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Committee Secretary  
Standing Committee on Community Affairs

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To the Committee Secretary

Thank you for your invitation to make a submission to the Community Affairs Legislation Committee inquiry into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024.

Following the ten-year mark of the NDIS, reforms to the *NDIS Act 2013* are welcome. It is critical that the NDIS is sustainable whilst ensuring participants receive the reasonable and necessary disability-related supports that they need to achieve full participation in their community. There is also an urgent need to address safeguarding of participants, as there have been too many instances when participants have experienced harm or experienced inappropriate support; or where scheme funding has not been used appropriately.

I am appointed as the Public Advocate (PA) for South Australia under the *Guardianship and Administration Act 1993 (SA)*. This Act empowers me to advocate for people with impaired decision-making ability ('mental incapacity' in the words of the Act). I am also appointed under this Act as the guardian for adults with impaired decision-making ability when the South Australian Civil and Administrative Tribunal (SACAT) deems that there is no other suitable person to perform this role. I delegate functions of my role to staff of the Office of the Public Advocate (OPA). I am currently the guardian for over 2,200 South Australian adults, approximately 1400 of whom are NDIS participants.

I am also appointed as the Principal Community Visitor (PCV) via the *Mental Health Act 2009 (SA)* and have responsibilities under that Act and the *Disability Services (Community Visitor Scheme) Regulations 2013*. As the PCV, I administer the South Australian

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Community Visitor Scheme (CVS). The CVS promotes the wellbeing, dignity, safety, and rights of people:

- living with a mental health condition receiving care from a mental health service,
- living with a disability in a state-run disability service,
- who are under the guardianship of the Public Advocate and participants in the National Disability Insurance Scheme (NDIS).

I have reviewed the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* and the explanatory memorandum. The Bill provides a framework with much of the detail remaining to be set out in Rules and Instruments which are yet to be developed. The Rules and Instruments will be critical to the future operations of the scheme and consultation regarding the details is vital for the effectiveness and efficacy of the scheme, particularly in fostering collaboration and cooperation for stakeholders and guardians involved in supported NDIS participants.

### **Safeguarding**

NDIS participants with a statutory guardianship order and those visited by the CVS are some of the most disadvantaged and vulnerable people in the community. It is positive that the Bill includes mechanisms for the CEO, NDIA to safeguard participants, including the ability to decline a request to change the plan manager or the nominee, and to restrict the funding period within the plan under certain circumstances. Having these matters enshrined in the legislation strengthens the NDIA's powers to continue to safeguard participants. The OPA has experienced situations where service providers have taken advantage of funds in a participant's plan, thereby prematurely exhausting funding which can result in service failures and unnecessary social admissions to hospital or other inappropriate housing. This is an undesirable outcome for participants and places an unnecessary burden on the hospital, health, and homelessness sectors. The OPA has also experienced situations where service providers advise that they are sending a person to hospital due to a lack of funding in the plan; a delayed NDIS plan review; or for their inability to cope and support a participant due to behaviours of the participant, or the skill and capacity of their staff.

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The OPA continues to work with the National Disability Insurance Agency (NDIA) and the NDIS Quality and Safeguards Commission (the Commission) to address such situations, but without the necessary powers in the NDIS Act they are limited in addressing this issue. While these changes along with additional powers for the Commission, will not stop such avoidable hospital social admissions, it will go some way to reducing the risk. It is critical that the NDIA and the NDIS Quality and Safeguards Commission can act immediately to address service provider conduct when they advise they are sending participants to hospital or other inappropriate conduct. Currently, the OPA and the NDIA deal with urgent plan reviews and escalations as a result of this service provider conduct to resolve the issue, but there is very little consequence for the service provider. That is, the focus is responding to the crisis rather than on service provider conduct.

The Bill also makes changes to the conditions of approval for quality auditors via Schedule 2 to ensure banned persons cannot engage in auditing activities. These changes are also welcome.

The Bill does not address recommendations for a nationally consistent Community Visitor Scheme (CVS) from both the *NDIS Review* and the *Royal Commission into Abuse Neglect and Exploitation of People with Disability* (Royal Commission). As the Bill deals with other safeguards, this is a missed opportunity to address these recommendations.

Information-sharing arrangements between the State and Commonwealth governments are critical for safeguarding people with guardianship orders and impaired decision-making ability. The NDIA and South Australia (SA) signed a Memorandum of Understanding (MOU) for Information Exchange between the NDIA and SA Government Agencies in February 2022. Schedules under the MOU specific to each State government agency were then to be negotiated. These negotiations have stalled. This has inhibited the OPA's ability to have visibility of all clients who are NDIS participants and their relevant and critical details regarding elements of their plans.

Furthermore, information sharing arrangements are essential to support a nationally consistent CVS. State and Territory-run CVSs would require information about registered Specialist Disability Accommodation (SDA) sites and providers charging for Supported Independent Living (SIL). A framework for reporting and remediation between the States and the Commonwealth would need to be established in the legislation to ensure identified issues revealed by CVS visits are appropriately addressed.



### **Plan duration**

Longer plans will go some way to reducing the administrative burden for participants and for Public Advocate staff who are currently required to attend multiple planning and implementation meetings. Most participants under guardianship have permanent disability where their support needs remain unchanged over time.

Removing the need for annual meetings unless a person's situation changes is welcomed.

The flexibility of funding rolling over into the next funding period combined with longer plans is positive as it provides more certainty and flexibility for people and their funding. However, it is noted that unspent funding is not rolled over into the new plan.

### **New budget framework**

Changes to the reasonable and necessary budget framework is supported, as this will provide greater flexibility to respond quickly within budget to a participant's changing situation. It will enable the safeguarding of the client whilst a change in situation or while a request for plan reassessment is lodged.

### **Definition of NDIS support**

Section 10 of the Bill defines "NDIS support" with 10 (b) and (c) defining what is *not* a NDIS support, which will be set out in Rules agreed by the states and territories. The Applied Principles Tables of Support (APTOS) will be relied on until agreement is reached about what is not a "NDIS support". The APTOS, established in 2015, has never been updated due to difficulty reaching agreement between the States/Territories and Commonwealth on such a complex and multi-faceted interface. Defining supports that are not the responsibility of the NDIS in the Rules, under-estimates the complexity and subtleties when determining a person's support needs and eligibility for the NDIS.

The application of the APTOS has been problematic in its application as conflicts have arisen in defining what is a disability related support and what is not e.g., "trauma" vs "disability," "criminogenic" vs "disability." The poor demarcation of supports between the states and commonwealth often results in a person not receiving the most appropriate support.

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The APTOS needs to be prefaced with a commitment from both Commonwealth and states/territories to work together, for example through joint funding, when the distinction is not clear cut.

As it stands, the APTOS oversimplifies complexity and does not have a dispute resolution process for when there are disagreements between Commonwealth and state agencies about responsibility for a particular matter.

While updating the APTOS will be challenging for all parties, an update is urgently needed, especially if the States/Territories are expected to be responsible for all other services. The Commonwealth and States/Territories need to commit to reaching agreement on this vexed issue to ensure that people can receive timely and appropriate services.

People requiring support should not be burdened with concerns about who will pay for what or risk falling through gaps in the services system.

### **Assessments**

Section 34 which sets out reasonable and necessary *support* is being replaced with Section 32(k) which is about working out a reasonable and necessary total *budget*. The assessment tool and process for calculating total amounts of the participant's budget are yet to be determined and will be spelt out in the Rules. The detail in the Rules will be important and consultation on the Rules is recommended.

The Bill proposes a change (Section 30(a)) which allows the CEO of the NDIA to request information from a participant or request they undergo an assessment. While there is value in assessment to ensure that participants receive the right level of funding for support, this may present challenges for people under guardianship who have limited or no reliable informal support to assist them in obtaining these assessments.

Some of the clients who are visited by the Community Visitor Scheme have psychosocial disability and may not be under guardianship. These people are often difficult to engage and may not have the ability or the will to attend assessment appointments which may result in their access being revoked. This is a concern as the discussion paper states that *'Where a participant fails to comply with a request for information within the timeframe prescribed, the CEO must revoke the participant's status unless otherwise satisfied there are reasonable grounds to have not complied with that request.'*

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The practice of my office is to engage allied health professionals who are registered with the Commission and will only engage unregistered providers as a last resort to provide services to participants under statutory guardianship. There are significant waiting times to access registered allied health professionals and Public Advocate clients living in regional and remote areas are additionally disadvantaged due to thin markets. There would be frequent circumstances where my staff need to advocate for people under guardianship to remain on the scheme because the client will not be able to comply with the above diktat of the CEO of the NDIS.

Although it was noted in the recent Department of Social Services webinar that the NDIA would cover the cost of assessments required by the Agency, this is not specified in the Bill. Most people under Public Advocate guardianship and those visited by the Community Visitor Scheme are reliant on the Disability Support Pension for income and cannot afford to pay for assessments to remain on the NDIS. Any assessments need to be funded by the NDIA.

### **What is missing?**

#### **Recognition of statutory guardians and administrators**

The Bill, as with the *NDIS Act 2013*, remains silent on public guardianship and administration. This continues to present challenges for my office in working with the NDIA for participants under guardianship as the Public Advocate is not a nominee and state guardianship is not recognised in the *NDIS Act 2013*. The opening of the Act is an opportune time to make provisions to recognise and allow for State and Territory guardianship laws to function alongside nominee provisions.

It should be noted that since the commencement of the NDIS there has been a significant increase in the number of Public Advocate appointments for people who are NDIS participants to assist them to navigate the complexity of the scheme. My office has seen a steady increase of 15% per annum in growth in guardianship appointments over the last 5 years. Much of this growth is related to the complexity of navigating the NDIS and the need for a guardian to facilitate this work.



### **Supported decision-making**

A greater emphasis on supported decision making in the NDIS is needed. This was also a recommendation from the *NDIS Review* and the Disability Royal Commission. Supporting people to exercise their own choice and control will also divert them from having a formal guardian appointed, which is restrictive. Support for decision-making and informal arrangements are preferable as supporters often know the person better than a publicly appointed statutory guardian.

Supported decision-making should be included in the Bill. Recommendation 5 of the *NDIS Review* relates to providing better support for people with disability to make decisions about their lives and promoting independence, choice, and control. This includes providing accessible information and supports relating to decision making. The Explanatory Memorandum states that the Bill aims to give effect to Recommendation 3 and the interconnected parts of Recommendations 5, 6, and 7. The Bill does not discuss supported decision-making and the interplay with the role of nominees. The *Exposure Draft of the Aged Care Act 2023* enshrines supported decision-making principles in the legislation, based on recommendations of the Australian Law Reform Commission (ALRC) and the research report released by the Aged Care Royal Commission. Representatives and supporters must comply with these principles. It would be a missed opportunity to omit from the amended NDIS Act provisions like those in the *Exposure Draft of the Aged Care Act* regarding supported decision-making.

### **Case management**

The NDIA has steered away from case management but fails to recognise that some people with disability require this support to navigate the NDIS. This support should be available to help people gather the evidence to access the scheme. Such support could be provided by local area coordination agencies as they are the NDIS partners in the community and understand what evidence is required to support an access request.

Once someone is a participant, they should be able to access ongoing support to navigate the complexities of the NDIS. We are aware that there has been a proposal for a navigator role within the NDIA and this could potentially include assisting participants to navigate the complexities. While most people will not need this support, it should be available for

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those who do. Navigation support should be funded by the NDIS for people who need it. It should not be limited to a certain amount of funding in a person's plan. In the absence of such support, my office has seen an increase in guardianship appointments with a notable number due to families finding the NDIS too complex to navigate.

In conclusion, I support the safeguarding aspects of the Bill but await consultations around the Rules and Instruments which will provide clarity about many of the aspects not articulated within the Bill. I understand that this Bill is the first of a series of legislative changes that the Australian Government intends to make in response to the independent *NDIS Review*. Amendments are needed to address supported decision-making, statutory guardianship, and case management. If they are not to be part of this first tranche of amendments, they should be addressed in subsequent tranches.

Thank you for the opportunity to provide feedback on the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*. I look forward to seeing the finalised Bill.

Yours sincerely



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**Assistant Public Advocate**

**Exercising the Powers and Functions of the Public Advocate**