Allied Health Professions Australia

Submission to Senate Community Affairs Legislation Committee Inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

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This submission has been developed in consultation with AHPA's allied health association members.

Allied Health Professions Australia
Level 1, 530 Little Collins Street
Melbourne VIC 3000
www.ahpa.com.au
office@ahpa.com.au

AHPA and the Disability Working Group

Allied Health Professions Australia (AHPA) is the recognised national peak association for Australia's allied health professions. AHPA's membership consists of 27 national allied health associations and a further 13 affiliate members, each representing a particular allied health profession. AHPA collectively represents some 200,000 allied health professionals and AHPA works on behalf of all Australian allied health practitioners, including the largest rural and remote allied health workforce numbering some 14,000 professionals.

AHPA's Disability Working Group (the Working Group) comprises policy and clinician representatives drawn from the range of AHPA's members that provide services in the National Disability Insurance Scheme (NDIS). The Working Group is therefore informed by the views and experiences of both individual allied health professions and the allied health sector as a whole.

AHPA and its member associations are committed to ensuring that all Australians, regardless of disability, can access safe, evidence-based services to assist them to realise their potential for physical, social, emotional and intellectual development.

Allied health professions in the NDIS

Allied health providers have two main roles in the NDIS: contributing expertise to assessments for access to the Scheme and any subsequent reviews of participants' plans; and providing supports and services under allocated plan funding.

Most of the allied health professionals who currently provide NDIS services do so within the category of 'therapy supports'. However, orthotic and prosthetic supports are not deemed therapy supports under the NDIS, with orthoses and prostheses instead being defined as assistive technology, and orthotic and prosthetic services assigned to the Custom Prostheses and Orthoses registration group.

Nevertheless, orthotic and prosthetic services do include clinical services (assessment, review and education) associated with the provision of orthoses and prostheses. These clinical services provided by orthotists/prosthetists parallel those provided by those allied health professions that are defined as providing NDIS therapy supports.

Accordingly, when referring to NDIS supports or services provided by allied health professionals, this submission refers to 'allied health supports' or 'allied health providers'.

Overview

AHPA and our members engage extensively with the National Disability Insurance Agency ('NDIA') and the NDIS Quality and Safeguards Commission on matters of policy and practice, and we welcome the opportunity to make a second submission on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 ('the Bill').[1]

Although the amendments made to the Bill in the House of Representatives address some of the problems we previously identified, we have significant remaining concerns about several aspects.

[1] Our first submission on the Bill can also be found at https://ahpa.com.au/advocacy/submission-to-senate-community-affairs-legislation-committee-inquiry-into-national-disability-insurance-scheme-amendment-getting-the-ndis-back-on-track-no-1-bill-2024/ . Appendix 1 to that submission, which was provided to the Committee, describes the scope of practice, requisite qualifications and regulatory framework relevant to the 16 different allied health professions that currently provide NDIS supports or services.

This submission does not consider whether all of the issues of concern raised by submitters might be addressed by current or proposed amendments to the Bill, but instead largely focuses on matters that most directly pertain to allied health supports.

AHPA would appreciate the opportunity to provide further evidence to the Committee.

Over-reliance on delegated legislation and discretionary Ministerial powers

Despite amendments in the House of Representatives and others proposed, the Bill still leaves many significant matters to yet-to-be-drafted delegated legislation and/or Ministerial or NDIA discretion.

Following Recommendation 1 of the Senate Community Affairs Legislation Committee Report on the Bill ('Senate Committee Report'),[2] a proposed Senate amendment to the Bill would see First Ministers also be recognised as Ministers (in addition to Disability Ministers) for the purposes of Category A rule-making ((1) on sheet PA112).

However, even if this amendment is passed, stakeholders are still generally expected to take on faith that they will be genuinely and fully consulted about the content of rules or Ministerial instruments, let alone be treated as co-collaborators in the reform process. Past extremely limited consultation by the Minister and the NDIA, including on the present Bill before its introduction to Parliament, does not encourage a high degree of trust in the process.

AHPA's analysis of the amendments to the Bill concerning co-design and the definition of NDIS supports, as detailed below, shows that at best it is only people with disability who are likely to have some degree of meaningful input into the content of NDIS subordinate legislation.

Involvement of people with disability

Amendments (5) and (8) on sheet PA110 passed in the House of Representatives require the Minister to have regard to the principle of co-design in current NDIS legislation when making legislative instruments establishing how needs assessments will be conducted and the method to be used in calculating a participant's budget.

However, even if these amendments were deemed by NDIS participants to be sufficiently consultative, 'co-design' clearly only applies to 'people with disability' and not generally to providers.[3] Needs assessments are specifically discussed below.

Similarly, the definition of NDIS supports is now to be set by the Rules,[4] with the associated Supplementary Explanatory Memorandum referring to 'deep engagement with the disability community on the future approach to NDIS supports' (p3).

The involvement of the disability community in the development of subordinate legislation is further supported by an amendment proposed in the Senate, following Recommendation 2 of the Senate Committee Report. This amendment ((17) on sheet PA112) requires the Minister to provide a statement describing the nature of the consultation, the people and organisations consulted, and a summary of the views expressed by those people and organisations, for all legislative instruments made under the NDIS Act.

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[2] Senate Community Affairs Legislation Committee Report on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, June 2024.
[3] *National Disability Insurance Scheme Act 2013* ('NDIS Act'), s 4(9A).
[4] See eg amendment (5) on sheet SK113.

The associated Revised Supplementary Explanatory Memorandum describes Government commitment to consultation and co-design as including:

> 'extensive consultation and co-design with the disability community. This will be achieved through working together with the disability community to design and implement legislative instruments to ensure people with disability remain at the centre of the Scheme.' (p10)

The Revised Supplementary Explanatory Memorandum also specifies Disability Representative Organisations as playing a key role in consultation and co-design activities. In contrast, providers are only potentially and implicitly included in:

- 'Engagement events with members of the public and stakeholders including webinars, information sessions and community updates.
- Surveys, discussion papers and submissions.
- Research and partnerships with disability organisations and experts.' (p11)

Implications for allied health provider involvement

Relying on Government and the NDIA to solicit stakeholder input into subordinate legislation is particularly problematic for providers, and especially for those who provide allied health supports.

AHPA's previous submission on the Bill outlined a history of NDIA and Government failures to meaningfully collaborate with the allied health sector on matters that affect our professionals and their work with participants. That submission critiqued an NDIS culture in which allied professionals and the services we provide are not always given appropriate status and recognition. Failures have included a lack of appropriate engagement with and a devaluing of the key roles of allied health professionals in assessment, access and planning processes. This culture results in NDIS participants not receiving the full value of allied health services that they need and deserve.

The most recent striking illustration of the marginalisation of allied health providers is the NDIS 2023-24 Annual Pricing Review Report (June 2024). The Report largely ignores allied health submissions in favour of a methodology previously roundly criticised by providers, and its conclusions deny even an indexation increase to pricing limits for therapy supports, for the fifth successive year.[5]

AHPA strongly supports the developing concept and practice of participant codesign alongside the NDIA and Government. But NDIS policy and practice cannot meaningfully proceed without also ensuring that decision makers have regular structured engagement with providers of disability services.

It appears that co-design — however imperfectly applied in practice — has become a 'justification' for the NDIA and Government not to work constructively and comprehensively with providers, nor to facilitate regular collaborative opportunities among the NDIA, providers, participants and Disability Representative Organisations. This approach is in stark contrast to the aged care sector

[5] https://ahpa.com.au/news-events/allied-health-faces-fifth-consecutive-year-without-price-limit-increase/ ; https://www.miragenews.com/govts-ndis-pricing-review-accused-of-cheating-1265555/ ; https://teamdsc.com.au/resources/ndia-s-annual-pricing-review?utm_source=Klaviyo&utm_medium=campaign&_kx=U4GlyswdZAJsRhZkyllUNMsGzfYfQpYahEQFIJe0JKA.X8eRsJ .

where many providers have conduits to decision makers, and aged care consumers and providers regularly engage with one another.

With particular respect to processes in development of the Bill and the presence of allied health provider themes, scrutiny of the Senate Committee Report and parliamentary debates produces a total of three references to allied health providers by Government MPs.[6] Two of the references were by Minister Shorten, with one of those reiterating a narrative popular with media in the past few months:

> 'Some allied health professionals hate me talking about it, but the reality is that some are taking advantage of the system, and we owe it to people on the scheme to tell the truth and not see them treated as human ATMs. We've upgraded the NDIS rules with the ACCC to make sure this overcharging is prohibited.'[7]

The only reference in the debates to consulting or collaborating with allied health concerned needs assessments (see below).

Becoming a participant

AHPA reiterates our first submission's concern that the effect of the changes proposed by Clauses 24—27 in the Bill would be, in essence, that a would-be participant would have to satisfy either the disability requirements of (existing) section 24 or the early intervention requirements of (existing) section 25, or both.

How methods or criteria are 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 is left to Rules that are to be clarified and expanded. Again therefore, this raises concerns about the degree to which stakeholders are likely to be involved in the content.

We also reiterate the point from AHPA's first submission that there should be no financial and administrative barriers to any person with disability accessing the Scheme. This must include a guarantee that participants will not incur out-of-pocket costs, such as for reports that are necessary to facilitate access to the NDIS, and in providing additional information if requested to do so by the NDIA. This would also be consistent with the Bill's proposed approach to the cost of needs assessments.

Needs assessments

Our concerns are partly related to the contribution of Clauses 24—27, as discussed above, to the Bill's failure to assess and fund participants at a 'whole of person' level. AHPA understands that various amendments are proposed, and we defer to the views of people with disability as to their likely efficacy.

AHPA's first submission also focused on subclause 32L(8) of the Bill. This gives extensive power to the Minister to determine all aspects of the needs assessment process, including assessment tools, the approved assessors and the content of assessment reports. We noted that in this case at least,

[6] There were no Government references to allied health in the Senate debates.
[7] Commonwealth, *Hansard Proof*, House of Representatives, 5 June 2024, 34 (Bill Shorten, Minister for the National Disability Insurance Scheme).

the original Explanatory Memorandum indicated that these aspects would be developed in consultation with 'allied health technical professionals', among others.[8]

Minister Shorten also stated during Bill debate that the needs assessment tools:

> 'will be developed through an extensive consultation and co-design process with deep engagement with the disability community and relevant experts. We'll use an iterative process of designing and testing with people with disability, as well as allied health professionals and people with technical expertise in the development of needs assessments. The process will be transparent. It'll involve extensive testing of existing supports needs assessments with groups and disability types for whom they're validated to inform the design of any new needs assessment.'[9]

Despite the Minister's wording, as we have outlined above, allied health professionals have tended to be marginalised in other stated Government and NDIA commitments to consultation in the development of subordinate legislation. In particular, our first submission detailed the lack of consultation experienced by allied health professionals with regard to the previous independent assessment model, and the NDIA's inappropriate use of our report (see further below).

AHPA and our individual profession peak body members must centrally participate in the needs assessment reform process, including as clinical experts in the analysis and selection of suitable assessment tools and the establishment of qualifications and skills criteria for assessors. Planning for selection of assessors and assessment processes must also be informed by allied workforce data, including future projections of workforce availability, and the development of associated strategies to meet demand.

As detailed above, although the Bill has now been amended in the House of Representatives to require the Minister to have regard to the principle of co-design when making legislative instruments establishing how needs assessments will be conducted (amendments (5) and (8) on sheet PA110), this does not guarantee appropriate allied health participation and consultation.

Proposed amendment (17) on sheet PA112, requiring the Minister to provide a statement when tabling NDIS legislative instruments, also has significant limitations with regard to allied health. First, the statement is after the fact of any consultation and therefore relies simply on parliamentary objections to the instrument being tabled. Second, it is highly likely that the overwhelming emphasis on what counts as an acceptable level of consultation will be on the disability community, as for PA110.

Accordingly, AHPA recommends that an amendment be made to the aspects of the Bill amended in the House of Representatives by amendment (8) on sheet PA110. Our recommended amendment is to the effect that in making a determination relating to assessments and reports, the Minister must consult with and consider the views expressed by relevant experts, including allied health professionals and therapy support providers.

[8] Explanatory Memorandum, p1.

[9] Commonwealth, *Hansard Proof*, House of Representatives, 5 June 2024, 36 (Bill Shorten, Minister for the National Disability Insurance Scheme).

AHPA refers the Committee to Appendix 2 of our first submission on the Bill, which consists of a report to the NDIA on development of credentialing, training and quality assurance for assessors.[10] The Appendix, provided to the Committee in confidence for intellectual property reasons, is evidence of the allied health sector's strong interest and appropriate expertise to engage with the needs assessment issues pertinent to Ministerial determination.

AHPA also supports the inclusion in the Bill of participants' right to at least one replacement assessment, along the lines of the amendments proposed in the House of Representatives by Dr Monique Ryan MP.

Information-gathering powers

AHPA is concerned about the extent of the power that the Bill provides for regarding NDIA requests for information from a participant. The range of circumstances and types of requests should be specified, consistent with Recommendation 3 of the Senate Committee Report.

Constraints on obtaining supports, spending funds and plan management

Similar to our concern about NDIA information-gathering powers, and again consistent with Recommendation 3 of the Senate Committee Report, AHPA submits that the proposed new powers allowing the NDIA to impose various conditions on how a participant obtains supports and spends flexible funding, or to override a participant's plan management request, are too broad.

We suggest that Dr Ryan's proposed amendment in the House of Representatives may be appropriate.

Other amendments

AHPA supports the amendment put by Dr Ryan and passed in the House of Representatives, requiring an independent review of the amendments in five years.

AHPA also supports the various amendments proposed by Senator Lidia Thorpe concerning First Nations representation and consultation, cultural participation and custodial settings.[11]

We reiterate that several key aspects of the proposed reforms in the Bill rely on the prior establishment of foundational supports. As these will entail States and Territories providing supports to people deemed not eligible for the NDIS, it is imperative that there is public confidence in these arrangements, assisted by full stakeholder consultation during their development and implementation.

Afterword

Lastly, we stress to the Committee that the impact of the reforms proposed in the Bill and in other future legislative tranches cannot be analysed in isolation from the outcomes of the 2023-24 Annual Pricing Review. Many NDIS providers are either in financial crisis, or soon will be, and there are market indications that providers of quality services are leaving the Scheme.

[10] Our report was based on the assumption that the assessment information obtained would inform decision making related to access to the Scheme only, and AHPA was strongly opposed to the ensuing independent assessment model that has since been discredited.

[11] Sheets 2671 and 2673, Sheet 2672, and Sheets 2670 and 2674.

There is a growing sense that Government and the NDIA are failing to treat providers of disability supports with respect. If reforms are to be meaningful and to genuinely enhance choice and control for participants, this must change.