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Attention: Aaron Verlin

General Manager
Co-design and Engagement
National Disability Insurance Agency

By email: STAKEHOLDER.ENGAGEMENT@ndis.gov.au

Dear Mr Verlin

Feedback on eligibility reassessment documents

I refer to your emails sent on 6, 10 and 12 December 2024. AFDO is grateful for the opportunity to provide feedback on the Agency's current eligibility reassessment process and your communications to NDIS participants, pending the Agency undertaking a co-design process of "the participant experience" of the eligibility reassessment process in the new year.

Thank you for providing the two further sample letters. However, we are not able to amend or mark up those sample letters. We have, therefore, provided our feedback and suggested amendments, in mark up to the template letter.

I enclose, for your consideration, the amended version (in markup) of the template letter to a participant/nominee. We make the same comments, and relevant amendments to each sample letter, and to the factsheet.

This letter is also endorsed by AFDO member and DRO consortium member, Deafness Forum Australia.

1. Basis for eligibility reassessment other than under sections 30 and 30A

In addition to the feedback on the documents, AFDO considers that is vital for clarity around the legislative or other basis for the eligibility reassessment process, including any decision that a particular participant is no longer eligible when the process by which that decision is made does not comply with sections 30 or 30A of the National Disability Insurance Scheme Act 2013 (**Act**).

1.1. "Information" vs "specific information; 28 vs 90 days

As we understand the Agency's position, where there is a concern that a participant may no longer meet the eligibility requirements the Agency is able to request the participant to provide information (directed to the eligibility requirement the Agency identifies) that addresses the Agency's concern. The participant is given 28 days to provide that information.

However, the Agency draws a distinction between this type of request and a request for "**specific evidence** to make a decision about your eligibility" (see Agency Guideline "How much time will you have to give us more evidence?" retrieved from https://ourguidelines.ndis.gov.au/home/becoming-participant/leaving-ndis/are-you-still-eligible-ndis/how-much-time-will-you-have-give-us-more-evidence on 13 December 2024). The Agency considers that a request for "specific" information is a request made under subsection 30(3), giving the participant at least 90 days to provide that "specific" information.

The Agency is making a distinction between "information" and "specific information" which not a distinction made in the Act. Sections 30 and 30A are very clear in their terms. It is worthwhile to set out those provisions:

> (2) If the CEO is considering revoking a participant's status as a participant in the National Disability Insurance Scheme under subsection (1), the CEO may make one or more requests under subsection (3) for the purposes of deciding whether or not to do so.
>
> (3) The requests the CEO may make under this subsection are as follows:
>
> (a) that the participant, or another person, **provide information** that is **reasonably necessary for deciding** whether or not to revoke the participant's status as a participant in the National Disability Insurance Scheme;

The CEO cannot make a valid request that does not fall within the scope of subsection (3).

Nothing in the wording of section 30 gives any basis for interpreting "information" as limited to "specific information" – whatever that may mean. The CEO may request information that is "**reasonably necessary**" for deciding whether to revoke a participant's status. This is the only qualification on the information that can be requested. The letter lists many different pieces of information that the Agency "needs" to complete the reassessment. It is clear the Agency considers that information as being reasonably necessary to allow the Agency to make its decision.

Further, to the extent to which there is a requirement for the information to be "specific" (which is not conceded), the evidence listed in the section "Evidence we need" is "clearly defined or identified or capable of being so; particular" (Definition of "specific";

Oxford English Dictionary, retrieved from https://www.oed.com/search/dictionary/?scope=Entries&q=specific on 13 December 2024).

To the extent to which the concept of "specific information" is relevant, the information sought (and listed) in the letters is "specific information".

Even if it is valid for the Agency to make a distinction between "information" and "specific information" (which is not conceded), there is nothing in the Agency's Guidelines that provides any information as to how the Agency classifies a request for "specific information", other than in the context of an example in which a neurologist's assessment is requested. It seems (although it is not entirely clear) that this is considered a request for specific information because the Agency:

> only (requests) reasonably necessary evidence …. We don't ask (for) their whole medical record, or reports from every neurology appointment they've been to.

The "Evidence we need" section refers to "evidence from a treating health professional about your impairment(s) and how this impacts your ability to do daily life activities". The participant's whole medical record is not needed, nor is every report from every specialist who has examined or treated the participant identified as being "needed".

The Agency's Guideline "How do we decide if you're still eligible for the NDIS?" (retrieved from https://ourguidelines.ndis.gov.au/home/becoming-participant/leaving-ndis/are-you-still-eligible-ndis/how-do-we-decide-if-youre-still-eligible-ndis on 13 December 2024) refers to information sought as part of an eligibility reassessment with a 28 day response time as "this **specific information**".

If the Agency conducts an eligibility reassessment it is doing so because the CEO is considering revoking a participant's status. Whilst the CEO is not required to make any request**, any request for information** that is made must be in accordance with section 30 (or section 30A), and must provide a 90-day response period. We cannot identify any other provision in the Act that gives any authority to the Agency to request information from a participant when the CEO is considering revoking a participant's status.

However, we are very interested to know the legislative or other basis the Agency relies on for the power to issue a request for information with a 28-day deadline. We are also very interested to know how (and the basis on which) the Agency determines a request is for "specific" information. We invite you to provide this information.

1.2. Is a decision to revoke status after a 28-day deadline lawful and valid?

Even if the interpretation discussed above is open to the Agency (and, so there is no misunderstanding, we say that it is not), the Agency cannot make a lawful and valid decision to revoke a participant's status under a process that gives the participant 28 days to provide information. This is the case even if the request is not a request for "specific" information. The Agency's Guideline "How do we decide if you're still eligible

for the NDIS?" is clear. The Agency is deciding to revoke participants' status after giving only 28 days to provide information. The Guidelines states:

> If we check your eligibility, and evidence suggests that you may no longer meet the eligibility requirements, we will start an eligibility reassessment. We'll let you know and give you the opportunity to provide us with more evidence about your NDIS eligibility. You'll have **an opportunity to respond in 28 days** with the necessary information or request an extension of time to obtain the evidence. We will look at the evidence you provide us. If, based on the evidence **we believe you're not eligible, we will revoke your status** as a participant (our emphasis).

The Agency is making these decisions notwithstanding that sections 30 and 30A are the only source of power of revocation under the Act, and clearly require at least a 90-day response time.

It is also clear from the "Example" in that Guideline that the Agency is also deciding to revoke participants' status because of failures to respond to a request for information that imposes a 28-day response period. Again, subsections 30(4) and 30A(7) are clear. Revocation following a failure of a participant to respond can only occur if:

(a) the Agency has issued a valid request, in writing, pursuant to subsections 30(3) and (3AAA) or 30A(5) and (5AAA), and

(b) the participant has failed to provide the requested information within at least 90 days after the request was made.

There is no basis under the Act or otherwise on which the Agency may make a valid revocation after 28 days.

Again, we are very interested to know the basis on which the Agency asserts it is able to revoke a participant's status after a failure to respond to a request that gives only 28 days to respond. We invite you to provide this information.

2. Feedback on the documents

I now turn to our comments and feedback on the documents.

A reference to any section or other part of legislation is, unless stated otherwise, a reference to the relevant section or other part of the Act.

2.1. It is helpful to state at the outset the reasons why the Agency "needs" to reassess the participant's eligibility. If a letter is generated as part of an administrative process to review, at regular intervals, a participant's eligibility then saying so will alleviate any (potentially significant) concerns of the participant that:

(a) the participant has done something wrong or illegal that has prompted the review, or

(b) the Agency has some factual, legal or some other proper basis for questioning the participant's eligibility,

and the participant is at risk of being removed from the Scheme.

Evidence given to the Robodebt Royal Commission clearly demonstrates the potential effects letters such as this can have on vulnerable people, such as people with disability. AFDO is confident the Agency does not wish to see a repeat of those tragic, unwarranted, and unjustified circumstances because of notification of eligibility assessments.

2.2. If the review is not part of a regular administrative process, it is even more important that this is made clear at the beginning of any letter.

2.3. If the review is part of a regular administrative process, it is also helpful to include at least the date of the last administrative, regular review of the participant's eligibility the Agency undertook.

2.4. If any part of the decision to undertake a review of a participant's eligibility was made by, or with the assistance of, an automated decision-making process, this must be fully disclosed at the beginning of any letter.

2.5. According to the sample letters, the Agency regularly checks eligibility, including when a participant's plan is reassessed. Does this mean that a participant's eligibility can be checked, with no letter being issued if the check does not identify any issues of concern or any lack of information that establishes the participant's eligibility?

In these circumstances, will the participant have no knowledge of the regular eligibility check having occurred?

2.6. In addition to advising the participant that they can still use the NDIS supports in their plan while you reassess eligibility, it is useful to make it very clear that the participant remains a NDIS participant while the reassessment take place.

2.7. Further, not only can the participant continue to use the NDIS supports in their plan while the reassessment process occurs, but they will be able to continue to do so until the Agency decides, and communicates to the participant, that the Agency is satisfied that the participant does not meet the NDIS eligibility requirements. Again, this needs to be made very clear in the letter.

2.8. The letters refer to both "information" (which we note is the term used in sections 30 and 30A) and "evidence" interchangeably. We suggest that the Agency uses one of these terms consistently, to avoid possible confusion. We recommend the letter refers only to "information", consistent with the Act.

2.9. In relation to a reassessment because of a concern that the participant may no longer meet the disability or early intervention requirements, it is important to remember the CEO has previously decided that the CEO was satisfied that at the time of considering the request, the person met the disability requirements or the early intervention requirements. If that view has changed, that must be based on new or previously unavailable information that the Agency now has. The information that you require from the participant must be directed to address

specifically that new information.

2.10. What the participant or nominee is required to do, and the date by when that action must be completed, must be clearly stated immediately under the heading "What you need to do".

2.11. Each sample letter asks the participant or nominee to provide "evidence" that "shows" that the participant meets the relevant eligibility requirement (residence (section 23); disability (section 24); or early intervention (section 25).

2.12. Similarly, each letter states (further down) the Agency will decide if the participant is "still eligible for the NDIS". These are not correct statements of what is required under the Act to revoke a participant's status.

The onus is not on the participant to establish that the participant meets the eligibility requirements. Subsection.30(1), and paragraphs 30A(1)(b) and (c), are clear. The CEO of the Agency may only revoke a participant's status if the CEO is satisfied that the participant "**does not meet**" the relevant requirement. The Agency does not decide that the participant is still eligible.

Absent a failure to provide requested information within 90 days, or such longer period as is specified in the request (subsections 30(5) and 30A(7)), there is no other basis on which a participant's status as a participant can be revoked. The onus is on the CEO of the Agency to be satisfied that the participant **does not meet** the requirements.

2.13. Whilst we appreciate that the Agency seeks to use easily understood language, "living in Australia" is not equivalent to the legal concept of "residency" (which is the requirement under paragraph 23(1)(a)).

2.14. Further, paragraph 23(1)(a)) makes no reference to residing "permanently" in Australia.

2.15. It is not sufficient for the Agency to simply state that the participant is asked to provide further information about (or, as we assert, that the Agency has a concern that the participant no longer satisfies, the eligibility requirements based on) the participant's residence, citizenship, disability, or permanence of "impairment".

2.16. As the Agency's Guideline "How much time will you have to give us more evidence?" acknowledges, a participant will be sent "a letter to explain **why** we think you (the participant) are no longer eligible" (our emphasis). The sample letters do not explain **why** the Agency has a concern about the participant's eligibility. The sample letters only identify the eligibility requirement that is of concern to the Agency.

In addition to stating clearly which eligibility requirement the Agency considers is called into question, to ensure that each participant is afforded natural justice, the Agency must give full particulars of the concern, why the concern exists or has

been raised, and the information the Agency has that has caused it to question the participant's continuing eligibility.

2.17. The letters refer to the "evidence" the Agency has already "received". All "evidence" (or information) that the Agency has and on which it intends to rely in deciding the question of the participant's eligibility must be disclosed – not only the "evidence" the Agency has "received".

2.18. Any "evidence" (or information) that the Agency has, and that which it knows, or may reasonably suspect, the participant or nominee does not have, must be provided to the participant or nominee with the letter. The Agency must also tell the participant or nominee that if they do not have copies of any of the documents or other information listed, they can ask the Agency to send copies, at no charge to the participant or nominee.

2.19. The time set for the participant's response must be paused until the participant receives the requested copies. This must also be disclosed in the letter.

2.20. We recommend the participant or nominee is invited to provide any information that they believe shows that any of the matters raised in the information disclosed by the Agency is not correct or is incomplete, or that any opinion expressed, or conclusion reached in that information is not properly available, fails to consider relevant facts, considers irrelevant facts, or is not relevant.

2.21. We also recommend the participant or nominee is, in addition to, or instead of, providing further information, invited to tell the Agency in writing why the participant or nominee says the information the Agency has does not demonstrate that it is more probable than not that the participant does not meet the eligibility requirements.

2.22. Each sample letter states:

> If you decide not to provide new evidence, we'll make a decision based on the information we have.

2.23. Again, this is not a correct statement of the position of the revocation process under the Act. Each of subsections 30(5) and 30A(7) are clear. If the requested information is not received no decision about the participant's eligibility is made. Instead, if:

(a) information is requested under subsection 30(3) or 30A(5), and

(b) the information is not received by the CEO within 90 days, or such longer period as is specified in the request, after that information is requested,

the CEO **must revoke** the participant's status as a participant, **unless** the CEO is satisfied that it was reasonable for the participant not to have complied with the request within that period (our emphasis).

2.24. It is more helpful if you can provide direct links to the relevant documents, rather than ask a participant or nominee to search your website. It is even more helpful

if you can include the relevant Guidelines with the letter.

2.25. In relation to the information that you identify as relevant to the issue of the residency requirement, you assume that a participant is either living alone or, if in a shared arrangement, is named on certificates of title, sale contracts, leases and accounts. That is not a valid assumption you can make. For example, what evidence is required if a participant lives with another family member, and is not named on any lease or other document that evidences occupancy, and has no legal or financial obligations in respect of property expenses?

2.26. Further, you must make it very clear that the information you list is not the only information that will mean that the CEO cannot be satisfied that the participant is not eligible. You must notify the participant that the participant may provide evidence relevant to any of the matters listed in subsection 23(2).

It will assist participants if you list each of those matters in the relevant part of the "Evidence we need" section.

2.27. In relation to a participant born on or after 20 August 1986 who only provides a full Australian birth certificate, every time you refer to "one parent" (except in the last dot point), an asterisk is used after "parent". However, there is nothing to indicate what this asterisk refers to, or what further information or qualification is required in relation to "one parent". This needs to be made clear.

2.28. Does the reference to "one parent" in the last dot point also need an asterisk?

If you would like to discuss any of these matters, please contact me (but note the AFDO office is closed from 24 December 2024 to 2 January 2025, and I am on leave from 20 December 2024, returning on 2 January 2025.

We look forward to seeing revised letters, a revised factsheet and revised Guidelines, consistent with our feedback, being used by the Agency as soon as possible. We also look forward to seeing the Agency implement the necessary changes to the Agency's policy and processes, so the eligibility reassessment process is consistent with the requirements of the Act, and any decision to revoke a participant's status is valid, lawfully made in accordance with the Act, and consistent with the principles of procedural fairness.

We also look forward to engaging with the Agency in a properly considered and executed codesign process in the new year, and to hearing from you in relation to the issues raised in section 1 of this letter.

Yours sincerely

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