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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE
NDIS BACK ON TRACK NO. 1) BILL 2024**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

**(Circulated by the authority of the
Minister for the National Disability Insurance Scheme, the Hon Bill Shorten MP)**

NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024

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SUMMARY OF AMENDMENTS

One of the key changes made by the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill) is to insert a new definition of 'NDIS support' into the *National Disability Insurance Scheme Act 2013* (the Act).

Item 14 of Schedule 1 to the Bill inserts new section 10, which provides for the new definition of NDIS support. This concept appears in numerous places throughout the Bill and will be central to the operation of the future of the National Disability Insurance Scheme (NDIS) in a number of ways.

This new concept of NDIS support provides clarity around the supports that can be funded by the NDIS and those that cannot. This approach is consistent with the original intention of the Scheme to provide supports to people with significant and permanent disability and people who are in need of early intervention supports. It is also consistent with the recommendations of the Independent Review into the NDIS (NDIS Review) in that it focuses on the needs of a participant, rather than a diagnosis. Additionally, the definition makes clear the constitutional basis for the new budget-based planning framework recommended by the review and provides clarity and consistency across the entirety of the Act.

With the move away from the current planning approach, which includes an individualised assessment of 'reasonable and necessary supports' (that must by their nature be supports of a particular kind that are appropriately funded or provided by the NDIS), it is necessary to include a legislative definition of the supports capable of being funded by the NDIS. The definition will guide participants on how they may spend their flexible budget, once there is no longer a decision made about their entitlement to individual reasonable and necessary supports.

This change is necessary to assist 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. It is not intended to limit or restrict the supports that have always been capable of being funded by the NDIS.

The definition of NDIS support relies, in part, on the creation of Category A NDIS rules, requiring the agreement of the Commonwealth and all States and Territories. Given the critical nature of this definition, it is necessary to have a transitional approach to defining NDIS support until final NDIS rules can be agreed.

Since the introduction of the Bill, the government has listened to concerns raised by the disability community about the definition of NDIS supports. In particular, concerns have been raised about a lack of clarity in the drafting of the provision, requiring participants to undertake a complex analysis of whether a support may be considered

an NDIS support for them. Concern has also been raised about the fact that the original drafting of proposed section 10 listed certain articles of the *Convention on the Rights of Persons with Disabilities* (CRPD). To address this, these parliamentary amendments replace the original proposed definition of NDIS support with a new, more accessible provision.

FINANCIAL IMPACT STATEMENT

These amendments will not alter the financial impact of this Bill.

NOTES ON AMENDMENTS

Amendment 1 makes a minor change to item 6 of the Bill, which inserts a reference to NDIS support into section 9 of the Act (the definitions section). This is consequent on the new drafting of section 10, which defines NDIS support by reference to an inclusive definition (in subsection 10(1)) and an exclusive definition (in subsection 10(4)). These two aspects of the definition will now be included in section as the definition of NDIS support.

Amendment 2 omits section 10 and replaces it with a new draft of that same section.

Proposed section 10 provides a definition of NDIS support. This definition serves two purposes:

- It makes clear the constitutional basis for the new budget setting framework recommended by the 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.

For the sake of consistency and simplicity across the entirety of the NDIS Act, the definition has been adopted in key areas, particularly where references to supports being appropriately funded by the NDIS already exist.

Summary of proposed new section 10

New subsection 10(1) provides that a support will be an NDIS support for a person if it is declared in NDIS rules to be an NDIS support for participants or prospective participants generally, or a class of participants or prospective participants that includes the person. This is subject to subsection (4), which enables NDIS rules to declare that a support is not an NDIS support for participants or prospective participants generally, or a class of participants or prospective participants that includes the person.

This means, in practical terms, that a person will be able to know with ease and certainty what supports are, and are not, NDIS supports for them. So long as a support is listed in rules made under subsection 10(1) as being an NDIS support for people or generally, or a class that includes the person, and is not listed in rules made under

subsection 10(4) for people generally, or a class that includes the person, it will be an NDIS support for that person. This is a much more straightforward approach than the previous draft of section 10.

Subsections 10(2) and 10(3) provide limitations around the types of supports that can be declared to be NDIS supports under subsection 10(1). In practice, this requires the Minister to do most of the work that previous section 10 left to the participant.

Before declaring a support as an NDIS support for the purpose of subsection 10(1), subsection 10(2) requires that the Minister be satisfied that the support is appropriately funded by the NDIS for participants or prospective participants generally, or a class of participants or prospective participants that includes the person (whichever is applicable).

In addition, the Minister must also be satisfied of at least one of the following before declaring a support in rules made for the purpose of subsection 10(1):

- (a) the declaration of the support implements Australia's obligations under:
 - (i) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006; or
 - (ii) any other agreement with one or more other countries; or
- (b) the declaration of the support enables the provision of sickness benefits.

Constitutional considerations

The Federal Parliament can only make laws on certain matters that are set out in the Australian Constitution, and the Commonwealth can only provide funding and support to people where there is a constitutional basis to do so.

For the most part, constitutional support for the NDIS comes from the external affairs power in section 51(xxix) of the Constitution as a mechanism to implement the CRPD.

Section 10 also references the 'social welfare power', which provides the Commonwealth with power to make laws with respect to:

The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

This ensures the definition of NDIS supports captures the broadest range of supports the Constitution will allow, including those that may fall outside of the scope of the CRPD.

In relying on the treaty implementation aspect of the external affairs power, there are 2 tests that must be satisfied. First, the external affairs power can only be used to implement aspects of a treaty that are 'sufficiently specific' to give rise to a positive obligation. Second, the Commonwealth can only make laws that are 'reasonably capable of being considered appropriate and adapted' to implementing those positive obligations.

The current language of proposed section 10 lists a number of articles from the CRPD that meet these tests and can therefore be relied upon to fund supports under the NDIS. These articles are capable of funding a wide range of supports for people with disability.

Public commentary on the Bill has queried why the current drafting of proposed section 10 does not specifically reference all the articles from the CRPD in its definition of NDIS support. Concerns have also been raised that proposed section 10 currently requires an individual participant to assess whether a support meets all of the relevant criteria to be an NDIS support for them, placing an inappropriate burden on the participant.

These amendments change the structure of section 10 so that the Minister must assess whether certain supports may rely on obligations under of the CRPD (or the sickness benefits power) when making rules under proposed subsection 10(1). It takes the onus off the participant to identify relevant obligations under the CRPD, and as a result the specific articles of the CRPD no longer need to be specifically referenced in the provision.

Appropriately funded by the NDIS

Intergovernmental agreements outline the supports that are appropriately provided by the NDIS and those that are more appropriately funded by other programs and service systems. For example, the NDIS is not responsible for supports that may be provided through the Medicare or other Commonwealth programs, nor is it responsible for supports that may be provided through State and Territory health care systems.

This requirement already exists in the Act and is relevant to both access and the existing planning framework. For example, current paragraph 34(1)(f) of the Act provides that reasonable and necessary supports must be most appropriately funded or provided through the NDIS.

The requirement that supports are appropriately funded by the NDIS is also a requirement in paragraph 24(1)(e), which provides that a person is likely to require support under the NDIS for their lifetime, and subsection 25(3) dealing with whether early intervention supports are most appropriately funded or provided by the NDIS.

Inserting this requirement into the definition of NDIS supports simplifies the Act so that the requirement is set out in one place, rather than intermittently throughout the NDIS Act.

Amendment 3 makes a minor amendment to item 115 of Schedule 1 to the Bill, to ensure that NDIS rules made under subsections 10(1) and 10(4) are both 'category A' rules within the meaning of section 209 of the Act, requiring the agreement of the Commonwealth and all States and Territories.