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NDIS Policy, Legislation and Engagement  
Department of Social Services  
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Submitted by email: [NDISconsultations@dss.gov.au](mailto:NDISconsultations@dss.gov.au)

Dear NDIS Policy, Legislation and Engagement team

### **Australian Psychological Society response to the NDIS Supports consultation**

The Australian Psychological Society (APS) welcomes the opportunity to contribute to the Department of Social Services consultation on NDIS Supports. As the leading professional association for psychologists in Australia, the APS is 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, including through the NDIS. The APS seeks to work actively with the Department and the government through this period of NDIS reform to build a Scheme which sustainably and effectively achieves its objectives for the benefit of participants and the Australian community.

### **The context for this consultation**

We wish to frame our response by acknowledging that this consultation takes place within the context of considerable change and uncertainty about the future of the NDIS. This consultation cannot be separated from the clear political and policy signals that the NDIS will be scaled back and that access to supports will be increasingly limited. This messaging is occurring in tandem with participants' and providers' real-time experiences of increasingly drastic cuts to plan funding and eligibility.

We therefore encourage that all consultative input be viewed through this lens of change and consultation fatigue, as well as the fear and apprehension held by both participants and providers about the future of the Scheme. The APS recognises the increased psychological demands placed on our members, including through unbillable cognitive and emotional labour, during this period of change. Ultimately, however, we hold deep concerns about the implications for participants and their opportunity to access supports which promote participation, capacity, connection and an enhanced quality of life.

### **APS Response**

Nonetheless, the APS seeks to provide sensible, evidence-based and pragmatic solutions which support the development of the NDIS Supports Rules. Much has already been said about the impact of the NDIS Supports lists, particularly following the commencement of the National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024 (*the Transitional Rules*). We do not intend to repeat these specific issues. We refer to our previous submission in relation to the Department's consultation on the Draft Lists of NDIS Support in 2024, which is **attached** for reference. We note that many of the issues raised in our submission remain unresolved, to detriment of participants and providers.

Rather, this submission focuses on broader themes relating to administrative decision-making, governance and regulatory culture in the development and operation of NDIS Supports Rules. We will illustrate this with examples showing the impact on NDIS psychology services.

## **1. Theme 1: Policy and regulatory misalignment, and the casualty of evidence-based practice**

The APS supports the policy objective in the development of NDIS Supports Rules, namely that NDIS funds should only be allocated to reasonable and necessary disability supports for participants, as intended under the Scheme. This principle is foundational to the sustainability and integrity of the Scheme and aligns with the original intent of the NDIS.

However, the APS is concerned that the current regulatory approach, particularly the use of prescriptive lists under the NDIS Supports Rules, is misaligned with broader policy objectives and best practice in evidence-based regulation. Rather than enabling clarity and consistency, the reliance on static lists has created confusion, limited access to needed supports, and fails to be responsive to emerging evidence and participant needs. The APS notes the following key concerns:

- **The Rules do not reflect evidence-based practice:** The current approach to the development of NDIS Supports Lists do not facilitate participants to receive evidence-based supports. Despite previous consultations with professional bodies, including the APS, there is no clear mechanism through which professional input substantively informs the lists' content or structure. Rather, unhelpful assumptions and broad-brush exclusions are used primarily to limit expenditure rather than to promote access to reasonable and necessary supports. For example, the Transitional Rules have continued to uphold a misleading dichotomy between mental health and disability supports which are at odds with the practice and research about the role of therapy supports provided by psychologists.
- **Absence of ongoing collaborative mechanisms:** Current consultative processes do not allow for ongoing engagement with providers, peak bodies, and the research community beyond a one-off submission. Input from these key stakeholders is often sought in a limited or ad hoc manner, without mechanisms for co-design or iterative improvement. Previous submissions and recommendations, made in good faith, appear to be easily disregarded or forgotten. Aligning policy intent and evidence-based practice can be complex and nuanced, and a proper forum to engage with the difficult questions of how to regulate the funding of such supports is essential. It cannot be achieved through a binary approach to thinking about inclusions and exclusions.
- **Delay in the establishment of the Evidence Advisory Committee:** The establishment of the NDIS Evidence Advisory Committee (EAC) was intended to help address the concerns above. However, the delay and lack of transparency in operationalising the EAC has further constrained the Scheme's ability to respond to new evidence in a timely and structured way. This delay exacerbates concerns about the responsiveness, transparency, and inclusivity of decision-making.
- **No defined review cycle:** The absence of a review timeline or revision process for the NDIS Supports Lists, which form a key part of the NDIS Supports Rules, undermines providers' ability to plan and deliver services. It also limits assurance for participants that supports will be regularly updated to reflect advances in evidence, technology, therapeutic practice and emerging participant need.

## **2. Theme 2: Interpretive ambiguity leading to unsound decisions and harmful outcomes**

The APS is concerned that the drafting and operationalisation of the NDIS Supports Rules creates significant interpretive ambiguity, leading to decision-making which is inconsistent, inefficient or contrary to policy intent. In the Transitional Rules, the APS and our members have identified the following issues:

- **A constricting culture of interpretation:** A framework for inappropriately limiting the use of participant funds has been introduced through the use of the word "includes" or "including", to identify specific supports under each category. While each category sets out the general functional aim of the type of support, the items which follow have the effect of limiting the scope of each category. For example, the Disability-Related Health Supports category in the Transitional Rules contains this appropriately-worded functional objective:

"Health supports that relate to the functional impact of a participant's disability."

This statement, however, is followed by a set of items which set out particular services and supports. Although the list is prefaced by "This includes" (and not "This means"), the items contain only a narrow range of possibilities within this objective. Supports which fall outside these items (for example supports provided by a psychologist to facilitate positive health behaviours, compliance and appropriate utilisation of other health-related supports) are at risk of not being funded because of way in which the purposive intent of the category is immediately narrowed by specific items.

In another example, the Early Intervention Supports for Early Childhood category in the Transitional Rules contains the following:

"This includes the following: ... therapy provided by allied health professionals *including speech pathologists and occupational therapists*" (emphasis added)

The experience of our members has been that this form of words has been used to deny therapy provided by psychologists under this category, with the incorrect rationale that because only speech pathologists and occupational therapists are named in the list, only these professions can provide the services. This is contrary to the evidence base and best practice guidelines which affirm the importance of psychologists in early childhood intervention, particularly supports provided in natural settings.

The approach to interpreting the Transitional Rules shown by these two examples is inconsistent with well-established principles of statutory interpretation, which apply to the Rules as a legislative instrument. A fundamental interpretative principle is that the word "includes", unlike the word "means", is intended to *enlarge*, not constrain, the meaning of a concept or word. Unfortunately, the opposite has occurred: the types of support provided in the inclusion list are seen as exhaustively defining the scope of the category. The result of this interpretative culture is that reasonable and necessary psychology supports which align with the purposive intent of the category have been repeatedly and unjustifiably excluded.

We submit that this problem could be avoided in redeveloped NDIS Supports Rules by:

- a. Drafting the Rules to state the objective of the category of support clearly, without the use of "includes" statements, and with the intent of empowering regulated professionals to exercise their judgment to make decisions about the provision of supports which give effect to the intention of the category;
  - b. Where necessary, following legislative drafting conventions to provide examples, where these examples are clearly distinct from the operational statement about the purpose of the category of support (consistent with section 15AD of the *Acts Interpretation Act 1901*); and
  - c. Ensuring that any extra-legislative guidance on the Rules (including information published on the NDIA website, and internal decision-making guidance) clearly states that examples are non-exhaustive and are intended to extend and not limit the operation of the category.
- **Interpretive and decision-making guidance is not transparent or public:** Not all guidance material used by NDIA delegates in interpreting and applying the NDIS Supports Rules is publicly available. This absence of transparency raises serious concerns for procedural fairness and administrative accountability. Providers and participants are often unaware of

the interpretive criteria being applied by delegates, and are therefore unable to understand, provide evidence to address, or contest decisions that affect their access to reasonable and necessary supports.

- **Risks of an inflexible application of policy:** The resultant decision-making and interpretive culture runs contrary to principles of effective and lawful administrative decision-making. In instances where a decision-maker refuses a support purely because a non-legislative policy or guidance document says so, and does so without fully assessing whether the support meets the requirements in the NDIS Supports Rules within the specific situation of the participant, the decision is unsound. It may constitute a reviewable error under administrative law on the basis that there has been an inflexible application of policy.

Unfortunately, the APS is aware of multiple examples where such unsound decision-making is occurring under the current framework. Supports that were previously funded for a participant are being denied under an approach to interpretation that is inflexible, inconsistent with the participant's situation and the evidence base, and often references non-legislative guidance. We also see similar changes occurring in the increasingly rigid interpretation of "reasonable and necessary", which no longer flexible and responsive to participants ongoing and changing needs. A culture of interpretive rigidity undermines the person-centred, functional, and goals-based intent of the NDIS.

A principles-based approach, including through NDIS Supports Rules which focus on the function and outcome of a support, would better align with the Scheme's policy and legislative objectives. Developing NDIS Supports Rules which minimise interpretive ambiguity and the opportunity for inflexibility would have the flow-on effect of enhancing social and economic participation and promoting individual capacity-building by ensuring supports are tailored to a person's goals and needs.

For such a model to succeed, NDIS delegates must also be empowered and equipped to exercise professional discretion, supported by high-quality training and access to expertise and insights from providers, research professional bodies. Together with providers, delegates and decision-makers must be encouraged to consider context and complexity, not just compliance and expenditure.

### 3. Theme 3: Working together for a sustainable NDIS

As noted above, the political and policy context in relation to the NDIS is clear: that significant reduction in expenditure is required to maintain the sustainability of the NDIS, and this can only be achieved through cuts to some supports and services. Yet the piecemeal nature of consultations and reforms to the NDIS allows for a pretence of the status quo being maintained in relation to participants. For example, the Discussion Paper to this consultation contains this statement:

"The changes aren't meant to reduce the level of supports a person gets through their NDIS plan. They help make it clearer what it is and isn't appropriate to spend NDIS funds on. This includes being clear NDIS funding should only be spent on disability supports."

While this is technically true, it is disingenuous in the broader context of NDIS reforms. Our members report seeing cuts in funding, denials of funding, reviews of plans and prospective participants being denied access to the Scheme at an unprecedented pace. Given this, a different approach to engagement and reform is required which acknowledges this political and economic reality. We therefore recommend that:

- a. The process of developing new NDIS Support Rules must acknowledge, and be aligned with, the policy direction in relation to the NDIS. In particular, the aims to reduce NDIS expenditure, including through a reconsideration of participant eligibility and the scope of the Scheme, should be stated with clarity and transparency to providers and participants. Despite the difficulty of this work, there is an opportunity to use the knowledge, expertise and experience of the sector to develop a collaborative approach to change. This

includes working together to identify efficiencies and realistic opportunities for savings which do not compromise the integrity and objectives of the Scheme; and

- b. Throughout this consultation and implementation process, there should be recognition that there are increasing costs and consequences to participants and providers as a result of the current state of uncertainty. The status quo of the pre-NDIS Review state to participants and providers already no longer exists. We therefore encourage the Department, and the government more broadly, to work with providers, peak bodies and the disability sector to provide a joined-up roadmap for change that allows not only for future service planning but provides certainty in the provision of services during this interim period.

Thank you again for the opportunity to contribute to this consultation on the NDIS Support Rules. If any further information is required from the APS, I would be happy to be contacted through the National Office on (03) 8662 3300 or by email at [z.burgess@psychology.org.au](mailto:z.burgess@psychology.org.au).

Yours sincerely

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