding of what is appropriately funded by the NDIS.

It is clear that things such as holidays and online gambling are not appropriately funded by the NDIS. However, there are situations where it is less clear for a participant. For example, standard household appliances and whitegoods are not appropriately funded by the NDIS as they are everyday items and do not relate to a person’s disability. However, if a person has a need for a particular appliance as a result of their disability and they otherwise would not require that appliance, then it may be an NDIS support for that person. For example, for a person with dysphasia who experiences difficulty swallowing, a doctor may recommend a soft food diet for which a blender may be purchased using NDIS funding.

Funding provided under the NDIS is not income support or a social security payment that can be used to purchase any item or service a person could spend their own money on. It is specifically and directly intended to obtain supports that a participant needs as a result of their disability to allow them to realise their full potential for physical, social, emotional and intellectual development, as well as participate in and contribute to social and economic life.

This new definition of NDIS supports will provide clarity and certainty for people with disability when selecting their supports but it does not change the types of supports that have always been appropriate to purchase with NDIS funding. The overarching test will remain whether a person

has a need for the support as a result of their disability, and whether the support is most appropriately funded by the NDIS.

- (b) *if a support that is currently funded through the NDIS does not meet the new definition of NDIS support (for example the item is declared by NDIS rules to be a support that is not appropriately funded through the NDIS), will that support be taken away from an existing participant or no longer funded*

Any item that has already been purchased or provided to a participant will not be taken away from a participant. However, if a participant is using funds to obtain supports that should not be provided by the NDIS (and are therefore not NDIS supports), they will no longer be able to use NDIS funding to continue to obtain those supports.

It is important to note this is not about denying people with disability supports they have a genuine need for as a result of their disability. It is about ensuring that Commonwealth expenditure has a constitutional basis and that NDIS funding is used for the purpose for which it is intended. For example, NDIS funding should not be used for pharmaceuticals and medication funded through the health system or the pharmaceutical benefits scheme.

This is not a retrogressive measure. Any supports that a person may no longer have access to under the NDIS will be supports that should never have been purchased using NDIS funding. Clarifying the existing boundaries of the NDIS is a legitimate objective in implementing this definition.

- (c) *whether there is flexibility to take into account a participant's individual support needs in assessing whether a support meets the definition of an NDIS support*

The definition of NDIS support is necessarily individualised. What is an NDIS support for one person, may not be an NDIS support for another. The test is whether a person has a need for the support as a result of their disability. For example, a participant who does not experience impacts on their mobility as a result of their disability will not require mobility aids.

There will be items that will never be an NDIS support for any participant, such as online gambling however in general, the approach is entirely needs based and therefore specific to each individual participant.

- (d) *why is it necessary to enable the definition of NDIS support to be narrowed by way of NDIS rules (as per subsections 10(b) and (c))*

As the Committee has identified, the new definition of NDIS support serves two purposes:

- It makes clear the constitutional basis for the new budget setting framework recommended by the *Independent Review into the National Disability Insurance Scheme* (NDIS Review), and helps to clarify and identify the constitutional basis of the NDIS as a whole.
- It assists participants and the disability community to understand what is (and always has been) capable of being funded by the NDIS having regard to intergovernmental agreements and constitutional considerations.

The constitutional boundaries of what the NDIS may fund are far broader than those that are appropriately funded by the NDIS. Other Commonwealth and State and Territory systems and programs, such as Medicare and the State and Territory health systems are responsible for funding

a range of supports for people with disability that could be constitutionally supported. It is necessary for these kinds of supports to be excluded from what may be funded by the NDIS.

The NDIS Act currently limits available supports to those that are reasonable and necessary for the particular participant. This limitation means the responsibility of identifying constitutionally valid supports, and supports that are appropriately funded by the NDIS, lies with the National Disability Insurance Agency (NDIA).

Once the new budget-based planning framework commences, participants will no longer receive funding in relation to specific reasonable and necessary supports. Instead, participants will receive a flexible budget (along with a limited number of identified supports that will be stated in their plan). Without rules clarifying what may be NDIS supports, the onus would be on a participant to identify whether supports are lawfully (constitutionally valid) or appropriately funded by the NDIS.

Requiring the Minister to make NDIS rules specifying what is an NDIS support puts the onus of identifying what can be funded by the NDIS in law, rather than the participant. The rules will make it much clearer for participants about what supports can, and cannot, be purchased using funding under their plan. This will also assist participants to understand what supports may more appropriately be funded and provided through other service systems so they are able to access those supports through alternative means and use their funding for appropriate disability supports.

#### **NDIS access requirement rules**

*Rights of persons with disability; rights to an adequate standard of living, health and social security; rights of the child*

The Committee has drawn attention to proposed new language for section 27 of the Act and its compatibility with the above rights.

The Bill repeals and replaces section 27 of the Act. Section 27 of the Act already provides for NDIS rules relating to the disability requirements and early intervention requirements in sections 24 and 25 of the Act respectively. However, the current drafting of section 27 is long, complex and confusing. The proposed replacement for section 27 simplifies the existing provision, making it easier to understand and apply.

While the Committee has not asked for additional information on this amendment, it has noted that it will scrutinise any NDIS rules made under section 27 in the future. It is noted that not only will such rules be subject to Commonwealth Parliamentary scrutiny, but they are also Category A NDIS rules, and therefore require the consideration and unanimous agreement of all States and Territories.

Consistent with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, any instrument made under section 27 of the Act will have an accompanying statement of compatibility with human rights that will set out the relevant human rights considerations.

#### **Requests for information**

*Right to privacy*

The Committee has asked for further information about the compatibility of new information gathering powers with the right to privacy. The Committee has asked for advice in relation to:



*(a) what circumstances would trigger the CEO considering whether to revoke a participant's status under section 30 of the Act*

Subsection 30(1) of the Act will not be changed in any way by the Bill. It currently allows the CEO to revoke a participant's status if the CEO is satisfied they do not meet the residence requirements or either the disability requirements or the early intervention requirements.

A decision to revoke a participant's status under existing section 30 is discretionary and can only be used when the CEO has evidence a participant no longer meets the residence requirements and either the disability requirements or the early intervention requirements.

The CEO will consider revoking the participant's status under this provision only if there is evidence before the CEO that reasonably suggests the person no longer meets the eligibility criteria. For example, if a participant provides updated medical evidence as part of a plan reassessment which suggests they no longer meet the disability or early intervention requirements, the CEO may consider further whether this is the case and if so, the participant's status may be revoked.

Similarly, if the CEO receives information suggesting a participant has relocated overseas, the CEO would seek information to determine whether or not that is the case, and therefore whether or not the participant continues to meet the residence requirements.

*(b) what circumstances are likely to be prescribed for the purposes of proposed section 30A*

The intent of proposed section 30A is primarily to operationalise the new early intervention pathway once it is ready to be implemented. NDIS rules made under section 30A are likely to prescribe matters such as the age of a participant, particularly where a child has entered the NDIS due to developmental delay, and the length of time that a participant has been in the Scheme. This will allow for a consideration of whether early intervention supports are working for a participant and identify whether those supports are no longer required, or whether a participant would benefit from receiving different kinds of supports or services under the NDIS and/or other service systems such as universal education.

*(c) how likely or frequently would the CEO make a request for information and reports from a participant and why does the bill not provide any limit on how often the CEO could make such requests of participants*

Requests for information under proposed section 30A can only happen at times prescribed in NDIS rules. The CEO will not be able to make requests under section 30A in any other circumstances. Participants and their families and carers will know and be able to anticipate when the CEO will make a request for information under section 30A because it will be prescribed in NDIS rules.

With respect to section 30, the CEO will request information if there is already reasonable evidence that suggests the participant does not meet one of the relevant criteria. There will not be recurring requests unless a participant fails, without reasonable excuse, to comply with earlier requests for information.

It is critical the CEO has the ability to request information in this circumstance, as it will ensure decisions about ongoing access to the Scheme are based on current information and ensure the participant is able to access the most appropriate support to meet their needs. It also gives the participant an opportunity to respond to any potentially adverse information that may have been provided to the NDIA. The information requested must be reasonably necessary for the purpose of considering whether the participant continues to meet the relevant criteria or not. Once that has been established, there may be no need for the CEO to request further information unless there is sufficient information for the CEO to make a decision that the participant no longer meets the access requirements at the time. It is important to note that this would not preclude a person from making any future access requests. There is no limitation on the number of times a person can apply for access to the NDIS.

*(d) what types of places could the CEO specify in requesting that a participant undergo an examination (under proposed subparagraph 30(3)(b)(ii))*

The type of location is likely to depend on the kind of examination that is being undertaken. For example, a medical examination may be most appropriately undertaken at the premises of a medical practitioner who has appropriate equipment to conduct the examination. Alternatively, if the examination focuses on a person's ability to undertake self-care activities, it may be more appropriate for the examination to occur in the person's home or other place that they spend time in on a day-to-day basis.

Proposed subparagraph 30(3)(b)(ii) is consistent with subparagraph 26(1)(b)(ii), which allows the CEO to request that a prospective participant undergo certain examinations by an appropriately qualified person, whether or not at a particular place.

*(e) if the CEO specified a place, whether a participant could choose an appropriately qualified person to undertake an examination even if that person was not able to perform the examination at the place specified*

If the qualified person was not able to undertake an examination at the place specified, the NDIA would work with the person to enable a suitable alternative location that would allow the examination to occur.

### **Working out total funding amounts for NDIS participants**

*Rights of persons with disability; rights to an adequate standard of living, health and social security; rights of the child*

The method for working out a total amount for a participant's reasonable and necessary budget is to be worked out in accordance with a method determined by the Minister through a legislative instrument (see proposed new section 32K). In making this determination, the Minister must have regard to the following:

- the principle that people with disability should be supported to receive reasonable and necessary supports, including early intervention supports
- the principle that reasonable and necessary supports for people with disability should:
  - support people with disability to pursue their goals and maximise their independence
  - support people with disability to live independently and to be included in the community as fully participating citizens

- develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment
- the need to ensure the financial sustainability of the NDIS.

The Committee has asked for further information about the compatibility of the requirement to have regard to the financial sustainability of the NDIS with the above rights. In particular, the Committee has asked for advice on the following:

- (a) *what is the objective of the measures and how does this objective address a pressing and substantial social or public concern*

The need to ensure the financial sustainability of the NDIS is fundamental to giving effect to the Objects of the Act (see paragraph 3(3)(b) of the Act). The requirement is also consistent with subsection 209(3) which requires the Minister to have regard to the objects and principles of the Act as well as the need to ensure the financial sustainability of the NDIS when making all NDIS rules, which are the primary form of legislative instrument under the Act.

The NDIS Review supported the proposition that ‘a right that cannot be sustained is a right denied’ (see page 30 of the NDIS Review Final Report). A critical objective must be that the NDIS is sustainable in the long term so that it can continue to meet the needs of people with disability into the future. There has been substantial social and public concern about the future of the NDIS, including its long-term sustainability and the projected growth of the Scheme. The Bill addresses these concerns by including new measures that will return the NDIS to its original intention and ensure it continues to be available to support Australians with permanent and significant disability for their lifetimes.

It is, therefore, appropriate to have regard to the need to ensure financial sustainability of the NDIS in determining the method for calculating a participant’s reasonable and necessary budget under the new planning framework and supporting participants to manage their budget. It is important to note this is only one consideration the Minister is required to make in the context of the determination.

- (b) *how much weight is to be given to each matter (namely, the principles set out in section 4 of the Act and the financial sustainability of the NDIS) and whether guidance will be prepared to assist the minister in this regard*

The Bill does not prescribe the weight to be given to each of the matters mentioned in proposed subsection 32K(3). While it is a matter for the Minister to determine what weight should be given to each consideration, generally equal weight should be given to each.

Specific guidance will not be prepared to assist the Minister in determining how much weight is given to each matter prescribed in proposed subsection 32K(3). It will be a matter for the Minister to consider each matter having regard to appropriate advice and information including consultation and co-design with the disability community.

It is important to note that section 17 of the *Legislation Act 2003* requires a rule-maker to undertake appropriate consultation before making legislative instruments. In particular, subsection 17(2) of the *Legislation Act* provides that in undertaking appropriate consultation, a rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise



in relevant fields and the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

This process will provide opportunities for affected parties to provide input to the Minister which may guide the Minister's consideration of each relevant matter. Details of consultation undertaken in the preparation of a legislative instrument must also be included in the explanatory statement.

*(c) whether there is flexibility for the minister to have regard to other matters, such as the best interests of the child*

While the Minister is required to have regard to the matters prescribed in subsection 32K(3) when making the determination, there are no limits in relation to any other matters the Minister may choose to have regard to.

As noted above, the Minister will also be required to undertake appropriate consultation before making the instrument, and should have regard to any relevant matters brought up through that process.

*(d) whether the measures could result in a participant's total funding amount being reduced and consequently having supports taken away from them*

Under the current planning framework, participants do not receive a 'total funding amount'. They receive a plan that identifies reasonable and necessary supports for them. This may be done with reference to an amount of funding, in practical terms, but the central concept in a plan under the current framework is the provision of specific reasonable and necessary supports rather than an overall funding amount.

The new planning framework will rely on a comprehensive assessment of a participant's needs in order to work out a participant's reasonable and necessary budget. This will be established as an amount of funding a participant can use to purchase the range of supports they need to meet their disability needs. This is a different approach to planning that, for the most part, no longer identifies what reasonable and necessary supports are for the participant. The plan that results from this new process is not comparable with a plan developed under the existing framework.

The key area of reform, consistent with the NDIS Review is that the new planning framework will provide more flexibility so participants can identify supports that best meet their disability support needs. This will not take supports away from participants, but rather give them more autonomy and choice and control about how they select their supports.

*(e) what, if any, safeguards accompany the measures to ensure that the NDIS continues to provide sufficient supports to people with disability such that the minimum core obligations with respect to key economic and social rights, including the rights to social security, health and an adequate standard of living, are satisfied*

It is important to note that the NDIS is not, and has never been intended to be, a form of social security. The purpose of social security is to provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. The UN Committee on Economic Social and Cultural Rights has stated that social security, through its redistributive character, plays an important role in poverty reduction and alleviation.

The redistributive (and means tested) nature of social security is not consistent with the scope of the NDIS, which provides support to all people with a permanent and substantial disability, or to those who may benefit from early intervention support.

The structure of the Bill ensures that all participants will have access to the supports they require as a result of their disability, in line with Australia's obligations under the CRPD. This is, and always has been, the intention of the NDIS and that will not change under the new framework.

By providing participants with a reasonable and necessary budget that is directly linked to a comprehensive assessment of their needs, the new planning framework will provide participants with sufficient funding for their disability-related needs. This link between funding provided and an assessment of overall needs is an important safeguard for ensuring participants have sufficient funding to access appropriate disability supports.

The Bill also includes a number of safeguards to ensure that participants will have access to supports over a sustained period of time. For example, the Bill introduces the concept of a 'funding period' which essentially releases funding under the participant's plan in set intervals. This ensures that a participant will continue to have access to sufficient funding for disability-related supports throughout their entire plan period.

Additionally, by including requirements to consider the financial sustainability of the Scheme in certain decisions, the Bill safeguards the future of the NDIS ensuring it will be available to provide sufficient supports to people with disability into the future.

*(f) what, if any, safeguards are there to ensure the measures are not retrogressive*

The Bill introduces a new approach to planning which is more participant-focused and flexible, consistent with recommendations of the NDIS review. Providing participants with a reasonable and necessary budget, including a flexible budget that can be used to purchase a range of supports chosen by the participant, is an important safeguard against retrogression. Many of the measures in the Bill are focused on moving back to the intention of the NDIS and provide participants with choice and control in the context of a fairer and more consistent approach to decision-making around access and planning for the benefit of people who need access to early intervention or disability supports.

Additionally, the new planning framework will rely on a needs assessment which will be the subject of extensive consultation, technical expertise and deep engagement with the disability community. This will ensure needs assessments are fit-for-purpose and support continuous improvement in planning experiences for all participants in the Scheme.

### **Approved quality auditor conditions**

#### *Right to work*

Approved quality auditors are responsible for auditing registered NDIS providers and applicants seeking to be registered as an NDIS provider. This role provides an important safeguard for people with disability, as it enables identification of providers who are not complying with the NDIS Commission Practice Standards and may be putting participants at risk.

The Bill includes two new rule-making powers that allow NDIS rules to be made guiding the initial and ongoing approval of approved quality auditors, and to place conditions on the approval of all approved quality auditors. This includes conditions to the effect that an approved quality auditor must not employ or engage a person against whom a banning order has been made, or have such a person as part of their key personnel. The conditions would be applied when a ban has demonstrated a person is not suitable to work with a person with disability or to provide evidence to assess the suitability of a provider. Additionally, the Bill ensures that an approved quality auditor must be notified if a member of their staff or key personnel has a banning order made against them.

The Committee has drawn attention to this measure and its compatibility with the right to work. Although further information has not been sought, to assist the Committee and the Parliament, I provide the following additional context.

One of the NDIS Commissioner's core functions is to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services. This includes by regulating NDIS providers and issuing banning orders to prevent persons who are unsuitable from being involved in provision of supports or services to people with disability. This is an important safeguarding tool for protection of participants.

It has recently been identified that individuals subject to banning orders can continue to be indirectly involved in the provision of supports and services to people with disability through the approved quality auditor framework. This is inconsistent with the functions of the NDIS Commissioner and may put participants at risk of harm, which is not acceptable. Banning orders are only applied in the most serious breaches and persons subject to banning orders made by the NDIS Commission should not be able to have any level of involvement in the provision of supports and services to people with disability. Ensuring approved quality auditors cannot employ or engage persons subject to a banning order is a necessary and appropriate part of the Commissioner's functions, in particular the function of promoting participant health, safety and wellbeing.



**The Hon Linda Burney MP**  
Minister for Indigenous Australians

MS24-000021

Mr Josh Burns MP  
Chair, Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

Dear Mr Burns

I refer to the Parliamentary Joint Committee on Human Rights' (the Committee) Human Rights Scrutiny Report 12 of 2023 (the Report), dated 15 November 2023, and suggested actions regarding the Social Security (Remote Engagement Program) Determination 2023 (the Instrument).

I thank the Committee again for their consideration of the Instrument, and for the opportunity to respond in full to the Committee's initial views in October 2023.

I note advice from the Committee Secretariat that the Committee does not require a response to the Report, and that the Instrument is now a concluded matter for the Committee.

As noted in my previous response, the Government has committed to replace the Community Development Program (CDP) with a new program with real jobs, proper wages and decent conditions developed in partnership with First Nations people. The Remote Engagement Program (REP) is a trial that has helped inform the design of the new program.

As at 29 February 2024, there has been very limited uptake of the REP Trial, there are currently no trial participants and no participant has become eligible for a REP payment. The REP Trial and availability of the REP payment will not be extended beyond 30 June 2024.

The Government remains committed to supporting community and real job opportunities for people in remote Australia, including in the Ngaanyatjarra Lands. These employment opportunities will aim to ensure just and favourable conditions of work, in line with the Committee's recommendations.

On 13 February 2024, the Government announced a \$707 million investment in a new Remote Jobs and Economic Development Program that will help close the gap in employment outcomes by creating 3,000 jobs in remote Australia.

I have asked the National indigenous Australians Agency to take consideration of the Committee's findings in designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia, which together will replace the CDP.

Thank you again for raising these matters.

Yours sincerely

**The Hon LINDA BURNEY MP**  
Minister for Indigenous Australians

15 / 5 / 2024