

Community Affairs Legislation Committee,
Senate Standing Committees on Community Affairs

26 July 2024

To Senator Urquhart and Members of the Community Affairs Legislation Committee,

**NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT
(GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024 (CTH)**

I am writing to you as **National President of the Australian Lawyers Alliance (ALA)**. The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom, and equality before the law for all individuals.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia, including National Disability Insurance Scheme (NDIS) participants living with disabilities of all types.

The ALA is represented in every state and territory in Australia. Our office is located on the land of the Gadigal people of the Eora Nation.

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

The ALA has had an opportunity to review the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) ('Bill'), which has been referred to this Committee for inquiry.

In our submission dated 22 May 2024 (**enclosed**) to this Committee's earlier inquiry on this Bill, the ALA expressed our strong support for substantial legislative reform in order to guarantee appropriate outcomes for all NDIS participants and the ongoing sustainability of the NDIS.

Since then, ALA members have been deeply concerned by some of the messaging and rhetoric around NDIS reforms, especially the announcement that NDIS participants will not be able to use NDIS funding to access specialised sexual services. We note that NDIS Minister the Hon. Bill Shorten has publicly confirmed, in response to a question specifically about sex worker services during a *Sky*

News interview, that the Federal Government will move to ban those services from being accessed with NDIS funding.¹

This proposed ban defies both international law and academic research, which consider sexual health as a basic human right – including for those living with a disability – and, moreover, a right deserving of support from governments and broader society.²

This proposed ban also defies domestic jurisprudence. The ALA notes that the Federal Court of Australia has already determined unanimously that “participation in sexual activity” (for example, accessing sexual therapy services) is a “reasonable and necessary support” for the purposes of NDIS funding; is not expressly excluded under the *National Disability Insurance Scheme Act 2013* (Cth) (*‘NDIS Act’*) or under the NDIS Rules; and is actually in direct alignment with “the values, objectives, purposes and guiding principles” of the NDIS.³

Additionally, the ALA questions whether this ban will have any impact on the sustainability of the NDIS, which we understand is a key priority of the Federal Government. While the NDIA has not shared how many NDIS participants have ever used NDIS funding for sex work services, Minister Shorten has recently revealed that none of the 228 requests for that kind of funding were approved in the year to the end of April 2024.⁴ It is, therefore, very unclear to the ALA what savings (if any) will come from banning NDIS funding for sexual services.

In the meantime, public and media attention is focused on the vilification of NDIS participants and their recognised human rights. Instead, ALA members believe that the focus on NDIS reforms must be directed at refining and progressing this Bill before the next Federal Election.

¹ Jake Evans, ‘Sex work access under NDIS to be banned, removing supports for ‘ordinary life’, say disability advocates’, *ABC News* (online, 7 July 2024) <www.abc.net.au/news/2024-07-07/sex-worker-ndis-funding-ban/104068652>.

² *Convention on the Rights of Persons with Disabilities*, UN Doc A/RES/61/106 (3 May 2008, adopted 12 December 2006) art 25; World Health Organization, *Promoting sexual and reproductive health for persons with disabilities* (Guidance Note, 2009); Belén Gutiérrez-Bermejo and Cristina Jenaro, ‘Sexual Assistance for People with Intellectual Disabilities: Proposal for a Service Delivery Model’ (2002) 40 *Sexuality and Disability* 347, 349; Patricia Pérez-Curiel, Eva Vicente, M. Lucía Morán and Laura E. Gómez, ‘The Right to Sexuality, Reproductive Health, and Found a Family for People with Intellectual Disability: A Systematic Review’ (2023) 20(2) *International Journal of Environmental Research and Public Health* 1587, 1588.

³ See: *National Disability Insurance Agency v WRMF* [2020] FCAFC 79, including at [142].

⁴ Cait Kelly, ‘Sex work services on the NDIS: is it a real issue or just a ‘red herring’?’, *The Guardian* (online, 10 July 2024) <www.theguardian.com/australia-news/article/2024/jul/10/sex-work-services-on-the-ndis-is-it-a-real-issue-or-just-a-red-herring>.

Even with the amendments that were made to the Bill in the House of Representatives, the ALA remains concerned about many provisions in this Bill in its current form. It is, we submit, in the best interests of the NDIS and all NDIS participants across Australia that further amendments are made.

We refer the Committee to our May 2024 submission, in which we have recommended that:

- clarification be sought from the Federal Government by this Committee regarding the new definition of “NDIS support” proposed by this Bill;⁵
- any new criteria against which NDIS participants will be judged (for example, whether a participant remains eligible for support through the NDIS) and any new powers being afforded to the Minister or to the NDIA must all be fully described in the *NDIS Act*, instead of being articulated in the NDIS Rules away from the proper scrutiny that the legislative process entails;⁶
- clarification be sought from the Federal Government by this Committee that, under proposed amendments to section 28(2) of the *NDIS Act*, NDIS participants who enter the NDIS through early intervention requirements will not be treated differently to those who qualify for the NDIS through the disability requirements;⁷
- the additions of proposed sections 32K and 32L to the *NDIS Act* be reviewed closely to ensure that funding entitlements will not, as a result, be restricted for NDIS participants and/or that NDIS participants will not be able to seek review of funding decisions;⁸ and
- clarification be sought from the Federal Government by this Committee regarding the measures proposed in the Bill to address and prevent fraud and other criminal conduct within the NDIS, including to ensure that no new powers afforded to the NDIA will result in the NDIS not being accessible to eligible or existing NDIS participants.⁹

We urge the Committee to recommend that the Federal Government amends this Bill to address the concerns and issues raised in the ALA’s May 2024 submission.

⁵ Australian Lawyers Alliance, Submission to the Community Affairs Legislation Committee, Senate, Parliament of Australia, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth)* (22 May 2024) 5.

⁶ Ibid 6, 8 and 10.

⁷ Ibid 7.

⁸ Ibid 10.

⁹ Ibid 11.

Whistleblower protections within the NDIS

The ALA has had the opportunity to review the Human Rights Law Centre's submission dated 31 May 2024 to this Committee.

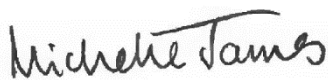
The focus of the Human Rights Law Centre's submission is the deficiencies in the *NDIS Act* in relation to whistleblower protections. The ALA agrees with the Human Rights Law Centre that comprehensive protections for whistleblowers who disclose information about the NDIS (including any misconduct or fraud) are essential to support those whistleblowers, to keep them safe, and to prevent reprisals.

The ALA endorses the Human Rights Law Centre's recommendations outlined in their submission for amendments needed to the *NDIS Act*. We encourage the Committee to recommend that the Federal Government address and greatly improving whistleblower protections as part of ongoing reforms to the NDIS.

Summary

The ALA is grateful to the Community Affairs Legislation Committee for considering the recommendations we have made in this correspondence and in our **enclosed** submission, all of which are aimed at ensuring fair outcomes for all NDIS participants and the ongoing sustainability of the NDIS. ALA members are available to provide further assistance to the Committee on the issues raised by the ALA and the recommendations we have made.

Yours sincerely,



Michelle James
National President,
Australian Lawyers Alliance

Enclosed:

- Australian Lawyers Alliance, Submission to the Community Affairs Legislation Committee, Senate, Parliament of Australia, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth)* (22 May 2024) <www.lawyersalliance.com.au/documents/item/2726>.

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

Submission to the Community Affairs Legislation
Committee, Senate, Parliament of Australia

22 May 2024

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input to the Community Affairs Legislation Committee ('Committee') on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) ('Bill').
2. ALA members represent National Disability Insurance Scheme (NDIS) participants across Australia, and the ALA supports substantial legislative reform in order to guarantee appropriate outcomes for all NDIS participants and the ongoing sustainability of the NDIS.
3. The ALA's submission will address the following regarding this Bill:
 - a. the new definition of "NDIS support";
 - b. the NDIS Rules relating to disability requirements and early intervention requirements;
 - c. requirements for the National Disability Insurance Agency (NDIA) CEO to provide notice to NDIS participants regarding the NDIA CEO's access decision;
 - d. the circumstances in which the NDIA CEO must consider an NDIS participant's status;
 - e. the new reasonable and necessary budget framework for the preparation of NDIS participants' plans; and
 - f. additional measures outlined in this Bill.

A new definition of "NDIS support"

4. The ALA notes the new definition of "NDIS support" proposed by this Bill.²
5. While this appears to be a broad definition, **the ALA submits that clarification should be sought from the Federal Government by this Committee as to:**
 - a. **whether this new definition is intended to limit the type of supports currently being provided to NDIS participants; and**

² National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 14, inserting s 10 into the *National Disability Insurance Scheme Act 2013* (Cth).

- b. if so, which types of supports will be limited either through additional primary legislation or – as the Explanatory Memorandum to this Bill implies – through the NDIS Rules.³

NDIS Rules relating to disability requirements and early intervention requirements

6. This Bill proposes amendments to section 27 of the *National Disability Insurance Scheme Act 2013* (Cth) (*'NDIS Act'*) such that the NDIS Rules could “make provision for determining any matter for the purposes of section 24 (disability requirements) or section 25 (early intervention requirements)”.⁴
7. ALA members are concerned that this would give the NDIA and the Federal Government the ability to put in the NDIS Rules proscriptive criteria which would limit access to the NDIS.
8. The ALA submits that this is too broad of a power that could result in overly prescriptive entry requirements being enshrined through the NDIS Rules, instead of through primary legislation which would attract the appropriate scrutiny that accompanies the passage of proposed legislation through the Parliament of Australia.
9. This is greatly concerning to ALA members for the effect this could have on NDIS participants' access to the NDIS and adequate support.
10. **The ALA recommends that this power and the use of the NDIS Rules in this context should be reviewed and that all final provisions should be included in this Bill, not in the NDIS Rules.**

³ Explanatory Memorandum, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) Sch 1 – Amendments, 3.

⁴ National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 25, amending s 27 of the *National Disability Insurance Scheme Act 2013* (Cth).

Written notice to NDIS participants regarding the NDIA CEO's access decision

11. Amendments to section 28(2) of the *NDIS Act*, as outlined in this Bill,⁵ detail a requirement that the NDIA CEO “must give written notice” to NDIS participants which must include whether each NDIS participant has entered the NDIS by meeting the disability requirements, the early intervention requirements, or both.
12. The ALA has no issue with clarity being provided as to which requirements NDIS participants satisfied such that the NDIA accepted them into the NDIS.
13. However, the ALA also notes:⁶

The Bill will also clarify and expand the NDIS rules relating to access provisions, including the methods or criteria to be applied when making decisions about the disability and early intervention criteria and the matters which must or must not be taken into account.

14. ALA members are concerned that NDIS participants may be treated differently and restricted because they entered the NDIS through early intervention requirements, rather than through the disability requirements (or vice versa). The ALA contends that the Federal Government and the NDIA must treat all NDIS participants equally regardless of the requirements they satisfied to access the NDIS.
15. **As such, the ALA submits that clarification should be sought from the Federal Government by this Committee as to whether the amendments proposed by the Bill and any subsequent expansion of the NDIS Rules will be used to treat NDIS participants who enter the NDIS through early intervention requirements differently to those who qualify for the NDIS through the disability requirements.**

⁵ National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 26, amending s 28(2) of the *National Disability Insurance Scheme Act 2013* (Cth).

⁶ Explanatory Memorandum, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) Outline, 1.

Circumstances in which the NDIA CEO must consider an NDIS participant's status

16. This Bill proposes the addition of section 30A to the *NDIS Act*,⁷ in order to allow the NDIA CEO to consider the status of an NDIS participant and to revoke a person's status as an NDIS participant.

17. The ALA is concerned that the following elements will all be prescribed by the NDIS Rules:⁸

- the “circumstance” (or “circumstances”) which would require the NDIA CEO to review an NDIS participant's status;
- “requirements with which the CEO must comply”;
- “criteria that the CEO is to apply”; and
- “matters to which the CEO may, must or must not have regard” in making a decision under section 30A(1).

18. We note that in other sections of the Bill and the *NDIS Act*,⁹ details are provided as to what a relevant ‘circumstance’ is or what the relevant ‘circumstances’ are through the primary legislation, not through the NDIS Rules.

19. **Given that this significant power would be used to either include or exclude a person from the NDIS entirely, the ALA submits that:**

- a. clarification should be sought from the Federal Government by this Committee as to what “circumstances” are being contemplated for the purposes of the proposed section 30A(1); and**
- b. that all elements, criteria and circumstances relevant to the application of the proposed section 30A(1) and (2) must be outlined in the Bill, rather than through the NDIS Rules.**

⁷ National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 31, adding s 30A to the *National Disability Insurance Scheme Act 2013* (Cth).

⁸ Ibid cl 31, proposed s 30A(1) and proposed s 30A(2).

⁹ See, eg, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 36, in which proposed s 32F(7) clarifies the circumstances relevant for proposed s 32F(6).

The new reasonable and necessary budget framework for the preparation of NDIS participants' plans

19. The additions of proposed sections 32K and 32L to the *NDIS Act* would change the way in which funding amounts are to be determined.¹⁰ These changes go to the very heart of the NDIS as they will dictate what supports are funded. Therefore, the ALA contends that close scrutiny of these provisions is required.
20. Proposed section 32K details that funding amounts be determined by applying a method set out in legislative instrument to the information contained in the newly proposed 'needs assessments', which are introduced through proposed section 32L.¹¹ The ALA has several concerns about these changes.
21. First, these provisions arguably operate to circumvent the 'reasonable and necessary' criteria for funding set out in the *NDIS Act* at section 34(1) by delegating the substance of the funding decision to a subordinate legislative instrument, and to the needs assessment. At its worst, this power could be used to create restrictive lists of which supports will and will not be funded through the NDIS without oversight and scrutiny from the Parliament of Australia.
22. Secondly, these provisions could establish the needs assessment as the primary, or even sole, basis for determining funding. The ALA submits that this is inappropriate given the crucial nature of evidence from NDIS participants' treating practitioners, and from the NDIS participants and their families in determining needs and funding. This appears to be another attempt to introduce 'independent assessments' into the NDIS, which has previously been the subject of much criticism from the disability community.
23. Further, relying on the needs assessment to determine participant funding may narrow or undermine the ability of NDIS participants to seek external review of the funding decision. The ALA is concerned that the contents of the needs assessment itself will not be reviewable. While proposed section 32L(7) contemplates replacement assessments,¹² the circumstances under which they will be required are not articulated, nor are any factors to which the CEO should have regard when making this decision. Further, the proposed changes to do not

¹⁰ See: National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) cl 36.

¹¹ *Ibid.*

¹² *Ibid.*

appear to contemplate that a decision made by the CEO pursuant to proposed section 32L(7)(c) will be reviewable.

24. The quality and accuracy of the needs assessments could vary enormously but ALA members are concerned that an NDIS participant could effectively be stuck with that outcome with no avenue to review either the needs assessment itself nor the CEO's decision to not arrange a replacement assessment. This is a crucial issue, particularly given the funding method set out in the legislative criteria could simply state that the NDIS will only fund supports set out in the needs assessment.
25. Finally, the wording of proposed section 32K(4) suggests that the Minister will have power to determine a method for taking into account lump sum compensation, other than what is currently used to determine the Compensation Recovery Amounts (CRA) as set out in the *National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013* (Cth). If the Federal Government is contemplating changes to the CRA and the associated Rules, the Federal Government should be explicit about this and provide detail of how they wish to do so.
26. **The ALA urges the Committee to closely consider the proposed additions of sections 32K and 32L since:**
 - a. **the provisions of these proposed sections could be used to restrict funding entitlements for NDIS participants through subordinate instruments, rather than through the *NDIS Act*; and**
 - b. **these proposed sections could also dilute or even remove the ability of NDIS participants to seek review of funding decisions.**

Additional measures outlined in this proposed legislation

27. The ALA notes that in the Bill there are additional “measures focused on protecting participants” which address matters including:¹³

- how an NDIS participant must only spend amounts for NDIS supports in accordance with their plan; and
- how the NDIA will be empowered to take precautions (such as imposing shorter funding periods) “to safeguard participants where others may seek to exploit or coerce the participant to use their package in a way that is not consistent with their best interests”.

28. The ALA strongly supports any attempts to address and prevent fraud and other criminal conduct within the NDIS, including by dishonest service providers. The NDIS was designed to help vulnerable NDIS participants, and the ALA is disturbed by cases of roting and fraud.

29. In doing so, however, the ALA submits that the Federal Government and the NDIA must ensure that the NDIS is still accessible to NDIS participants and that NDIS participants are not punished (that is, the support and treatment those NDIS participants receive through the NDIS is not compromised or suspended) due to the dishonest or malicious actions of third parties.

30. **The ALA submits that clarification should be sought from the Federal Government by this Committee as to:**

- a. why the powers the NDIA already has under the current legislative and regulatory framework to manage plans and budgets are not sufficient to address issues like fraud within the NDIS;**
- b. whether the Federal Government and the NDIA intend for these new powers to be used narrowly and in exceptional circumstances (such as, in cases of fraud), or whether they are intended for broad use in the everyday management of the NDIS and NDIS participant plans; and**
- c. how these new provisions and powers will interact with the flexible funding provisions of this Bill.**

¹³ Explanatory Memorandum, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) Outline, 1–2.

Conclusion

31. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Community Affairs Legislation Committee on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth).

32. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



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