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By email: [REDACTED]

Dear Dr Popple,

NDIS RULES: PUBLIC CONSULTATION ON NEW FRAMEWORK PLANNING

Thank you for the opportunity to contribute to the Law Council of Australia's submission to the Department of Health, Disability and Ageing's [consultation](#) on new framework planning for the National Disability Insurance Scheme (**NDIS**). The Law Society's Public Law, Indigenous Issues, and Human Rights Committees contributed to this submission.

In 2024, amendments were made to the *National Disability Insurance Scheme Act 2013* (**NDIS Act**) by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Cth) (**Amendment Act**). The Discussion Paper notes that information about how the changes will work will be outlined in new NDIS Rules (**Rules**).

We understand the Discussion Paper provides an outline of what the new framework planning approach is intended to include, and note that, at this stage, there are no draft Rules available for consultation. Without being able to review the Rules, we are limited in our ability to comment on the possible operation, and any unintended consequences, of the proposed Rules. Accordingly, we would welcome the opportunity to make further comment and revise our position once the draft Rules are released.

Ambiguities we can identify from the Discussion Paper include how the "comprehensive support needs assessment tool (I-CAN version 6)" will operate as an assessment tool, and what powers the Administrative Review Tribunal (**ART**) retains in the external review mechanism.

2024 amendments

Section 32L(2) of the NDIS Act mandates that assessments "be undertaken using the assessment tool". We note that the Discussion Paper contemplates using the I-CAN tool for this process alongside a personal and environmental questionnaire and targeted assessment processes, to assist the National Disability Insurance Agency (**NDIA**) assessor to understand the participant's needs. We caution against use of standardised algorithmic assessment tools, and emphasise the need for the exercise of judgment by NDIA assessors. Use of prescriptive assessments and algorithmic calculation creates "algorithmic grey holes" that obfuscate the

reasoning and basis for a decision¹ which can only be alleviated by ensuring human-centric decision making. If this approach is to be adopted, to address these concerns, we suggest that the Rules require the NDIA to provide participants with a simple, understandable explanation of how their assessment results were used to produce their final budget. The Discussion Paper confirms that the budget method will be technical and formula-driven. Ensuring participants receive an explanation in plain language would improve transparency and procedural fairness.

Algorithmic decision-making (ADM)

The Discussion Paper notes “for information only” that:²

The University of Melbourne has partnered with the Centre for Disability Studies to provide a support needs assessment tool to the NDIA. The tool is called the Instrument for the Classification and Assessment of Support Needs (I-CAN).

The I-CAN version 6 has been refined over 20 years and is used in programs including the national Disability Support for Older Australians program.

The NDIA chose the I-CAN through a competitive procurement process and were supported by a disability lived experience expert advisory group.

Issues of algorithmic bias, technology deference and a decreased ability to understand or interpret decisions are significant concerns with government use of ADM, particularly when employed in the context of service delivery to vulnerable populations. Recent criticism of the Government’s algorithm-based assessment tool that determines federal aged care home support funding packages highlights the serious risks in a lack of adequate protections.³ We suggest that the I-CAN should produce an output report which can be provided to an affected NDIS participant in such a way that they are able to interrogate the results and identify errors to assist with seeking review of a decision.⁴

Where decisions involve vulnerable people, as is the case in the context of the NDIS, the Government must ensure that services are accessible to those groups. For example, this may involve the retention of manual processing options, keeping humans in the decision-making loop to determine appropriate exceptions to rules, and providing humans with the option to override I-CAN’s decisions based on clinical assessment.

As I-CAN will be used in decision-making that affects people with disability, there should be bespoke approaches for specific vulnerable cohorts to assist them in understanding the decision-making process and their rights in relation to it. It may not be appropriate, and can be particularly overwhelming for vulnerable people, to be referred to an online portal for such information. The Government should look to upskilling staff and supporting provision of trauma-informed and appropriately tailored human services to support individuals who may face compounded difficulties in understanding a decision-making process which engages ADM. We consider it particularly important that there is a readily available human contact point for individuals to discuss time sensitive

¹ See Julie Falck, “The NDIS Transformation from Discretion to Rules: Legislative Rebuttal and Administrative Justice” (2025) 53(2) *University of Western Australia Law Review* 304, 306.

² Department of Health, Disability and Ageing, “NDIS rules: public consultation on new framework planning Discussion Paper” (January 2026) 6: https://consultations.health.gov.au/ndis/nfp-public-consultation/user_uploads/public-consultation-on-nfp---discussion-paper.pdf.

³ Melissa Davey, “Algorithm-based tool for home support funding is cruel and inhumane, Australian aged care workers warn”, *The Guardian* (18 February 2026): <https://www.theguardian.com/australia-news/2026/feb/17/australian-aged-care-algorithm-tool-home-support-funding-packages>.

⁴ Law Society of NSW, Automated Decision Making and AI Regulation – Issues Paper (2022): <https://www.lawsociety.com.au/sites/default/files/2022-11/Letter%20to%20Law%20Council%20of%20Australia%20-%20Automated%20Decision%20Making%20and%20AI%20Regulation%20%E2%80%93%20Issues%20Paper%20-%2014%20April%202022.pdf>.

decisions (for example, those which impact housing or social security payments), which have a significant impact on a person's security and wellbeing.

In relation to any arrangement between the University of Melbourne, the Centre for Disability Studies and the Government on the roll-out and use of the I-CAN tool, we suggest there should be a requirement, contractual or otherwise and without exception, to require appropriate disclosure by the University of Melbourne and the Centre for Disability Studies to Government, as well as to affected individuals, of the use of ADM and the system processes employed, including for the purpose of administrative and/or judicial review of a relevant decision by the ART, a court, or other body.⁵ We also suggest mandatory requirements to allow for government auditors to access detailed information relating to the I-CAN system, including sensitive data, on an as-needs basis, which will need to be appropriately and lawfully handled.

Review of decisions

It is our view that governments should not seek to prevent or limit people affected by fully or partially automated decisions from accessing administrative law review and accountability mechanisms, such as the Commonwealth Ombudsman, merits review and freedom of information applications. We note that access to these forms of review was restricted throughout the operation of the Robodebt program⁶ and emphasise that independent review could have improved the operation of that service and reduced the magnitude of its harm. The impact of restricting access to administrative law forums is evident in the eroding of public trust that resulted from that program. The costs associated with implementing accountability will ultimately result in better systems and processes.

All reviews should involve a human decision maker with power to override the algorithmic decision having regard to the intended purpose of the regulatory authority under which the decision is made, its impact on the affected person's rights and legitimate interests, as well as on the overall socio-economic context in which the ADM is used. We would support the introduction of statutory protections in line with international best practice, such as those provided in Article 22 of the General Data Protection Regulation, which include the right to obtain human intervention and to contest an automated decision.⁷

The Discussion Paper does not sufficiently outline the powers of the ART in reviewing supported needs assessments. For example, it is unclear what the word "arrange" in the description following means in practice:

If needed, reviewers or the ART can arrange a replacement SNA [Support Needs Assessment], in whole or in part, under the rules.⁸

We suggest that the draft Rules address such ambiguity and clearly outline the role of the ART under the new planning framework.

⁵ See discussion of transparency in Paul Miller, 'A New 'Machinery of Government'? The Automation of Administrative Decision-Making' (Book chapter, online) in Zofia Bednarz and Monika Zalnieriute, *Money, Power and AI: From Automated Banks to Automated States* (Cambridge University Press 2023), online: <https://www.cambridge.org/core/books/money-power-and-ai/new-machinery-of-government/19159C1F35EEF85EBABFD1FE374451C5>.

⁶ Royal Commission into the Robodebt Scheme, *Report – Volume 1* (2022) xxvii: <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF>.

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, <https://gdpr-info.eu/art-22-gdpr/>.

⁸ Department of Health, Disability and Ageing, "Review and appeals under the new way of planning (from mid-2026)" (January 2026) 2: https://consultations.health.gov.au/ndis/nfp-public-consultation/user_uploads/fact-sheet---reviews-and-appeals-under-the-new-way-of-planning.pdf.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)

Further, we emphasise the need for the new framework to be consistent with Australia's human rights obligations, including under the CRPD:

- **Article 4(1)(a) - Implementation of the Convention:** The Discussion Paper does not sufficiently clarify how the proposed framework supports the implementation of the CRPD. We suggest that both the Notice of Impairment rules and the budget-setting rules should be aligned with the CRPD. Although the post-2024 reforms require "NDIS supports" to be consistent with the CRPD, the rule-making power vested in the NDIA to exclude certain supports does not require any consideration of the CRPD in the exercise of this power (see ss 10(3)-(4) of the NDIS Act). The new rules should require consistency with the CRPD to the extent possible in both the issuance of Notices of Impairment and budget-setting to ensure the CRPD is effectively implemented.
- **Articles 4(1)(i), 8(2)(d), 13(2) - Training obligations:** The adoption of algorithmic tools should be scrutinised in light of the Government's obligation to ensure staff are working with persons with disabilities in the rights recognised in the CRPD. I-CAN must be trained appropriately, and the Rules must ensure I-CAN respects the CRPD in administering budgets. The NDIA should also specify what training non-algorithmic decision-makers will be receiving.
- **Article 12 - Equal recognition before the law:** The new I-CAN tool risks undermining autonomy and legal capacity by substituting the will and preferences of participants with tool-driven classifications, undermining the principle of supported decision-making.
- **Article 13 - Access to justice:** We also note that support needs assessment reports are not eligible for a merits review appeal under s 99 of the NDIS Act. While the CEO has the discretion to undertake a replacement needs assessment report under s 32L(7), these reports are not reviewable despite their central role in determining the applicant's funding under the new budget-setting methodology. This falls short of the Government's obligations to facilitate access to justice for persons with disabilities on an equal basis with others.
- **Article 19 - Living independently and being included in the community:** The new budget rules and use of the I-CAN tool should avoid prioritising administrative efficiency by bundling supports over individualised and co-designed living arrangements.
- **Preamble (e), Articles 1, 3(d):** The CRPD requires the acknowledgement that disability is diverse and there must be respect of this difference. The current regime's categorisation model, as distinct from a holistic, evidence-based model, does not respect this difference. The rollout of the rules for "classes" of participants and the rules themselves (in particular, the Notice of Impairment and budget-setting rules) ought to respect this difference. Individuality is a core tenet underpinning the human rights of persons with disabilities.

Concerns regarding Aboriginal and Torres Strait Islander peoples

Aboriginal or Torres Strait Islander make up eight per cent of NDIS participants,⁹ but are under-represented¹⁰ when compared with the number of Indigenous people with disability.¹¹ A recent report published by the Law and Justice Foundation of NSW found that:

As of 31 December 2024, there were 692,823 active NDIS participants. Children and young people aged 18 years and under accounted for 361,504 of these participants. The highest number of participants was in New South Wales (205,597 people), followed by Victoria (185,989 people), with the lowest number of participants in the Northern Territory (6,270 people). The majority of participants resided in major cities (474,923 people, 69% of participants), with only 10,768 participants living remotely/very remotely (1.55%). There were 61,300 (8.8% of participants) who identified as culturally and linguistically diverse. There were only 55,675 people (8.0% of participants) who identified as Aboriginal or Torres Strait Islander. The rate of Aboriginal and Torres Strait Islander NDIS participants is particularly notable given that the rate of Aboriginal and Torres Strait Islander people with disability (25.3%) is higher than that of the non-Indigenous population (21.4%).¹²

Additionally, a report commissioned by the Royal Commission into the Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**), found the following:¹³

- The number of Aboriginal and Torres Strait Islander people participating in the NDIS is expected to grow twice as fast as the number of non-Indigenous participants over the next decade.
- Approximately 13,000 NDIS workers are needed in the First Nations disability sector by 2031 to meet growth in demand.
- There is an urgent need for the whole disability workforce to better deliver and understand culturally-safe and trauma-informed approach to care.
- First Nations people are underrepresented in the care workforce across the country, and particularly in remote communities.

We also note that the Disability Royal Commission found that proportion of Aboriginal and Torres Strait Islander people with cognitive disability in custody, particularly in youth detention, is a “hidden national crisis.”¹⁴ In light of these findings, it is critical that the Aboriginal and Torres Strait Islander disability community are meaningfully consulted on the Rules to ensure that there is access to culturally safe and appropriate support and the systemic barriers preventing access by Aboriginal and Torres Strait Islander people to the NDIS are addressed.

⁹ National Disability Insurance Scheme, *Delivering more First Nations support within the NDIS* (Web Page, 27 October 2025) <<https://www.ndis.gov.au/news/10977-delivering-more-first-nations-support-within-ndis>>.

¹⁰ In September 2022, the NDIS was providing disability support to 40,842 Aboriginal and Torres Strait Islander participants: see National Disability Insurance Scheme, ‘More First Nations Australians receiving NDIS support’ (Media Release, 18 November 2022) <<https://www.ndis.gov.au/news/8524-more-first-nations-australians-receiving-ndis-support>>.

¹¹ In 2022, 183,700 Aboriginal and Torres Strait Islander people had a disability: Australian Bureau of Statistics, ‘Aboriginal and Torres Strait Islander peoples with disability, 2022’ (25 February 2025) <<https://www.abs.gov.au/articles/aboriginal-and-torres-strait-islander-peoples-disability-2022>>.

¹² Davies K, Ratcliffe S, Kothe E, Takchi S, Law and Justice Foundation of NSW, “I would have given up without it”: An evaluation of the NDIS Appeals Program Legal Services” (2025) 5: <https://nla-production-assets.s3.ap-southeast-2.amazonaws.com/public/Reports/2025/NDIS-Appeals-Program-Evaluation-/NDIS-Report.pdf>.

¹³ Deloitte, *Research Report – Options to Improve Service Availability and Accessibility for First Nations People with Disability* (Report, June 2023) <<https://disability.royalcommission.gov.au/system/files/2023-09/Research%20Report%20-%20Options%20to%20improve%20service%20availability%20and%20accessibility%20for%20First%20Nations%20people%20with%20disability.pdf>>.

¹⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report: Volume 9*, (2023), 139. See also Youth Justice NSW, *2022 Young People in Custody Health Survey Report* (2025) at 138. This Report found that a high proportion of Aboriginal participants in the study, who were young people in custody, may have had a disability, with almost half reporting difficulty with learning and applying knowledge.

Additionally, in complement to this, we support funding to legal assistance providers which specialise in providing legal services to Aboriginal and Torres Strait Islander peoples and systemic policy advocacy. We understand from our members that Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) are not sufficiently funded for NDIS work, and not funded for any NDIS appeal work in the ART. We support sufficient funding for specialist legal assistance providers to ensure that Aboriginal and Torres Strait Islander people are able to access culturally safe legal service, and in doing so, enhancing access to the NDIS.

In our view, the under-representation of Aboriginal and Torres Strait Islander peoples as NDIS participants and in NDIS appeals reflects, among other factors, the lack of resources for legal assistance providers and other Aboriginal Community Controlled Organisations (**ACCOs**) to be able to reach these communities. In order to be effective, legal and non-legal therapeutic support should be provided by culturally safe assistance providers.¹⁵

Additionally, consistent with the National Agreement on Closing the Gap, specifically, Priority Reform 2 on building capacity of ACCOs, and Priority Reform 3 on transforming Government organisations, mainstream services providing NDIS-related services to Aboriginal and Torres Strait Islander peoples should transition those services to ACCOs, and any new funding should go to ACCOs.¹⁶ ACCOs and Aboriginal Community Controlled Health Organisations frequently deliver disability services with inadequate funding and resourcing.¹⁷

If you have any queries about the items above, or would like further information, please contact Mimi Lee, Policy Lawyer, on 02 9926 0174 or mimi.lee@lawsociety.com.au.

Yours sincerely,



Ronan MacSweeney
President

¹⁵ Access to disability support by ATSILS is explored in NATSILS submission to the Independent Review of the National Legal Assistance Partnership 2020-25: <https://www.natsils.org.au/wp-content/uploads/2024/04/NATSILS-Submission-to-the-NLAP-Review-Final-EDIT-public.pdf>.

¹⁶ Clause 43, National Agreement on Closing the Gap: "The Parties acknowledge that Aboriginal and Torres Strait Islander community-controlled services are better for Aboriginal and Torres Strait Islander people, achieve better results, employ more Aboriginal and Torres Strait Islander people and are often preferred over mainstream services. Priority Reform Two received the strongest support in the 2019 engagements.": https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf.

¹⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Research Report - Options to improve service availability and accessibility for First Nations people with disability* (June 2023) 2: <https://disability.royalcommission.gov.au/system/files/2023-09/Research%20Report%20-%20Options%20to%20improve%20service%20availability%20and%20accessibility%20for%20First%20Nations%20people%20with%20disability.pdf>.