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Dear Committee Secretary

Australian Psychological Society Submission to the Inquiry into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

The Australian Psychological Society (APS) welcomes the opportunity to provide a submission to the Inquiry into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (*the Bill*). As the peak body for psychology in Australia, we are dedicated to advancing the scientific discipline and ethical practice of psychology in the communities we serve to promote good psychological health and wellbeing for the benefit of all Australians.

The APS welcomes the Government's commitment to implementing the recommendations arising from the NDIS Review Final Report. However, we join with other peak bodies, providers, and participant groups to express our concerns with aspects of the Bill.

1. Excessive reliance on NDIS Rules and legislative instruments

A key feature of the Bill is that it defers the development and scrutiny of significant substantive principles and operational powers through the use of delegated legislation. A significant proportion of policy changes, including implementation of some of the NDIS Review's recommendations, will be implemented through NDIS Rules or legislative instruments which are yet to be developed. These include:

- Section 10: how supports are included or excluded as NDIS supports (NDIS Rules);
- Section 27: disability requirements and early intervention requirements (NDIS Rules);
- Section 32B: classes of participants that are to have new framework plans (legislative instrument);
- Section 32J: requirements, methods/criteria and considerations for working out a reasonable and necessary budget (NDIS Rules);
- Section 32K: formula for working out total funding amount for flexible funding or stated support(s) (legislative instrument); and
- Section 32L: assessment tools and reporting requirements for conducting a needs assessment (legislative instrument).

The APS considers the extensive use of such enabling provisions in the Bill to be poor regulatory design. We are given frameworks but very limited substantive detail in the Bill itself. In the absence of this detail, the scope of this Inquiry is fundamentally limited. We cannot comment on what might be; and when there is an opportunity to comment on the Rules and instruments, we will already be constrained by the framework set in the enabling legislation.

We acknowledge that most of the Rules to be made under the Bill are Category A rules (items 100 to 102 of the Bill), requiring agreement by Commonwealth and each host jurisdiction (section 209 of the *NDIS Act 2013*). However, we note that the required consultation with each jurisdiction under the Act does not also require consultation with participants, providers, and other stakeholders. Jurisdictions are also only given 28 days initially, with a maximum of 90 days, to provide their agreement, limiting their own ability to consult with the community.

While the Department will need to show that it has consulted with relevant stakeholders in relation to proposed Rules or instruments under section 17 of the *Legislation Act 2003*, this is a very low threshold. The extent of consultation will be self-determined by the Department, and inadequate consultation has no bearing on the validity of the Rule or instrument (*Legislation Act 2003*, s 19). We, and the Australian community, are therefore relying on the goodwill of the Government to “go through a consultation and co-design process with the disability community on updates to the NDIS Rules—continuing to put people with disability at the heart of NDIS reforms”.¹ The APS maintains hope in a genuine consultative process, but firmly believes that discussion on matters of such public policy significance should not be left to Departmental discretion.

If the widespread use of Rules and legislative instruments is considered necessary for the flexible operation of the NDIS, then appropriate checks and balances should be introduced into the Bill itself. For example, the Bill should require that Rules and instruments be developed in a consultative and collaborative way *ab initio*, rather than allowing for reactive and discretionary consultation.

The APS therefore recommends the establishment of a NDIS Rules and Legislative Instruments Provider Co-development Committee as a statutory body under the Bill. This Committee should be comprised of representatives from peak bodies, providers, and participant groups. Given the unique contribution of psychologists to the NDIS and to participants, we strongly believe that the APS should be represented on the Committee, and that this representation should be enshrined in legislation.

Section 209 of the Act should then be amended to require the Committee’s participation in the design and development of Rules and instruments impacting providers and professions. The Committee should be involved from the very beginning of the development process, not just be called to endorse regulatory models that have already been designed or drafted.

We consider that the establishment of this Committee would lead to substantial benefits for the NDIS ecosystem, including that:

- There would be a higher level of transparency by having key provider and community stakeholders co-design relevant Rules and instruments, resulting in higher levels of trust and engagement by providers and participants;
- The Committee would act as a standing expert body working alongside Government to provide informed, evidence-based and practice-led insights into the design, development, review and evaluation of Rules and instruments;
- There would be increased efficiency and savings to Government and the community through this process of ongoing engagement and collaborative design. Considerable time, money and effort would be saved in minimising the multiple reactive consultative processes which would be otherwise required, each of which requiring a separate submission, response or hearing but often with limited impact on outcomes.

- The creation of the Committee would signal a new and collaborative approach to NDIS reform, avoiding the repeated criticism of current ineffective consultation processes under this Government.

2. Needs-based assessments

The APS reiterates its concerns that details about needs-based assessments (proposed section 32L(8)) have been deferred to a legislative instrument which is yet to be developed. We are therefore cautiously anticipating further information about the assessment process, but we are wary that the Government has committed to this model without knowing what it looks like or how it will operate.

We also echo the concerns raised by Professor Helen Dickinson that “many of the tools needed for this process do not yet exist.”² As psychologists who are led by evidence-based practice, we are very aware that the development of valid and reliable assessment tools can take considerable time and cannot be rushed. We would like to see concerted effort given to the development of these measures in a transparent and collaborative way. Psychologists have unparalleled expertise in evidence-based assessment, the development and evaluation of assessment measures, and the use of assessments in a person-centred way. As a profession, we look forward to being an active part of this development process.

In the meantime, we recommend that the Bill be amended to provide certainty on matters relating to needs-based assessments, rather than leaving these details to Rules or instruments:

- The Bill should unequivocally provide that the cost of assessments will be borne by the NDIA, and that providers conducting assessments will be paid a reasonable amount for their professional services and be given a reasonable amount of time to complete their reports. This would ensure alignment with the NDIS Review Final Report recommendations (Action 3.1).³ Our recommendation also extends to assessments required for potential revocation decisions under proposed sections 30(3)(b) and 30A(5)(b).
- The Bill should expressly provide for the reviewability of needs-based assessment decisions. The Bill amends section 99 of the Act to make only the *approval* of a statement of participant supports (under proposed section 32D(2)) a reviewable decision. This is presumed to include the decisions required under proposed sections 32E to 32K to determine supports funding amounts, although this ambiguity could be resolved by including these provisions as reviewable decisions. Other key decisions relating to needs assessments and subsequent funding decisions are not included as reviewable decisions (e.g., the needs assessment itself [s 32L]; restrictions on how flexible funding is spent [s 32F(6)], and decisions to require a replacement assessment [s 32L(7)]). These omissions should be rectified as a matter of priority.
- The Bill should emphasise participants’ choice and control in the assessment process. This could be achieved by amending proposed section 32L(4) to enable participants to provide information (including previous assessment reports) to the NDIA as part of the assessment process, and to require that relevant information (e.g., a previous report prepared by a regulated professional, such as a psychologist) be considered. This would be consistent with the NDIS Review Final Report, which states that: “*Evidence to support the assessment should come from the participant, any treating professional if required, and take into account holistically the participant's life circumstances*” (p. 39, emphasis added).³

3. Reasonable and necessary budgets

The term “reasonable and necessary budget” in proposed section 32E, and throughout the Bill, is confusing and potentially misleading. Section 32E does not state how a participant’s *budget* is to be reasonable and necessary. Rather, the term merely seems to refer to a budget for reasonable and

necessary *supports*. The APS is concerned that the ambiguity in the interpretation of this term will lead to misunderstandings by decision-makers, allowing it to be used inappropriately to impose limits on supports merely because of cost.

As noted in our previous submissions,⁴⁻⁶ APS members have reported frequent instances of participants' budgets for psychology services inappropriately cut by decision-makers because of a misunderstanding of psychologist' contribution to the NDIS, coupled with a culture of cost-cutting. We fear that such inappropriate decision-making will only increase if the new budget provisions can be used in a way which is adverse to participants but which is not intended in the Bill itself.

The intentional choice of this language in the Bill reflects the disproportionate weight given to cost (and cost-cutting) over the provision of reasonable and necessary supports to participants. We therefore recommend that an unambiguous, and legislatively meaningful, term be used in place of "reasonable and necessary budget".

4. A non-consultative Bill development process

Finally, the APS is disappointed that there was no consultation in relation to the development of the Bill. This Inquiry is the first opportunity that we, and the Australian community, have had to comment on the first tranche of significant structural changes to the NDIS arising from the NDIS Review. To our knowledge, there was no consultation informing the design and development of the Bill and no Exposure Drafts of the Bill were circulated. This is not the kind of cultural reform, community engagement, and collaborative co-design we expected following the NDIS Review's recommendations.

Unless our recommendations under part 1 above are adopted, the APS is concerned that this approach to the Bill's development signals a further cycle of confirmatory and reactive consultations. Not only is this an inefficient and ineffective way to consult, but it has the potential to exhaust an already overworked NDIS and disability sector. Disengaging the sector is not the way to get the NDIS back on track, especially at this early phase of NDIS reforms. Moreover, as discussed above, the regulatory design of the Bill and its reliance on Rules and legislative instruments will significantly limit opportunities for meaningful and transparent consultation on matters of such public, operational and personal significance.

Thank you again for the opportunity to provide a submission into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024. If any further information is required from the APS, I would be happy to be contacted through our National Office on (03) 8662 3300 or by email at: z.burgess@psychology.org.au

Yours sincerely

Dr Zena Burgess, FAPS FAICD
Chief Executive Officer

References

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