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Friday May 17 2024

Senators Marielle Smith and Penny Allman-Payne  
Chairs, Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
[community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)

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

Dear Senators

Thank you for the opportunity to provide a submission to your committees' inquiry into the provisions of the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*<sup>1</sup> (the Bill). We also thank you for extending the due date for submissions to mid-May so that Disability Representative Organisations and other interested parties can provide their thoughts on this document.

What follows are Physical Disability Australia's (PDA's) thoughts on the Bill and its Explanatory Memorandum<sup>2</sup> as they pertain to:

- The new definition of NDIS Supports;
- How the term 'Reasonable and Necessary' will be used;
- How "new format plans" (that include budgets rather than set funding amounts for various support categories and items) will be built;
- The clarified process for reassessment of participants' compliance with NDIS disability requirements; and
- The processes by which the National Disability Insurance Agency (the Agency) may assume management responsibility for a participant's plan.

Our points of agreement and contention with the Australian Government's proposed changes to the *NDIS Act 2013*<sup>3</sup> (the Act), and our recommendations, have been formulated with the help of Physical Disability Australia's (PDA's) members, many of whom are NDIS participants, and reflect their thoughts and concerns about the Bill's provisions and how they might affect their access to NDIS supports vital to their wellbeing and capacity to lead ordinary lives.

***The definition of 'NDIS Supports'***

In principle, PDA approves of the Government's intention to better define what supports should and should not be supplied by the NDIS, and that this be done through explicit descriptive clauses within the Act. The Bill provides this by providing

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<sup>1</sup> [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7181\\_first-reps/toc\\_pdf/24047b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7181_first-reps/toc_pdf/24047b01.pdf)

<sup>2</sup> [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7181\\_ems\\_f83281ef-0f46-4fbb-a59f-2e19439dcacb/upload\\_pdf/JC012589.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7181_ems_f83281ef-0f46-4fbb-a59f-2e19439dcacb/upload_pdf/JC012589.pdf)

<sup>3</sup> <https://www.legislation.gov.au/Details/C2022C00206>

for a new section 10 'Definition of NDIS Support' to be inserted in the Act. PDA is happy with this approach.

However, we are unhappy that the list of NDIS Support specifications were written without direct consultation with existing and potential participants and their representative organisations, and while PDA is happy to see:

- (i) Social and economic participation assistance;
- (ii) Impairment-dictated transport options;
- (iii) Mobility-related assistive technology equipment, guides, and assistance animals ;
- (iv) to (vi) Impairment-dictated health and rehabilitation services (and support to attend them); and
- (vii) Further impairment prevention therapy,

... we are alarmed that any other supports (including many of those participants currently receive through the NDIS) are contingent on their inclusion in yet-to-be-written NDIS Rules in accordance with subsection 10(b).<sup>4</sup>

For example, many PDA members rely on non-mobility related assistive technology for communication and self-care, and it is concerning that these are not listed in subsection 10(a). Beyond that – in concert with advocates for participants with intellectual and sensory impairments, participants living with neuro-divergency and participants with psychosocial disability – we are similarly alarmed that many other commonly provided non-mobility or non-attendant care supports<sup>5</sup> that *they* rely on are missing from this subsection too.

#### **Recommendation 1**

***That the Senate Committees recommend that the Bill's paragraph 10(a) provisions be significantly expanded to include those supports the Agency and Australian community routinely acknowledge to be both reasonable and necessary (as this term is used in the in-force Act) for participants in accordance with their impairments and circumstances.***

In making this recommendation, we are not opposing retaining the Bill's provisions relating to subsection 10(b) as it **does** provide flexibility for more things to gain 'NDIS support' status as evidence recommends. However, authorising the NDIS' provision of so many routinely required supports in this way leaves them more vulnerable to being de-listed in the future.

#### **Reasonable and Necessary**

One of the key issues behind participant, community, and Government concern with the way the NDIS operates (as identified in the Independent Review into the NDIS' (NDIS Review's) *What We Have Heard*<sup>6</sup> and *Final Reports*<sup>7</sup>) is that the Act's reliance on the term 'Reasonable and Necessary' is unsupported by either a concise

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<sup>4</sup> Presently there are 30 NDIS Rules published on the Australian Government's *Federal Register of Legislation* (<https://www.legislation.gov.au/>).

<sup>5</sup> In particular, those supports that the NDIS routinely acknowledges to be both reasonable and necessary for participants in accordance with their impairments and circumstances.

<sup>6</sup> <https://www.ndisreview.gov.au/sites/default/files/resource/download/what-we-have-heard-report.pdf>

<sup>7</sup> <https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf>

definition or list objectively determinable criteria. This leaves its meaning largely in the eye of the beholder.

Regrettably, the NDIS Review's *Final Report* does recommend that this problem be solved by inserting a definition of 'Reasonable and Necessary' into the Act. The closest it gets is Recommendation 23.2:

*"The Department of Social Services, in consultation with the National Disability Insurance Agency, the new National Disability Supports Quality and Safeguards Commission and the Independent Health and Aged Care Pricing Authority, should establish and manage a NDIS Evidence Committee to provide guidance on reasonable and necessary disability supports. (p. 15)<sup>8</sup>*

Perhaps because the *Final Report* didn't recommend it, the Bill doesn't settle the matter by providing a statutory definition of this quintessential term either. Instead, the Bill both side-steps the issue (by removing the term from the Act's sections detailing what supports the NDIS will provide) and exacerbates it (by confining the term to 'budgets'... excepting section 34 of the Act, 'Reasonable and necessary supports'.

As PDA understands it, the Bill provides for NDIS participants to receive 'Reasonable and Necessary' budgets with their new format plans which will be determined from information the Agency has (or requests) regarding their impairment-related support needs and, in some cases, the results of needs assessments Minister-approved 'needs assessment tools as specified in yet-to-be-written legislative instruments.

PDA submits that if the term 'Reasonable and Necessary' is to only apply to budgets in this way, it could easily be done away with,

Confusingly though, the Bill does *not* repeal section 34 'Reasonable and necessary supports'; the source of so much conflict between participants and the Agency since the NDIS commenced in 2013.<sup>9</sup>

Instead, the Bill, *inter alia*, swaps out the existing clause (f)<sup>10</sup> with the much more consequential:

(f) *the support is an NDIS support for the participant.*

As the current and proposed versions of section 34 require *all* clauses (aa) to (f) to be met before any requested support can be deemed 'Reasonable and Necessary', the substitute clause (f), proclaiming that a support is *only* 'Reasonable and Necessary' if it is a NDIS support (as defined by the proposed section 10), then section 34 has neither effect nor purpose.

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<sup>8</sup> PDA is disappointed that this list of actors does not include people with disability and their representative organisations.

<sup>9</sup> As indicated by the number of Administrative Appeals Tribunal cases that include the term in their decisions ([https://www.austlii.edu.au/cgi-bin/sinocrch.cgi?meta=;mask\\_path=au%2Fcases%2Fcth%2FAATA;method=auto;query=%22reasonable%20and%20necessary%20supports%22](https://www.austlii.edu.au/cgi-bin/sinocrch.cgi?meta=;mask_path=au%2Fcases%2Fcth%2FAATA;method=auto;query=%22reasonable%20and%20necessary%20supports%22)).

<sup>10</sup> That excluded supports that should be provided by other governmental entities (which is now dealt with in the Bill's provisions for new subsections 10(b) and 10(c) of the Act.

## Recommendation 2

***That the Senate Committees recommend the Bill be amended to repeal section 34 in its entirety and similarly delete (or replace, as appropriate) the term ‘Reasonable and Necessary’ from the Act to give full effect to:***

- ***Section 32 provisions defining the properties of budgets; and***
- ***Section 10 provisions defining what NDIS plans can be spent on.***

In addition to our textual analysis of the Bill, this recommendation is informed by the submission PDA made in response to the NDIS Review’s *What We Have Heard Report*<sup>11</sup> in which we recommended ‘Reasonable and Necessary’ be defined in relation to a ‘reasonable comparator.

### ***New format plans***

The Bill’s sections 32A to 32M, and 33(2) provisions introduce a system whereby the NDIS will provide participants with reasonable and necessary support budgets (in new format plans) rather than quantities of reasonable and necessary support items (to be called old format plans).

PDA approves of the Government’s determination to implement the NDIS Review’s *Final Report* recommendations 3.3 –

*The Agency should change the basis for setting a budget to a whole-of-person level, rather than for individual support items,*

... and 3.4 –

*The Agency should introduce new needs assessment processes to more consistently determine the level of need for each participant and set budgets on this basis.*

... through some of these provisions.

That being said, we are disappointed that recommendations 3.5 –

*The Agency should allow greater flexibility in how participants can spend their budget, with minimal exceptions.*

... and 3.6 –

*The Agency should adopt a trust-based approach to oversight of how participants spend their budget, with a focus on providing guidance and support.*

... appear not to have been as fully embraced. In our view, the Bill only provides for **some** flexibility, and it does not require the Agency to assume participants are trustworthy. Instead, many of the provisions deal with settings for less-flexible and non-flexible funding.

Section 32E allows for participants budgets to be divided into **flexible funding** (that can be spent on any NDIS support) and **stated supports** (that can only be spent on “particular stated supports or class of supports”).

PDA has no problem with this approach. If a participant, for example, has an acknowledged need for a piece of assistive technology (such as a power wheelchair or prosthetic leg), then it is appropriate for that person’s budget to have a ‘line-item’

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<sup>11</sup> [https://www.ndisreview.gov.au/sites/default/files/submissions/SUB-Y7Q3-003076%20pda-5-key-challenges-submission-25aug23\\_clean.pdf](https://www.ndisreview.gov.au/sites/default/files/submissions/SUB-Y7Q3-003076%20pda-5-key-challenges-submission-25aug23_clean.pdf)

reservation of funds for that support, and leave the remainder of the budget to be spent on other NDIS supports as their day-to-day circumstances dictate.

However, we are concerned that the 'class of supports' category may allow the Agency to stipulate that in home/workplace personal care supports (Core) and community engagement and allied health treatment supports (Capacity-building) are stated supports. This, in-turn would effectively remove any real flexibility from a participant's plan.

### **Recommendation 3**

***That the Senate Committees recommend the Bill be amended to remove the term "or class of supports" from its section 32 provisions to provide for maximum plan flexibility in real terms.***

### **Reassessment of participants' NDIS eligibility and support entitlements**

The Bill's section 30A provisions allow the CEO to revoke a person's participant status if that person is unable to prove they no longer meet NDIS disability requirement eligibility criteria. In essence, if the Agency suspects a person should have their participant status revoked, it will require them, within a 90-day<sup>12</sup> timeframe, to:

- Provide further information about their disability and other relevant circumstances; and/or
- Undergo a needs assessment that may include a one or more medical, psychiatric, psychological or 'other' examinations.

With this information, the Bill provides that the CEO has 14 days in which to either confirm or revoke the person's participant status (using criteria specified in yet-to-be-written NDIS Rules), or require them to provide yet further information.

PDA has no problems with the scope of these provisions. If people never properly met, or no longer meet, NDIS eligibility criteria, they should not retain participant status. What is missing though, is an acknowledgement that some participants may not have the means to provide the required information nor attend needs assessment meeting medical, psychiatric, psychological or 'other' examinations.

We feel there should be provisions that the Agency must commission needs assessments in circumstances where the participant cannot afford the assessment's cost nor the travel and accommodation expenses that might be entailed in providing them.

### **Recommendation 4**

***That the Senate Committees recommend the Bill be amended to require the CEO to provide any reasonably necessary support to assist participants obtain the information needed by the Agency for reassessment purposes.***

PDA understands that the Act's section 24 'Disability Requirements' and section 22 'Age Requirements' are separate components of the section 21 'Access Criteria', but the lack of any provision making this clear may lead to unnecessary participant fears that they may lose their access to the NDIS (and therefore be left to the not-so-

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<sup>12</sup> This is a minimum allowance. Section 30A(6) provisions do allow discretion for a longer information provision window as appropriate.

tender mercies of Australia's chronically under-resourced Age Care system) when they reach the age of 65.

#### **Recommendation 5**

***That the Senate Committees recommend the Bill be amended to make it clear that its section 30A provisions only apply to the Act's section 24 'Disability Requirements' or otherwise specifically exclude an existing participant's age from the CEO's consideration of their ongoing eligibility for NDIS participant status.***

Notwithstanding this recommendation, PDA approves of the Government's plans for more easily allowing the reassessment younger participants' (who gained access to the NDIS by way of the Act's section 25 'Early intervention requirements' provisions) eligibility for participant status.

In 2013, we were concerned that early intervention therapies that have the potential to build children with disability's functional capacity were included in the NDIS's remit, and believed that access should have been restricted to people who only met the disability and residence requirements. Since then, PDA has been concerned that younger people with impairments that respond well to early intervention therapy would be unintentionally grandfathered-in, and that this would unnecessarily add to the Scheme's cost and threaten its reputation.<sup>13</sup>

#### **Increased Agency involvement in plan management arrangements**

The Bill's section 43, 44 and 45 provisions allow the Agency more latitude to assume control of a participant's plan management arrangements if it forms the view that a participant, their nominee, and/or their registered plan management provider:

- Will not properly acquit their reasonable and necessary budgets in accordance with legislation and NDIS rules (those existing *and* those yet-to-be-written);
- Will fail to utilise their budgets in a way that ensures participant physical, mental, and financial safety; and/or
- Will fail to meet yet-to-be-determined funds management and acquittal requirements set forth in yet-to-be-written NDIS Rules.

As with other elements of the Government's NDIS reform agenda, PDA approves of measures to ensure the Australian community's investment is prudently spent providing participants with supports appropriate to their needs and circumstances, and that support coordinators, plan managers, and support providers are not afforded the opportunity to unduly profit by mishandling budgets.

That being said, the Bill fails to detail what circumstances the Agency should consider before deciding to take plan management responsibility unto itself beyond that they may be specified in yet-to-be-written NDIS Rules. PDA would not approve of any participant's plan management arrangements being changed on the basis of suspicion that funds ***might be*** improperly spent. Rather, such decisions should only be made after the Agency becomes aware that they ***have been***.

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<sup>13</sup> PDA's concern was later confirmed as a serious issue by the NDIS Review: <https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis/part-one-unified-system-support-people-disability-5#access-to-the-ndis-for-children-is-inconsistent-inequitable-and-not-based-on-need>

## **Recommendation 6**

***That the Senate Committees recommend the Bill be amended to add non NDIS Rule defined considerations that the CEO must make before any participant's plan management arrangements are changed. These considerations should ensure the CEO only makes plan management arrangement changes on the basis of demonstrated incapacity to, or intention not to, acquit funds appropriately.***

### **Conclusion**

PDA hopes the Senate Committees on Community Affairs understand the essential role the NDIS plays in allowing over 600,000 Australians with severe and profound disabilities to lead 'ordinary lives'.

We hope you also understand that the Government's reform agenda is driven as much by **its** need to reign in the Scheme's rapidly escalating costs as much as it is driven by **everyone else's** need for it to better meet the 'Reasonable and Necessary' support needs of people with permanent and significant disability as part of the larger landscape of supports outside of the NDIS.

The Bill you are examining is the first item on that agenda.

PDA agrees that reform is necessary, and we believe the Government should accept and implement almost all of the 23 recommendations of NDIS Review's *Final Report*. This, however, does not mean we approve of the speed with which the Government has drafted the Bill and introduced it to Parliament. There was no exposure draft nor consultation through which participants their representative organisations, and the wider community could have recommended ways in which it could, for example,

- Better address one of the Act's most glaring faults (that of having no clear definition of reasonable and necessary supports);
- Better ensure participants could exercise choice and control of their supports (by limiting the Agency's capacity to specify stated supports);
- Better protect people from arbitrary revocation of their participant status (by giving the CEO a means to commission the gathering of reassessment information); and
- Better protect participants from financial exploitation (by requiring all support coordinators and plan managers adhere to 'participant's best interest' practice guidelines).

Additionally, the **37** references to yet-to-be-written NDIS Rules that the Bill envisions testifies that its introduction to Parliament is premature. Given that NDIS Rules can be implemented by the Australian Government Executive and that Parliament's oversight capacity is limited to disavowal<sup>14</sup>, PDA feels at least *some* draft rules (subject to further consultation<sup>15</sup>) should have been included Explanatory Memorandum. This would allay many of the Australian disability community's fears about the Bill's underlying agenda and its potential effect on participants' lives.

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<sup>14</sup> As described in the Office of Parliamentary Counsel's *What is a legislative instrument?* fact sheet (<https://www.opc.gov.au/sites/default/files/2023-09/Fact%20Sheet%20-%20Legislative%20Instruments.pdf>).

<sup>15</sup> The *Legislation Act 2003* (<https://www.legislation.gov.au/C2004A01224/latest/text>) encourages consultation but does not explicitly require it.

## **Recommendation 7**

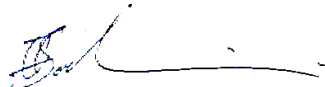
***That the Senate Committees recommend that further Parliamentary consideration of the Bill be delayed until:***

- ***Draft versions of the NDIS Rules related to the Bill's provisions are presented to the Australian disability community for consultation and finalisation; and***
- ***Finalised versions of these legislative instruments are added to the Bill's Explanatory Memorandum.***

The recommendations PDA has made in this submission are made with the intention of helping the Government realise the NDIS Review's Final Report (in part) vision for 'a fairer and more consistent participant pathway'.<sup>16</sup>

We hope you find them informative and compelling.

Your sincerely



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Physical Disability Australia

C.c. The Hon Bill Shorten MP, Minister for the NDIS and Government Services  
The Hon Amanda Rishworth MP, Minister for Social Services  
The Hon Michael Sukkar MP, Shadow Minister for Social Services, the NDIS,  
and Housing and Homelessness.

### **About Us:**

Physical Disability Australia (PDA) is a national peak membership-based representative organisation run by people with physical disability for people with physical disability. PDA was founded in 1995 and have over 1,200 members from all Australian States and Territories. Our purpose is to:

- Remove barriers through systematic advocacy to all levels of government to enable every Australian living with a physical disability opportunities to realise their full potential;
- Proactively embrace and promote difference and diversity for an inclusive society; and
- Actively promote of the rights, responsibilities, issues and participation of Australians with physical disability.

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<sup>16</sup> This is the title of Recommendation 3, and it encompasses of major areas of concern with the Bill's provisions.