Australian Government
Department of Social Services

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

Further supplementary joint submission to the Senate Community Affairs Legislation Committee Inquiry

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Abbreviations and acronyms used in this submission

- **Act** means the *National Disability Insurance Scheme Act 2013*
- **Bill** means the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024
- **CEO** means the Chief Executive Officer of the National Disability Insurance Agency
- **Committee** means the Senate Community Affairs Legislation Committee
- **Department** means the Department of Social Services
- **First Ministers** includes the Prime Minister, Premiers of each State and Chief Ministers of each Territory
- **NDIA** means the National Disability Insurance Agency
- **NDIS** means the National Disability Insurance Scheme
- **NDIS Commission** means the National Disability Insurance Scheme Quality and Safeguards Commission
- **NDIS Review** means the 2023 Independent Review into the National Disability Insurance Scheme
- **NDIS rules** means rules made under section 209 of the *National Disability Insurance Scheme Act 2013*
- **Scheme** means National Disability Insurance Scheme
- **Senate amendments** mean proposed parliamentary amendments to be moved by the Government in the senate, circulated on 27 June 2024

Introduction

On 17 May 2024 a joint submission was provided to the Committee by the Department, the NDIA and the NDIS Commission. That submission explained the operation of the Bill generally, with a focus on the more complex measures that are given effect to through these reforms.

On 5 June 2024, a supplementary joint submission was provided to the Committee by the Department and the NDIA. That submission provided further information to respond to concerns raised in submissions to the Committee and in evidence provided to the Committee. It also explained the operation of parliamentary amendments that were agreed by the House of Representatives on 5 June 2024.

On 27 June 2024, the Bill was referred back to the Committee for further inquiry, including examining any circulated amendments to the Bill and the positions of state and territory governments. This submission provides further information about those matters.

New framework planning process

The proposed Senate amendments respond to concerns that the Bill does not allow for a 'whole-of-person' needs assessment. The amendments clarify that the needs assessment process should consider a participant's needs holistically, taking into consideration a variety of factors that may impact a participant's need for support under the NDIS.

The proposed Senate amendments do not change the intended operation of the Bill. Instead, they provide clarification to ensure that the measures will be interpreted and applied in accordance with its intent.

The intent of section 32L has always been that a needs assessment will assess a participant's needs holistically, consistent with recommendations of the NDIS Review (actions 3.3, 3.4 and 3.5). Proposed amendments to section 32L further reinforce this.

Funding for supports under the NDIS will generally be provided to address needs arising from the impairments for which a participant meets the disability requirements or the early intervention requirements of the Act. However, these needs may be impacted by a range of other factors, including environmental factors such as a participant's geographic location, the availability of informal supports and the impact of impairments which do not meet the disability requirements or early intervention requirements.

Subsection 32K(2) allows the Minister to make a legislative instrument which determines the method for calculating a participant's reasonable and necessary budget. Proposed amendments to section 32K will impose an additional requirement on the Minister when making that instrument, specifically, that the Minister must be satisfied that the determination adequately takes account of the variety of factors that may affect a participant's need for NDIS supports.

The proposed Senate amendments insert a number of legislative notes to clarify what these 'factors' may be for the purposes of both sections 32K and 32L. These notes make it clear that, while funding under the NDIS may only be provided for needs arising out of impairments that meet the disability

requirements or the early intervention requirements, these needs may be affected by a range of other factors, including the interaction with other impairments and environmental factors.

While these legislative notes do not change the operation of the provisions, they do clarify how these provisions should be interpreted. This provides clarity and certainty for participants and will assist in the operationalisation of the new planning framework, as well as guidance for courts and tribunals in interpreting those provisions. These legislative notes will therefore ensure that the legislation is interpreted and applied consistently with the policy intent behind them.

Case studies

Peter

Peter meets the disability requirements for a physical impairment that impacts his functional capacity in the mobility and self-care domains. Peter has recently acquired a sensory impairment relating to vision loss. The impairment does not meet the disability requirements or early intervention requirements, but it does affect his functioning in the mobility and self-care domains.

Peter transitions to the new planning framework and has a needs assessment. The assessment tool takes account of Peter's holistic disability support needs. The outcome of the needs assessment reflects that the intensity of Peter's needs in the mobility and self-care domains arising from his physical impairment is higher due to the impact of his sensory impairment.

The assessment report details the intensity of Peter's needs across all domains. The NDIS will fund needs arising from Peter's physical impairment, taking into account the impacts of the sensory impairment on Peter's support needs. Peter may also be provided information and referrals to other services to support his sensory impairment.

Kylie

Kylie meets the disability requirements in relation to an intellectual impairment that affects her capacity for self-care and self-management. Kylie also lives in a remote area and does not have access to informal supports. Both of these factors impact Kylie's support needs that arise from her intellectual impairment.

Kylie transitions to the new planning framework and has a needs assessment. The assessment tool takes account of Kylie's holistic disability support needs. The outcome of the needs assessment reflects that Kylie has a higher support need intensity due to the effects of her environmental factors (being her remote location and lack of informal supports).

The assessment report details the intensity of Kylie's needs across all domains. The NDIS will fund needs arising from her intellectual impairment, taking into account the impact of Kylie's unique environmental factors on her needs.

Information gathering powers

The proposed Senate amendments implement recommendation 2 made by the Committee in the report into its inquiry into the Bill. The Committee recommended that the Government further clarify the circumstances under which the additional information gathering powers granted to the CEO will be

used. Specifically, the recommendation relates to new information gathering powers for the purpose of the CEO considering whether a participant continues to meet the access criteria (sections 30 and 30A) and for the purpose of making certain decisions about the participant's plan (section 36).

Requests to be given in writing

In practice, all requests for information from participants and other people under the NDIS Act are given in writing (as well as that person's preferred mode of communication if different and known). These amendments now explicitly require all requests for information under sections 30, 30A and 36 to be given in writing. This ensures accountability and transparency.

By requiring the requests to be in writing, the amendments also clarify that the CEO has the ability to vary or revoke that request at any time after it has been made. The power to vary or revoke is given by operation of subsection 33(3) of the *Acts Interpretation Act 1901* which relevantly provides that where an Act confers a power to make an instrument of administration character (such as a written request for information), that power may also be exercised to revoke or vary that instrument.

Failure to comply with certain requests for information

To ensure the CEO is making decisions on current and accurate information, sections 30, 30A and 36 allow the CEO to request certain information from participants and other people within timeframes set out in those sections or in a longer timeframe prescribed in the request.

If a person does not provide the requested information within the relevant timeframe, the CEO may revoke a person's status as a participant (sections 30 and 30A) or suspend the preparation of a participant's new framework plan (section 36).

The CEO is not permitted to take these actions if the CEO is satisfied that it was reasonable for the participant or another person not to provide the requested information within the relevant period. In these circumstances, the CEO may make a further request for information or provide an additional time period.

The proposed Senate amendments will provide guidance for the CEO in considering whether it was reasonable for a person not to have complied with a request for information made under sections 30, 30A or 36 within the timeframe prescribed in the request. The amendments will require the CEO to have regard to the following matters in considering whether it was reasonable not to comply with a request for information within a prescribed timeframe:

- the length of time the person has had to provide the information (for example, a delay of 6 months may be appropriate in certain circumstances whereas a delay of 12 to 18 months may not be)
- any previous failures by the participant to comply with a request for information made under the Act
- any previous failures by the other person to comply with a request for information made under the Act in relation to the participant
- the length of time since the CEO was last provided with information relevant to the decision whether or not to revoke the participant's status as a participant (in relation to sections 30 and 30A only)

- whether the failure to comply with the request was beyond the control of the participant or other person because of a delay in the provision of information to the participant or other person
- any matters prescribed by Category A NDIS rules
- any other matters the CEO considers relevant.

These amendments provide additional clarity about how and when the CEO will exercise certain information gathering powers.

State and Territory engagement

This submission deals with two aspects of state and territory engagement. The Senate amendments will make changes to the arrangements for state and territory Ministers to agree to NDIS rules on behalf of host jurisdictions. The submission also responds to concerns raised by states and territories through the submission made by the Council on the Australian Federation about the Australian Government's plan to consult on the list of authorised and unauthorised NDIS supports.

Agreement to NDIS rules

Section 209 of the Act sets out requirements for seeking the agreement of host jurisdictions to NDIS rules. Relevantly, agreement to NDIS rules must be through the relevant 'host jurisdiction minister'.

Currently, a host jurisdiction minister means a Minister of a host jurisdiction who is a member of the Ministerial Council. The Ministerial Council is a body that consists of Ministers of the Commonwealth, States and Territories and has responsibility for the NDIS. This generally does not include the Premiers and Chief Ministers.

The proposed Senate amendments would amend the definition of 'host jurisdiction Minister' so that it means a Minister of the host jurisdiction who is:

- A member of the Ministerial Council
- If the host jurisdiction is a State – the Premier of the State
- If the host jurisdiction is a Territory – the Chief Minister of the Territory.

This will allow communication about agreement to NDIS rules to occur directly with the Premier or Chief Minister and will allow for Premiers and Chief Ministers to provide agreement to NDIS rules themselves.

These amendments provide greater flexibility in how host jurisdictions manage engagement on, and agreement to, NDIS rules. They will also allow First Ministers to directly agree to NDIS rules in joint forums such as National Cabinet. While the Minister must make the NDIS rules, the Prime Minister can agree to them on behalf of the Commonwealth in such forums.

This amendment implements recommendation 1 made by the Committee in the report into its inquiry into the Bill that First Ministers are also recognised as Ministers for the purposes of Category A rule-making.

State and territory views

In its submission to the Committee, the Council of Australian Federation (CAF) has called for the Commonwealth Government to undertake genuine and meaningful consultation with the disability

community, service providers, and state and territory governments on the reforms outlined in the Bill. States and territories raised concerns about potential limitations on their role in the governance of the NDIS, primarily due to new legislative instrument making powers for the Minister that will play a role in determining the future direction and operation of the NDIS.

In particular, the CAF submission raised concerns about certain legislative instruments not being Category A NDIS rules, including the transitional rule that will provide a definition of NDIS support and the legislative instruments that will facilitation transition to new framework plans.

Once agreed, new Category A NDIS rules to define an NDIS support will provide an outline of supports that can be purchased using NDIS funds as well as supports that cannot be purchased using NDIS funds. This will provide clarification about supports that are, and are not, the responsibility of the NDIS. This will be based on intergovernmental agreements about the responsibilities of different service systems. These new rules will take time to develop with the disability community and must be agreed by all states and territories. Until these NDIS rules are made, a transitional rule will be made to provide for the definition of NDIS support on an interim basis.

A draft consultation list of what is and is not an NDIS support has been prepared for consultation with state and territory Disability Ministers and the disability community.

The transition to new framework plans is an operational matter and will need to take into account the evolving nature of the transition and operational constraints and requirements. The overall plan for transition will necessarily involve consultation with the disability community and state and territory governments, but the instruments facilitating the transition are operational in nature and are therefore appropriately made by Ministerial determination.

The needs assessment tool will be the subject of extensive co-design and consultation with the disability community, state and territory governments and relevant experts. Once the substantive work has been completed to develop the assessment tool it will be of an operational nature. The method by which a resulting reasonable and necessary budget is calculated will also be the subject of consultation and co-design and will be an operational instrument.

It is important to note that the consultation requirements in the *Legislation Act 2003* will apply to these instruments, and this will include the Minister consulting state and territory governments where appropriate.

The CAF submission recommends that the commencement of the Bill be deferred until new Category A NDIS rules are agreed for the purpose of section 10, and to align commencement with new foundational supports.

The Bill establishes an enabling framework for rules and future reforms as the majority of the changes outlined in the Bill do not take effect until activated by future changes to NDIS rules and instruments. The Bill introduces 34 new rule-making powers and 6 new legislative instruments. Of these, 27 are Category A rules relating to changes with significant impact, requiring unanimous agreement from states and territories to come into effect. The timing of these changes coming into effect is expected to align with the introduction of Foundational Supports as agreed at National Cabinet to commence from 1 July 2025. DRMC agreed to publicly release a roadmap in July that outlines the timing and sequences of the changes.

States and territories have also recommended the Bill should be amended to strengthen quality, safeguarding, fraud and compliance measures. The Bill contains measures around safeguarding including enabling effective management of funding, changing plan management type based on fraud and financial decisions and audit banning powers for the Commission.

Addressing the recommendations from the Review around proportionate regulation is currently subject to consultation through the NDIS Provider and Worker Registration Taskforce to be considered in future tranches of legislative reform.

Consultation statements

The issue of consultation and co-design, particularly in relation to legislative instruments, has been the subject of widespread discussion since the Bill was introduced. This discussion included extensive submissions and evidence received by the Committee and resulted in amendments being agreed in the House of Representatives to explicitly require the Minister to have regard to the principle of co-design when making certain new legislative instruments.

The Committee considered that these amendments are a measured and appropriate response to concerns raised regarding co-design, but noted proposals from inquiry participants to ensure appropriate consultation occurs on disallowable legislative instruments as well as transparency over the consultation process.

The Committee therefore recommended that a 'consultation statement' be tabled accompanying all legislative instruments made under the Act that sets out consultations undertaken.

Paragraph 15J(2)(d) of the *Legislation Act 2003* requires the maker of a legislative instrument to provide information about consultation undertaken in the preparation of that instrument. While this general requirement already extends to the Minister when making legislative instruments under the Act, the proposed Senate amendments would clarify and strengthen these requirements specifically in relation to legislative instruments made under the Act.

The proposed Senate amendments specify that explanatory statements to legislative instruments made under the Act will be required to meet the following requirements:

- describe the nature of the consultation
- describe in general terms the persons, bodies or organisations who were consulted
- contain a summary of the views expressed by those persons, bodies or organisations.

The requirement to describe the nature of the consultation undertaken will require the Minister to explain how consultation occurred. For example, was there a public consultation process; what did it consist of (e.g. small consultative forums, public forums and town halls, and/or an online engagement process; and was there an opportunity extended to provide written submissions?

The requirement to describe the persons, bodies or organisations consulted will require the Minister to explain who was engaged in the consultation, for example, advocacy bodies, individuals in the disability community, other organisations or government bodies.

The above descriptions must not identify a person, body or organisation, or reveal the views of a person, body or organisation, except with the agreement of the person, body or organisation. This is an important qualification to protect the privacy of individuals but also to provide entities the opportunity to provide confidential input into consultation processes.

Parliamentary amendments circulated by non-government Senators

Senator Thorpe has circulated a number of proposed amendments to be moved in the Senate in the Committee of the Whole stage. The government will give careful consideration to these amendments in the lead up to the Committee of the Whole stage in the Senate.

The Opposition indicated on numerous occasions during the second reading debate in the Senate that it would be moving parliamentary amendments 'at the appropriate time'. As these amendments have not been circulated at the time of preparing this submission, the department and NDIA are not in a position to provide comment.