

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

Public Hearing – 25 July 2024

ANSWER TO QUESTION ON NOTICE

Department of Social Services

Topic: National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]

Question reference number: IQ24-000131

Question asked by: Jordon Steele-John

Type of Question: Spoken. **Hansard Page/s:** 45

Date set by the Committee for the return of answer: 31 July 2024

Question:

Senator STEELE-JOHN: There are a number of legislative instruments that have been tabled in the Senate and will, I'm sure, be tabled in the future which enable methods which functionally amount to an algorithmic or automated process. That could be an option that government decides to adopt in relation to this method, couldn't it?

Mr Swainson: Senator, there is nothing in this legislation or bill which authorises the process you're talking about. There is nothing in here which authorises an automated or algorithmic decision-making process. Now, that's not to say a person might not need a calculator to make it, but under this bill and the current legislation there is a human who makes that decision based on the legislative instruments before them. There is nothing in here that authorises or provides for automated decision-making.

Senator STEELE-JOHN: Just to clarify: you say nothing authorises it, but the reference to the method is quite short, so what section of this bill are you reading and interpreting as a prevention against a future government or the current government deciding that the method is an automated or algorithmic process.

Mr Swainson: To allow an instrument to be made which enables automated decision-making would require clear authorisation in primary legislation. That is a legal principle. We heard from a number of lawyers yesterday. I'm sure there'd be no debate with any of those lawyers on that proposition. There doesn't need to be a specific prevention in the primary legislation to prevent that. It would be unlawful unless it were authorised in the primary legislation.

Ms Shannon: It's the other way around

Mr Swainson: It's the other way around. The ministerial instrument could not do it unless it were specifically authorised. So I'd take that to be a very non-contentious legal position, and I'm sure that all of the lawyers appearing yesterday would agree with me on that.

Senator STEELE-JOHN: We've taken a number of submissions that have warned of the potential for this legislation to be used for precisely that purpose, so could you take on notice which sections of the legislation actively prevent this government, or a future government, from enacting an automated or algorithmic process within a legislative instrument related to a budget method. That would be very useful.

Answer:

There is no provision in the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 that authorises automated decision making.

Automated decision-making must be expressly authorised in primary legislation. It cannot be authorised by a legislative instrument because a legislative instrument cannot override the operation of the Act.

An example of a provision that authorises automated decision-making is section 6A of the *Social Security (Administration) Act 1999* which provides the following:

6A Secretary may arrange for use of computer programs to make decisions

(1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary or any other officer may make decisions under the social security law.

Note: The definition of *decision* in the 1991 Act applies for the purposes of this section: see subsection 3(2) of this Act. That definition covers the doing of any act or thing. This means, for example, that the doing of things under subsection 202(1) or (2) of this Act are decisions for the purposes of this section.

(2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary.