

OFFICIAL

Draft – Opening remarks to Senate Community Affairs Legislation Committee Inquiry

Introduction

- The Department of Social Services welcomes the opportunity to provide evidence before the second Inquiry of the Senate Community Affairs Legislation Committee Inquiry into the NDIS Amendment (Getting the NDIS Back on Track Bill No. 1) Bill 2024 together with colleagues from the National Disability Insurance Agency.
- As you will be aware, a further (3rd) joint submission to the Senate Committee Inquiry was made by the Department of Social Services and the National Disability Insurance Agency which has been published on the Committee's website [*check*].
- We trust this is of assistance to the Committee and want to briefly address some areas proposed for government amendment and early work on the development of subordinate legislation.

Proposed amendments

- Proposed government amendments tabled in the Senate responded to recommendations made by this Committee in its report tabled on 20 June 2024 as well as concerns about the new framework planning process.
- Given the focus of this Inquiry, I would like to take some time to outline the policy intent of these amendments [*and further work we are doing in responding to/ considering outstanding concerns raised by stakeholders*].

Engagement on priority subordinate legislation

- Without pre-empting the passage of the Amendment Bill, I would also like to outline how we are working with states and territories and the disability community on the development of subordinate legislation.
- If the Bill passes, the department will work the Agency to publish a wider engagement plan on the development of rules and legislative instruments.

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New framework planning process – needs assessments

- As outlined in our submission to this Inquiry, in addition to responding the Inquiry report tabled on 20 June 2024, the proposed Senate amendments respond to concerns the Bill does not allow for a ‘whole of person’ needs assessment to inform the new planning framework and participant budget.
- While the Committee did not make a specific recommendation around this issue, there has been extensive commentary and some confusion about section 32L relating to needs assessments to inform budget decisions will operate.
- The amendments to section 32L make it clear the needs assessment process must consider a participant’s needs holistically, taking into consideration a variety of factors, including environmental factors (such as a participant’s living arrangements) that may impact on a participant’s disability support needs.
- This has always been the intention, consistent with recommendations of the NDIS Review – specifically actions 3.3 to 3.5 [which were:
 - 3.3 The National Disability Insurance Agency should change the basis for setting a budget to a whole-of-person level, rather than for individual support items.
 - 3.4 The National Disability Insurance Agency should introduce new needs assessment processes to more consistently determine the level of need for each participant and set budgets on this basis.
 - 3.5 The National Disability Insurance Agency should allow greater flexibility in how participants can spend their budget, with minimal exceptions.]
- While the assessment itself is holistic, funding for supports under the NDIS can only be provided in relation to impairments that meet the disability or early intervention requirements.
- This is about Scheme sustainability and ensuring the NDIS does not take on funding responsibility for service systems and other costs that are not about meeting the disability support related needs of participants.

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- Additional information to be included in the needs assessment report will be outlined in a legislative instrument that will be the subject of consultation and co-design.
- This will ensure the needs assessment report contains all relevant and appropriate information about a participant and their disability support needs.
- In addition to amendments to the needs assessment, proposed amendments to section 32K specify additional matters the Minister must have regard to when making a disallowable legislative instrument about the new reasonable and necessary budget planning framework.
- In making the legislative amendment, the Minister *must* consider that a variety of factors may affect a participant’s need for NDIS supports beyond impairments that meet the disability or early intervention requirements which would include environmental factors.

Outstanding concerns about the needs assessment process

- We understand from submissions made to this Inquiry and our engagement with advocates and Disability Representative Organisations there are some outstanding concerns about how the needs assessment process will work.
- Some of these concerns seem to be based on current operational practice in that there is currently no Agency process for listing and removing impairments.
 - Conditions/diagnoses and/or impairments are used variably based on variable medical and other information received as part of the access process.
- Based on submissions and our own engagement, we are considering further amendments to provide transparent and reviewable decision-making processes associated with adding and removing impairments subject to government decision.

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- This would be about enabling transparency about impairments which would be the focus of a needs assessment report, having regard to broader environmental factors which impact on a participant's disability related support needs for NDIS funding.
- We are currently working with stakeholders and government to explore opportunities to make these and other modest amendments to address outstanding concerns around the needs assessment and planning process.

Limitations and clarifications for information gathering powers

- The Bill includes new powers for the Agency to request information, or for a participant to attend an assessment or examination, within the context of considering whether they continue to meet access requirements.
- This is not about people having to 're-prove' their disability but will allow the Agency to understand the impacts of their impairment (which can change over time) having regard to the best available information to ensure they are receiving the most appropriate supports.
- Currently the Agency has no ability to request information for the purposes of determining whether a participant continues to meet the early intervention or disability requirements which means consideration may be based on outdated or incorrect information.
- In its previous inquiry report, the Committee recommended that the Government further clarify the circumstances under which the additional information gathering powers granted to the CEO of the National Disability Insurance Agency will be used.
- Proposed amendments tabled in the Senate:
 - Make it clear that requests will be made in writing and may be varied or withdrawn where, for example, information has been obtained or provided elsewhere, is not longer required or because it is reasonable for the relevant person not to provide the information.
 - While information requests made under the NDIS Act are generally given in writing, it is important to note that if written

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communication is not the most suitable method of communicating with a participant, they will also be given the request in their preferred manner of communication.

- Further proposed amendments provide guidance for the Agency in considering whether or not it is reasonable for a person not to have complied with certain requests for information within the timeframe prescribed in that request. For example, whether failure to comply with the request is beyond the control of a participant such as where the information is being provided by a third party such as treating health professional.
 - New rule making powers have been proposed which would prescribe matters the Agency must have regard to in considering whether it was reasonable for a person not to have complied with requests for information. These would be Category A rules requiring the agreement of states and territories.
- The proposed amendments are in addition to amendments made in the House of Representatives which require the Agency to have regard to other reasonable alternatives before making any request for an assessment or examination.
 - In addition, the Agency cannot request an assessment or examination unless the delegate is satisfied the report would provide information they could not otherwise reasonably obtain.
 - It is important to note the decision to require an assessment or examination is discretionary and the impact on a participant will always be a factor to be considered.

Consultation statements

- The issue of consultation and co-design, particularly in relation to legislative instruments, has been the subject of widespread discussion since the Bill was introduced.

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- In its previous inquiry report, the Committee recommended that a ‘consultation statement’ be tabled along with all legislative instruments made under the NDIS Act that sets out consultations undertaken.
- The proposed Senate amendments insert a new section 211 which prescribes certain information about consultation that must be included in explanatory statement to legislative instruments made under the NDIS Act.
- The Minister is already required to provide information about consultation undertaken on legislative instruments under paragraph 15J(2)(d) of the Legislation Act 2003. This amendment clarifies and strengthens this requirement in relation to legislative instruments made under the NDIS Act. Specifically, explanatory statements to all legislative instruments made under the NDIS Act will be required to meet the following requirements:
 - describe the nature of the consultation
 - describe in general terms who was consulted
 - contain a summary of the views expressed by stakeholders.
- While the Bill provides the scaffolding for reform, the majority of changes will not take effect until changes to NDIS Rules are made following a process of co-design and engagement with the disability community.

Further engagement on the development of legislation

- In my previous submission to this Committee, I mentioned the Agency has commenced co-design work on a number of areas for reform and how they will be implemented, through its extensive existing co-design and consultative mechanisms. These areas are published on the Agency’s website and include participant pathway experience, safety and services.
- The Department has been working with the Agency to use the insights from this co-design to inform the development of policy around priority rules and other instruments and will be leading broader engagement on the detail together with states and territories.

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Definition of NDIS Support

- One of the priority areas for subordinate legislation in the event the Bill passes is the definition of NDIS Support.
- I would like to outline our proposed approach to engagement on the meaning of NDIS Support and provide some further context about a potential transitional rule.
- One of the key changes made by the Amendment Bill is to introduce flexible budgets. This means participants will have more choice and control in choosing what supports are right for them.
- It also means a new definition of ‘NDIS support’ needed to be inserted into the NDIS Act to make it clear what the NDIS does and does not fund to help participants make more informed choices.
- This is relevant to ensuring that participants do not inadvertently spend NDIS funding on goods or services that are not NDIS supports and risk incurring a debt which I would also like to outline.
- A transitional rule will need to be in place at the time the Bill commences until a longer-term rule can be designed with the disability community and agreed with State and Territory Governments.

Why do we need a definition of NDIS Support?

- The NDIS Review heard consistently, particularly from participants, that it is not always clear what they can spend their funding on.
- Currently this information is contained in lots of different documents (such as rules and operational guidance) which can be difficult to understand all together.
- Without a definition of NDIS Support, this has resulted in the issue of whether a support can be funded by the NDIS being determined on a case-

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by-case basis (at the cost of individual participants going through complex and often traumatic appeals processes).

- There are many other examples of AAT decisions which cannot reach agreement about day to day living costs...
- I would like to draw the Committee’s attention to a recent Federal Court decision which made a significant expansion in the interpretation of day to day living costs by allowing funding for extensive relocation costs for participants who sell a home and then purchase a new home including conveyancing costs.¹

Transitional rule

- We want the transitional rule to provide clarity for participants when purchasing supports and services to reflect what the NDIS was intended to fund.
- There will be goods and services that while generally not funded under the NDIS, will need to be determined based on a participant’s individual disability support needs.
- These will be represented as ‘carve outs’ from the transitional rules about what the NDIS will not fund based on a person’s disability support needs. For example, where there is an assistive technology adaptation to an item that would ordinarily be regarded as a cost of daily living or where a support enables social and economic participation.
- Most importantly, the transitional rule will need to be clear and easy to understand what NDIS funding can and cannot be used to buy.

¹ Warwick v National Disability Insurance Agency [2024] FCA 616

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Engagement approach to NDIS Support transitional rule

- We have commenced initial engagement with states and territories and Disability and Carer Organisations on lists of what the NDIS would and would not fund.
- As I mentioned, the reason why we have commenced consultation before the Amendment Bill has been passed is because a transitional rule will need to be in place at the time the Bill commences.
- We would like to take as much time as possible to hear from the disability community about the transitional rule, before we make a longer-term rule on NDIS supports.
- We are waiting for initial feedback from states and territories and disability representative organisations before undertaking a public consultation process for 2 reasons.
- The first is to test the lists and identify any changes that need to be made ahead of public consultation and the second is to ensure disability organisations are best placed to support their members in responding to the consultation.
- We know that discussion about what supports are important to the lives of participants can be distressing and we need to take the time to minimise that distress and misinformation.
- It is for these reasons that we have chosen not to table a copy of the lists for the purposes of this hearing because it will add unnecessary confusion and distress.

Debt recovery powers

- Also, in the context of defining NDIS Support, some stakeholders have raised significant concerns about how debt recovery powers will operate if a participant spends NDIS funding on something that is not included in the NDIS supports lists.

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- I should note that debt recovery powers already exist in section 182 and the changes made to section 46 are designed to ensure funds may only be used to obtain supports that are appropriately funded by the NDIS and directed towards meeting a participant’s disability support needs.
- The Agency is preparing an educative approach to ensure that participants understand what NDIS funding can and cannot be spent on.
- It would only be in circumstances such as where a person has deliberately misused NDIS funding that consideration of raising a debt under section 182 may occur under the new arrangements, which is the case now.
- *Insert any information we can discuss about debt waiver provisions and how existing Commonwealth debt waiver provisions operate.*

Additional priority rules subject to co-design and consultation

Section 33 – management of intra-plan inflation

- To support the immediate operation of the Bill, the Minister intends to make a disallowable legislative instrument under proposed new subsection 33(2E).
- This instrument enables the Agency to specify legally enforceable total funding amounts in participants’ plans. These enforceable funding amounts are critical to address intra-plan inflation under the current planning framework (that is in old framework plans).
- *[Do we want to say more explaining intra-plan inflation and costs]*
- The Agency has been working through co-design groups to understand key drivers in plan overspends and support participants with resources to stay within these new funding limits.
- As is the case currently, participants will be able to seek variations based on changes in circumstances or in situations where a participant has

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experienced crisis or emergency situations as outlined in amendments to section 45(5).

- The Commonwealth will be undertaking public consultation and seeking feedback and support from states and territories for the Minister for the NDIS to make the new instrument as close as possible to the commencement of the Bill.

Plan management

- Another area for priority rule making in the event the Bill is passed is subsection 44(5) which enables consideration of whether a participant or other person managing funding under the plan is likely to comply with section 46 when making a decision about plan management type.
- As I have already mentioned, section 46, as amended by the Bill, requires funding provided under a participant’s plan to be spent in accordance with the plan and only to acquire NDIS supports for the participant.
- New subsection 44(5) will enable the Agency not to give effect to a plan management request if satisfied the relevant person is unlikely to comply with section 46.
- This is an important safeguarding provision as it will minimise the risk of a participant’s plan being spent on supports that are not NDIS supports for them, and will ensure participants are supported to spend funding in their plan in such a way that they will continue to have access to necessary supports throughout the duration of their plan.
- It will also protect participants where there is reason to believe their plan nominee or plan manager is likely to use funding under the participant’s plan in an inappropriate way, which could lead to the participant being without funding for much needed supports.
- The rules made under subsection 44(5) are Category A rules requiring agreement of each state and territory to prescribe matters to which the

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Agency must have regard in considering whether a relevant person is likely to comply with section 46.

- The Agency is undertaking targeted consultation with participants, their families and carers, as well as representative organisations on the risk-based decision-making framework that will support delegates to make a plan management decision under this new rule.
- The Department will use the insights from the Agency's work with states and territories consult on options for a new rule.

First Minister agreement to NDIS rules

- The other amendment that has been proposed in the Senate relates to the first recommendation of the initial inquiry into the Bill and that is about elevating responsibility for NDIS governance and rule-making to First Ministers.
- Governments share the goal of reaching long term sustainability for the Scheme and have elevated this objective to National Cabinet.
- A sustainable growth trajectory for the NDIS will support equity and fairness for all Australians living with disability, including for those not eligible for the NDIS, and ensure that every dollar goes to those who need it most.
- The Council for the Australian Federation includes First Ministers of all Australian states and territories and was 'formed to support and enhance the Australian federal system by providing an intergovernmental forum for state and territory leaders in Australia'.
- In its submission, the Council highlighted the elevated focus of all First Ministers on NDIS reform. As the Committee observed: The reforms have naturally risen up to reflect the need for governments to be joined up in their decision-making, reflecting the fact that the broader care economy and provision social services is interconnected across sectors and providers, impacting a range of portfolios and Ministers.

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- Currently only State and Territory Ministers with responsibility for the NDIS can communicate agreement to NDIS rules.
- The amendment to the section 9 definition of ‘host jurisdiction’ will mean that both State and Territory Disability Ministers and First Ministers will be able to agree to NDIS rules.
- This will facilitate the discussion and potential agreement to NDIS rules by First Ministers in forums such as the National Cabinet.

Alignment with Foundational Supports

- As I outlined in my initial opening statement to the first Committee Inquiry, we have also heard clearly from states and territories and the disability community – and agree – that NDIS legislative reforms need to move forward at the same time as new Foundational Supports are designed and implemented.
- These rules will need to be implemented in consultation with the disability community and with agreement from states and territories – which means that key changes can be ‘switched on’ as additional Foundational Supports are available.
- With that I’ll conclude these opening remarks and welcome your questions.



Australian Government
Department of Social Services

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

Senate Community Affairs Legislation Committee Inquiry

SES Briefing Pack

25 July 2024



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1. Introduction

- The Department of Social Services welcomes the opportunity to provide evidence before the second Inquiry of the Senate Community Affairs Legislation Committee Inquiry into the NDIS Amendment (Getting the NDIS Back on Track Bill No. 1) Bill 2024 together with colleagues from the National Disability Insurance Agency.
- As you will be aware, a further (3rd) joint submission to the Senate Committee Inquiry was made by the Department of Social Services and the National Disability Insurance Agency which has been published on the Committee's website [*check*].
- We trust this is of assistance to the Committee and want to briefly address some areas proposed for government amendment and early work on the development of subordinate legislation.

2. Government amendments proposed before the Senate

New framework plans – needs assessment

- While the Committee did not make a specific recommendation around this issue, there has been extensive commentary and a lack of understanding around how section 32L (relating to needs assessments to inform budget decisions) in particular applies.
- The intent of section 32L has always been that a needs assessment will assess a person wholistically, looking at all of their disability related support needs, consistent with recommendations of the Independent Review into the NDIS.
- The amendments clarify that needs resulting from impairments that meet the disability requirements or early intervention requirements may also be impacted by other factors, including other impairments that do not meet the disability requirements or early intervention requirements.
- While the assessment itself is holistic, funding for supports under the NDIS can only be provided in relation to impairments that meet the disability or early intervention requirements.
- The NDIS was always intended to only fund disability support needs that are the responsibility of the NDIS and not other service systems.
- Additional information to be included in the needs assessment report will be outlined in a legislative instrument that will be the subject of consultation and co-design.
- This will ensure the needs assessment report contains all relevant and appropriate information about a participant and their disability support needs.

Will a participant only receive funding for impairments identified at the point of access?

- The amendments also clarify that the assessment of whether a participant's impairments meet the disability or early intervention requirements is not based on whether their impairments met those requirements at the time that they gained access to the scheme.
- This means that new impairments, or impairments that have deteriorated or changed, will be taken into account in subsequent planning and funding decisions.

Amendments made to the Ministerial determination about the new reasonable and necessary budget planning framework

- In addition to amendments to the needs assessment, proposed amendments to section 32K specify additional matters the Minister must have regard to when making a disallowable legislative instrument about the new reasonable and necessary budget planning framework.
- In making the legislative amendment, the Minister *must* consider that a variety of factors may affect a participant's need for NDIS supports beyond impairments that meet the disability or early intervention requirements. These factors may include other impairments or environmental factors.

Information gathering powers

- The Bill includes new powers for the Agency to request information, or for a participant to attend an assessment or examination, within the context of considering whether they continue to meet access requirements.
- This is not about people having to 're-prove' their disability but will allow the Agency to understand the impacts of their impairment (which can change over time) having regard to the best available information to ensure they are receiving the most appropriate supports.

- Currently the Agency has no ability to request information for the purposes of determining whether a participant continues to meet the early intervention or disability requirements, which means consideration may be based on outdated or incorrect information.
- In its previous inquiry report, the Committee recommended that the Government further clarify the circumstances under which the additional information gathering powers granted to the CEO of the National Disability Insurance Agency will be used.

Proposed Senate amendments

- The proposed government amendment gives effect to recommendation 3 of the initial report of the Committee.
- The circulated amendments clarify the circumstances in which the Agency can use information gathering powers, providing further safeguards to the exercise of this power.

Requests to be given in writing

- The proposed amendments make it clear that requests will be made in writing and may be varied or withdrawn. For example, a request may be withdrawn if information has been obtained or provided elsewhere, is no longer required or where it is reasonable for the relevant person not to provide the information.
- Although requests for information from participants and other people under the NDIS Act are generally given in writing, this amendment clarifies that fact, and ensures the CEO has the power to explicitly vary or revoke their request at any time after it has been made.
- It is important to note that 'in writing' does not limit the manner in which the communication is provided. If a participant requires a different communication method, the request may still be provided and revoked or varied in a communication method that suits them.

Failure to comply with requests for information

- Feedback received throughout the Committee inquiry and beyond identified that there was concern surrounding the revocation of a participant's access if they are unable to comply with a request for information within the prescribed timeframe.
- To respond to this, the Government has inserted guidance for the CEO when considering if it is reasonable for a participant to have not complied with a request for information. For example, the CEO will need to consider whether failure to comply with the request is beyond the control of a participant such as where the information is being provided by a third party such as treating health professional.
- These changes create a safeguard for participants when being asked to provide information to the Agency.
- New rule making powers have been proposed which would prescribe matters the Agency must have regard to in considering whether it was reasonable for a person not to have complied with requests for information. These would be Category A rules requiring the agreement of states and territories.

Consultation statements

- The issue of consultation and co-design, particularly in relation to legislative instruments, has been the subject of widespread discussion since the Bill was introduced.
- In its previous inquiry report, the Committee recommended that a 'consultation statement' be tabled along with all legislative instruments made under the NDIS Act that sets out consultations undertaken.
- The proposed Senate amendments insert a new section 211 which prescribes certain information about consultation that must be included in explanatory statement to legislative instruments made under the NDIS Act.

- The Minister is already required to provide information about consultation undertaken on legislative instruments under paragraph 15J(2)(d) of the Legislation Act 2003. This amendment clarifies and strengthens this requirement in relation to legislative instruments made under the NDIS Act. Specifically, explanatory statements to all legislative instruments made under the NDIS Act will be required to meet the following requirements:
 - describe the nature of the consultation
 - describe in general terms who was consulted
 - contain a summary of the views expressed by stakeholders.
- The consultation statement cannot identify or include the views of a person, body or organization unless they have given consent. This is an important protection on the privacy of those that are consulted.

First Ministers agreement to NDIS rules

- Recommendation 1 made by the Committee in its initial report was that First Ministers be recognized as Ministers for the purposes of Category A rule-making.
- A Senate amendment is proposed to implement this recommendation by amending the section 9 definition of ‘host jurisdiction Minister’. This will mean that both State and Territory Disability Ministers and First Ministers will be able to agree to NDIS rules.
- This will facilitate the discussion and potential agreement to NDIS rules by First Ministers in forums such as the National Cabinet.
- The amendment does not change the Minister’s power to make instruments.

Senator Thorpe Proposed Amendments

- Senator Thorpe has circulated proposed amendments relating to participants in custody, embedding consultation with Aboriginal and Torres Strait Islander peoples and having consideration to the cultural needs of indigenous participants, and placing an Aboriginal or Torres Strait Islander board member on the NDIS Board.

Referring the Bill back to the Committee for further inquiry

- This amendment was successfully passed in the Senate.
- The Government is supporting this amendment by appearing before the Committee and providing a further supplementary submission to assist the Committee with its inquiry.

Will the government agree to these amendments?

- The Government continues to carefully consider and respond to feedback on the Bill, including the amendments proposed from non-government Senators.

First Nations Board Member

- The government is giving close consideration to this proposed amendment, which aligns with a recommendation from the Disability Royal Commission.
- This amendment would ensure an Aboriginal or Torres Strait Islander person with lived experience of disability would be part of the governing body of the NDIA.
- The government is committed to ensuring First Nations participants have a voice in the future of the NDIS. Careful consideration is being given to how this can best be enshrined in the Act.

Participants in custodial settings

- The proposed amendment inserts that supports should be provided to participants in or transitioning out of custodial settings.

- While we agree that this is an important issue to be raised, there is nothing in the Bill that excludes people in or exiting custodial settings from accessing NDIS supports.
- Supports that are most appropriately funded by the NDIS in these circumstances are arranged between the Commonwealth and States and Territories.
- The NDIA has commenced work on how to better support participants upon release from custodial settings, through identification, improved planning, and building a greater understanding of appropriate supports. This is the subject of ongoing work and consultation with state and territory governments.

Inclusion of cultural participation and consultation with Aboriginal and Torres Strait Islander participants

- The government has proposed an amendment to ensure that a consultation statement is included in any instrument made by the Minister under the Bill. There is nothing preventing the Minister from deeply and meaningfully engaging with Aboriginal and Torres Strait Islander participants and disability representative organisations when making legislative instruments.
- This amendment is already covered by the requirement for the Minister to have regard to the objects and principles of the act under paragraph 209(3)(a) of the Act.
- The objects and principles of the Act include requirements such as supporting people with disability to participate and contribute to social and economic life (s 3(1)(c) & s 4(2)), access to supports (s 3(1)f), co-design (s 4(9A)), respect for privacy and dignity (s 4(10)), as well giving effect to international obligations such as the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (s 3(1)(i)).
- Further consideration and consultation will be undertaken on how to recognize the importance of culture to First Nations people with disability

and other culturally diverse participants, in a way that will ensure all people with disability have their culture respected without creating legal uncertainty or unintended consequences for the operation of the Act.

3. What Government amendments were agreed in the House of Representatives?

- The amendments which passed the House of Representatives addressed key community concerns such including:
 - the operation of section 10 and why it only refers to certain aspects of the United Nations Convention on the Rights of Persons with Disabilities
 - clarifying a participant will have access to their needs assessment and will be able to seek a new assessment (or part thereof) as part of a merits review process in relation to a planning decision
 - amendments to section 33 allowing for 'funding periods' to be specified in a participant's plan and
 - amendments to section 45 setting out circumstances in which payments can be made above funding amounts
 - amendments to sections 30 and 30A including additional safeguards in relation to new CEO powers to request that a participant undergo an examination only where there is no other reasonable alternative to accessing the information
 - embedding co-design and consultation in the development of new legislative instruments which control needs assessment and budget setting
 - an independent 5-year review of the operation of changes introduced by the Bill was supported by Government.

Access to assessment reports

- The Senate Community Affairs Legislation Committee received a significant amount of evidence, both through submissions and directly from witnesses, that needs assessment reports must be provided to participants.

- This was always the intention, from an operational perspective and in accordance with the requirement in subsection 32D(2) to prepare a plan 'with the participant'.
- Amendments were made to specify that a needs assessment report must be given to a participant as soon as possible after it is received by the CEO. This was considered to be the most practical way of the Agency ensuring a participant has access to the assessment.
- Amendments were also made to clarify that a replacement needs assessment must be arranged if the decision-maker is satisfied that this should occur, and that category A NDIS rules can determine circumstances in which another needs assessment must be undertaken and matters that the CEO must have regard to in considering whether a replacement assessment should be obtained.

Can participants seek a replacement needs assessment?

- Participants will be provided with a copy of their needs assessment before any planning decisions are made by the CEO.
- This will give them the opportunity to provide feedback and correct errors. The CEO will then consider whether a replacement needs assessment should be undertaken.
- Amendments were made to clarify that a replacement needs assessment must be arranged if the decision-maker is satisfied that this should occur.
- Category A NDIS rules can determine circumstances in which another needs assessment must be undertaken and matters that the CEO must have regard to in considering whether a replacement assessment should be obtained.
- For example, if a participant identified errors or omissions, these may be able to be corrected by a further assessment or part of an assessment as required.

- If a participant seeks internal or external review the CEO's decision to approve a statement of participant supports, they can request that a replacement needs assessment be undertaken.

Amendments to section 33 - total funding amounts in old framework plans

- The Bill makes amendments that will allow a participant's statement of participant supports to specify a total funding amount for reasonable and necessary supports together with one or more funding component amounts for each support or class of support.
- The amendments to section 33 also allow for 'funding periods' to be specified in a participant's plan.
- The amendments provide certainty for participants about the amount of funding they have available during a specified period of time, which will also assist participants in budgeting their funding for supports appropriately over the duration of their plan.
- Amendments made to the Bill in the House clarify the operation of the new provisions in section 33. This includes categorising supports into 'groups', with each group having a funding component amount.
- The amendments also require all plans to include a total funding amount.
- These amendments will not commence until a Ministerial Determination is made under new subsection 33(2E) that outlines how the amounts will be calculated and other relevant matters.

What happens if NDIS participants have used their budget and don't have enough funds?

- As introduced, the Bill enabled a payment to be made above a relevant funding amount if there were exceptional circumstances that would justify this (with exceptional circumstances required to be prescribed in NDIS rules).
- Amendments were made to in the House that prescribe circumstances in the Act in which the CEO may make a payment above a relevant funding amount (under Section 45).

- This will provide important clarity for participants and ensure payments can be made in circumstances that justify it. These new circumstances include:
 - the participant has experienced fraud or financial exploitation,
 - making the payment is necessary to prevent or lessen an imminent threat to an individual's life, health or safety,
 - the participant has been unable to request a variation or reassessment of the participant's plan because of one or more of the participant's impairments or a lack of decision-making support,
 - the participant has requested certain variations of their participant's plan (including where a participant has sought crisis or emergency funding as a result of a significant change to their circumstances) and the CEO has not yet made a decision about the variation.

Related: Plan variations

- Amendments were made to prescribe a number of circumstances in which the CEO may vary the amount of a participant's reasonable and necessary budget directly in the Act - see Section 47A(1AB). This was previously a matter to be dealt with in NDIS rules.
- This will provide important clarity for participants and ensure additional funding can be provided in circumstances that justify it. These new circumstances are:
 - if they are satisfied that the participant requires funding because the participant has experienced fraud or financial exploitation
 - necessary to prevent or lessen a threat to the participant's life, health or safety (whether current or future).

Safeguards around the use of new powers for the CEO to require a participant to attend an assessment or examination?

- The Bill includes new powers for the CEO to require a participant to attend an assessment or examination, within the context of considering whether they continue to meet access requirements for the Scheme.
- Requests for information can only be made if the information is required for the purposes of making very specific decisions.
- Amendments were made to ensure the CEO will only be able to require someone to undergo an examination or an assessment if there is no other reasonable alternative way of obtaining the information (30(3) and 30A(5)).
- The new limitations will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination.
- For example, whether the participant or another person can provide additional information.
- New amendments moved by the Government in the Senate will provide further clarity around when this power can be exercised.

Explicitly reference co-design in the development of legislative instruments

- Commitment to co-design is a legislative requirement which currently exists under the Act.
- Subsection 4(9A), which is one of the general principles guiding actions under the Act, provides that 'people with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity'.
- To solidify the commitment amendments were made in the House that require the Minister to have regard to subsection 4(9A) when making legislative instruments under sections 32K (reasonable and necessary budget) and 32L (needs assessments and reports).

- This ensures that the requirement to include the disability community in co-design must be at the forefront of the Minister's mind when making these instruments.

Note: The Minister will be required to provide an explanation of the nature of the consultation that has occurred in the making of the instruments.

- This obligation is imposed by paragraph 15J(2)(d) of the Legislation Act 2003, which provides that an explanatory statement to a legislative instrument must contain a description of the nature of consultation that has been undertaken before the instrument was made.
- This means that the Minister will be required to inform Parliament, and the public, of the nature and extent of consultation that occurred in the making of the relevant instrument.
- Amendments have been circulated by the government requiring that a consultation statement be included in every explanatory statement to instruments made under the NDIS Act. This statement will include information about who has been consulted, how consultation was undertaken and the views of those consulted. This will enhance transparency over the consultation process and support parliamentary scrutiny of disallowable instruments.

Why haven't you strengthened co-design or consultation requirements as part of the powers to make all new rules and legislative instruments?

- Express requirements for consultation or co-design with the disability community on specific instruments (beyond what already appears in the Act and the Legislation Act) could cause significant uncertainty for the operation of the NDIS.
- There is no broadly accepted process for 'co design' in Commonwealth legislation.

- This could lead to legal uncertainty about whether an instrument is validly made.

Note: In addition, subsection 17(1) of the Legislation Act provides that before a legislative instrument is made, the rule-maker must be satisfied that there has been appropriate and reasonably practicable consultation. Subsection 17(2) of the Legislation Act provides that in determining whether any consultation that was undertaken was appropriate, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument. The subsection also ensures that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content. Proposed amendments strengthen the requirement for a statement of the nature of consultation, as already required by the Legislation Act. There is no need for this to be inserted into the Act as an *additional* requirement.

- The requirements under the Act and the Legislation Act together impose a requirement on the Minister to consult with the disability community when making any legislative instruments under the Act.
- Given that the requirement already exists, it is not necessary to impose any further consultation obligations on the Minister.

Include a 5-year review of the amendments made by the Bill

- The Government took on board proposed amendments from other parliamentarians, including a recommendation for an independent review of the changes made by the Bill.
- This measure ensures the accountability of government in the process of implementing the recommendations of the NDIS Review.
- It is a requirement of the amendment that the public is consulted when conducting the review. This meets additional obligations within the Bill to engage and consult with the community when making decisions that relate to them.
- The amendment sets out that a review must be conducted after 5 years of the Act receiving the Royal Assent.
- The Minister will be required to table the report of the 5-yearly review in Parliament no later than 9 months after the end of the 5-year period.

Other minor technical and consequential amendments

- Consequential amendments were required to take account of some of the above-mentioned amendments. For example, the definition section (section 9) is required to be amended to take account of the new drafting of sections 10 and 33.
- Other minor amendments include inserting legislative notes to clarify the operation of provisions, and providing application provisions for new amendments where necessary.

4. Engagement on the Bill and development of subordinate legislation

Consultation with people with disability?

As part of the NDIS Review:

- The changes made by the Bill address some of the key recommendations from the 2023 independent review of the NDIS (recommendations 3, 6, 7 and 9).
- As part of the NDIS Review, there was deep engagement with the disability community.
- The Review Panel consulted broadly across Australia. They used lived experience from people with disability to inform their recommendations.
- The Panel:
 - heard from over 10,000 people and organisations
 - received over 4,000 submissions
 - spent over 2,000 hours listening to the stories, ideas, and feedback of people with disability
 - had regular meetings with Commonwealth, state, and territory disability ministers.
- The Panel used findings from other reviews and inquiries, like the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
- The voices of people with disability will stay at the center of designing and implementing the changes to the NDIS.

On the Bill

- The Bill is the first step in a range of important reforms. The Government has indicated that it is committed to undertaking genuine and meaningful consultation with the disability community, service providers, and state and territory governments on the detail of future reforms.

- This commitment is evidenced by the range of consultation processes that the Australian Government and Commonwealth officials have conducted to seek feedback from the disability community since the NDIS Review was finalised and on introduction of the Bill.
- The Minister and the Department have hosted 8 events across Australia to discuss the Bill following its introduction – as well as three DSS information webinars on the legislation – involving a combined total of over 4,900 community members who joined in person or online.
- In addition, the Minister hosted 9 town hall meetings on the Review’s findings and recommendations which were conducted by members of the Review Panel and Minister Shorten, involving around 5,200 participants in person and online.

With states and territories

- There continues to be significant engagement with states and territories about the NDIS Review and legislation to give effect to key recommendations.
- Disability Reform Ministerial Council (DRMC) is meeting in person every 6–12 weeks. DRMC has met to date this year in February and April and is due to meet again in June, August, October, and November.
- Disability Deputy Department Heads are meeting monthly to engage on strategic reform priorities.

What is the urgency of the Bill given the Government has not even responded to the NDIS Review or Disability Royal Commission?

- The decision to bring forward legislative changes and associated rules was made by National Cabinet in December 2023. This was a decision of Government to respond to key recommendations around restoring the scheme to its original intent.

- The experiences of participants were clearly heard through the NDIS Review. While Governments are considering their responses, a key initial step in responding to the NDIS Review is developing the new budget-based planning framework.
- While it is important to ensure there is careful sequencing of other key recommendations from the NDIS Review such as foundational supports, the Bill establishes the framework to allow the time that it will take to carefully co-design and develop the detail in subordinate legislation.

How many new rules and instruments are created by the Bill?

- Of the complete list of new or amended rules and legislative instruments outlined below there are:
 - 27 Category A rules –requiring unanimous state and territory agreement
 - 2 Category C rules – requiring majority agreement of states and territories, including the Commonwealth
 - 5 Category D rules – requiring consultation with states and territories
 - 6 disallowable legislative instruments
- Not all of the rule making powers may be used but the department has identified some priority areas that will need to be ready to commence if the Bill is passed.

Further engagement on the development of subordinate legislation

- In my previous submission to this Committee, I mentioned the Agency has commenced co-design work on a number of areas for reform and how they will be implemented, through its extensive existing co-design and

consultative mechanisms. These areas are published on the Agency's website and include participant pathway experience, safety and services.

- The Department has been working with the Agency to use the insights from this co-design to inform the development of policy around priority rules and other instruments and will be leading broader engagement on the detail together with states and territories.

Definition of NDIS Support

- One of the priority areas for subordinate legislation in the event the Bill passes is the definition of NDIS Support.
- One of the key changes made by the Amendment Bill is to introduce flexible budgets. This means participants will have more choice and control in choosing what supports are right for them.
- It also means a new definition of 'NDIS support' needed to be inserted into the NDIS Act to make it clear what the NDIS does and does not fund to help participants make more informed choices.
- This is relevant to ensuring that participants do not inadvertently spend NDIS funding on goods or services that are not NDIS supports and risk incurring a debt which I would also like to outline.
- A transitional rule will need to be in place at the time the Bill commences until a longer-term rule can be designed with the disability community and agreed with State and Territory Governments.

Why do we need a definition of NDIS Support?

- The NDIS Review heard consistently, particularly from participants, that it is not always clear what they can spend their funding on.
- Currently this information is contained in lots of different documents (such as rules and operational guidance) which can be difficult to understand all together.

- Without a definition of NDIS Support, this has resulted in the issue of whether a support can be funded by the NDIS being determined on a case-by-case basis (at the cost of individual participants going through complex and often traumatic appeals processes).
 - There are many other examples of AAT decisions which cannot reach agreement about day to day living costs...
 - I would like to draw the Committee's attention to a recent Federal Court decision which made a significant expansion in the interpretation of day to day living costs by allowing funding for extensive relocation costs for participants who sell a home and then purchase a new home including conveyancing costs.¹

Transitional rule

- We want the transitional rule to provide clarity for participants when purchasing supports and services to reflect what the NDIS was intended to fund.
- There will be goods and services that while generally not funded under the NDIS, will need to be determined based on a participant's individual disability support needs.
- These will be represented as 'carve outs' from the transitional rules about what the NDIS will not fund based on a person's disability support needs. For example, where there is an assistive technology adaptation to an item that would ordinarily be regarded as a cost of daily living or where a support enables social and economic participation.
- Most importantly, the transitional rule will need to be clear and easy to understand what NDIS funding can and cannot be used to buy.

¹ Warwick v National Disability Insurance Agency [2024] FCA 616

Engagement approach to NDIS Support transitional rule

- We have commenced initial engagement with states and territories and Disability and Carer Organisations on lists of what the NDIS would and would not fund.
- The reason why we have commenced consultation before the Amendment Bill has been passed is because a transitional rule will need to be in place at the time the Bill commences.
- We would like to take as much time as possible to hear from the disability community about the transitional rule, before we make a longer-term rule on NDIS supports.
- We are waiting for initial feedback from states and territories and disability representative organisations before undertaking a public consultation process for 2 reasons.
- The first is to test the lists and identify any changes that need to be made ahead of public consultation and the second is to ensure disability organisations are best placed to support their members in responding to the consultation.
- We know that discussion about what supports are important to the lives of participants can be distressing and we need to take the time to minimise that distress and misinformation.

Additional priority rules subject to co-design and consultation

Section 33 – management of intra-plan inflation

- To support the immediate operation of the Bill, the Minister intends to make a disallowable legislative instrument under proposed new subsection 33(2E).

- This instrument enables the Agency to specify legally enforceable total funding amounts in participants' plans. These enforceable funding amounts are critical to address intra-plan inflation under the current planning framework (that is in old framework plans).
- *[Do we want to say more explaining intra-plan inflation and costs]*
- The Agency has been working through co-design groups to understand key drivers in plan overspends and support participants with resources to stay within these new funding limits.
- As is the case currently, participants will be able to seek variations based on changes in circumstances or in situations where a participant has experienced crisis or emergency situations as outlined in amendments to section 45(5).
- The Commonwealth will be undertaking public consultation and seeking feedback and support from states and territories for the Minister for the NDIS to make the new instrument as close as possible to the commencement of the Bill.

Plan management

- Another area for priority rule making in the event the Bill is passed is subsection 44(5) which enables consideration of whether a participant or other person managing funding under the plan is likely to comply with section 46 when making a decision about plan management type.
- As I have already mentioned, section 46, as amended by the Bill, requires funding provided under a participant's plan to be spent in accordance with the plan and only to acquire NDIS supports for the participant.
- New subsection 44(5) will enable the Agency not to give effect to a plan management request if satisfied the relevant person is unlikely to comply with section 46.

- This is an important safeguarding provision as it will minimise the risk of a participant’s plan being spent on supports that are not NDIS supports for them, and will ensure participants are supported to spend funding in their plan in such a way that they will continue to have access to necessary supports throughout the duration of their plan.
- It will also protect participants where there is reason to believe their plan nominee or plan manager is likely to use funding under the participant’s plan in an inappropriate way, which could lead to the participant being without funding for much needed supports.
- The rules made under subsection 44(5) are Category A rules requiring agreement of each state and territory to prescribe matters to which the Agency must have regard in considering whether a relevant person is likely to comply with section 46.
- The Agency is undertaking targeted consultation with participants, their families and carers, as well as representative organisations on the risk-based decision-making framework that will support delegates to make a plan management decision under this new rule.
- The Department will use the insights from the Agency’s work with states and territories consult on options for a new rule.

5. Access

Clarification of access

- The Bill makes no changes to who can access the NDIS.
- The Bill makes clear that when a person meets the access criteria to become a participant in the Scheme, the NDIA must advise them whether they met the disability requirements (section 24) or the early intervention requirements (section 25), or both.
- This is the first step in creating a new early intervention pathway, which will be developed over time using Category A NDIS rules. Until that has occurred, the only difference for participants will be the information included in their access decision.
- The Bill will also clarify and expand the power to make 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.
- Rules already exist under section 27 as it is currently in force. Any new Rules will be developed in consultation and co-design with the disability community and will provide clarity and detail about the meaning of key concepts in the Act.
- New rules might, for example, tell us how to understand and measure substantially reduced functional capacity, or when an early intervention support is likely to benefit a participant.

What changes are being made for participants who enter under early intervention requirements?

- The only change that people will see on commencement is that the NDIA will be required to inform new participants in writing if they met access based upon the early intervention or disability requirements, or both.
- The Bill provides the necessary architecture to prepare for long-term changes to establish the new early intervention pathway recommended by the NDIS Review.
- The creation of a new early intervention pathway will be operationalised through new Category A NDIS rules.
- The NDIS Review recommended the NDIS should work differently for people accessing early intervention supports than for people receiving disability supports for a lifelong disability – based on their needs.
- Participants who gained access to the Scheme on the basis of the early intervention requirements may have regular check-ins with the NDIA to assess whether the supports they are receiving are beneficial.
- If not, whether they meet the disability requirements or whether they should continue to be a participant in the Scheme.

Does the Bill make changes to affect people with psychosocial disability?

- This Bill does not remove access to the NDIS or make any specific changes for participants with psychosocial disability.
- Establishing a new pathway for people with a psychosocial disability is still a matter that Government is considering.
- However, the Bill establishes new rulemaking powers that could enable the NDIA to introduce an early intervention pathway for many new participants with psychosocial disability who entered the scheme via section 25 (the

early intervention requirements). This change is recommended by the NDIS Review.

6. Information gathering – what are the new CEO powers?

- The Bill includes new powers for the CEO to request information, or to require a participant to attend an assessment or examination, within the context of considering whether they continue to meet access requirements for the Scheme.
- Amendments were made to ensure the CEO will only be able to require someone to undergo an examination or an assessment if there is no other reasonable alternative way of obtaining the information.
- Currently, there is no ability for the CEO to request information for the purposes of considering the revocation of a person's status as a participant. It is important for the CEO to be able to request and receive information from participants.
- This will ensure that the CEO is making decisions based on up to date and current evidence about a participant.
- This will not result in people having to 're-prove' their disability but will allow the CEO to determine the impacts of their impairment (which can change over time) having regard to the best available information to ensure they are receiving the most appropriate supports.
- Recently circulated Senate amendments clarify that the CEO must take into account a range of factors when requesting information from participants.
- These amendments ensure a greater level of transparency for participants when being requested to provide information to the Agency.

What protections are there to ensure the new powers of the CEO are appropriately constrained in their use?

- Amendments were made in the House of Representatives to require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide additional information.
- There is also an express limitation in subsections 30(2) and 30A(4) that information can only be requested where it is reasonably necessary for the purposes of considering whether to revoke a person's status as a participant. This is consistent with requirements of the Privacy Act 1988 that limit access to personal information.
- The Bill will ensure that participants will not be removed from the Scheme where the CEO is satisfied it was reasonable not to have complied with the request for information within the relevant timeframe. This will ensure participants with complex needs, for example those with multiple and complex disabilities, cognitive impairments and those in regional and remote areas, will not be unfairly impacted by the new provisions.
- To ensure that information requests do not place undue burden on participants, the Bill provides that the CEO cannot request an assessment or examination unless the CEO is satisfied that the report would provide information that the CEO cannot otherwise reasonably obtain.

Can the NDIA demand all your private medical information without saying why?

- The Bill does not enable the NDIA to access any information without a specific request being made.
- A request can only be made for information that is reasonably necessary for the purpose of the decision being made. This limitation is consistent with the Privacy Act 1988, which protects personal information such as medical information.

What type of assessment or reports can the NDIA request from a participant? Will there be clear guidelines developed to defined what the NDIA can request?

- The Bill includes new powers for the CEO to require a participant to attend an assessment or examination, within the context of considering whether they continue to meet access requirements for the Scheme. The participant will then be required to provide a report from the assessment or examination in the approved form. The person conducting the assessment or examination will complete the report.
- Amendments were made to ensure the CEO will only be able to require someone to undergo an examination or an assessment if there is no other reasonable alternative way of obtaining the information (30(3) and 30A(5)).
- These limitations will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide additional information.
- The CEO can also request a participant or other person to provide information. However information can only be requested where it is reasonably necessary for the purposes of considering whether to revoke a person's status as a participant.

Are there legislative mechanisms for the CEO to withdraw a request for information once it has been made?

- The CEO can withdraw a request for information under the Bill currently, but it is not clearly stated.
- Senate amendments will insert a requirement for information to be provided in writing. This ensures, under the Acts Interpretation Act 1901, that the power to request information will include the power to revoke that request.
- A legislative note will be included to draw the reader's attention to this.

Will an assessment be required if there is a risk that a participant may experience harm?

- The decision to require an assessment or examination is a completely discretionary decision.
- The impact on a participant will always be a factor to be considered.
- Currently the CEO has no ability to request information for purpose of determining whether a participant continues to meet the early intervention or disability requirements, meaning the CEO's consideration may be based on outdated or incorrect information.
- The CEO may only request that a participant attend an assessment or examination if there is no other reasonable way to obtain the information. If the participant is at risk of harm by attending an assessment, the CEO will take this into account in deciding whether there is another reasonable way to obtain the same information.
- The CEO must not revoke a participant's access to the Scheme if satisfied that it was reasonable for the participant not to comply with a request to attend an assessment or examination. A reasonable reason for refusing to attend an appointment might include an demonstrable risk of harm to the participant.
- Including a specific 'risk of harm' exception would be highly problematic, as it would leave it open for all participants to argue they will suffer harm by attending an assessment. This would be inconsistent with the intention of the provisions.

How will assessments requested by the CEO for the purposes of be paid for?

- The National Disability Insurance Agency (NDIA) does not usually pay for assessments or medical examinations, however it can do so in certain circumstances.

- The NDIA must not revoke access unless they are satisfied that non-compliance with the request was reasonable. This may include consideration of whether it is reasonable to expect the participant to meet costs associated with the request.
- It is also important to note that these requests will only be made of people who are already participants in the Scheme. The types of assessments requested may be able to be funded out of the participant's plan.

7. Powers to revoke access

What differences characterise revocation at section 30 and section 30A?

Section 30: This is a discretionary decision that already exists in the Act.

The Bill will provide a legislative ability to request specific information where considered it is **reasonably necessary** for the purpose of deciding about a participant's ongoing access to the scheme. The CEO will also be able to require a participant to attend an examination or assessment, but only if there is no other way to reasonably obtain the information.

- Access will not be revoked because of failure to comply with the request for information if it was reasonable for the participant or other person not to have complied.

Section 30A: This section operates in a mandatory way, in the sense that a participant's status must be revoked if they no longer meet the access requirements or if they fail to comply with a request for information. It also requires the CEO to consider a participant's status in circumstances prescribed in NDIS rules, and includes similar information gathering powers to those inserted by section 30

- This section will not operate upon commencement of the Bill and will only become operational once Category A NDIS Rules are made specifying the circumstances in which it will apply. As with section 30 the CEO cannot revoke access for a participant where there is a reasonable explanation for the information requested not being provided within the timeframe.

Note: Any decision to revoke a participant's status as an NDIS participant continues to be a reviewable decision pursuant to section 99 table 1 item 3.

Are new powers of the CEO to revoke a participant's access excessive?

- A discretionary power to revoke participants access have always existed under the NDIS Act. The Bill does not change this existing power, but simply ensures the CEO's decision about ongoing access is based on current information.
- The intent of this change is to ensure the NDIA can request information from participants, and that there will be consequences for failing to comply with that request without a good reason. Without these provisions, participants can refuse to engage with the NDIA resulting in decisions about ongoing access to the Scheme being made on the basis of outdated and incorrect information.
- The Bill does introduce a new provision that may lead to access being revoked (section 30A), but that provision will not operate until Category A NDIS Rules have been made. It is intended to apply to participants that accessed the Scheme through the early intervention pathway.
- One of the requests for information that the CEO may make under sections 30 and 30A for the participant or another person to provide information within a specified timeframe. If the participant or other person does not comply with this request, this may result in the participant's access being revoked. Information may only be requested by the CEO under these sections if it is reasonably necessary for the purpose of the decision being made. This is consistent with requirements of the Privacy Act 1988 that limit access to personal information.
- The CEO can also request that a participant attend an assessment or examination and provide a report, but can only do so if there is no other way to obtain the information.
- The CEO cannot revoke a person's status as a participant in the NDIS if they are satisfied that it was reasonable for the participant, or another person, not to provide the requested information or report within the relevant timeframe.

- Senate amendments will clarify the requirement for the CEO to seek this information in writing (as well as a participant's preferred way of communication) and to revoke that request for information.

Will a participant be removed from the Scheme if they don't provide information requested by the CEO within 90 days due to the delay of a third party?

- No, subsection 30(6) and 30A(7) provides that the CEO must not revoke access to the Scheme following a failure to provide information where it was reasonable for the person not to have provided the requested information.
- Additionally, the CEO may extend the timeframe for providing evidence if required.
- Operationally the NDIA is aware that delays occur that are outside of the control of participant for example, due to the delay of a third party, including obtaining relevant appointments with allied health or medical professionals.
- A decision to revoke a person's status as a participant, including because of a failure to provide information, is a reviewable decision under the NDIS Act. The person reviewing the decision will be able to consider whether there was a reasonable basis for failing to provide the information, or may consider the information if it has since become available.

What additional limitations exist to ensure procedural fairness?

- Amendments were made to the Bill ensure the CEO will only be able to require someone to undergo an examination or an assessment if there is no other reasonable alternative way of obtaining the information (30(3) and 30A(5))
- There is also an express limitation in subsections 30(2) and 30A(4) that information can only be requested where it is reasonably necessary for the

purposes of considering whether to revoke a person's status as a participant. This is consistent with requirements of the Privacy Act 1988 to limit access to personal information.

- The new limitations will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide additional information.
- The CEO cannot revoke a person's status as a participant in the NDIS if they are satisfied that it was reasonable for the participant, or another person, not to provide the requested information or report within the relevant timeframe.
- The CEO is also able to extend the timeframe for providing information, for example if the participant is unable to meet the original timeframe due to unavailability of their medical professionals.
- Participants will receive written notice of the CEO's decision pursuant to 30 and 30A in a manner that is consistent with accessibility requirements of the participant.

8. Changes to how plans are set and how funding can be used

The Bill makes the following changes to how plans are set and how funding can be used:

- It creates the **new reasonable and necessary budget framework** for the preparation of NDIS participants' plans. The Bill provides for 'new framework plans', to be developed in accordance with the new budget framework. Participants will receive funding based on whether they accessed the Scheme on the basis of impairments that meet the disability requirements or the early intervention requirements or both.
- It provides for a **needs assessment process** and the method for calculating the total amount of the participant's flexible funding and funding for stated supports for new framework plans to be specified in legislative instruments and NDIS rules. These will be developed in consultation with people with disability, the disability community, health and allied health technical professionals, and with all States and territories, consistent with existing governance arrangements.
- It inserts a **new definition of 'NDIS supports'** which will provide a clear definition for all participants of the supports that will be funded by the NDIS and those that will not. This will confirm alignment with the original intent of the NDIS to support people with permanent and significant disability as part of a larger landscape of supports outside of the NDIS.
- It links reasonable and necessary supports to impairments that meet the disability requirements or the early intervention requirements, consistent with the original intention of the Scheme and current practice.
- It inserts **measures focused on protecting participants** such as:
 - Requiring the Agency to specify in the statement of participant supports the total funding amount under the plan for reasonable and necessary supports together with the funding component amount under the plan for each support or class of support up to a specified amount.
 - Clarifying the requirement that an NDIS participant who receives an amount or amounts for NDIS supports may only spend that money in accordance with the participant's plan. This reflects the

reasonable expectation that participants should spend up to the limits specified in their plan – unless their needs significantly change.

- Enabling the Agency to change the plan management type as well 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.

9. Old planning framework

- The Bill amends 'old framework plans', which are plans that participants currently have and will continue to have until instruments and rules are developed and the new planning framework commences.
- The Bill allows old framework plans to specify a 'total funding amount' for all supports under the plan and at least one 'funding component amount', which is the total amount of funding for a group of supports.
- These changes to old framework plans will allow greater oversight and clarity for participants of their total funding amount.
- The changes are not designed to create confusion for participants, it is to assist in the reduction of participants spending more than has been determined reasonable and necessary by the Agency. The changes are also intended to protect participants from exploitation by providers or plan nominees spending funding from plans inappropriately and leaving a participant without access to supports.
- Changes to old framework plans will not be operationalised until the Minister makes a determination setting out how to work out these amounts.

What are the changes to current plans to keep people from overspending their NDIS funds?

- This Bill provides clarity that participants must spend within the funding amount in their plan by ensuring all plans include a total funding amount that a participant must adhere to. Plans will also include one or more 'funding component amounts', which will apply to groups or categories of supports.
- Participants will be unable to spend more than their allocated funding for reasonable and necessary supports, but the CEO may enable payments above the limit in limited circumstances.
- The measure will help control the current challenge the NDIA is experiencing with some participants exhausting their funding for reasonable and necessary supports, and then asking the NDIA for more funding without a good reason.
- This will support the NDIA's ability to help participants manage their allocated funding for reasonable and necessary supports.
- Participants who have previously exhausted their allocated funding for reasonable and necessary supports without a change in their circumstances, or who are at risk of exhausting their allocated funding for reasonable and necessary supports without a change in circumstances, will be assisted to manage within their funding limit to ensure they can continue to access reasonable and necessary supports throughout the duration of their plan.

10. New planning framework

What is the new planning framework?

- The Bill creates a new planning framework that will build participant plans to include a reasonable and necessary budget, rather than identifying reasonable and necessary supports line-by-line.
- Under new framework plans, participants' reasonable and necessary budgets will be based on the outcomes of a needs assessment and calculated using a method set out in a legislative instrument (not in a NDIS rule). Plans will include a flexible budget, which can be used to purchase a range of supports of the participant's choice, and/or stated supports, which will be supports like home and living or high cost assistive technology and funding must be used for that particular support.
- New framework plans will include similar elements to old framework plans including a statement of goals and aspirations and statement of participant supports.
- Participants will be able to spend their flexible budget on supports that are NDIS supports for them. This change provides participants choice and control to flexibly use their plan to support their needs without applying to the NDIA for a variation or reassessment.
- Participants will not move to the new framework until the needs assessment and the method for calculating the budget have been developed.

Will this impact a participant's ability to exercise choice and control?

- The concept of 'choice and control' remains central to the NDIS and will be significantly strengthened under the new planning framework.
- Under the Bill, new framework plans will draw on the new support needs assessment in setting a 'reasonable and necessary' budget. This budget will include a flexible budget, which can be used to purchase a range of supports of the participant's choice, and/or stated supports, which will be supports like home and living or high cost assistive technology and funding must be used for that particular support.
- This will be a move away from the current line-by-line determination of individual 'reasonable and necessary supports' which the NDIS Review found can produce contested and inconsistent outcomes.
- The new planning framework provides participants with significantly more choice and control over how they utilise funding provided under their plan, which will allow for greater flexibility and innovation in support provision.

How will impairment(s) be funded under the new planning framework?

- Under the new planning framework, as with the existing planning framework, funding will be provided to participants in relation to impairments that meet the disability criteria (section 24) or the early intervention criteria (section 25) at the time the planning decision is made. This is consistent with the original intent of the Scheme and the National Disability Insurance Agency's current practice.
- The focus on support needs represents a more person-centered and strength-based approach than over reliance on functional assessments and deficit-based approaches currently preferred.

- These changes support the Review's focus on budgets built primarily on support needs and intensity, rather than functional impairments. A focus on whole of person, circumstances and support needs will also end unhelpful and ongoing focus on primary and secondary disability. Budgets will be built on support needs and not diagnosis.
- Government amendments have been circulated that amend these provisions to make the existing policy intention clearer. The amendments make it clear that a needs assessment will assess all of a person's disability support needs, without limiting this to impairments that meet section 24 or section 25. The participant's plan will then include funding for supports needs arising from impairments that meet section 24 or section 25 as mentioned above.

Will everyone with a current NDIS plan have their eligibility reassessed? How will this work?

- No. NDIS participants already in the scheme will continue to receive funding under the current planning framework, while the new budget framework is being developed.
- Currently, a participant's access to the Scheme can be revoked if they no longer meet the access criteria. The Bill makes no changes to this.
- The Bill does introduce a new provision which require the NDIA to consider whether a person continue to be eligible for the Scheme in certain circumstances. This requirement cannot operate until category A NDIS rules have been made prescribing those circumstances. This is intended to give effect to the early intervention pathway when it has been fully established. It will ensure regular check-ins with participants who accessed the Scheme because they required early intervention supports. For example, if a child has entered the Scheme to access early intervention supports, the NDIA can consider they continue to need early intervention support or as they age, may need access to the Scheme under the disability criteria. It will also allow the CEO to consider whether the supports they are receiving are working for them or whether they may benefit from a different approach.

How will participants be transitioned to the new planning approaches in legislation?

- Participants will be transitioned to the new approach over time. This phased approach will provide the NDIA appropriate time to design and test operational changes, and provide governments time to develop the system of foundational supports outside of the NDIS.
- The intention is to slowly move participants over to the new arrangements in groups. These groups may be based on characteristics such as where the participant lives or their age, or may be based on the types of supports they require.

- Over time, all participants will be covered by the new budget-setting approach included in this Bill.
- Participants will not move to the new framework until the needs assessment and the method for calculating the budget have been developed.

What is a reasonable and necessary budget?

- Reasonable and necessary budgets form part of the statement of participant supports in new framework plans.
- The budget will set out flexible funding and/or stated supports for the plan. Flexible funding can be used to purchase any support that is an NDIS support for the participant, while funding for stated supports must be used for that particular support. Stated supports will include items like high cost assistive technology, or home and living supports.
- Having a flexible budget allows for greater choice and control in obtaining supports to meet participant's individual needs as they require them.

What is flexible funding?

- Flexible funding will be available to a participant where the needs assessment indicates the participant requires at least some NDIS supports that are not stated supports.
- This is an amount of funding, informed by the needs assessment and calculated in accordance with the prescribed method, that a participant may use to acquire a range of supports they need because of their impairment(s), provided those supports are NDIS supports for them.

- A transitional instrument will define what supports are 'NDIS supports' for participants. This will be replaced by a future category A Rule, to be developed and designed in consultation with the disability community.
- This change implements action 3.5 of the NDIS Review, to allow greater flexibility in how participants can spend funding received under the NDIS.
- This change is based on the principle that people with disability know their own support needs and are best placed to determine how to meet these needs. The inclusion of flexible funding in a plan is the default position for most participants.

How will flexible funding amounts be worked out?

- The process for calculating flexible funding amounts will be in a legislative instrument made by the Minister.
- The method will use the information from the needs assessment to determine a participant's budget.

Are there any restrictions on funding?

- In certain circumstances, the CEO may place restrictions on the spending of some or all of the flexible funding provided for in a reasonable and necessary budget.
- This will only occur where the CEO is satisfied that any of the following circumstances exist:
 - Participant is likely to suffer physical, mental or financial harms if the flexible funding was not subject to restriction.
 - The participant, their plan nominee or registered plan management provider has not complied with the spending requirements (set out in section 46).
 - A circumstance provided by NDIS rules (category A).

- These restrictions will only be used where a participant has a history of over-spending, non-compliance with the relevant NDIS rules, or the Agency has identified risk of harm to a participant.
- These restrictions will only be used in the most extreme of circumstance, adopting recommendation 3.6 of the Final Report.
- A participant will be able to seek internal and external review of the decision to impose funding restrictions, as this will form part of the decision to approve their statement of participant supports which is a reviewable decision.

What are stated supports?

- A stated support is a support, or class of supports, specifically identified in a plan. The needs assessment will identify whether a participant requires stated supports.
- Funding for stated supports can only be spent on that support (or class of supports) and cannot be spent for any other purpose, including acquiring other NDIS supports.
- Category A NDIS rules will prescribe supports that are stated support for all participants or certain groups of participants. For example, high-cost assistive technology, home modifications and supported independent living may all be stated supports. These rules will be co-designed with the disability community.
- Including stated supports in participant plans is an important mechanism to ensure alternative commissioning agreements operate effectively.
- Stated supports are also an important safeguarding mechanism for the provision of higher risk supports that need to be provided by particular providers, or in a particular manner, to protect the participant from harm.

What are funding periods (or intervals) and how will they be worked out?

- New framework plans are intended to be in effect for several years for most participants. To ensure participants have access to funding throughout their entire plan, plans will include 'funding periods' which will be a period of time during which a proportion of the total plan budget will be available. For example, a plan may include 5 funding periods and 1/5th of the total plan budget will be available during each period. This applies equally for flexible funding and stated supports.
- Each period will be no more than 12 months, with each period to run consecutively. The length of a funding period will depend on the participant's circumstances, for example a shorter funding period might be a necessary safeguard for the participant.
- This is to ensure that when participants have longer plans of up to 5 years, they are provided with an easy mechanism to manage their funding throughout the duration of the plan.
- If funding is not spent within one funding period, it will be rolled over into the next to ensure participants have access to their full budget amount over the duration of their plan. However funding will not rollover between plans.
- A participant will be able to seek internal and external review of the length of their funding periods, as this will form part of the decision to approve their statement of participant supports which is a reviewable decision.

What happens if I spend my budget before my plan ends?

- Participants will be supported to manage their budget throughout the duration of their plan.
- This support may include regular check-ins by the NDIA with participants, as well as other educational activities related to spending funding under their plan.
- The NDIA will co-design with the disability what this support should look like and when different types of support to manage a budget should be used.
- The ability of participants to request a plan variation or reassessment is not changed by the Bill. Participants will remain able to seek a plan variation or reassessment if their circumstances change.
- If a participant spends all their allocated funding during a funding period, this does not automatically enable a 'top-up' in funds. Rather, if their circumstances have changed, they can follow the existing avenues for reassessments. If the participant's circumstances have not changed and they have spent the allocated amount before the end of the relevant funding period, they may be required to wait until the next funding period.

Can a participant only receive funding for impairments that met the disability or early intervention requirements at access?

- No, a needs assessment will not be limited to assessing only the impairments for which access was originally met.
- The needs assessment will take account of the participant's needs as a whole, but funding may only be provided in relation to impairments that meet the disability requirements or the early intervention requirements at the time the planning decision is made. This is consistent with the original intent of the Scheme and the NDIA's current practice.

- If a participant acquires a new impairment that meets the disability or early intervention requirements, they will receive funding in relation to that impairment even if it was not considered at the time they met access. The time for assessing whether impairments meet the criteria is at the time the planning decision is being made.
- A person will not be required to 're-prove' their disability. Any information previously provided about their impairments or circumstances can be relied on in undertaking a needs assessment. Participants will, of course, be required to provide information about changes they experience, including about the impact of their impairments or new or additional impairments that may arise.

How will a participant's budget be calculated?

- As recommended by the NDIS review, the new needs assessment model will be based on a holistic assessment of support needs and not based solely on primary disability.
- The development and design of the needs assessment process will occur in consultation and co-design with people with disability, appropriate technical experts and disability stakeholders.
- A report will be prepared of the needs assessment, and the information from this report will then be applied to a method to arrive at a participant's budget amount. The needs assessment and the method will both be prescribed in legislative instruments and developed in consultation with the disability community and relevant experts.

11. Needs assessment

What is the difference between the proposed needs assessment and independent assessments?

- One of the major changes proposed by the NDIS Review was to create a new budget-based planning framework, based on an assessment of need at a 'whole-of-person' level rather than for individual support items. The Review also recommended a 'trust-based approach', where participants are provided with a flexible budget and there is a focus on providing guidance and support to participants to spend their budget appropriately.
- The new needs assessment is consistent with recommendations of the NDIS Review about how a participant's support needs should be assessed. It will result in a budget being allocated to a participant on the basis of their assessed needs, with participants having the flexibility to purchase a range of supports rather than a prescriptive line-by-line plan.
- The needs assessment will be conducted in accordance with an assessment tool (or tools) that will be co-designed with people with disability and a range of relevant experts. The tool(s) will be the subject of extensive consultation and discussion to ensure it can assess a participant's needs, taking into account their multifaceted and diverse experience of disability. Once this process has occurred, the assessment will be made transparent through a legislative instrument. These steps ensure it is an entirely different process to the previously proposed independent assessments.

Rights of review and access to a needs assessment

- Amendments were made in the House to clarify that a participant will be provided with a copy of their needs assessment.
- The needs assessment is a procedural step that provides information required for the decision to approve the statement of participant supports (budget/funding).
- A needs assessment can be challenged if a participant seeks internal or external merits review of a decision to approve a statement of participant supports.
- Amendments were made in the House to clarify that a replacement needs assessment must be arranged if the decision-maker is satisfied that this should occur, and that category A NDIS rules can determine circumstances in which another needs assessment must be undertaken and matters that the CEO must have regard to in considering whether a replacement assessment should be obtained.
- A legislative note was also included in the amendments to clarify and confirm that the same requirements apply when a decision is being reviewed.
- The participant will be able to explain to the reviewer why they disagree with the assessment report and want a replacement report to be obtained.
- The reviewer will be required to consider whether a replacement needs assessment report should be arranged and arrange one if they are satisfied this should occur.

Does the introduction of the needs assessment lessen review rights around planning outcomes?

- The Bill makes no changes to internal and external review rights in relation to participant's plans.
- Under the new planning framework, like the existing framework, the reviewable decision will be the decision to approve a participant's statement of participant supports. As with the existing planning framework, this decision will contain multiple components that can all be challenged as part of the same review application. This approach ensures simplicity for participants exercising their review rights.
- A participant will be able to challenge all aspects of their statement of participant supports in the same way they currently can. This means that a participant can, for example, request a different type of plan management at the same time they are seeking a change to their reasonable and necessary budget (which may require a replacement needs assessment to be arranged).

NOTE: further detail is included on the next page about how merits review works in the context of the needs assessment.

How does merits review work with the needs assessment?

- Under the new planning framework, like the existing framework, the reviewable decision will be the decision to approve a participant's statement of participant supports.
- When a decision-maker is deciding whether to approve a statement of participant supports under the new planning framework, they **must** arrange a replacement needs assessment if they are satisfied this should occur. They might be satisfied of this for their own reasons, or because the participant has disagreed with aspects of the needs assessment report and the decision-maker agrees with their concerns.
- The critical point is that a decision-maker is unable to approve a participant's statement of participant supports without considering

whether a replacement needs assessment is required, and arranging one if they are satisfied this should occur.

- This requirement applies equally to all decision-makers, including original decision-makers (NDIA planners), internal review decision-makers, and external review decision-makers (the Tribunal).
- In practical terms, this means a participant will have three opportunities to challenge their needs assessment:
 - At the initial planning meeting, because they will have received their report in advance of that meeting
 - As part of an internal review
 - As part of review by the Tribunal
- On each occasion, if the relevant decision-maker agrees with the participant that a replacement assessment is required then they must arrange for that to occur. If the decision-maker does not agree with the participant, they will approve the statement of participant supports on the basis of the existing assessment and the participant will then be able to raise their concerns with the assessment at the next stage of review.
- A participant will also be able to request a new needs assessment at any time if their circumstances have changed.

Why isn't the outcome of the Needs Assessment explicitly a reviewable decision under the Act?

NOTE: further detail is included on the previous page about how merits review works in the context of the needs assessment.

- There has been a lot of confusion about this issue.
- The needs assessment is not a decision under the Act, and so is not separately reviewable. The needs assessment is a procedural step which is then required to be considered in a particular way by the decision-maker who is preparing the participant's plan.
- Under the new budget-based planning framework there is one planning decision that is reviewable. That is the decision to approve a statement of participant supports, which is similarly the single planning decision that is reviewable under the existing planning framework.
- All aspects of the statement of participants supports, including the reasonable and necessary budget is reviewable. This will include a replacement needs assessment being arranged if the person conducting the review is satisfied that should occur.
- To make the needs assessment report a separate reviewable decision would be inconsistent with the operation of the overall planning framework.
- If it were a separate reviewable decision, there would be circumstances in which participants do not have an approved plan while awaiting the outcome of the review of their needs assessment. This would leave participants without access to support through the NDIS while they go through the merits review process.
- There would also be a disadvantage to participants if each aspect of the statement of participant supports was a separately reviewable decision. Participants may be unable to obtain the outcome they are seeking if they inadvertently do not seek review of the right decision and would be tied up with legal technicalities attempting to achieve their desired outcome.

Can a participant request a new needs assessment?

- Participants will be provided with a copy of their needs assessment report before any planning decisions are made by the CEO.
- Participants will be given the opportunity to review their needs assessment and provide feedback (including any identified errors) at the planning meeting.
- The Bill operates so that a decision-maker is unable to approve a participant's plan without considering whether a replacement needs assessment is required, and arranging one if they are satisfied this should occur.
- This requirement applies equally to all decision-makers, including original decision-makers (NDIA planners), internal review decision-makers, and external review decision-makers (the Tribunal).
- In practical terms, this means a participant will have three opportunities to challenge their needs assessment:
 - At the initial planning meeting, because they will have received their report in advance of that meeting
 - As part of an internal review
 - As part of review by the Tribunal
- On each occasion, if the relevant decision-maker agrees with the participant that a replacement assessment is required then they must arrange for that to occur. If the decision-maker does not agree with the participant, they will approve the participant's plan on the basis of the existing assessment and the participant will then be able to raise their concerns with the assessment at the next stage of review.
- Arranging a replacement assessment does not mean that the entire assessment needs to always be reconducted (although a participant could request an entirely new assessment). It could be as simple a change of certain aspects of the needs assessment report that had an impact on the participant's reasonable and necessary budget.

- A participant will also be able to request a new needs assessment at any time if their circumstances have changed.

Why is there no detail yet about how the needs assessment will be developed?

- The needs assessment tool (or tools) will be developed through a consultation and codesign process, involving deep engagement with the disability community and relevant experts.
- This is an opportunity to undertake an iterative process of design and testing with people with disability, as well as health and allied health professionals, and people with technical expertise in the development of needs assessments.

Will participants be required to pay for needs assessments?

- Further work will need to be undertaken around the design of the needs assessment process and a decision will need to be made in the Budget context around payment.

What expertise will the Needs Assessor have?

- The Bill provides new planning framework to give effect to key NDIS Review recommendations. This includes a needs assessment process that will be used to calculate a participant's budget.
- The qualification and prerequisites used to determine an appropriate Needs Assessor is not specified in the Act. This is because the needs assessment itself must first be developed, which will be done through co-design with the disability community and consultation with relevant experts.
- Once this has occurred, selection of appropriate needs assessors will also be undertaken in consultation with the disability community and relevant experts.

- It is important that the development and design of these interconnected elements occurs with people with disability to ensure that potential limitations are addressed prior to implementation of the new needs assessment process.
- There are various interconnected actions and considerations proposed by the NDIS Review that Government will address in finalising the role and expertise of the Needs Assessor.

What is meant by support for ‘whole of person’?

- The term ‘whole-of-person’ is not used in the Bill as it lacks legal clarity.
- Under the new planning framework, as with the existing planning framework, funding will be provided to participants in relation to impairments that meet the disability criteria (section 24) or the early intervention criteria (section 25) at the time the planning decision is made. This is consistent with the original intent of the Scheme and the National Disability Insurance Agency’s current practice.
- It also suggests that the NDIS will meet all of a participant’s needs, even those that are not related to their disability, which is not consistent with the intended operation of the NDIS or the recommendations of the NDIS Review.
- The NDIS was always intended to operate as part of a broader ecosystem of supports, and this is reflected heavily in the NDIS Review recommendations.
- The Bill is structured in a way that a person’s disability support needs as a whole. The focus on disability support needs represents a more person-centered and strength-based approach than over reliance on functional assessments and deficit-based approaches currently preferred.
- Creating a new budget-based planning approach, calculated on a ‘whole-of-person’ level rather than for individual support items, ensures planning considers a person's holistic living situation including stage of life, their environment, and their needs.

- There will no longer be a distinction between primary and secondary disability and the needs assessment will be developed in such a way that it will identify and take account of all of a participant's impairments.

How does the needs assessment shape participant budgets?

- A needs assessment will not be limited to assessing only the impairments for which access was originally met. The needs assessment will take account of the participant's disability needs as a whole, but funding will only be provided in relation to impairments that meet the disability requirements or the early intervention requirements at the time the planning decision is made.
- If a participant acquires a new impairment that meets the disability or early intervention requirements, the assessment will take that into account to inform funding in relation to that impairment even if it was not considered at the time they met access.
- A person will not be required to 're-prove' their disability. Any information previously provided about their impairments or circumstances can be relied on in undertaking a needs assessment including additional information about broader disability support needs.
- In relation to disability support needs that do not meet the threshold requirements outlined in early intervention or disability criteria for access, participants will be supported to link with mainstream and other supports and services.
- The amendments ensure that the assessments align with recommendations 3.3, 3.4 and 3.5 of the NDIS Review.

12. New definition of NDIS Supports – section 10

Why do we need a definition of NDIS support?

- The definition of NDIS support serves two primary purposes:
 - It makes clear the constitutional basis for the new budget setting framework recommended by the NDIS Review and helps to clarify and identify the constitutional basis of the NDIS as a whole.
 - To assist participants and the disability community to understand what is (and always has been) capable of being funded by the NDIS having regard to intergovernmental agreements and constitutional considerations.

Benefits of defining ‘NDIS Supports’ in section 10:

- The Bill inserts a new definition of ‘NDIS support’ into the Act. This concept appears in numerous places throughout the Bill and will be central to the operation the future planning and budget-setting model.
- This moves away from the current planning approach, which determines an individual’s ‘reasonable and necessary supports’, those that are appropriately funded or provided by the NDIS.
- The definition of ‘NDIS Supports’ will provide greater clarity around the supports that can be funded by the NDIS and those that cannot.
- For the sake of consistency and simplicity across the NDIS Act, the definition has been adopted in key areas, particularly where references to supports being appropriately provided by the NDIS (as opposed to other service systems) currently exist.

Why the change to re-define ‘NDIS Supports’ was required:

- Concerns were raised by the community about a lack of clarity in the drafting of new section 10. Notably as it required participants to undertake a complex analysis of whether a support could be considered an NDIS support for them.
- Concerns were explicitly raised that the proposed definition only referenced specific articles of the Convention on the Rights of Persons with Disability which may limit the supports a person can purchase.
- To address this, the Government moved parliamentary amendments to replace new section 10 with a revised definition of 'NDIS support'.
- These amendments change the structure of section 10 so that the Minister must assess whether supports fall within any of Australia's obligations under of the CRPD (or the sickness benefits power) when prescribing supports that are NDIS supports). This takes the onus off the participant to identify relevant obligations under the CRPD, and as a result the specific articles of the CRPD no longer need to be specifically referenced.

The new definition of NDIS supports will reference the Convention generally rather than specific articles. Why wasn't this done from the beginning?

- In response to concerns raised, including about why the definition did not reference the whole Convention on the Rights of People with Disability, Government amendments in the House of Representatives replaced the previous definition of 'NDIS Support' to clarify it and make it more accessible.
- Instead of referencing specific articles, the definition now requires the Minister to be satisfied that a support will implement any of Australia's obligations under the Convention on the Rights for People with Disability before prescribing it in as an NDIS support in rules.
- The specific articles were referenced initially because of the way the section was structured, which required a participant to assess whether a particular

support was an NDIS support for them by applying various criteria. References to specific articles was provided to assist participant understanding of the proposed process.

- The new structure of the section puts the onus on the Minister to assess whether supports fall within the relevant articles of the Convention on the Rights for People with Disability, rather than the participant. The Minister will be required to consider all the relevant obligations under the Convention on the Rights for People with Disability when making the instrument.

Why were transitional arrangements changed?

- The Government heard concerns about the use of the Applied Principles and Tables of Support (APTOS) as an interim approach to defining 'NDIS Supports'
- To address this, parliamentary amendments were agreed that amend the Bill to remove the reliance on APTOS. Instead the Bill provides for a transitional rule that will be in place only until new Category A rules under section 10 can be agreed. These rules will set out the kinds of supports that are NDIS supports and specify kinds of supports that are not NDIS supports.

Note: It is necessary to have a transitional provision as section 10 cannot operate without rules being in place and it will be critical to the operation of the Act once the Bill is enacted. The transitional rule will only operate until substantive rules have been agreed and made.

Does the definition of NDIS support limit the kinds of supports the NDIS will fund?

- The original intention of the NDIS was to provide particular kinds of supports to people with disability. These are currently described as 'reasonable and necessary supports', which requires a delegate of the CEO to consider a list of criteria in respect of each support, for each participant. This can lead to a lack of flexibility for participants, inconsistent planning decisions, and delays in plans being approved.

- These concerns are a key reason why the NDIS Review recommended a move towards a more flexible, budget-based approach. The Bill implements this approach. However the new budget-based approach will no longer have a decision about individual reasonable and necessary supports, making it necessary to have an overarching definition of NDIS support.
- By inserting a definition of 'NDIS support', the Bill does not tighten the kinds of supports the NDIS will fund. Instead, the Bill clarifies the supports that have always been available under the NDIS. It still allows for innovation and choice and control while clarifying the parameters of the Scheme.
- NDIS Supports are goods and services required to support a participant's disability needs, which are appropriately funded by the NDIS.
- The key test is not where items are purchased from, but rather whether the item is needed because of a participant's impairment(s). For example, groceries are an ordinary living cost all Australians are required to purchase and will not be an NDIS support. However a participant who requires continence supplies as a result of their disability may choose to purchase these from a supermarket if that is more convenient or cheaper for them. This is a key advantage of the flexible budget model in that participants will have more flexibility around how they address their own needs and where they obtain their NDIS supports.

13. Changes focussed on safeguarding participants

- The Bill inserts **measures focused on protecting participants** such as:
 - Requiring the Agency to specify in the statement of participant supports the total funding amount under the plan for reasonable and necessary supports together with the funding component amount under the plan for each support or class of support up to a specified amount.
 - Clarifying the requirement that an NDIS participant who receives an amount or amounts for NDIS supports may only spend that money in accordance with the participant's plan. This reflects the reasonable expectation that participants should spend up to the limits specified in their plan – unless their needs significantly change.
 - Enabling the Agency to change the plan management type as well 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.

Plan management – the NDIA can take over control of your supports if they disagree with how you are using your funding

- The Bill does not substantially change the existing provisions around plan management.
- The only change made by the Bill is that a participant will not be able to self-manage their plan, or use a particular plan management provider, if the CEO is satisfied that this would make it unlikely for section 46 to be complied with. Section 46 requires funding under the plan to be spent in accordance with the plan and/or on NDIS supports.

- This is intended to safeguard participants including to prevent a debt being raised against a participant and does not necessarily mean the plan will become Agency-managed.

How are NDIS participants supported to make decisions about their needs and how to spend their funding on appropriate supports?

- The Bill enables a range of mechanisms to support and encourage participants to spend in accordance with their plans. The amendments remain consistent with current practices and operational guidelines of supported decision-making and self-management.
- The definition of NDIS Support will empower participants in how they may spend their flexible budgets under the new planning framework by providing clearly set out supports that may or may not be purchased by the participant.
- If it is identified that a participant is at risk of not complying with section 46 (which relates to how funding provided under a plan can be spent), the NDIA will contact and discuss this with the participant to support them with the effective implementation of a plan. The Bill includes this as a relevant circumstance for the purpose of determining plan-management type, which will protect participants from incurring a debt and ensure their funding is available to be used for the supports they require.

14. Quality and safeguards amendments

Approved quality auditors

What are approved quality auditors?

- Section 73U of the Act allows the NDIS Commissioner to approve a person or body to be an approved quality auditor.
- Although these auditors are not directly involved in providing supports to people with disability, they are responsible for auditing registered providers and applicants for registration. The outcome of these audits can directly impact on people with disability.

What changes does the Bill make, and why?

- Currently, the NDIS Commissioner has limited ability to regulate approved quality auditors. This can lead to people that have been banned from providing supports to people with disability still having an indirect role by conducting audits. This is unacceptable as it can put participants at risk of harm.
- The Bill includes new rule-making powers that will allow the Commissioner to place stricter conditions around approved quality auditors. This can include conditions about employing people subject to banning orders.
- The Bill also requires the Commissioner to notify an approved quality auditor if a member of their staff or key personnel becomes subject to a banning order. This will ensure these persons are unable to continue working a role that has the potential to put people with disability at risk of harm.

Delegation of Regulatory Powers - what is the change made by the Bill?

- One of the key functions of the NDIS Commission is to secure compliance with the NDIS Act through effective regulatory action, including under the Regulatory Powers (Standard Provisions) Act 2014 (the Regulatory Powers Act)
- The NDIS Act currently allows the Commissioner to delegate powers and functions under the Regulatory Powers Act to SES-level employees only.
- The Bill amends this delegation provision to allow the NDIS Commissioner to delegate powers and functions relating to infringement notices to Executive Level 2 staff, and powers and functions relating to compliance notices to Executive Level 1 and 2 staff.

Why is this appropriate?

- The current delegation means there are only a limited number of staff who are able to exercise these powers and functions.
- Many of the powers are straight forward and low risk such as issuing compliance notices and infringement notices.
- By enabling these more straightforward powers to be delegated below SES level, the Bill will improve efficiency and allow for a greater degree of compliance and enforcement activities by the NDIS Commission.

Are there any safeguards?

- In delegating these powers and functions relating to compliance and infringement notices, the Commissioner must consider whether the position is sufficiently senior, or otherwise the employee must have appropriate qualifications or expertise.

- All the remaining compliance and enforcement powers of the NDIS Commission under the Regulatory Powers Act continue to be exercisable by SES level employees only, in recognition of the seriousness.

15. Delegated legislation and co-design

Why has the legislation been developed without knowing what the rules will be?

- The Bill provides the architecture for a new planning framework and enables the development of delegated legislation to fully implement this new framework. The Government is committed to undertaking genuine and meaningful consultation with the disability community, service providers, and state and territory governments on the detail of reforms.
- The Department is working on a public roadmap to provide opportunities for consultation and engagement in the development of policy and rules outlining details of reforms.
- To take specific reform elements forward, the NDIA, Disability Representative and Carer Organisations and the NDIS Independent Advisory Council have agreed to prioritise co-design consultation and engagement activities.
- Engagement, genuine co-design and consultation is critical to the success of these reforms. It is intended that an exposure draft will be available for the second tranche of reforms, which include many of the proposed rule changes.
- The Government is committed to public consultation on legislative instruments and amended or new NDIS Rules required to give effect to changes made by the Bill.

How can the Government ensure there will be sufficient scrutiny of NDIS Rules?

- The Government proposes to introduce amendments in the Senate to embed additional consultation requirements in the NDIS Act.
- Rules will continue to be subject to Parliamentary scrutiny through disallowance processes and will be considered by both the Senate Standing

Committee for the Scrutiny of Delegated Legislation and the Parliamentary Joint Committee on Human Right.

- The majority of the new NDIS rules created by the Bill are category A rules, which means they will require the agreement of all states and territories.

How is co-design embedded in the development of rules and new legislative instruments?

- Subsection 4(9A), which is one of the general principles guiding actions under the Act, provides that:
 - *People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.*
- Subsection 209(3) of the Act requires that the Minister must have regard to the Objects and Principles of the Act when making NDIS rules. Amendments to the Bill were made and agreed in the House of Representatives that require the Minister to have regard to the principle of co-design when making instruments under the new framework that are not NDIS rules.
- In addition, subsection 17(1) of the Legislation Act provides that before a legislative instrument is made, the rule-maker must be satisfied that appropriate and reasonably practicable consultation has been undertaken.
- Subsection 17(2) of the Legislation Act provides that in determining whether any consultation that was undertaken was appropriate, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.
- The Minister must comply with the above requirements under the Act and the Legislation Act when making any legislative instruments under the Act.
- In addition, paragraph 15J(2)(d) of the Legislation Act provides that an explanatory statement to a legislative instrument must contain a description

of the nature of consultation that has been undertaken before the instrument was made.

- Including an express requirement for consultation or co-design with the disability community on specific instruments (beyond what already appears in the Act and the Legislation Act) could cause significant uncertainty for the operation of the NDIS. This is because there is no broadly accepted process for 'codesign' which could lead to legal uncertainty about whether an instrument is validly made.

Consultation statements

- The proposed Senate amendments insert a new section 211 which prescribes certain information about consultation that must be included in explanatory statement to legislative instruments made under the NDIS Act.
- The Minister is already required to provide information about consultation undertaken on legislative instruments under paragraph 15J(2)(d) of the Legislation Act 2003. This amendment clarifies and strengthens this requirement in relation to legislative instruments made under the NDIS Act. Specifically, explanatory statements to all legislative instruments made under the NDIS Act will be required to meet the following requirements:
 - describe the nature of the consultation
 - describe in general terms who was consulted
 - contain a summary of the views expressed by stakeholders.

Future co-design and engagement activity

- To take specific reform elements forward, the NDIA, Disability Representative and Carer Organisations and the NDIS Independent Advisory Council have agreed to prioritise co-design consultation and engagement activities on the following topics:
 - Participant pathway experience
 - Assessments and budgeting
 - Navigator Functions

- Participant Services
- Psychosocial Disability
- Home and Living
- Integrity and Fraud Prevention
- NDIA Workforce Capability and Culture
- Participant Safety, and
- Supporting Children and Young People in the NDIS.
- A range of activities will be undertaken to include participants, families, carers, supporters, providers and the public in co-design, consultation and engagement. These activities include:
 - involving people from the disability community in projects to help define problems, find solutions, refine and implement them
 - co-design workshops on specific issues, processes or products
 - focus groups, interviews and engagement with participants, families and carers
 - 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, and
 - targeted approaches to hear from under-represented participants and groups.
- The Department will work with the NDIA and Commission to use the insights from this co-design to inform the further development of policy around NDIS rules and other legislative instruments, and to lead broader engagement on the detail of subordinate legislation together with states and territories.
- The Bill provides the architecture for a new planning framework to enable the time to carefully co-design rules to commence alongside Foundational Supports. These rules will need to be implemented with agreement from states and territories – which means that key changes can be ‘switched on’ as additional Foundational Supports are available.

How does the Government intend to ensure that co-design is achieved?

- The Government acknowledges concerns raised through the Committee's inquiry support a high level of public interest in the consultation and co-design processes around legislative instruments that will be made under new provisions in the Bill.
- The Government has made commitments to embed the voices of people with disability in the design and implementation of delegated legislation under the Bill.
- Additional Senate amendments will further solidify this commitment and address concerns of the disability community and Committee through inserting of a requirement for a consultation statement to accompany the explanatory statement.
- An engagement plan is being developed with the disability community to support meaningful engagement and co-design.

17. Debt recovery

What changes have been made to debt recovery powers?

- The Bill makes no changes to the debt recovery provisions.
- It is correct that a debt could be recovered from a participant if they do not spend funding in accordance with the requirements of the Act, which is the case now.
- The Agency is preparing an educative approach to ensure that participants understand what NDIS funding can and cannot be spent on.
- **NOTE FOR CONTEXT/BACKGROUND:**
- The Bill makes changes to section 46 (which provides requirements about how a participant can spend funding provided under their plan). Under the Act currently, money that is not spent in compliance with section 46 becomes a debt to the Agency. By expanding the operation of section 46, the Bill expands the circumstances that may lead to a debt arising but the Bill does not specifically change the provisions relating to debts.

18. Interaction with Foundational Supports

What are Foundational Supports?

- The NDIS Review recommended Governments invest in foundational supports to bring fairness, balance and sustainability to the ecosystem supporting people with disability.
- The Review defined foundational disability supports as disability-specific supports that are available to all people with disability and, where appropriate, their families and carers.
- In 2023, National Cabinet agreed to the design of Foundational Supports that will be engaged by the Commonwealth and states and territories, to create more pathways outside of the NDIS for young children and people accessing the Scheme.
- Foundational Supports will work toward a model of care that incorporates mainstream services. Foundational Supports will be evidence-based supports and services to better connect people with disability that are not necessarily best-placed by the NDIS to provide.
- It is the intention of Foundational Supports to create an inclusive and accessible disability ecosystem.

What is the Government doing to engage with States and Territories on Foundational Supports?

- Recent questions have centered on the engagement of states and territories to develop foundational supports. The Government is committed to the design of Foundational Supports alongside the disability community, and state and territory governments.
- This collaboration will take the time needed to progress and implement the required reforms.
- Further detailed planning will be developed to support engagement on the legislative reform program and made available on the department's engagement web page.

Why are Foundational Supports not part of this Bill?

- The NDIS Review was not intended to implement all recommendations within a short timeframe.

- The engagement with the disability community, states and territories is critical to ensuring the success of Foundational Supports. Until that work has occurred, it will not be possible to include foundational supports in the Act.

19. Budget implications

What is the detail of the \$14.4 billion moderation of growth outlined in the Budget linked with the Bill?

- The 2024-25 Budget papers outline that the legislative reforms associated with the NDIS Amendment Bill will moderate the growth in participant costs by \$14.4 billion over four years from 2024-25, once the 8 per cent annual growth target under the NDIS Financial Sustainability Framework is accounted for.
- This includes immediate changes to encourage participants to spend within existing plan amounts, and longer-term changes to enable fair and consistent assessments of a person's support needs.
- The Bill will help get the NDIS back on track by determining NDIS participant plans more consistently based on participant need and supporting participants to spend in accordance with their plans.
- This will assist the NDIA around dealing with plan inflation where participants are spending their funding faster than what was considered reasonable and necessary as part of their plan and asking for top-ups in funding, particularly where there is no change of circumstances in relation to their needs.
- The following table provides annual rates of plan inflation at the March 2024, December 2023 and September 2023 quarters. It provides the total figure, and the contribution of changes at plan reassessment (interplan inflation) and changes occurring within a plan between reassessments (intraplan inflation).

Quarter	Total Inflation %	Interplan Inflation %	Intraplan Inflation %
March 2024	7.5	1.8	5.7
December 2023	11.2	4.2	6.9
September 2023*	12.7	5.5	7.2

- Source: relevant Quarterly Reports to Disability Ministers. * September figures exclude indexation.

Can you provide the breakdown of the moderation of growth associated with the Bill?

The impact of spending provisions have been estimated to reduce Scheme expenditure by between 4% and 5% over the forward estimates. This estimate is supported by two independent pieces of evidence:

- Top down analysis showing that 63% of intra-plan inflation (i.e. approximately 5% p.a.) relates to 4% of NDIS participants, who are the participants with high plans (\$200K or more). This insight allows a specific focus on high cost plans as a mechanism for reducing intra-plan inflation
- Bottom up analysis showing that approximately two thirds of intra-plan inflation (i.e. also approximately 5% p.a.) does not have evidence indicating any change of circumstances

The moderation in NDIS expenditure growth is comprised of the following components:

- Addressing intra-plan inflation. This component is responsible for around half of the moderation in growth. The legislative reforms will support participants to spend in accordance with their plans, rather than exhausting their funding for reasonable and necessary supports and then needing to be 'topped up' with additional funding for supports.
 - This will be achieved through amendments to sections 33 and 46 of the NDIS Act which will provide the NDIA with the power to set a total plan funding amount, and then require a participant or nominee to spend within that funding amount.
 - A legislative instrument will set out the method by which the total funding amount is calculated.
- Budget model. This component is responsible for around 45 per cent of the moderation in growth. The reforms will help determine participant plans more consistently based on participant need.
 - A 'needs assessment' process will be developed by the NDIA through co-design, with a legislative instrument setting out the methodology by which a person's support needs are determined.
- Improved information gathering powers This component is responsible for around two per cent of the moderation in growth.

- Amendments to section 30 of the NDIS Act to require information for the purpose of considering whether to revoke a participant's status will ensure participants can no longer access the Scheme if they do not meet the access criteria.
- Addressing fraud and non-compliance. This component is responsible for around two per cent of the moderation in growth.
 - Legislative amendments will improve fraud compliance, such as by clarifying the supports a participant can purchase with funding received under their plan, and other supporting provisions.

Does this mean the Scheme is effectively capped?

- No, the scheme remains demand driven and needs based, and the Financial Sustainability Framework provides a target for scheme costs, not a cap.
- Participant costs are still expected to grow substantially by over 9 per cent in the next two years from 2024-25.

20. Other matters

Once the Bill is passed what will be the functional impact of the transition on participant experience?

- Many changes in this Bill rely on further legislative instruments being made. These will be developed over time with the disability community and states and territories.
- Some changes will come into effect immediately (28 days from the Royal Assent). These changes are about restoring the Scheme to its original intent.
- Changes that come into effect 28 days from the Royal Assent include:
 - that the NDIA will have to tell participants if they have met access to the Scheme based on the disability or early intervention requirements, or both. This is important for when the early intervention pathway is developed;
 - the new definition of NDIS supports, which will provide guidance around the supports that can be purchased using NDIS funding;
 - that participants will need to provide information to the NDIA, if asked, if the NDIA is considering whether they continue to meet the access criteria;
 - reasonable and necessary supports in a plan will need to relate to impairment(s) that meet the disability or early intervention requirements;
 - that plan management types can be changed where the participant, or the plan nominee, child representative or plan manager is unlikely to comply with section 46 in relation to the plan;
 - there is an obligation for participants to remain within a set funding limit. This change will only come into effect when a ministerial determination is made.
- The quality and safety improvements will also commence immediately (28 days from Royal Assent). This will make it easier for the Commission to use its compliance and enforcement powers under the Act.

Why is the term “class” used in the Bill?

- The term “class” is a legal concept.
- It is used to ensure the measures in the Bill appropriately encompass the diverse needs of participants and their supports.
- In most cases when referring to participants or supports, there is also reference to classes of participants or supports – it can be one person or many people. A class of supports could be supports provided by Occupational Therapists.
- Each participant is different and may fall into many ‘classes’, for example due to their age or location as well as the kinds of supports and services that they may receive.
- This may relate to categories of assistive technology where a class of support would be required to be prescribed by an allied health professional.
- It is likely that this will also be required in relation to the transition and how participants would transition to new framework plans.

Why doesn't the Bill address serious quality and safeguards issues that were raised through the Disability Royal Commission and in the context of the NDIS Review?

- Quality and safeguarding is being strengthened in this Bill. Some examples of amendments made by the Bill include:
 - changing plan management type to prevent misuse of funds under a plan.
 - enabling effective management of funding within a participant's plan.
 - a more transparent and equitable needs assessment and planning process.
 - new audit and banning powers of the NDIS Quality and Safeguards Commission.
- Future tranches of legislative reform will give effect to other important recommendations.

How does the Bill protect and support the enabling of alternative commissioning?

- Alternative commissioning approaches are not a return to the model of 'block funding' rather, will assist in providing remote and very remote regions with better continuity of services while retaining choice and control over which service delivery model best suits the needs of local community.
- The Bill does not directly deal with alternative commissioning, but under the new planning framework the CEO may place restrictions on a participant's plan in certain circumstances. These restrictions include:
 - Requirement that supports be provided or provided by a specified persons or persons in a specified class
 - Requirement that a specified process be undertaken before supports are acquired or provided and
 - Requirement that specified conditions be satisfied in relation to the participant before the supports are acquired or provided.
 - Requirements that are prescribed in Category A rules.
- This may enable alternative commissioning arrangements where appropriate, for example for First Nations participants in remote communities.

What provisions are there within the NDIS for the recognition of statutory guardians and administrators?

- The Bill makes no changes to existing arrangements regarding guardians or administrators.

Are there any plans to introduce case management for participants who require it?

- There are no current plans to introduce case management for participants and the Bill does not enable this.
- The NDIA, Disability Representative and Carer Organisations and the NDIS Independent Advisory Council have agreed to prioritise co-design consultation and engagement activities on the design of a new navigation function to support people with disability inside and outside of the NDIS.

What provisions are provided under the Bill ensure a strong and safe pathway for whistleblowers?

- The Bill makes no changes to existing integrity and protection of information provisions under the Act.

Why doesn't the Bill do anything to address lack of adequate whistleblower protections, what has been done by the Government in this space?

- The Government acknowledges there is a desire for a whole of government approach to restore integrity in government and to ensure the effective protection of public interest whistleblowers.
- The Government is committed to the development of a best-practice public sector whistleblowing framework to inform future reviews of, and reforms to, other whistleblowing frameworks, including those relevant to the NDIS. This work is ongoing across government.

Parliamentary committee summaries

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights reported on the Bill in their 4th report of 2024.

The Report was tabled on 15 May 2024.

If asked - What issues were raised by the Committee in relation to the Bill?

- The Committee raised issues surrounding the consideration of compatibility with the right to privacy, ensuring more clearly set out considerations for compatibility with human rights as set out in the statement of compatibility with human rights. The report highlights the Constitutional objective for the provisions to pursue a legitimate purpose and be proportionate to the Constitutionally-prescribed system of government.

If asked - What response was provided in relation to the Committee report?

- The Department provided a response to the Committee on 30 May 2024 in relation to the concerns raised
- A response has not been received from the Committee.

What recommendations were made by the Senate Standing Committee on Community Affairs Final Report on the Bill?

Recommendations made by the Community Affairs Legislation Committee
Recommendation 1 2.150 The committee recommends the bill include amendments so that First Ministers are also recognised as Ministers for the purposes of Category A rule-making.

Recommendation 2

2.158 The committee recommends that a consultation statement be tabled accompanying the legislative instrument that sets out consultations undertaken.

Recommendation 3

2.175 The committee recommends that the Australian Government further clarify the circumstances under which the additional powers granted to the National Disability Insurance Agency Chief Executive Officer will be used.

Recommendation 4

2.178 Subject to the above recommendations, the committee recommends that the bill be passed.

Additional Comments made by the Coalition

Additional Comments – Coalition Senators
<p>1.1 The Coalition is unable to provide fully informed commentary on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions] legislation, due to the government’s unwillingness to grant an extension to the committee for further scrutiny on sensible and necessary measures for the sustainability of the NDIS</p>
<p>1.2 We note insufficient time has been provided for proper consultation with the sector and the community on the bill who have expressed widespread misgivings about the current legislation.</p>
<p>1.3 The opportunity to properly engage with this bill is important in bringing the NDIS back onto sustainable footing in a manner that does not disadvantage or impact negatively on participants most in need.</p>
<p>1.4 It was also concerning that the committee was not given the opportunity to consult the sector on government amendments tabled on the day of the public hearing.</p>
<p>1.5 The Coalition notes legislative instruments and rules are still under development and the committee has not been provided with substantial detail on this to date.</p>
<p>1.6 The two-and-a-half days of hearings conducted by the committee pointed to significant concerns from the disability community about the lack of detail and potential unintended consequences of the current legislation without significant amendment.</p>
<p>1.7 Given the broad consensus of the need for greater consideration, and the Coalition’s willingness to work constructively with the government, it is disappointing the government has opted to reject a reasonable request for an extension to the reporting date and for a meaningful hearing day with the NDIA, especially.</p>

Dissenting recommendations made by the Australian Greens

Dissenting Report – Australian Greens
Recommendation 1 1.74 That the Bill not be supported.
Recommendation 2 1.75 That the Government ensure foundational supports be comprehensively defined and implemented in states and territories.
Recommendation 3 1.76 That the Government deliver a formal response to the Disability Royal Commission and the NDIS Review.



Australian Government
Department of Social Services



NDIS Quality
and Safeguards
Commission

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

**Joint submission to Senate Community Affairs Legislation
Committee Inquiry**

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Abbreviations and acronyms used in this submission

- **Agency** means the National Disability Insurance Agency
- **APTOS** means the Applied Principles and Tables of Supports agreed by First Ministers in 2015
- **Bill** means the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024
- **CEO** means the Chief Executive Officer of the National Disability Insurance Agency
- **CRPD** means the *Convention on the Rights of People with Disability*
- **Department** means the Department of Social Services
- **Legislation Act** means the Legislation Act 2003
- **LEOMR** means the *Legislation (Exemptions and Other Measures) Regulation 2015*
- **NDIS Act** means the *National Disability Insurance Scheme Act 2013*
- **NDIS Commission** means the National Disability Insurance Scheme Quality and Safeguards Commission
- **NDIS Commissioner** means the National Disability Insurance Scheme Quality and Safeguards Commissioner
- **NDIA** means the National Disability Insurance Agency
- **NDIS** means the National Disability Insurance Scheme
- **NDIS Review** means the 2023 Independent Review into the NDIS
- **NDIS rules** means rules made under section 209 of the *National Disability Insurance Scheme Act 2013*
- **Scheme** means the National Disability Insurance Scheme
- **SES** means the Senior Executive Service established under section 35 of the *Public Service Act 1999*

Introduction

This submission is jointly made by the Department, the NDIA and the NDIS Commission. It is intended to give a background and summary of the Bill as well as expand on some of the more critical and complex aspects to assist the Committee in its consideration. This submission is made on the basis of the Bill as introduced into the House of Representatives.

The voices of people with lived experience of disability will be at the centre of the way reforms will be designed and implemented. The new NDIS rules and legislative instruments will be the subject of deep engagement and consultation with the disability community and States and Territories. Some rules will also require agreement from States and Territories before they can be made.

There are some matters dealt with in this submission that are the subject of ongoing discussion as a result of feedback that has been received following the introduction of the Bill. Some of these may be addressed by parliamentary amendments, including technical amendments to clarify the operation of certain provisions. The Department undertakes to advise the Committee if any parliamentary amendments are made prior to the release of its report and provide supplementary and/or revised explanatory memoranda.

Background

On Tuesday 18 October 2022, the Minister for the NDIS the Hon Bill Shorten MP announced there would be an independent review into the NDIS to improve the wellbeing of Australians with disability and the Scheme's sustainability. The Terms of Reference for the NDIS Review provided 3 overarching objectives:

- put people with disability and their families back at the centre of the NDIS to create a more personal experience
- restore trust and confidence
- ensure the long-term sustainability of the NDIS.

The NDIS Review, which was co-chaired by Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM, delivered its final report *'Working together to deliver the NDIS'* in December 2023. It included 26 recommendations with 139 integrated actions which were intended to provide a blueprint to renew the promise of the NDIS and deliver a more accessible and inclusive Australia.

The Bill addresses priority recommendations from the Review and represents the first tranche of amendments to the *National Disability Insurance Scheme Act 2013* to improve participant experience.¹ It follows agreement by National Cabinet that the Commonwealth would work with state and territory governments to implement legislative and other changes to return the NDIS to its original intent of supporting people with permanent and significant disability, within a broader ecosystem of supports. These changes are critical to improving the experience of people with disability participating in the Scheme while ensuring the long-term sustainability of the NDIS, so that it is available to support Australians with disability for many years to come.

¹ The Hon Bill Shorten MP, Media Release, 27 March 2024

The amendments made by the Bill enable progress of key NDIS Review recommendations to clarify the NDIS access requirements and the supports that the NDIS will provide a participant, to create a new budget-based planning framework, and provide more flexibility on how the NDIS Commissioner can take regulatory actions to protect NDIS participants from abuse, harm and neglect. Many of the changes in the Bill will require new legislative instruments to be able to operate. Development of instruments will involve deep engagement and consultation with the disability community as well as state and territory governments.

The changes made by the Bill are an important first step in implementing the recommendations of the NDIS Review but are not intended to be the only step. The Government has stated that the NDIS Review recommendations will take years to implement.

Outline of the Bill

NDIS supports

The Bill inserts a new concept of 'NDIS supports' into the Act, which will be central to the Scheme's operation moving forward. This measure clarifies the existing legislative boundaries of the Scheme by making provision for the specific types of supports a participant can obtain to be defined.

Access

The Bill makes no changes to the disability requirements or the early intervention requirements as set out in the Act. But the amendments will require the NDIA to provide participants with a clear statement of the basis on which they entered the Scheme either by meeting the disability requirements, the early intervention requirements, or both.

This change also facilitates a new 'early intervention pathway', which will include a focus on evidence-based early intervention supports with regular check-ins. The details of the pathway are to be established by new NDIS rules, which will require agreement from state and territory governments and will be the subject of deep engagement and consultation with the disability community and a range of expert advisors.

Planning

New planning framework (the 'new framework')

The Bill creates a new, budget-based framework for the preparation of NDIS participants' plans. The creation of a new planning framework is one of the most extensive changes made by the Bill and represents the biggest change for participants once it becomes operational. A participant will receive a 'reasonable and necessary budget', which will be based on a needs assessment, rather than a plan specifying individual 'reasonable and necessary supports' as the Act currently requires.

This change is significant because it paves the way for greater consistency in approach to planning decisions and gives participants greater flexibility in how they choose to spend their reasonable and necessary budget once it is determined.

The new planning framework relies on a range of legislative instruments, including but not limited to a specialised and fit-for-purpose needs assessment. The new planning framework does not commence until the required instruments are designed and in force.

These instruments will be the subject of detailed consultation and co-design. For example, the states and territories will be consulted in the same way as the consultation process required for 'Category D' NDIS rules.

Existing planning framework (the 'old framework')

The Bill also makes some changes to the existing planning framework, which are important steps in returning the Scheme to its original intent of supporting people with permanent and significant disability as part of a larger ecosystem of supports outside of the NDIS. All these changes are in line with the NDIA's existing operational guidance and have been included in the Act to provide a sense of certainty for participants and decision-makers (including NDIA delegates and the AAT).

Protecting participants

There are additional measures focused on protecting participants, such as clarifying requirements about how funding received from the NDIS can be spent and expanding the circumstances where a participant may be at an 'unreasonable risk' if a certain plan management type is to continue.

NDIS Commission

Amendments relating to the functions and powers of the NDIS Commission are also included to enable the imposition of conditions on approved quality auditors to not employ or engage a person against whom a banning order has been made, and to enable greater delegation of the NDIS Commissioner's compliance and enforcement powers to specified positions.

Commencement

If passed, the whole of the Act will commence on the 28th day after the Bill receives the Royal Assent.

Many aspects of the Bill are operationalised by legislative instruments and do not practically commence until these instruments are made. Most critically, the new planning framework is unable to operate until a suite of supporting NDIS rules have been developed and made. Similarly, the new approach to setting total funding amounts in old framework plans depends on a Ministerial determination.

NDIS rules will also need to be made to determine when early intervention participants may have their participant status reconsidered to see whether early intervention is still required before the process can commence.

The Department, the NDIA and the NDIS Commission are committed to working with the disability community and continuing to put people with disability at the heart of NDIS reforms. The most significant changes made by this Bill will take time to develop, using a phased and considered consultation and co-design approach.

NDIS Supports

The Bill inserts a new concept of 'NDIS supports' into the Act by inserting a definition in proposed new section 10. The new definition clarifies which supports are provided through the NDIS in a manner that is consistent with the original intention of the Scheme and the recommendations of the NDIS review. This also reinforces the constitutional basis for the supports that are funded and provided under the Scheme, particularly as it transitions to the new budget-based planning framework.

It is acknowledged that the disability community and other stakeholders have concerns about the intent and operation of proposed section 10 and consideration is being given to whether parliamentary amendments may be made to clarify the purpose and operation of the section. The Department undertakes to advise the Committee if and when parliamentary amendments dealing with section 10 are proposed and to provide the Committee with a copy of the proposed amendments together with explanatory material.

To assist the Committee in its consideration of the Bill in the meantime, an explanation of the operation of section 10 as it is currently drafted is provided below.

People are the experts in their own disability, and with the assistance of NDIS rules and Agency guidance, participants will be able to use their reasonable and necessary budget to fund supports that they require as a result of their disability.

'Category A' NDIS rules will set out what supports may be NDIS supports for participants. These supports must be appropriately provided by the NDIS and have a constitutional basis for their provision. The new rules setting out NDIS supports will be developed with extensive consultation with states and territories and other Commonwealth bodies to ensure clear boundaries are drawn as to supports that are the responsibility of the NDIS, and those that are the responsibility of another service system.

Appropriately funded by the NDIS

NDIS supports must be appropriately funded by the NDIS. This is consistent with existing requirements under the NDIS Act. For example, current paragraph 34(1)(f) provides that reasonable and necessary supports must be most appropriately funded or provided through the NDIS.

The requirement that supports are appropriately funded by the NDIS is also relevant to access, in the requirement in paragraph 24(12)(e) that a person is likely to require support under the NDIS for their lifetime, and subsection 25(3) dealing with whether early intervention supports are most appropriately funded or provided by the NDIS.

Inserting this requirement into the definition of NDIS supports simplifies the legislation so that the requirement is set out in one place, rather than intermittently throughout the NDIS Act. The principle is already relevant to access and the existing planning process. It will also be relevant to the new planning framework once it commences.

Ensuring that that NDIS supports only includes supports that are appropriately funded or provided by the NDIS is a critical part of implementing the recommendations of the NDIS Review around returning the NDIS to its original intent. This reflects the principle that the NDIS is only one part in an ecosystem of supports for Australians with disability so that they have the same opportunities as others in the Australian community.

Constitutional considerations

The current drafting of section 10 identifies the constitutional basis for the provision of NDIS supports. The federal Parliament can make laws only on certain matters that are set out in the Australian Constitution. This means that the Commonwealth can only provide funding and support to people where there is a constitutional basis to do so.

For the most part, constitutional support for the NDIS comes from the external affairs power in section 51(xxix) of the Constitution as a mechanism to implement the CRPD. Public commentary on the Bill has queried why new section 10 does not specifically reference all the articles from the CRPD in its definition of NDIS support.

In relying on the treaty implementation aspect of the external affairs power, there are 2 tests. First, the external affairs power can only be used to implement aspects of a treaty that are 'sufficiently specific' to give rise to a positive obligation. Second, the Commonwealth can only make laws that are 'reasonably capable of being considered appropriate and adapted' to implementing those positive obligations.

Section 10 of the Bill replicates articles 19(b), 20(a) and (b), 25(b) and 26(1) of the CRPD. Those articles impose sufficiently specific obligations. They are also broadly expressed and provide the constitutional basis for a wide range of supports provided under the Scheme.

In addition to the implementation of the CRPD, section 51(xxiiiA) of the Constitution, which is generally known as the 'social welfare power', provides the Commonwealth with power to make laws with respect to:

The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

The reference to 'sickness benefits' is included in the definition of NDIS supports to ensure this definition captures the broadest range of supports the Constitution allows the NDIS to fund for people with disability in Australia, including those that may fall outside of the scope of the CRPD.

Access

Currently, section 21 of the NDIS Act requires the CEO to decide whether a person meets the access criteria, including by meeting either the disability requirements in section 24 or the early intervention requirements in section 25. However, there is no requirement for the CEO to specify whether the prospective participant meets the disability requirements or early intervention requirements when making an access decision.

The NDIS should work differently for people accessing early intervention supports than for people receiving disability supports for a lifelong disability. Right now, it does not – for example, participants with a lifelong disability often feel they are required to prove their disability over and over at each plan reassessment.

The Bill amends the NDIS Act to require the CEO to make a specific decision about whether a prospective participant meets the disability requirements, the early intervention requirements, or both when a person enters the scheme. Participants will be notified about what criteria they have met as part of their access decision.

Requiring the CEO to make a specific decision on whether a prospective participant meets the disability and/or early intervention requirements will allow for the establishment of an early intervention pathway,

ensuring that participants receive the supports and services that are most appropriate to them. It also provides clarity for participants entering the Scheme.

On enactment, the only changes that people will experience is that it will be clear for new participants to understand on what basis they have met access, specifically by meeting the early intervention requirements, disability requirements or both. The creation of an early intervention pathway may be operationalised later once 'Category A' NDIS rules are in place. This change is being made now to prepare for the long-term changes recommended by the NDIS Review.

The NDIS Review recommends that the NDIS should work differently for different groups of people, based on their needs – people for whom early investment can change their life outcomes, and people who have a permanent, lifelong disability.

The Bill also clarifies, and expands, the NDIS rule-making powers relating to the access criteria. NDIS rules and legislative instruments are discussed further below.

New planning framework

The creation of a new planning framework is the most significant change made by the Bill and gives effect to one of the key recommendations of the NDIS Review.

Under the new planning framework, participants receive a 'reasonable and necessary budget' which consists of either or both of the following:

- a flexible budget, to be used for any of the participant's NDIS supports,
- stated supports, which must be used for the purpose stated in the plan.

For participants that accessed the Scheme by meeting the disability requirements, new framework plans are intended to be in effect for a longer period before a full reassessment of the plan is required (generally 5 years depending on the participant's circumstances). Funding will be released throughout the plan in set intervals. These will generally be 12 months but may be reduced in circumstances where a participant is at heightened risk of exploitation or other harm and would benefit from added protections around their flexible budget. The interval lengths may also be adjusted where there are concerns about the rate at which funding is being used, so that a participant is not at risk of insufficient budget to meet their support needs.

Participants who have accessed the Scheme by meeting the early intervention requirements are more likely to have shorter plans, so that the benefit they receive from the early intervention supports can be monitored on a regular basis, and there is a clear and expected point at which the person's needs will be re-assessed, and any future support needs determined.

All participants will retain the ability to request a reassessment or variation of their plan at any time.

Transition

With more than 650,000 participants expected to be in the NDIS by the time the new framework begins to be implemented, it is important that there is a clear and measured approach to transitioning all existing participants into the new arrangements. The timeframe and overarching process for transition

of the Scheme to the new framework will be agreed by the Minister in consultation with state and territory counterparts.

The Bill allows the Minister to make a legislative instrument prescribing classes of participants that are to transition to new framework plans as phased transition is required due to the number of participants in the scheme. That instrument must also prescribe the timeframe in which each class of participants is to be transitioned to the new framework. If it appears that the timeframe set out in the instrument for a class of participants cannot be met (for example, due to operational constraints), it is open to the Minister to amend that instrument to extend the period of time.

The instrument will be the subject of consultation with the states and territories and other stakeholders. For example, the states and territories will be consulted in the same way as the consultation process required for 'Category D' NDIS rules.

The term 'class of participants' has a broad meaning and allows the Minister to prescribe groups based on any identifiable characteristic of a participant. Examples include, but are not limited to, age, location, length of time that they have been a participant and kinds of supports that the participant receives under the old framework. The term 'class' has an established legal meaning and has been used intentionally to allow for maximum flexibility.

Once a participant has been identified as falling within a prescribed class of participants, the CEO must give them a notice advising them that they are to have a new framework plan. Participants will also be advised when that is expected to occur and how the arrangements to put the new framework plan in place will be managed, and how they will be supported to engage in that process. Once this notice has been given, the participant will not be able to be reassessed under the old framework and after a participant has received a new framework plan, they cannot subsequently receive an old framework plan.

The decision to issue a notice will not be subject to review as it is an administrative decision.

Once a notice has been issued, there will be a period of time before the new framework plan is in place, to allow for assessments and planning discussions to be undertaken with the person. Because the process to establish the new framework plan will take time, the CEO will still be able to vary an old framework plan, for example, in case of an emergency or to change a reassessment date to allow for more time to undertake relevant assessments and prepare a new framework plan.

Any participant who has not received a notice within 5 years of the relevant provisions of the Bill commencing will automatically have their next plan prepared under the new framework. The Bill allows for the legislative instrument to be extended.

Overview of new framework planning process

New framework plans will be structured in a similar way to old framework plans, in that they will include a participant's statement of goals and aspirations and a statement of participant supports. The statement of participant supports specifies the participant's reasonable and necessary budget (discussed further below), general supports that to be provided, the end date for the plan and the date the NDIA must prepare a new plan, circumstances in which the NDIA must reassess a plan (if relevant), the management of funding for supports under the plan, and the management of other aspects of the

plan. A participant's plan may also include additional matters, including additional matters prescribed by the NDIS rules.

Unlike old framework plans, new framework plans will be in effect for a set period, which may be a number of years, at the end of which a participant will be provided with a new plan. Having a set period of time provides participants with more certainty and will make it easier for participants to plan how they intend to use their funding for supports over the life of the plan.

A participant can still request a reassessment or variation of their plan prior to its end date if their circumstances change.

Content of reasonable and necessary budget

A participant's reasonable and necessary budget will be made up of flexible funding and stated supports.

Flexible funding will be provided to, or in relation to, a participant up to a certain amount. People with disability know their own support needs best, so flexible funding may be used for any NDIS supports for the participant. This means that a participant may use flexible funds for a range of supports that they need as a result of their impairment/s, provided those supports are appropriately funded by the NDIS. This gives participants a much higher level of choice and control around identifying and acquiring the supports that best meet their individual needs. Participants will no longer be constrained by line-by-line plans that specify particular supports and support intensity.

New framework plans may also include funding that must be used for specified NDIS supports. These supports are 'stated supports'.

New NDIS rules may prescribe what supports must be stated supports. If a class of supports is prescribed in NDIS rules as a stated support, it must be a stated support in a participant's plan. Funding for stated supports cannot be used flexibly and must be used for the purpose specified in the participant's plan.

Stated supports may be things such as high-cost assistive technology, home modifications and home and living supports (such as supported independent living or specialist disability accommodation). These kinds of supports are likely to be stated supports because the support is critical for the participant and the need for the support will be consistent and unlikely to change, the support is particularly high risk, they are high-cost and/or their funding amounts may be determined through a quote process.

Funding periods

Funding will be provided under a plan for specified periods (known as funding periods). This is critical under the new planning framework where participants may have plans of up to 5 years' duration. Providing access to 5 years' worth of funding from the outset of a plan is not appropriate as it makes it more difficult to participants to consistently manage their plans, keep track of expenditure, and adjust their support arrangements periodically. It could also leave participants who may be at risk of harm, more vulnerable to financial exploitation.

The NDIA may need to support some participants to manage their funding and ensure that the flexible funding is used on supports that enable a person to meet their goals, and to also avoid the flexible funding being spent too quickly. This is necessary in some circumstances to enable a participant to

enjoy the benefits of flexible budgets, while ensuring that they have funding to purchase their NDIS supports over the whole plan period, and support to identify the supports they will most benefit from.

A funding period will be a period of 12 months, unless the CEO is satisfied that it is appropriate to specify a shorter period, for example as part of an approach to safeguarding or to help build a participant's capacity and confidence to manage their own funding.

Only a specified portion of the total amount of flexible funding will be provided under the plan in each funding period. For example, in a 5-year plan with flexible funding, the plan may specify that 20 per cent of the flexible funding is available every 12 months.

Depending on the nature of a stated support, funding for stated supports may also be provided in intervals. For example, a participant may get 100 per cent of their funding for a stated support in the first year of their plan if that funding is for high-cost assistive technology, but for other supports that are provided on an ongoing and regular basis, like supported independent living, funding may be provided on a monthly basis.

The first funding period must commence on the day the plan comes into effect. Subsequent funding periods start immediately after the former one ends. Any funding not used during a funding period will 'roll-over' and can be used during the next funding period. Funding does not 'roll-over' between plans as the funding is calculated with reference to a set time period (being the length of the plan).

New NDIS rules, developed with the disability community, will set out how the CEO decides the length of funding periods.

Conditions on funding

When enacted, in limited circumstances the CEO has the ability to place restrictions or conditions on portions of flexible funding. In particular, the CEO may require that funding be used for a specific purpose. This does not make that portion a 'stated support' as it will be specific to the participant. Restrictions or conditions on funding can only be applied in the following circumstances:

- the participant is likely to suffer physical, mental or financial harm if the funding were not subject to certain restrictions
- there has been non-compliance with section 46 (dealing with acquittal of NDIS amounts) in relation to parts, or all, of the participant's plan or a previous plan
- other circumstances prescribed by NDIS rules.

The circumstances prescribed in NDIS rules will be subject to co-design with the disability community. It is expected that the CEO would only put in place such restrictions in the most extreme circumstances. For example, where there are very specific identified supports that a person must access to avoid risk of harm or a detrimental impact on their health and wellbeing, or to avoid a significant escalation in their support needs over time.

Conditions may also be placed on funding more generally. For example, some stated supports (such as assistive technology or home modifications) will require a quote before funding can be allocated released.

Working out amounts

The total amount of flexible funding and total amount of funding for stated supports will be worked out using a method built with the disability community and prescribed in a legislative instrument made by the Minister. The states and territories will be consulted on the instrument in the same way as the consultation process required for 'Category D' NDIS rules.

In determining the method, the Minister is required to have regard to certain principles in the NDIS Act as well as the need to ensure the financial sustainability of the NDIS.

Specifically, the relevant principles are:

- that people with disability should be supported to receive reasonable and necessary supports, including early intervention supports and
- reasonable and necessary supports for people with disability should:
 - support people with disability to pursue their goals and maximise their independence
 - support people with disability to live independently and be included in the community as fully participating citizens
 - develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

Amounts will be worked out based on the information contained in the needs assessment report (see below).

The method may consider information, such as the participant's personal situation including geographic location and living arrangements.

The outcome of the method will be a dollar amount for flexible funding and/or funding for stated supports.

Needs assessment

Consistent with recommendations of the NDIS Review, a participant's reasonable and necessary budget will be based on a wholistic assessment of their support needs.

The support needs assessment may also identify a need for supports that are not appropriately funded or provided by the NDIS.

The assessment of a participant's support needs will be undertaken in accordance with a specialised assessment tool that will be set out in a legislative instrument made by the Minister under new section 32L. The states and territories will be consulted on the instrument in the same way as the consultation process required for 'Category D' NDIS rules.

There may be different assessment tools set out in the instrument for certain classes of participants (for example assessment tools may be different for children as opposed to adults).

The assessment tool(s) will be developed in collaboration with the disability community and individuals or organisations with relevant expertise in disability needs assessment tools and disability supports, as well as international learning and best practice. These are all important to ensure the tool(s) provide a comprehensive and accurate assessment of an individual's need for support.

It is anticipated that aspects of the assessment tool(s) may be complex and technical in nature to ensure it accurately captures the varied personal and environmental circumstances of people with disability, as well as the impact of a person's impairments.

The needs assessment will be carried out by individuals who have specific training in applying the tools. The CEO also has the ability to request information for the purpose of completing a needs assessment under section 36 of the Act (as amended by the Bill).

In general, a needs assessment will be undertaken in person as this will usually be the best way for a participant (and any accompanying support persons such as family members or carers) to fully express their needs. However, it is not a legislative requirement, and in some circumstances, an in-person assessment will not be possible or appropriate for an individual, so alternative arrangements may be made.

After the needs assessment has been completed, the needs assessor will prepare an assessment report and provide it to the CEO as soon as practicable (see subsection 32L(5)). It may also be provided to the participant, allowing them to clarify any points which they think have been misunderstood by the assessor, particularly where they do not accurately reflect their needs and circumstances. This is a procedural step (specified in the Agency's operational guidance) consistent with the legislative requirement that participant plans be prepared with the participant.

Once the report is received, the CEO must consider whether it is an appropriate reflection of the needs assessment. If it is not, then the CEO must arrange for a replacement needs assessment to be undertaken. NDIS rules may set out considerations for the CEO in determining whether the report accurately reflects a participant's needs.

Linking impairments to funding

Under the new planning framework, a participant's reasonable and necessary budget will be calculated based on the needs assessment having regard only to impairments that meet the disability requirements and/or the early intervention requirements. This is a separate consideration to the impairments assessed at the time the person became a participant in the Scheme, to ensure that newly acquired or developed impairments can be considered for the purpose of a participant's plan regardless of when they first arise. Each time a participant's plan is being prepared under the new framework, consideration will be given to the impairments previously assessed as meeting section 24 or section 25 and the participant will be given an opportunity to provide evidence about any newly developed impairments that may also meet the requirements. The participant is not required to re-establish impairments previously assessed as meeting section 24 or section 25, unless there is new evidence that suggests the relevant criteria may no longer be met for that impairment.

It is crucial for a participant's funding amount to be linked to their impairments that meet the disability and/or early intervention requirements for a number of reasons. Firstly, it ensures that participants receive adequate funding for their disability support needs by considering all impairments that meet the criteria at the time of the plan being prepared rather than limiting funding to impairments that were assessed at the time of access.

Secondly, it helps return the NDIS to its original intent of providing supports to people with significant and permanent disability as part of a broader ecosystem of supports available to all people with

disability. If a participant has chronic health conditions in addition to their disability, or another impairment that is not permanent, these will be identified in the planning process and the participant may be referred to the relevant foundational or mainstream systems for support, while receiving funding for disability-related supports through the NDIS.

This does not mean that the assessment tool only assesses impairments that were considered as part of the participant's access request. Rather, the assessment tool will consider and provide funding for all impairments that meet section 24 and/or section 25 at the time the assessment is being conducted regardless of when they first arose.

It is important to note that this explicit link is relevant to the needs assessment process only. It does not restrict the supports that a participant can purchase, so long as funding is only used to obtain supports or services that are NDIS supports for that individual.

Old framework plans

The Bill amends current section 33 of the NDIS Act which deals with matters to be included in a participant's old framework plan. It allows the CEO to specify 'total funding amounts' and 'funding component amounts' in old framework plans and make several related amendments.

The decision to specify a total funding amount or a total component amount will be discretionary and add to the tools available to the CEO to support participants to stay within any allocated funding amounts in old framework plans. The amendments to section 33 will work together with the amendments made to plan management provisions and to sections 45 and 46 of the Act that aim to support participants to spend in accordance with their plans.

The proposed amendments to section 33 also provide participants with greater certainty about the amount of NDIS funding available to them which supports them to make informed decisions about the supports they acquire including planning for the frequency and intensity of their supports.

Finally, the amendments provide an effective safeguard to the risk of the participant being subjected to financial exploitation, violence and abuse by providers who may draw down on a participant's plan too quickly.

The Bill also makes other minor amendments to old framework planning provisions, including a new requirement that the CEO, in approving a statement of participant supports, is to have regard to whether a participant has complied with section 46 of the NDIS Act (dealing with the acquittal of NDIS amounts) in relation to any existing or previous plans.

Funding amounts

Total funding amounts will set out the total amount of funding that a participant may access for the entirety of a participant's plan for a specified period of time (a funding period). Funding component amounts will set out the total amount of funding that a participant may access for a specific support or class of supports for a funding period.

Every funding amount set out in a participant's plan will have an associated funding period. This ensures that a participant knows how much funding has been allocated for a set period of time. Funding periods

can be no longer than 12 months and may be of varying lengths depending on the circumstances of a participant.

Ministerial determination

To operationalise the amendments to section 33 of the NDIS Act, the Minister may make a determination setting out any of the following matters:

- how to work out the total funding amount for reasonable and necessary supports
- how to work out the funding component amount for a support, or class of supports
- kinds of supports, or classes of supports, that must have funding component amounts
- circumstances in which a statement of participant supports must specify a total funding amount or funding component amount that will be provided under a plan
- how to work out the start date of the first funding period under an old framework plan

The determination may also prescribe requirements with which the CEO must comply, methods or criteria that the CEO is to apply and matters that the CEO may, must, or must not take into account in working out a total funding amount or a funding component amount, or deciding relevant matters.

Plan management

Under the NDIS Act, if a participant makes a plan management request, the statement of participant supports in the plan must give effect to the request unless certain circumstances exist. Currently, there is a lack of clarity about what those circumstances are. While the CEO can decide not to give effect to a plan management request if doing so would pose an 'unreasonable risk' to the participant, this has been applied inconsistently.

The Bill amends the NDIS Act so that the statement of participant supports does not need to give effect to a plan management request if the CEO has concerns about the risk to a participant and is satisfied that the participant is unlikely to comply with section 46 (which relates to how NDIS amounts are spent) in relation to the plan.

This applies equally to a plan nominee (that is if the CEO is satisfied that a plan nominee is unlikely to comply with section 46) and to a person with parental responsibility for a child who is a participant.

This allows the CEO to take proportionate steps to support a participant to manage their plan within the allocated budget, starting with education and navigation support. Where this fails and a plan is being consistently overspent, the CEO may decide that it is appropriate for a plan to be wholly or partially managed by the Agency.

New NDIS rules will be able to prescribe criteria that the CEO is to apply, and matters to which the CEO must have regard, in considering whether a person is unlikely to comply with section 46 in relation to a plan.

Currently, NDIS rules can prescribe criteria that the CEO is to apply and matters to which the CEO must have regard in considering whether giving effect to a plan management request would pose unreasonable risk to a participant.

The Bill provides for new NDIS rules that may prescribe circumstances in which a participant, a registered plan management provider, a plan nominee, or a child representative managing the funding for supports under a plan to any extent, is taken to present an unreasonable risk to the participant (for example, because the participant is at risk of exploitation). This is a stronger test and does not involve CEO discretion, only a factual consideration of whether certain circumstances exist.

New framework plans

The Bill allows a participant to make a request that they manage portions of their flexible funding and/or portions of funding for stated supports. This is consistent with the approach in old framework plans where participants can make a request to manage only certain aspects of their plans.

In addition, and consistent with the approach to the management of funding under old framework plans, the Bill provides that the CEO can decide that portions of flexible funding and/or portions of funding for stated supports must be managed by the NDIA. This will only be done in the following circumstances:

- the CEO is satisfied that the participant would be likely to suffer physical, mental or financial harm
- there has been non-compliance with section 46 in relation to parts, or all, of the participant's plan or a previous plan
- other circumstances prescribed by NDIS rules

This is a purposefully high bar, which is appropriate noting the general intent that participants should manage their plan funding to the extent that they would like to.

Funding for supports under the NDIS

The Bill makes amendments to existing sections 45 and 46, which respectively relate to how funding for supports under a plan is to be paid and can be spent.

Payment of amounts under the NDIS

Existing section 45 sets out how funding payable under a participant's plan (known as 'NDIS amounts') is to be paid by the CEO (including who the payment is to be made to, and how it should be made). The Bill inserts new subsections 45(4) to 45(6) that set out circumstances in which funding cannot be paid under a participant's plan.

If the participant has a new framework plan, the Agency must not pay an NDIS amount to any person if the payment would result in:

- the total amount of flexible funding being exceeded (either for a funding period or for the plan as a whole), or
- the total amount of funding for a stated support being exceeded (either for a funding period or for the plan as a whole).

If the participant has a total funding amount or funding component amount specified in an old framework plan, the Agency must not pay an NDIS amount to a person if the payment would result in:

- the total amount of funding for reasonable and necessary supports under the plan being exceeded, or
- the total amount of funding for a support or class of supports exceeding a funding component for the support or class of supports (either for a funding period or for the plan as a whole).

These changes enable the CEO to apply and enforce spending limits and are designed to ensure participants spend within the funding allocated under their plan.

These are critical amendments to support the long-term sustainability of the Scheme and combat intra-plan inflation.

The CEO will be able to make further payments notwithstanding that a funding limit would be exceeded if they are satisfied exceptional circumstances exist. For example, where a participant has been exploited and left without funding in their plan or where the participant has experienced an emergency or an urgent and unexpected change in circumstances. This ensures participants are not left without critical support while their needs and/or use of their plan is being assessed.

The relevant exceptional circumstances will be set out in new NDIS rules to provide certainty and clarity for participants.

Spending on supports

Currently, section 46 of the NDIS Act deals with acquittal of NDIS amounts, including a requirement that such amounts be spent 'in accordance with the participant's plan'. The requirement to spend NDIS amounts in accordance with a participant's plan on its own can be confusing and difficult to enforce. This is particularly the case as plans currently have a varying level of detail about the reasonable and necessary supports that are intended to be funded.

New subsection 46(1) extends previous subsection 46(1) by including a requirement that NDIS amounts may only be spent on NDIS supports for the participant, in addition to the requirement that these amounts are spent in accordance with the participant's plan. This ensures that NDIS amounts can only be spent on supports that are needed by the participant and appropriately funded by the NDIS.

As noted above, in practical terms participants have always been required to spend money provided under their plan on the types of supports that are now defined as NDIS supports. As such, this amendment is intended to specify the existing restrictions more clearly on use of NDIS funding rather than introduce any new restrictions.

These changes support the NDIS Review's recommendations to provide more guidance to participants about how to spend their NDIS funding.

Where old framework plans have prescribed funding amounts and funding periods, the requirement to spend NDIS amounts in accordance with a plan will extend to a requirement to spend within the limits for the relevant time periods. Similarly, in new framework plans, participants will be required to stay within the funding amounts and funding periods prescribed in their plan.

Another point of existing confusion around current section 46 relates to the fact that the requirement to spend NDIS amounts in accordance with a participant's plan only applies to a person who 'receives' an NDIS amount, but a participant will not always actually receive the funding under their plan before

it is then spent on supports. For example, NDIS amounts may be paid straight to a provider. This makes it unclear whether restrictions on spending only apply to funds that are actually received (at some point) by a participant, or whether it applies to all expenditure of NDIS amounts.

The Bill clarifies that a person does not need to actually 'receive' an NDIS amount to be responsible for its expenditure.

The Bill extends the requirements under subsection 46(1) to all NDIS amounts paid from a participant's plan for the acquisition of supports by or on behalf of the participant, regardless of whether that money was received by the participant or other person before it was spent).

Variations

Currently, a participant's plan can be varied in particular circumstances. A plan variation is different to a reassessment, which results in an entirely new plan being approved. A variation, on the other hand, results in a change to part of the plan while the remainder of the plan continues as previously approved. This is a simpler process than a full plan reassessment and is generally limited to circumstances where there is a minor change to the plan.

Under the new planning framework, a participant will still be able to request a variation of their plan. The aspects of the plan that can be varied are listed in new subsections 47A(1AA) and (1AB) and include all the relevant parts of the statement of participant supports under the new framework.

This is consistent with the existing circumstances in which funding for supports can be varied (see existing paragraph 47A(1A)(d)). The Bill also includes new variation provisions that are consequent on the changes to section 33, ensuring that total funding amounts, funding component amounts and funding periods under old framework plans can be varied.

Participants will continue to have the ability to request a reassessment of their plan, and this will be equally available under the new planning framework.

Information gathering

The Bill amends existing information gathering powers and inserts new information gathering powers for the CEO to obtain information from, or in relation to, participants in the NDIS. Broadly speaking, these information gathering powers enable the Agency to request and collect information about participants to inform decision-making about whether a participant continues to meet the access criteria, and funding for supports that will be provided in a participant's plan.

In each of the circumstances discussed below, the CEO can make one or more of the following requests:

- that the participant, or another person (such as a medical professional or nominated family member), provide information that is reasonably necessary for making the relevant decision
- that the participant does either or both of the following:
 - undergo an assessment and provide the CEO with the report of the assessment, in the approved form

- undergo, whether or not at a particular place, a medical, psychiatric, psychological or other examination, conducted by an appropriately qualified person, and provide the CEO with the report of the assessment, in the approved form.

Consideration of participant status

Section 30 of the NDIS Act currently enables the CEO to revoke a person's status as a participant at any time if satisfied they no longer meet the residence requirements, or at least one of the disability requirements, or early intervention requirements. This is a discretion which will only be exercised when the CEO has clear and conclusive evidence that the participant has ceased to meet at least one of the mandatory requirements for access to the Scheme.

At present, if a participant or their nominee does not respond to a request from the CEO to provide information for the purposes of eligibility reassessment, the NDIA must consider ongoing eligibility based on existing information, which is often out of date and no longer valid.

This is inconsistent with the powers provided to the CEO in relation to initial requests to access the Scheme (see section 26) and approving a participant's plan (see section 36, discussed further below). If participants fail to engage with the Agency when their ongoing access to the Scheme is being considered, the CEO is required to make a decision about their ongoing access on the basis of previously provided evidence which can be scant and is often outdated. This can lead to people remaining participants in the Scheme who would not be eligible if current information was available but could also result in participants who should remain eligible having their status revoked due to a lack of current evidence.

For this reason, item 30 of the Bill inserts a new process for gathering information to assist the CEO in considering whether someone continues to meet the access criteria, for the purpose of making a decision under section 30.

The Bill inserts a new section 30A into the Act, which requires the CEO to consider whether someone continues to meet the early intervention requirements if a circumstance prescribed by rules applies. This section has no impact until relevant NDIS rules have been made. This is intended to operate in relation to the early intervention pathway discussed above, ensuring that participants who accessed the Scheme by meeting the early intervention requirements will have their progress monitored at regular intervals.

Section 30A is structured in such a way that the CEO must first consider whether a person continues to meet the early intervention requirements, and if they do then no further action is required. If the person no longer meets the early intervention requirements, the CEO must then consider whether they meet the disability requirements and if they do, then the person will be transferred out of the early intervention pathway. If the person no longer meets the early intervention requirements, for example, because the early intervention supports have had the desired effect of reducing the person's need for ongoing support, or the disability requirements, the CEO must revoke their status as a participant.

New section 30A enables the CEO to request the information and reports for the purpose of making this decision.

If the CEO makes a request under section 30 or section 30A and the participant (or the other person who was requested to provide information) does not comply with the request by providing the

requested information, there may be consequences for the participant. If the request was made under section 30, then the CEO *may* revoke the participant's status as a participant if the relevant person has not provided the requested information within 90 days of the request being made. This is consistent with the discretionary nature of section 30.

If the request was made under section 30A and the relevant person does not provide the requested information within 90 days of the request, the CEO *must* revoke the participant's status. This is consistent with the mandatory nature of section 30A.

A decision to revoke the participant's status as a result of requested information not being provided is a reviewable decision – see item 100 which inserts these decisions into the list of reviewable decisions in the table to subsection 99(1).

Importantly, under both sections, the CEO *must not* revoke the participant's status if satisfied it was reasonable for the relevant person not to have complied with the CEO's request during the required timeframe. This ensures flexibility where a participant is unable to provide information due to their personal circumstances, for example because they are in hospital or because their disability has impacted on their ability to obtain the evidence requested within the appropriate timeframe, and also ensures the participant will not be penalised if another person, such as their treating medical professional, does not provide the requested information within the relevant timeframe.

Planning

Under existing section 36, the CEO can request information for the purpose of preparing a statement of participant supports or deciding whether to approve a statement of participant supports.

Once the new planning framework commences, the CEO may also need to request information for the purpose of the needs assessment process discussed above. As such, item 52 of the Bill amends existing section 36 to allow the CEO to request information for any of the following purposes:

- undertaking a needs assessment for the participant under section 32L
- preparing a statement of participant supports for a participant
- deciding whether to approve a statement of participant supports for a participant.

If the CEO has requested information or reports as part of a support needs assessment for the participant and that information or report is not provided within 28 days (or such longer period as the CEO allows), the CEO must suspend preparation of the participant's plan. The CEO has discretion to allow a longer period than 28 days if it was reasonable for the participant or other person not to have provided the information or report within 28 days. Similar to the operation of sections 30 and 30A, this allows for flexibility and avoid the participant being penalised where there is a good reason why they could not provide the information, or it was out of their control.

Suspension of the preparation of a participant's plan has no impact on the participant if a plan is still in effect. If there is an extended delay without a valid reason, it could mean that a participant will not receive a new plan until the information is provided, and therefore will not have a plan in place for a period of time. As soon as the information is provided, the preparation of the participant's plan can recommence.

Review rights

General

Consistent with general principles of administrative law, the NDIS Act provides a '3 tiered' model of decision-making. This means if a person is dissatisfied with a decision that affects their rights (the first tier in the decision-making model, known as the internal 'reviewable decision'), they can request the CEO to conduct a review of that decision (the second tier in the decision-making model, known generally as an 'internal review decision' – see section 100). If the person is dissatisfied with the internal review decision, they may seek external review by the AAT (the third, and final, tier in the decision-making model – see section 103).

The Bill makes no changes to this model. The only changes to a person's review rights are made by items 100 to 102 of the Bill, which ensure newly created decisions are capable of being reviewed by inserting them into the table to section 99. Specifically:

- item 100 omits the reference to existing section 30 and replaces it with the different types of decisions that can now be made under section 30 and new section 30A to ensure all decisions to revoke a participant's status will be reviewable,
- item 101 inserts a reference to a decision to approve a statement of participant supports under subsection 32D(2), consistent with the existing right for a participant to seek review of a decision made under subsection 33(2) to approve a statement of participant supports,
- item 102 inserts a new reference to a decision under subsection 36(3) to suspend preparation of a participant's new framework plan if they have not provided information requested by the CEO.

Item 103 also makes a minor change to section 101, which provides that if a decision is varied while a person is seeking review, the review is taken to be a review of the varied decision. This amendment includes a reference to a decision to approve a statement of participant supports under the new framework, which ensures that participants review rights under the new framework are identical to those under the existing framework by allowing them to continue with a review despite a new or varied plan coming into effect.

Other decisions impacted by the Bill, such as decision not to grant a person access to the Scheme or a decision not to vary or reassess a participant's plan, continue to be reviewable.

Needs assessment

As outlined above, under the new framework, a participant's statement of participant supports will include a reasonable and necessary budget calculated on the basis of a needs assessment.

The calculation of the budget is not a separate reviewable decision, and neither is the needs assessment. However, this does not mean a participant cannot seek review of their reasonable and necessary budget.

If a participant considers that the reasonable and necessary budget included in their statement of participant supports has not been determined correctly or is not adequate to meet their needs, they can seek a review of the CEO's decision to approve the statement of participant supports.

As part of the review, the reviewer will consider the accuracy of the needs assessment that was conducted previously and may result in a new needs assessment being conducted as part of the review.

This does not mean that the entire process will need to be conducted again, although it may be appropriate to do so. In some circumstances it may be as simple as correcting simple factual errors, while in other circumstances a participant may provide additional information as part of their request for a review.

The impact of this is that a review is no longer only about the dollar amount stated in a budget. Instead, the review is focused on ensuring that a participant's needs have been accurately assessed so that the budget meets those needs. This is a more person and needs centred approach and ensures greater consistency of budgets for participants with similar support needs.

If a replacement needs assessment report contains different information to the earlier report, this will likely result in a different reasonable and necessary budget for the participant.

A participant can seek review of all aspects of their statement of participant supports at the same time, including the needs assessment and other matters such as plan management or the length of funding periods. The Bill ensures that participants' review rights remain available in a manner that is as simple and accessible as possible, while ensuring participants can seek review of a decision if they believe their needs have not been appropriately assessed in the preparation of their plan.

NDIS rules and legislative instruments

The Bill inserts 30 new NDIS rule making powers and 6 new legislative instrument making powers. A summary of these is at **Attachment A** to this submission. All new NDIS rules and instruments will be the subject of considered and detailed consultation and input from stakeholders, and the states and territories.

Section 27

As noted above, section 27 of the NDIS Act will be repealed and replaced by the Bill. Under new section 27, NDIS rules can prescribe things that may or may not be considered when making decisions about the disability and early intervention criteria and rules are enabled about whether the person is likely to require NDIS supports for their lifetime.

These provisions also enable rules to better define the phrases "likely to benefit" and "substantially reduced functional capacity". The rules will also enable particular types of supports to be identified as likely to benefit particular groups of participants with shared experiences of disability. For example, the rules might prescribe certain supports as being likely to benefit children under the age of 9, but different supports as likely to benefit people living with particular progressive conditions.

Sunsetting

The Bill directly amends the LEOMR to provide that all legislative instruments made under the NDIS Act are exempt from sunseting.

The LEOMR prescribes instruments that are exempt from sunseting and is a central source of sunseting exemptions, facilitating whole-of-government management and ensuring that accurate sunseting information can be readily provided to Australian Government agencies, the Parliament and the general public.

It is appropriate for all legislative instruments made under the NDIS Act to be exempt from sunseting as they form part of an intergovernmental scheme, as provided in the Attorney-General's Department's [*Guide to managing sunseting of legislative instruments*](#).

The legislative instruments made under the Act operationalise the NDIS, which is an intergovernmental scheme involving the Commonwealth and all states and territories. As a result, the instruments form an integral part of an intergovernmental scheme.

All legislative instruments made under the Act are subject to formal state or territory consultation or agreement requirements in accordance with the NDIS Act and/or as required under section 17 of the *Legislation Act 2003*.

This means instruments cannot be made, amended or repealed without direct involvement of states and territories except in the case of sunseting where the instruments will be automatically repealed by operation of a Commonwealth law. This is inconsistent with the consultation and agreement requirements for NDIS rules specifically, and with the operation of the NDIS and the NDIS Act more broadly. The sunseting exemption ensures the same consultation and agreement requirements apply to an instrument being repealed as those that apply to the instrument being made, consistent with the intergovernmental nature of the NDIS.

NDIS Commission

The Bill makes several important changes to Part 3A of Chapter 4 of the Act, which deals with the regulation of NDIS providers. The Bill also makes minor changes to Part 6A of the Act, which sets out the ongoing functions and powers of the NDIS Commission/Commissioner.

The NDIS Commission is responsible for oversight of NDIS providers and has an important role in safeguarding and protecting participants. However, as identified by the NDIS Review, there are gaps in the NDIS Commission's ability to effectively regulate providers (and therefore protect participants).

The changes made by the Bill fill some of the identified gaps in the NDIS Commission's ability to protect participants. This supports a stronger focus on enforcement and compliance action by the NDIS Commissioner and staff of the NDIS Commission.

Approved quality auditors

Section 73U of the Act allows the NDIS Commissioner to approve a person or body to be an approved quality auditor. Although these auditors are not directly involved in providing supports to people with disability, they are responsible for auditing registered providers and applicants for registration against the NDIS Commission Practice Standards. Approved quality auditors also conduct cyclical quality audits during a registered NDIS providers registration period, dependent on a range of risk-informed factors. The outcome of any audit will impact on the provider's registration which in turn will directly impact people with disability. As such, it is crucial for the NDIS Commission to be able to regulate approved quality auditors.

Currently, the power to approve an approved quality auditor is broad and there are no clear limitations on circumstances in which a person should not be approved as an approved quality auditor. To assist in guiding the initial and ongoing approval of approved quality auditors, the Bill inserts a new rule-

making power (subsection 73U(9A)) that allows NDIS rules to be made prescribing requirements which must be complied with, criteria that must be applied, or matters to which the NDIS Commissioner may, must or must not have regard to in deciding the following:

- whether to give, or refuse to give, an approval as an approved quality auditor,
- whether or not to make an approval as an approved quality auditor subject to conditions,
- whether or not to vary or revoke an approval as an approved quality auditor.

The Bill inserts another new rule-making power, new subsection 73U(4A), which allows for NDIS rules to be made specifying conditions that apply to the approval of all approved quality auditors. This is similar to existing subsection 73U(5), which allows the NDIS Commissioner to make an auditor's approval subject to certain conditions, but provides a more transparent and consistent mechanism for regulating approved quality auditors by ensuring all approved quality auditors are subject to the same conditions.

One particular area of concern that has been identified is that the current legislative framework does not prevent an approved quality auditor from hiring a person who is subject to a banning order made by the NDIS Commission. This is a clear gap, as it would allow individuals that have been assessed as unsuitable to be involved in the provision of support to people with disability, to nonetheless be involved indirectly through an approved quality auditor. This is not an acceptable scenario. On this basis, proposed new subsection 73U(5) makes it clear that conditions may be placed on an approved quality auditor that require them not to employ or engage a person against whom a banning order has been made, or to have such a person as part of their key personnel.

In a related change, to protect participants by ensuring people who are subject to a banning order cannot indirectly participate in the NDIS, section 73ZN (which deals with making of banning orders) is amended to require the NDIS Commissioner to notify approved quality auditors as soon as possible if a member of their staff or key personnel has a banning order made against them. This will ensure approved quality auditors can comply with any conditions relating to employing or engaging a person who is subject to a banning order.

Delegation of Regulatory Powers

One of the key functions of the NDIS Commission is to secure compliance with the NDIS Act through effective regulatory action, including under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) Section 202B of the Act currently allows the NDIS Commissioner to delegate the NDIS Commission's powers and functions under the Regulatory Powers Act to SES-level employees; however, this means there are only a limited number of staff who are able to exercise these powers and functions many of which are straight forward and low risk such as issuing compliance notices and infringement notices. To remove the inefficiency of having SES-level employees exercise these more straight-forward and low risk powers and functions, the Bill amends section 202B to allow the NDIS Commissioner to delegate powers and functions relating to infringement notices to Executive Level 2 staff, and powers and functions relating to compliance notices to Executive Level 1 and 2 staff. Delegating these certain powers and functions to these levels also allows for the upscaling of compliance and enforcement activities by the NDIS Commission, allowing the NDIS Commission to take timely compliance and enforcement action against NDIS providers who fail to comply with the requirements of the Act.

In delegating these powers and functions relating to compliance and infringement notices, the Commissioner must consider whether the position is sufficiently senior, or otherwise the employee must have appropriate qualifications or expertise.

All the remaining compliance and enforcement powers of the NDIS Commission under the Regulatory Powers Act continue to be exercisable by SES level employees only, in recognition of the seriousness of the consequences these actions have.

Attachment A

Table of NDIS rule and legislative instrument making powers.

Topic	Rule amendment	Bill reference	Category of NDIS Rules
NDIS supports	New rule-making power to provide that specified supports are or are not NDIS supports for participants or prospective participants generally or specified classes of participants or prospective participants (ie what the NDIS will not pay for).	New section 10	A (requires unanimous state/territory agreement)
Access settings	Replacement of rule-making power with expanded scope and flexibility to make rules for the purposes of disability requirements or early intervention requirements for Scheme access including methods or criteria to be applied and circumstances in which a matter relevant to disability requirements or early intervention requirements is taken to exist or not exist concerning a prospective participant.	New section 27	A
Access settings	New rule-making power to expand scope to permit rules to be made for circumstances in which supports are taken to have been acquired or provided after the person ceases to be a participant	New subsection 29(3)	A
Access settings	A new rule-making power to prescribe circumstances in which the CEO must consider whether a participant continues to meet the early intervention requirements or the disability requirements. Rules may also prescribe requirements, criteria or certain matters that are relevant to the CEO's decision. Power to specify details and information that must be included in the notice of decision to participants under section 30A	New subsection 30A (1) and (2) and New subsection 30A (9)	A D (requires consultation with states and territories)
Plan and budget setting – general	New rule-making powers relating to the timeframes in which the CEO must begin the preparation of subsequent plans.	New paragraph 32(4)(b)	C (requires majority agreement of states/territories)

			and the Commonwealth)
Plan and budget setting – new framework plans	<p>New power to make a ministerial determination to determine classes of participants that are to receive a new framework plan and for each class, to determine the period within which the CEO must give notice to participants in that class.</p> <p>New rule-making power to specify details that must be included in a notice that a participant is to have a new framework plan.</p>	<p>New subsection 32B(1)</p> <p>New subsection 32B(3)</p>	<p>Disallowable Legislative instrument</p> <p>D</p>
Plan and budget setting – new framework plans	New power to make a ministerial determination to set a longer or shorter transition period than 5 years.	New subsection 32C(2)	Disallowable Legislative instrument
Plan and budget setting – new framework plans	<p>New rule-making powers relating to:</p> <ul style="list-style-type: none"> the timeframes in which the CEO must make a decision about approving a participant’s statement of supports in a new framework plan additional matters CEO must be satisfied of in deciding to approve general supports in a statement of participant supports matters the CEO must be satisfied of in approving a statement of participant supports. additional matters that may be included in a participant’s plan 	<p>New paragraph 32D(4)(a)</p> <p>New subparagraph 32D(6)(b)(ii)</p> <p>New paragraph 32D(6)(f)</p> <p>New subsection 32D(8)</p>	<p>C</p> <p>A</p> <p>A</p> <p>A</p>
Plan and budget setting – new framework plans	New rule-making power to prescribe what must be a stated support for participants generally or specified classes of participants	New subsection 32E(4)	A
Plan and budget setting – new framework plans	New rule-making power to prescribe circumstances in which the CEO may quarantine a portion of a flexible budget for a particular purpose	New paragraph 32F(7)(c)	A

Plan and budget setting – new framework plans	New rule-making power to prescribe stated supports that are not subject to a funding period (such as home modifications)	New subsection 32G(4)	A
Plan and budget setting – new framework plans	New rule-making power to prescribe requirements relating to the provision or acquisition of supports (such as obtaining a quote)	New paragraph 32H(2)(d)	A
Plan and budget setting – new framework plans	New rule-making power to prescribe requirements, methods, criteria or matters to be considered by the CEO in making decisions relating to certain parts of a participant’s plan and/or reasonable and necessary budget	New section 32J	A
Plan and budget setting – new framework plans	New ministerial determination-making power to determine methods for working out total funding amounts for flexible funding and stated supports	New subsection 32K(2)	Disallowable Legislative instrument
Plan and budget setting – new framework plans	New rule-making power to prescribe matters that the CEO must be satisfied of in deciding whether a replacement needs assessment should be undertaken.	New paragraph 32L(7)(b)	A
Plan and budget setting – new framework plans	New ministerial determination-making power to determine assessment tools to be used in undertaking a needs assessment, requirements for undertaking an assessment, information that must be included in a needs assessment report and requirements that a needs assessment report must meet. These assessment tools will be the basis for determining the participant’s needs and therefore their reasonable and necessary budget.	New subsection 32L(8)	Disallowable Legislative instrument
Plan and budget setting – old framework plans	New ministerial determination-making power to prescribe how total funding amounts and total component amounts will be worked out and how funding periods will be set. The determination may also prescribe requirements, methods or criteria and matters to be considered by the CEO in making a decision on funding amounts and/or funding periods.	New subsection 33(2E)	Disallowable Legislative instrument

Plan and budget setting - general	New rule-making power to specify circumstances in which supports are taken to be, nor not taken to be provided or acquired during a period of suspension of a statement of participant supports.	New subsection 41(3)	A
Plan management	New rule-making power to prescribe circumstances in which a new framework plan must be managed by the Agency or other relevant person or entity.	Paragraph 43(2C)(c)	A
	New rule-making power to prescribe requirements, methods or criteria and matters that are relevant to the CEO making a plan management decision for new framework plans	Subsection 43(2D)	A
Plan management	New rule-making power to prescribe circumstances in which a person or entity managing funding for supports under a plan would present an unreasonable risk to the participant.	New subsection 44(4)	A
	New rule-making power prescribing criteria to apply and matters to consider in considering the risk of non-compliance with section 46 (acquittal of NDIS amounts)	New subsection 44(5)	A
Payment of NDIS amounts	New rule-making power to prescribe what constitutes exceptional circumstances for the purposes of making a payment that would be in excess of a total amount of funding allocated under a participant's old or new framework plan	New subsection 45(6)	D
Plan variations	New rule-making power prescribing circumstances in which the CEO may vary a participant's reasonable and necessary budget	New subparagraph 47A(1AB)(j)(iii)	A
Plan variations	New rule-making power to prescribe matters that the CEO must be satisfied of when varying the statement of participant supports in a new framework plan	New paragraph 47A(2)(f)	A
Plan management – children	New rule-making power to prescribe circumstances in which a person or entity managing funding for supports under a child's plan would present an unreasonable risk to the child.	New paragraph 74(3C)(c)	A

	<p>Existing rule-making power to prescribe matters that must not be managed by a person (existing power replicated in replaced 74(4)(b))</p> <p>Replacement of existing rule-making power with expanded scope and flexibility to make rules for the purposes of making decisions about the management of a child’s plan</p>	<p>Replacement subparagraph 74(4)(b)(ii)</p> <p>Replacement subsection 74(6)</p>	<p>A</p> <p>A</p>
Quality and Safeguards	<p>New rule-making power to prescribe conditions relating to the appointment of approved quality auditors.</p> <p>New rule-making power to prescribe requirements with which the Commissioner must comply, criteria or matters the Commissioner must or must not regard in deciding to appoint quality auditor</p>	<p>New subsection 73U(4A)</p> <p>New subsection 73U(9A)</p>	<p>D</p> <p>D</p>
Transitional rules	<p>New ministerial transitional rule-making to permit Minister to make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions)</p>	<p>Item 138(1)</p>	<p>Disallowable Legislative Instrument (standard for transitional rules)</p>



Australian Government
Department of Social Services



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

**Supplementary joint submission to the Senate Community
Affairs Legislation Committee Inquiry**

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Abbreviations and acronyms used in this submission

- **APTOS** means the Applied Principles and Tables of Supports agreed by First Ministers in 2015
- **Bill** means the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024
- **CEO** means the Chief Executive Officer of the National Disability Insurance Agency
- **Committee** means Senate Community Affairs Legislation Committee
- **CRPD** means the *Convention on the Rights of People with Disability*
- **Department** means the Department of Social Services
- **Legislation Act** means the *Legislation Act 2003*
- **MYEFO** Mid-Year Economic and Fiscal Outlook
- **Act** means the *National Disability Insurance Scheme Act 2013*
- **NDIS Commission** means the National Disability Insurance Scheme Quality and Safeguards Commission
- **NDIS Commissioner** means the National Disability Insurance Scheme Quality and Safeguards Commissioner
- **NDIA** means the National Disability Insurance Agency
- **NDIS** means the National Disability Insurance Scheme
- **NDIS Review** means the 2023 Independent Review into the National Disability Insurance Scheme
- **NDIS rules** means rules made under section 209 of the *National Disability Insurance Scheme Act 2013*
- **Scheme** means the National Disability Insurance Scheme

Introduction

On 17 May 2024 a joint submission was provided to the Committee by the Department, the NDIA and the NDIS Commission. In the covering letter to the Committee, the Department offered to provide a supplementary submission to provide further information to assist the Committee's Inquiry, if required. This offer was accepted by the Committee when the Department, the NDIA and the NDIS Commission appeared before the Committee on 22 May 2024.

On 5 June 2024 the Government moved a number of parliamentary amendments to the Bill in the House of Representatives which were all agreed. Details of some of these amendments are set out in relevant sections below. A brief explanation of the other amendments not dealt with elsewhere in this submission is included at the end. Many of these amendments respond to concerns raised through submissions and evidence provided to the Committee. To assist the Committee, copies of the supplementary explanatory memoranda will also be provided.

In addition the Government supported a parliamentary amendment proposed by Dr Monique Ryan MP, requiring an independent review of the amendments made by the Bill to be conducted 5 years after the Bill receives the Royal Assent.

Co-Design and Consultation

Comments and concerns raised in submissions and Committee hearings indicate a high level of interest in consultation and co-design processes, seeking assurances that delegated legislation is developed in genuine consultation with the community. Further consultation will be undertaken with the disability community on transitional rules and arrangements.

The Bill enables a broad framework for reform. The Government has indicated that it is committed to undertaking genuine and meaningful consultation with the disability community, service providers, and state and territory governments on the detail of reforms.

This commitment is evidenced by the range of consultation processes that the Australian Government and Commonwealth officials have conducted to seek feedback from the disability community since the NDIS Review was finalised and on introduction of the Bill.

This has included through 9 town hall meetings on the Review's findings and recommendations which were conducted by members of the Review Panel and Minister Shorten, involving around 5,200 participants in person and online.

It has also included 8 events hosted by the Minister across Australia to discuss the Bill following its introduction – as well as three DSS information webinars on the legislation – involving a combined total of over 4,900 community members who joined in person or online.

To take specific reform elements forward, the NDIA, Disability Representative and Carer Organisations and the NDIS Independent Advisory Council have agreed to prioritise co-design consultation and engagement activities on the following topics:

- Participant pathway experience
- Assessments and budgeting

- Navigator Functions
- Participant Services
- Psychosocial Disability
- Home and Living
- Integrity and Fraud Prevention
- NDIA Workforce Capability and Culture
- Participant Safety, and
- Supporting Children and Young People in the NDIS.

A range of activities will be undertaken to include participants, families, carers, supporters, providers and the public in co-design, consultation and engagement. These activities include:

- involving people from the disability community in projects to help define problems, find solutions, refine and implement them
- co-design workshops on specific issues, processes or products
- focus groups, interviews and engagement with participants, families and carers
- 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, and
- targeted approaches to hear from under-represented participants and groups.

The Department will work with the NDIA and Commission to use the insights from this co-design to inform the further development of policy around NDIS rules and other legislative instruments, and to lead broader engagement on the detail of subordinate legislation together with states and territories.

The Bill provides the architecture to enable the time to carefully co-design rules to commence alongside Foundational Supports. These rules will need to be implemented with agreement from states and territories – which means that key changes can be ‘switched on’ as additional Foundational Supports are available.

Embedding co-design in legislation

Co-design is a legislative requirement under the Act. Subsection 4(9A), which is one of the general principles guiding all actions under the Act, provides that:

People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.

Subsection 209(3) of the Act requires that the Minister must have regard to the Objects and Principles of the Act when making NDIS rules.

To make the requirement to undertake co-design more explicit in relation to the new legislative instruments that may be made under sections 32K and 32L (which are inserted by item 36 of the Bill), an amendment was moved by the Government that will specifically require the Minister to have regard

to subsection 4(9A) of the Act when making these instruments. This amendment was considered and passed by the House of Representatives on 5 June 2024.

In addition, subsection 17(1) of the Legislation Act provides that before a legislative instrument is made, the rule-maker must be satisfied that there has appropriate and reasonably practicable consultation has been undertaken.

Subsection 17(2) of the Legislation Act provides that in determining whether any consultation that was undertaken was appropriate, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

The combination of the above requirements under the Act and the Legislation Act together impose an additional requirement on the Minister to consult with the disability community when making any legislative instruments under the Act.

In addition, paragraph 15J(2)(d) of the Legislation Act provides that an explanatory statement to a legislative instrument must contain a description of the nature of consultation that has been undertaken before the instrument was made.

A statement of the nature of consultation undertaken is required under the Legislation Act, and so does not need to be inserted into the Act as an additional requirement.

Including an additional requirement to consult with specified groups or entities on certain instruments could cause significant uncertainty for the operation of the NDIS as it would give rise to a risk that the instrument could be found invalid if challenged.

Definition of NDIS Support

One of the key changes made by the Bill is to insert a new definition of 'NDIS support' into the Act. This concept appears in numerous places throughout the Bill and will be central to the operation of the future of the NDIS in a number of ways.

With the move away from the current planning approach, which includes an assessment of individual 'reasonable and necessary supports' (that must by their nature be supports of a particular kind that are appropriately funded or provided by the NDIS), it is necessary to include a legislative definition of the supports capable of being funded by the NDIS. The definition of NDIS support will guide participants on how they may spend their flexible budget.

The definition will provide greater clarity around the supports that can be funded by the NDIS and those that cannot. This approach is consistent with the original intention of the Scheme to provide supports to people with significant and permanent disability and people who are in need of early intervention supports. It is also consistent with the recommendations of the NDIS Review in that it focuses on the needs of a participant, rather than a diagnosis.

For the sake of consistency and simplicity across the entirety of the Act, the definition has been adopted in key areas, particularly where references to supports being appropriately funded by the NDIS already exist.

Since introduction, however, the Government has listened to concerns raised about new section 10. Particular concerns were raised about a lack of clarity in the drafting of new section 10, requiring participants to undertake a complex analysis of whether a support may be considered an NDIS support for them. Concerns were also raised that the proposed section only listed certain articles of the CRPD.

To address this, the Government moved parliamentary amendments to replace new section 10 with a revised definition of 'NDIS support'. These amendments were agreed by the House of Representatives on 5 June 2024.

These amendments change the structure of section 10 so that the Minister must assess whether certain supports may rely on any of Australia's obligations under of the CRPD (or the sickness benefits power) when making rules under proposed subsection 10(1). The revised provision also takes the onus off the participant to identify relevant obligations under the CRPD, and as a result the specific articles of the CRPD no longer need to be specifically referenced.

What kinds of supports will be NDIS supports

Evidence was provided to the Committee that demonstrates a significant level of uncertainty and concern about what kinds of supports will be NDIS supports and what will not. NDIS Supports are goods and services required to support a participant's disability needs, which are appropriately funded by the NDIS.

Witnesses also expressed concerns that the definition of NDIS support would restrict where they could obtain certain supports from. The key test is not where items are purchased from, but rather whether the item is needed as a result of a participant's disability. This is a key advantage of the flexible budget model in that participants will have more flexibility around how they address their own needs and where they obtain their NDIS supports.

Intergovernmental agreements outline the supports that are appropriately provided by the NDIS and those that are more appropriately funded by other programs and service systems. For example, the NDIS is not responsible for supports that may be provided through the Medicare or other Commonwealth programs, nor is it responsible for supports that may be provided through State and Territory health care systems. This requirement already exists in the Act and is relevant to both access and the existing planning framework. For example, current paragraph 34(1)(f) of the Act provides that reasonable and necessary supports must be most appropriately funded or provided through the NDIS.

Transitional approach

The Government has also heard concerns about the use of the APTOS as an interim approach to defining NDIS support. In particular, concerns have been expressed about APTOS being out of date and not sufficiently clear to provide a comprehensive definition. To address this, parliamentary amendments have been agreed that amend item 124 of Schedule 1 to the Bill to provide for a transitional rule that will be in place only until new Category A rules under section 10 can be agreed. These rules will set out the kinds of supports that may be NDIS supports and specify kinds of supports that are not NDIS supports.

Item 124 is a transitional provision to be in effect only until the new NDIS rules can be made under proposed section 10. It is necessary to have a transitional provision as section 10 cannot operate without rules being in place and it will be critical to the operation of the Act once the Bill is enacted.

Needs assessment

Central to the new budget-setting planning framework is a needs assessment. Action 3.4 of the NDIS Review was that:

The NDIS should introduce a new needs assessment process to more consistently determine the level of need for each participant and set budgets on this basis.

The benefit of using a legislative instrument to determine needs assessments is that it will provide transparency, clarity and certainty to participants and the disability community. Every participant will know how they will be assessed and the process used for that assessment.

The needs assessment process will be transparent, trauma informed, culturally appropriate and will involve different assessment tools for different participants cohorts and areas of support need.

Development of needs assessment tool

The needs assessment tool (or tools) will be developed through an extensive consultation and co-design process, involving deep engagement with the disability community and relevant experts.

The NDIA will use an iterative process of design and testing with people with disability, as well as health and allied health professionals, and people with technical expertise in the development of needs assessments. The process will be transparent and involve extensive testing of existing support needs assessments with the groups and disability types for whom they were validated to inform the design of any new needs assessment.

The training and qualifications for individuals carrying out needs assessments will be determined through the needs assessment development process. The individuals undertaking the needs assessment will be trained in the use of the instrument, with some assessment tools requiring specific qualifications for use. Training will also ensure that individuals are able to work with people with disability in a culturally informed way that is respectful of their dignity and individual autonomy.

Access to assessment reports

The Committee received a significant amount of evidence, both through submissions and directly from witnesses, that needs assessment reports must be provided to participants. All participants will be provided with a copy of their needs assessment report as part of the planning process. They will have the opportunity to review it and provide feedback or correct any errors that may be present.

Subsection 32D(2) of the Bill requires a participant's plan to be prepared with the participant and approved by the CEO. A participant must be provided with a copy of the needs assessment report in order to be involved in the preparation of their plan.

Further, the needs assessment report is personal information about a participant for the purposes of the *Privacy Act 1988*. This means that the NDIA would be required to provide the participant with a copy of their needs assessment report (see Australian Privacy Principle 12.1).

However, the Government has heard the concerns expressed to the Committee, and to put this issue beyond doubt, moved parliamentary amendments specifying that a needs assessment report must be given to a participant. These amendments were agreed by the House of Representatives on 5 June 2024.

Parliamentary amendments were also moved by the Government and agreed by the House of Representatives on 5 June 2024 that clarify that category A NDIS rules can determine circumstances in which another needs assessment must be undertaken and matters that the CEO must consider when deciding whether another needs assessment should occur.

Merits Review

A number of witnesses and submissions have raised concerns that the needs assessment is not subject to merits review and there have been several recommendations that it be an administrative decision that is separately subject to merits review.

The needs assessment itself is not a decision under the Act, but rather a necessary input and preliminary step before a plan can be approved. The reviewable decision in the planning context will continue to be the decision to approve a statement of participant supports.

When seeking a review of statement of participant supports, the participant can seek review of all aspects of the statement of participant supports, which includes a participant's reasonable and necessary budget. As the needs assessment is a necessary input for the reasonable and necessary budget, a participant can ask for a replacement needs assessment as part of their review request. The CEO can also require a replacement needs assessment.

This does not mean that the entire assessment needs to be reconducted (although a participant could request an entirely new assessment). It could be as simple a change to certain aspects of the needs assessment report that had an impact on the participant's reasonable and necessary budget.

There would be several significant challenges with making the needs assessment a separately reviewable decision.

Firstly, this would be inconsistent with the operation of the remainder of the Act. If the support needs assessment were a separate reviewable decision, there would be circumstances in which participants do not have an approved plan while they are awaiting the outcome of the review of their needs assessment. This would mean participants do not have access to support through the NDIS for long periods while they go through the merits review process.

Additionally, the decision to approve the statement of participant supports contains a number of determinations within it (for example for new framework plans, the reasonable and necessary budget, the management of funding for supports, and the circumstances in which the plan will be reassessed). The benefit of retaining the one reviewable decision is that participants are able to have all of those matters considered through one review that encompasses all components of their statement of participant supports. If each component of the statement of participant supports as well as the needs assessment was reviewable, this could lead to multiple separate reviewable decisions to prepare a participant's plan. This would place a burden on participants to identify what decisions they are seeking to have reviewed and would lead to unacceptable delays to implement participant plans, ultimately frustrating the planning process.

The Administrative Appeals Tribunal will also be able to require that a replacement needs assessment is undertaken. This does not need to be stated specifically in the Act as it is already allowed under section 43(1) of the *Administrative Appeals Tribunal Act 1975*, which provides that the Tribunal may

exercise all of the powers and discretions that are conferred on the person who made the original decision. This means that anything that the original decision maker can do, the Tribunal can also do.

To address concerns raised in submissions and evidence to the Committee, the Government moved amendments in the House of Representatives to insert a legislative note making it clear that decision makers on internal and external review can arrange for a replacement needs assessment. This amendment was agreed by the House of Representatives on 5 June 2024.

Plan management

A number of witnesses and submissions have addressed the changes to the Act in relation to the choice for the participant in relation to plan management and circumstances in which persons must not manage funding. The Act provides that if a participant makes a plan management request, the statement of participant supports must give effect to that request unless certain circumstances exist.

The primary change implemented by the Bill is that the CEO may decide not to give effect to a plan management request if the CEO is satisfied that Section 46 (which requires funding under the NDIS to be spend in accordance with a plan and certain aspects of the Act) has not been complied with in relation to a previous or current plan. The CEO may also change a plan management type if the CEO is satisfied that section 46 would be unlikely to be complied with if the plan management request were given effect.

Category A NDIS rules will guide the CEO's decision-making when considering plan management requests. For example, a plan management type would only be changed if there is intentional or recurring non-compliance with section 46. The approach taken will be a proportionate and consider whether a risk of harm to a participant can be mitigated by capacity building supports or safeguards.

Where a participant is not complying with section 46 of the Act, the NDIA will discuss this with the participant before making any decisions. It may be that a participant simply requires support with plan implementation. Alternatively, the development of a new risk basis model will mean the CEO could consider whether additional safeguards can be placed into the participant's plan to assist them to manage their budget, such as only self-managing a smaller portion of the funding while building the participant's capacity to manage more of their plan.

In circumstances where a participant is at risk due to not spending in accordance with their plan, the CEO will consider whether it is appropriate to change the plan management arrangement having regard to the individual circumstances of the participant. This will involve consideration of the participant's past spending habits, any previous plan overspends and vulnerability to financial exploitation.

The approach taken will be consistent with current operational guidance focusing on participant safeguarding, self-management and supported decision making. The NDIA has a number of public policies and procedures that set out its existing approach, which can be found on its website at <https://www.ndis.gov.au>.

The amendments will support participants to spend in accordance with their plans. This ensures that participants receive the supports they need and funding under the NDIS is used for its intended purpose, which will in turn strengthen the integrity of the NDIS.

Foundational Supports

The NDIS Review set out a 5-year implementation plan for changes to the NDIS and improvements to the broader ecosystem. In December 2023, National Cabinet agreed to design additional Foundational Supports. These will be jointly designed, funded and commissioned by the Commonwealth and the states.

The Review found there are many people with disability who require disability-specific supports, but do not require the level of specialist, individualised support provided as part of the NDIS. The Panel recommended the development and implementation of Foundational Supports in particular areas to help address gaps in the current disability support system, while also reinforcing that this does not remove the need for mainstream settings to be inclusive and accessible.

It will be important to ensure there is careful sequencing of reforms to the Scheme to align with development of Foundational Supports. The Government, Department and the NDIA are working with states and territories and the disability community to ensure that the commencement of new access and planning arrangements will align with the development and roll out of Foundational Supports.

Earlier this year, the Government announced \$11.6 million to support the development of a Foundational Supports Strategy. There will be a phased approach to designing and delivering foundational supports. Services are expected to be commissioned from mid-2025, and progressively scaled to full roll out from mid-2027. Any related NDIS rules will not be implemented until appropriate supports are in place.

State and Territory Engagement

On 6 December 2023, the National Cabinet agreed to introduce legislation and other changes to the NDIS in the first half of 2024 to improve the experience of participants and restore the original intent of the Scheme to support people with permanent and significant disability.

As outlined above, National Cabinet also committed to do this within a broader ecosystem of supports, with agreement to jointly design and commission additional Foundational Supports for people with disability.

The Minister for the NDIS, the Minister for Social Services, the Department, NDIA and Commission continue to meet with our state and territory counterparts regularly on strategic reform priorities, including NDIS legislative reform arising out of the NDIS Review. Since late last year, States and territories have been engaged on the legislation through the Disability Reform Ministerial Council, as well as extensive and regular work by senior officials, which has significantly increased in tempo since the release of the Review's report, and prior to the introduction of the Bill.

Key features of the Bill, particularly the new budget-based planning framework, will not take effect until new and amended subordinate legislation (including NDIS rules requiring the unanimous agreement of all jurisdictions) are made following a process of co-design and engagement with the disability community. This will happen while other key reforms, like the development and implementation of Foundational Supports, progress.

Information gathering

Section 30 – discretionary revocation

Section 30 of the Act currently enables the CEO to revoke a person's status as a participant in the NDIS if satisfied they no longer meet one of the access criteria. This is a discretionary decision and will generally be considered if the CEO becomes aware of evidence suggesting a participant no longer meets one of the requirements. For example, a participant may provide evidence as part of their plan reassessment which suggests their impairment no longer results in substantially reduced functional capacity, which would mean they no longer meet the disability criteria.

Currently, there are no information gathering powers in the Act to assist the CEO in obtaining evidence relevant to their consideration of whether a participant continues to meet the access criteria for the purpose of section 30 of the Act. It is important that the CEO has access to up to date information and assessments in relation to a participant when undertaking this consideration, to ensure the correct decision is made about whether a person remains a participant in the NDIS.

At present, if the CEO is considering whether to revoke a participant's status under section 30, the participant will be provided with an opportunity to submit further information and evidence as a matter of procedural fairness. However, there is no obligation to provide such information and the CEO does not have any basis to compel information as part of this process.

In practice, many participants do not respond to requests and there is no obligation on them to do so. When this occurs, the NDIA will proceed to make a decision based on the information on file which may be out of date or of low quality. This can result in a participant's status being revoked due to a lack of evidence that they meet the relevant criteria.

If a person is no longer a participant in the Scheme they will no longer have access to supports funded by the NDIS, so it is critically important for both participants and delegates that this decision is robust and well informed.

The Bill amends section 30 to provide the CEO with a legislative ability to request specific information or an assessment of a participant where they consider this is reasonably necessary for the purpose of making a decision about the participant's ongoing access to the Scheme. A request may be made for the participant to provide information, or another person such as a treating medical practitioner. If a request is made under this new provision, the information must be provided in an approved form within 90 days (or longer as required by the participant/other person, for example where there is a longer wait time to access a health professional to obtain required information). If the participant or other person does not provide the information within the relevant timeframe, the CEO may proceed to revoke the participant's status as a participant.

Whether to revoke the participant's status remains a discretion of the CEO, consistent with the overall discretionary nature of section 30. However, if the participant or relevant person has not complied with a request for information, the CEO must not revoke the participant's status as a result of this failure if it was reasonable for the participant or other person not to have complied with the request for information. This ensures that a participant will not have their status as a participant revoked if there was a good reason why the information was unable to be provided within the required timeframe.

If the evidence establishes that the participant no longer meets one of the access criteria or requested information is not provided within the required timeframe without a reasonable basis, leading to the participant's status as a participant being revoked, consistent with current practice the NDIA will clearly explain this decision and the reasons why it was made in the preferred communication method of the participant (with phone and letter contact as the minimum). This will remain a reviewable decision, as it currently is.

The amendments to section 30 do not change the overall ability for the CEO to revoke a participant's status and in practical terms participants will continue to have the ability to voluntarily submit any information they would like the CEO to consider as part of this process. The amendments simply ensure the CEO has a legislative ability to request further information if there is not sufficient evidence to make a decision, which is ultimately in the best interests of the participant as it will ensure that decisions are made on the basis of current and adequate evidence.

Section 30A – mandatory revocation

The Bill inserts new section 30A, which will require to the CEO to consider a participant's status in certain circumstances and revoke their access to the Scheme if they no longer meet the disability or early intervention requirements. This provision operates in a mandatory way, which is different to the discretionary nature of section 30.

New section 30A includes similar information gathering powers to those inserted in section 30, but the CEO will be required to revoke a participant's status if information is not provided within the required timeframe and there is no reasonable explanation for why this did not occur. This mandatory revocation as a result of failure to provide information operates differently to the process under section 30, consistent with the overall mandatory nature of section 30A compared to the discretionary nature of section 30.

Section 30A will not operate immediately upon the Bill's commencement and will only become operational once Category A NDIS rules are made specifying the circumstances in which it will apply. It is intended that this mandatory revocation provision will operate in limited circumstances, and only participants who refuse to engage with the NDIA as part of the decision-making process will have their status as a participant revoked due to a failure to provide information. As with section 30, there will be no consequences for the participant if there was a reasonable explanation for the information not being provided within the required timeframe.

New limitations on the CEO's exercise of power

One of the requests for information that the CEO may make under sections 30 and 30A is that the participant undergo an assessment or a medical, psychiatric, psychological or other examination and provide a report to the CEO. There is already a limitation in proposed subsections 30(2) and 30A(4) that assessments and reports can only be requested for the purposes of considering whether to revoke a person's status as a participant in the NDIS under the relevant section

The Government has considered submissions and evidence given to the Committee during the course of its inquiry. To address concerns about the requirement for individuals to undergo assessments or examinations, parliamentary amendments were moved and agreed in the House of Representative on 5 June 2024. The amendments impose a further limitation in that the CEO can only make such requests if there is no other reasonable alternative way of obtaining the information. This limitation

will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide further information.

These limitations together provide a safeguard to ensure that participants will only be asked to undertake assessments and examinations where it is absolutely necessary for the CEO to make a decision about their ongoing access to the NDIS.

Further, subsections 30(6) and 30A(7) provide that the CEO must not revoke a person's status as a participant in the NDIS if they are satisfied that it was reasonable for the participant, or another person, not to provide the requested information within the relevant timeframe. If appropriate, it is also open to the CEO to notify a participant that they no longer require the information that has been requested.

Financial sustainability

Based on data up to December 2023, it is projected that without further action, NDIS payments would increase by \$14.4 billion over four years from 1 July 2024, compared with 2023-24 MYEFO. The NDIS reforms being undertaken by the Government are expected to moderate this additional growth, and ensure the NDIS remains on track to achieve the NDIS Sustainability Framework growth target agreed by National Cabinet from 1 July 2026. The introduction of the Bill provides the scaffolding for these reforms, including the NDIS Review recommendations and clarifying legislation and rules to return the Scheme to its original intent.

Use of term 'classes'

Concerns have been expressed about the use of the term 'class' in the Bill. The use of this term is a legislative drafting technique. It is used in the Bill to ensure the measures appropriately encompass the diverse needs of participants and their supports.

In most cases when referring to participants or supports in the Bill, there is also reference to classes of participants or supports. A class can be one person or many people who share one or more characteristics. Each participant is different and may fall into many 'classes', for example, due to their age or location as well as the kinds of supports and services that they may receive. Not each participant in a 'class' will need the same things.

For example, a class of participants could be all participants of a certain age who would benefit from early intervention supports or participants who live in a certain regional area who require additional assistance to access supports. A class of supports could be any supports provided by Occupational Therapists. A class of supports could also be 'assistive technology' or 'core supports'. It can mean any range of things and is an important mechanism to ensure that the legislation addresses the needs of all of the many different kinds of participants in the NDIS.



Australian Government
Department of Social Services



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

**Further supplementary joint submission to the Senate
Community Affairs Legislation Committee Inquiry**

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Abbreviations and acronyms used in this submission

- **Act** means the *National Disability Insurance Scheme Act 2013*
- **Bill** means the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024
- **CEO** means the Chief Executive Officer of the National Disability Insurance Agency
- **Committee** means the Senate Community Affairs Legislation Committee
- **Department** means the Department of Social Services
- **First Ministers** includes the Prime Minister, Premiers of each State and Chief Ministers of each Territory
- **NDIA** means the National Disability Insurance Agency
- **NDIS** means the National Disability Insurance Scheme
- **NDIS Commission** means the National Disability Insurance Scheme Quality and Safeguards Commission
- **NDIS Review** means the 2023 Independent Review into the National Disability Insurance Scheme
- **NDIS rules** means rules made under section 209 of the *National Disability Insurance Scheme Act 2013*
- **Scheme** means National Disability Insurance Scheme
- **Senate amendments** mean proposed parliamentary amendments to be moved by the Government in the senate, circulated on 27 June 2024

Introduction

On 17 May 2024 a joint submission was provided to the Committee by the Department, the NDIA and the NDIS Commission. That submission explained the operation of the Bill generally, with a focus on the more complex measures that are given effect to through these reforms.

On 5 June 2024, a supplementary joint submission was provided to the Committee by the Department and the NDIA. That submission provided further information to respond to concerns raised in submissions to the Committee and in evidence provided to the Committee. It also explained the operation of parliamentary amendments that were agreed by the House of Representatives on 5 June 2024.

On 27 June 2024, the Bill was referred back to the Committee for further inquiry, including examining any circulated amendments to the Bill and the positions of state and territory governments. This submission provides further information about those matters.

New framework planning process

The proposed Senate amendments respond to concerns that the Bill does not allow for a 'whole-of-person' needs assessment. The amendments clarify that the needs assessment process should consider a participant's needs holistically, taking into consideration a variety of factors that may impact a participant's need for support under the NDIS.

The proposed Senate amendments do not change the intended operation of the Bill. Instead, they provide clarification to ensure that the measures will be interpreted and applied in accordance with its intent.

The intent of section 32L has always been that a needs assessment will assess a participant's needs holistically, consistent with recommendations of the NDIS Review (actions 3.3, 3.4 and 3.5). Proposed amendments to section 32L further reinforce this.

Funding for supports under the NDIS will generally be provided to address needs arising from the impairments for which a participant meets the disability requirements or the early intervention requirements of the Act. However, these needs may be impacted by a range of other factors, including environmental factors such as a participant's geographic location, the availability of informal supports and the impact of impairments which do not meet the disability requirements or early intervention requirements.

Subsection 32K(2) allows the Minister to make a legislative instrument which determines the method for calculating a participant's reasonable and necessary budget. Proposed amendments to section 32K will impose an additional requirement on the Minister when making that instrument, specifically, that the Minister must be satisfied that the determination adequately takes account of the variety of factors that may affect a participant's need for NDIS supports.

The proposed Senate amendments insert a number of legislative notes to clarify what these 'factors' may be for the purposes of both sections 32K and 32L. These notes make it clear that, while funding under the NDIS may only be provided for needs arising out of impairments that meet the disability

requirements or the early intervention requirements, these needs may be affected by a range of other factors, including the interaction with other impairments and environmental factors.

While these legislative notes do not change the operation of the provisions, they do clarify how these provisions should be interpreted. This provides clarity and certainty for participants and will assist in the operationalisation of the new planning framework, as well as guidance for courts and tribunals in interpreting those provisions. These legislative notes will therefore ensure that the legislation is interpreted and applied consistently with the policy intent behind them.

Case studies

Peter

Peter meets the disability requirements for a physical impairment that impacts his functional capacity in the mobility and self-care domains. Peter has recently acquired a sensory impairment relating to vision loss. The impairment does not meet the disability requirements or early intervention requirements, but it does affect his functioning in the mobility and self-care domains.

Peter transitions to the new planning framework and has a needs assessment. The assessment tool takes account of Peter's holistic disability support needs. The outcome of the needs assessment reflects that the intensity of Peter's needs in the mobility and self-care domains arising from his physical impairment is higher due to the impact of his sensory impairment.

The assessment report details the intensity of Peter's needs across all domains. The NDIS will fund needs arising from Peter's physical impairment, taking into account the impacts of the sensory impairment on Peter's support needs. Peter may also be provided information and referrals to other services to support his sensory impairment.

Kylie

Kylie meets the disability requirements in relation to an intellectual impairment that affects her capacity for self-care and self-management. Kylie also lives in a remote area and does not have access to informal supports. Both of these factors impact Kylie's support needs that arise from her intellectual impairment.

Kylie transitions to the new planning framework and has a needs assessment. The assessment tool takes account of Kylie's holistic disability support needs. The outcome of the needs assessment reflects that Kylie has a higher support need intensity due to the effects of her environmental factors (being her remote location and lack of informal supports).

The assessment report details the intensity of Kylie's needs across all domains. The NDIS will fund needs arising from her intellectual impairment, taking into account the impact of Kylie's unique environmental factors on her needs.

Information gathering powers

The proposed Senate amendments implement recommendation 2 made by the Committee in the report into its inquiry into the Bill. The Committee recommended that the Government further clarify the circumstances under which the additional information gathering powers granted to the CEO will be

used. Specifically, the recommendation relates to new information gathering powers for the purpose of the CEO considering whether a participant continues to meet the access criteria (sections 30 and 30A) and for the purpose of making certain decisions about the participant's plan (section 36).

Requests to be given in writing

In practice, all requests for information from participants and other people under the NDIS Act are given in writing (as well as that person's preferred mode of communication if different and known). These amendments now explicitly require all requests for information under sections 30, 30A and 36 to be given in writing. This ensures accountability and transparency.

By requiring the requests to be in writing, the amendments also clarify that the CEO has the ability to vary or revoke that request at any time after it has been made. The power to vary or revoke is given by operation of subsection 33(3) of the *Acts Interpretation Act 1901* which relevantly provides that where an Act confers a power to make an instrument of administration character (such as a written request for information), that power may also be exercised to revoke or vary that instrument.

Failure to comply with certain requests for information

To ensure the CEO is making decisions on current and accurate information, sections 30, 30A and 36 allow the CEO to request certain information from participants and other people within timeframes set out in those sections or in a longer timeframe prescribed in the request.

If a person does not provide the requested information within the relevant timeframe, the CEO may revoke a person's status as a participant (sections 30 and 30A) or suspend the preparation of a participant's new framework plan (section 36).

The CEO is not permitted to take these actions if the CEO is satisfied that it was reasonable for the participant or another person not to provide the requested information within the relevant period. In these circumstances, the CEO may make a further request for information or provide an additional time period.

The proposed Senate amendments will provide guidance for the CEO in considering whether it was reasonable for a person not to have complied with a request for information made under sections 30, 30A or 36 within the timeframe prescribed in the request. The amendments will require the CEO to have regard to the following matters in considering whether it was reasonable not to comply with a request for information within a prescribed timeframe:

- the length of time the person has had to provide the information (for example, a delay of 6 months may be appropriate in certain circumstances whereas a delay of 12 to 18 months may not be)
- any previous failures by the participant to comply with a request for information made under the Act
- any previous failures by the other person to comply with a request for information made under the Act in relation to the participant
- the length of time since the CEO was last provided with information relevant to the decision whether or not to revoke the participant's status as a participant (in relation to sections 30 and 30A only)

- whether the failure to comply with the request was beyond the control of the participant or other person because of a delay in the provision of information to the participant or other person
- any matters prescribed by Category A NDIS rules
- any other matters the CEO considers relevant.

These amendments provide additional clarity about how and when the CEO will exercise certain information gathering powers.

State and Territory engagement

This submission deals with two aspects of state and territory engagement. The Senate amendments will make changes to the arrangements for state and territory Ministers to agree to NDIS rules on behalf of host jurisdictions. The submission also responds to concerns raised by states and territories through the submission made by the Council on the Australian Federation about the Australian Government's plan to consult on the list of authorised and unauthorised NDIS supports.

Agreement to NDIS rules

Section 209 of the Act sets out requirements for seeking the agreement of host jurisdictions to NDIS rules. Relevantly, agreement to NDIS rules must be through the relevant 'host jurisdiction minister'.

Currently, a host jurisdiction minister means a Minister of a host jurisdiction who is a member of the Ministerial Council. The Ministerial Council is a body that consists of Ministers of the Commonwealth, States and Territories and has responsibility for the NDIS. This generally does not include the Premiers and Chief Ministers.

The proposed Senate amendments would amend the definition of 'host jurisdiction Minister' so that it means a Minister of the host jurisdiction who is:

- A member of the Ministerial Council
- If the host jurisdiction is a State – the Premier of the State
- If the host jurisdiction is a Territory – the Chief Minister of the Territory.

This will allow communication about agreement to NDIS rules to occur directly with the Premier or Chief Minister and will allow for Premiers and Chief Ministers to provide agreement to NDIS rules themselves.

These amendments provide greater flexibility in how host jurisdictions manage engagement on, and agreement to, NDIS rules. They will also allow First Ministers to directly agree to NDIS rules in joint forums such as National Cabinet. While the Minister must make the NDIS rules, the Prime Minister can agree to them on behalf of the Commonwealth in such forums.

This amendment implements recommendation 1 made by the Committee in the report into its inquiry into the Bill that First Ministers are also recognised as Ministers for the purposes of Category A rule-making.

State and territory views

In its submission to the Committee, the Council of Australian Federation (CAF) has called for the Commonwealth Government to undertake genuine and meaningful consultation with the disability

community, service providers, and state and territory governments on the reforms outlined in the Bill. States and territories raised concerns about potential limitations on their role in the governance of the NDIS, primarily due to new legislative instrument making powers for the Minister that will play a role in determining the future direction and operation of the NDIS.

In particular, the CAF submission raised concerns about certain legislative instruments not being Category A NDIS rules, including the transitional rule that will provide a definition of NDIS support and the legislative instruments that will facilitate transition to new framework plans.

Once agreed, new Category A NDIS rules to define an NDIS support will provide an outline of supports that can be purchased using NDIS funds as well as supports that cannot be purchased using NDIS funds. This will provide clarification about supports that are, and are not, the responsibility of the NDIS. This will be based on intergovernmental agreements about the responsibilities of different service systems. These new rules will take time to develop with the disability community and must be agreed by all states and territories. Until these NDIS rules are made, a transitional rule will be made to provide for the definition of NDIS support on an interim basis.

A draft consultation list of what is and is not an NDIS support has been prepared for consultation with state and territory Disability Ministers and the disability community.

The transition to new framework plans is an operational matter and will need to take into account the evolving nature of the transition and operational constraints and requirements. The overall plan for transition will necessarily involve consultation with the disability community and state and territory governments, but the instruments facilitating the transition are operational in nature and are therefore appropriately made by Ministerial determination.

The needs assessment tool will be the subject of extensive co-design and consultation with the disability community, state and territory governments and relevant experts. Once the substantive work has been completed to develop the assessment tool it will be of an operational nature. The method by which a resulting reasonable and necessary budget is calculated will also be the subject of consultation and co-design and will be an operational instrument.

It is important to note that the consultation requirements in the *Legislation Act 2003* will apply to these instruments, and this will include the Minister consulting state and territory governments where appropriate.

The CAF submission recommends that the commencement of the Bill be deferred until new Category A NDIS rules are agreed for the purpose of section 10, and to align commencement with new foundational supports.

The Bill establishes an enabling framework for rules and future reforms as the majority of the changes outlined in the Bill do not take effect until activated by future changes to NDIS rules and instruments. The Bill introduces 34 new rule-making powers and 6 new legislative instruments. Of these, 27 are Category A rules relating to changes with significant impact, requiring unanimous agreement from states and territories to come into effect. The timing of these changes coming into effect is expected to align with the introduction of Foundational Supports as agreed at National Cabinet to commence from 1 July 2025. DRMC agreed to publicly release a roadmap in July that outlines the timing and sequences of the changes.

States and territories have also recommended the Bill should be amended to strengthen quality, safeguarding, fraud and compliance measures. The Bill contains measures around safeguarding including enabling effective management of funding, changing plan management type based on fraud and financial decisions and audit banning powers for the Commission.

Addressing the recommendations from the Review around proportionate regulation is currently subject to consultation through the NDIS Provider and Worker Registration Taskforce to be considered in future tranches of legislative reform.

Consultation statements

The issue of consultation and co-design, particularly in relation to legislative instruments, has been the subject of widespread discussion since the Bill was introduced. This discussion included extensive submissions and evidence received by the Committee and resulted in amendments being agreed in the House of Representatives to explicitly require the Minister to have regard to the principle of co-design when making certain new legislative instruments.

The Committee considered that these amendments are a measured and appropriate response to concerns raised regarding co-design, but noted proposals from inquiry participants to ensure appropriate consultation occurs on disallowable legislative instruments as well as transparency over the consultation process.

The Committee therefore recommended that a 'consultation statement' be tabled accompanying all legislative instruments made under the Act that sets out consultations undertaken.

Paragraph 15J(2)(d) of the *Legislation Act 2003* requires the maker of a legislative instrument to provide information about consultation undertaken in the preparation of that instrument. While this general requirement already extends to the Minister when making legislative instruments under the Act, the proposed Senate amendments would clarify and strengthen these requirements specifically in relation to legislative instruments made under the Act.

The proposed Senate amendments specify that explanatory statements to legislative instruments made under the Act will be required to meet the following requirements:

- describe the nature of the consultation
- describe in general terms the persons, bodies or organisations who were consulted
- contain a summary of the views expressed by those persons, bodies or organisations.

The requirement to describe the nature of the consultation undertaken will require the Minister to explain how consultation occurred. For example, was there a public consultation process; what did it consist of (e.g. small consultative forums, public forums and town halls, and/or an online engagement process; and was there an opportunity extended to provide written submissions?

The requirement to describe the persons, bodies or organisations consulted will require the Minister to explain who was engaged in the consultation, for example, advocacy bodies, individuals in the disability community, other organisations or government bodies.

The above descriptions must not identify a person, body or organisation, or reveal the views of a person, body or organisation, except with the agreement of the person, body or organisation. This is an important qualification to protect the privacy of individuals but also to provide entities the opportunity to provide confidential input into consultation processes.

Parliamentary amendments circulated by non-government Senators

Senator Thorpe has circulated a number of proposed amendments to be moved in the Senate in the Committee of the Whole stage. The government will give careful consideration to these amendments in the lead up to the Committee of the Whole stage in the Senate.

The Opposition indicated on numerous occasions during the second reading debate in the Senate that it would be moving parliamentary amendments 'at the appropriate time'. As these amendments have not been circulated at the time of preparing this submission, the department and NDIA are not in a position to provide comment.

Senate Committee Affairs Legislation Committee - Senate Inquiry Submissions Summary – Tranche 2

The below table outlines the common and significant themes identified through the second round of submissions to the Senate Committee Affairs Legislation Committee.

Theme	Outline of common concerns
<i>Access</i>	<ul style="list-style-type: none"> • Impairments that are considered in access decisions and whether a participant enters through early intervention should be reviewable by the participant before moving to the needs assessment.
<i>Choice and control</i>	<ul style="list-style-type: none"> • The introduction of Section 10 'in' and 'out' lists will limit participant choice and control. • Any requirement for participants to only engage registered NDIS providers will limit choice and control. • Concern that overly stringent fraud measures may place additional and costly burden on participants.
<i>Co-design</i>	<ul style="list-style-type: none"> • Inclusion of co-design principles in the legislation has been welcomed, however note that co-design when updating/modifying Rules is not a mandated requirement for Government.
<i>Debt recovery</i>	<ul style="list-style-type: none"> • There is significant concern that the NDIA will be able to retrospectively raise debts based on the new Section 10 lists. • There is also concern that debts raised by the NDIA against participants who are Agency or Plan Managed will cause significant financial harm, with one organisation recommending that legislation reflect that in such cases the Agency or Plan Manager be liable.
<i>Foundational Supports</i>	<ul style="list-style-type: none"> • Concerns that Foundational Supports will not be in place when new Rules are implemented. • Particular concerns around whether services available through Foundational Supports will be included in Section 10 list which the NDIA cannot fund.
<i>Information gathering</i>	<ul style="list-style-type: none"> • Submissions still reflect concern around the information gathering powers of the NDIA CEO. • Criteria for allowing participants more time (beyond 60 and 90 day timeframes) to gather information is not clear. • Concern access (access/reassessment/review) will be revoked automatically if information is not provided within legislated timeframes. • Participant status should not be revoked, and their plans should not be suspended, for failure to provide information. • Participants should not be forced to provide information or undertake an examination if that would cause harm or distress.
<i>NDIS Review</i>	<ul style="list-style-type: none"> • Commentary around the Bill being introduced before any response to the NDIS Review has been announced by Government. • The Bill should reflect both the recommendations made by the NDIS Review <i>and</i> the Disability Royal Commission
<i>Needs assessment</i>	<ul style="list-style-type: none"> • A significant proportion of submissions have expressed concern the needs assessments will be generic and limited to individual impairments rather than the individual needs and circumstances of the participant.

	<ul style="list-style-type: none"> • Significant concern that participants will not be able to review and influence the needs assessment <i>prior</i> to being used to create the plan budget, in particular the impairments which count towards their budget. • Recommendation that the capability for a need assessment to be reassessed prior to creating the plan • There is a view that the needs assessment is another attempt at introducing ‘independent assessments’, an assessment mechanism previously rejected. • Concern that there is no detail about <i>how</i> the needs assessment will be used to create the final plan budget. • Ongoing concern that the needs assessment will not take a <i>whole of person</i> approach as recommended in the NDIS Review, limiting supports and services for those with complex needs and comorbidity. • Questions regarding the skills and qualifications of NDIA staff to undertake a needs assessment, as well as concern around the needs assessment being undertaken by someone the participant is not comfortable with. • View that the 8% cost saving target will be viewed as a cap and the needs assessment will be used to cut supports. • Concerns there will be an emphasis on expediency of needs assessments rather than accuracy. • Concern that there will not be a specific mechanism for supporting participants who have variable disabilities whereby their needs may be complex change over time.
<i>Plan management</i>	<ul style="list-style-type: none"> • The circumstances where a person is moved from self-managed to Agency or Plan Managed are not clear, and should be legislated. • Concern that more people will be Agency or Plan-Managed without being consulted in an effort to limit supports and save money.
<i>Reasonable and necessary</i>	<ul style="list-style-type: none"> • Significant concern that the shift to reasonable and necessary ‘budget’ is an effort to reduce available services to save money, limiting choice and control.
<i>Section 10</i>	<ul style="list-style-type: none"> • Concern that the ‘in’ and ‘out’ lists have/will not be developed with the disability community. • Categorisation of supports and disabilities may lead to certain supports only being available for certain disabilities, potentially reducing required supports and limiting choice and control. • The definition of <i>NDIS Supports</i> should also be consulted on, in conjunction with s10 lists, as the definition and lists are intrinsically linked. • Concern that s10 precludes the use of mainstream products when considering assistive technology – many products (such as iPhones and automatic vacuums) provide significant support to people with disability, often better than dedicated assistive technology.

Senate Committee Affairs Legislation Committee - Summary of Media Reporting from 14 June 2024 (date of last hearing with DSS).

The below table outlines concerns picked up by the media about the Bill since the department last appeared before the Senate Committee Affairs Legislation Committee. These themes do not necessarily reflect the overall thrust of the media narrative on the scheme and the changes in the Bill. This has been provided separately – see overall media narrative and media headlines.

Theme	Concerns reported by media
<i>Lack of consultation</i>	<ul style="list-style-type: none"> • Concern there was no exposure draft, and the degree of consultation that occurred between the release of the review and the introduction of the Bill. • Concern that even though the bill was amended to reflect there would be consultation, that consultation on the rules won't occur or will be somehow limited. • Frequent and late changes to the Bill, with limited time to see if they address the concerns of the disability community - Senator Steele-John • Liberal senator Jane Hume said the Coalition would support the “sensible recommendations” in the legislation, but added that the government had “dumped a whole series of amendments” on the committee at the last minute and then expected the Senate to pass the legislation amended without any further scrutiny. “Stakeholders are coming to us and telling us that they’re concerned about how these changes are going to affect [them],” she said. “It’s much better to do the work now, get the job done and then pass the legislation rather than find out that there’s unintended consequences when it’s too late and the legislation’s been passed.”
<i>Criticisms of process</i>	<ul style="list-style-type: none"> • The original definition of NDIS support did not fully reflect Australia’s obligations under the United Nations Convention on the Rights of Persons with Disabilities. That definition was removed from the bill after the Disability Discrimination Commissioner warned it risked the NDIS not being “holistically responsive” to individuals’ needs. • Early drafts of the Bill used APTOS to set the interface between Commonwealth and State and Territory responsibilities; but it was not fit for purpose. • The Bill has deficit-focused language, with assessments only funding needs resulting from ‘impairments’. The Bill has been amended, but only to a point, and does not do anything to stop these flaws re-emerging as the rule making process moves forward.
<i>Cuts to services</i>	<ul style="list-style-type: none"> • General concern about what supports or services will be included, or excluded.

	<ul style="list-style-type: none"> • General concern that the approach taken by the bill to create ‘in and out’ lists undermines choice and control and might limit what services people can access.
<i>Cuts to sexual services</i>	<ul style="list-style-type: none"> • Organizations representing PWD have argued that sexual supports are critical to the wellbeing of people with disability, and have asked Minister Shorten to retract his comments that sex services would be excluded from the NDIS. • In its submission to the NDIS Review, made before the funding ban was announced, sex work and disability charity Touching Base argued funding sex work was appropriate because there was an established legal precedent in the 2020 federal court challenge, and had positive outcomes for people's physical and mental health. • Concern is it will remove choice for participants and access to supports that enable full participation in all aspects of life. • A ban on sex workers would mean the government would decide who could have sex • It's a double standard – the government provides public funds for sex-based supports such as Viagra on prescription, but does not want to provide sex-based supports through the NDIS – Senator Jordon Steele-John. • The government is seeking “to make such private and intimate details of disabled people’s supports the subject of public debate”. • The change is inconsistent with the NDIS Review, which recommends putting trust in people with disability. • Concerns that the ban on sex workers will put participant safety at risk – for example, by forcing women with disability to use dating apps, or by harming sex workers with disability. • The belief that sex workers should not be funded by the NDIS is ignorant of the reality for people with disability “for many people with a disability this is the only form of contact they get. There are also a lot of people with disabilities who see sex workers to simply lie down and cuddle, to have somebody hold them.”
<i>Removal of reasonable and necessary (and replacement with lists)</i>	<ul style="list-style-type: none"> • "The bill proposes a shift from reasonable and necessary supports to a restrictive list of permitted supports, claimable from budgets based on yet-to-be-developed needs assessments," the deputy chair of disability advocacy group Every Australian Counts, Nicole Avery, told the Senate inquiry last month. • "This approach risks denying necessary supports to people with complex needs and lacks the individuality and the flexibility that the NDIS promises." – Nicole Avery
<i>Reduction in choice and control and/or flexibility</i>	<ul style="list-style-type: none"> • While specific references to what NDIS payments could not be used on were removed from the original bill, the committee still believed the legislation wasn't flexible enough to cater to individual circumstances.

<i>Expanded government powers</i>	<ul style="list-style-type: none"> • General concern about expanded powers for the NDIA.
<i>Appeal rights</i>	<ul style="list-style-type: none"> • "It also removes really important legal protections, which we currently have to challenge agency decisions when they get something wrong – Senator Jordon Steele-John
<i>Lack of a coordinated response to the NDIS Review and DRC</i>	<ul style="list-style-type: none"> • One common criticism is that the bill has been introduced before the government has even made a formal response to the NDIS review, or to the Disability Royal Commission
<i>Participant safety</i>	<ul style="list-style-type: none"> • General concerns that the changes present risks for participant safety. • Specific concerns that the ban on sex workers will put womens safety at risk by forcing them onto dating apps. • Concerns that workforce issues, i.e. providers leaving the market, will negatively impact quality of services.
<i>Human rights</i>	<ul style="list-style-type: none"> • “The objective of ensuring the financial sustainability of the NDIS, while important from a policy perspective, may not in itself be sufficient to constitute a legitimate objective for the purposes of international human rights law,” the committee report said. • “There appears to be a risk that the measures could result in the total funding amounts for participants being reduced and consequently fewer supports being provided and, in such cases, would constitute a retrogressive measure.”
<i>Women’s Safety (in relation to removal of sex worker funding)</i>	<ul style="list-style-type: none"> • Concern that the change will mean women who access sex workers will be forced to use online dating apps to find sexual partners; and that this will expose them to harm and violence. • Concern removing funding for sex work would create safety issues for clients and sex workers with disability "if safer choices are eliminated".
<i>Privacy risks</i>	<ul style="list-style-type: none"> • The concerns also centre on the bill’s provision for personal and medical information to be requested, and for the NDIS’s overall financial sustainability to be considered when determining individual allowances.
<i>NDIS ‘robodebt’</i>	<ul style="list-style-type: none"> • Greens senator Jordon Steele-John appeared to link the concerns to Robodebt, whereby welfare recipients were made to feel like criminals. “Just like the previous government proactively dropped stories on so-called ‘dole bludgers’ to undermine the calls for a royal commission into Robodebt, it is the view of the Australian Greens that this government is undermining the NDIS in the same way,” Senator Steele-John said.
<i>Need for family and community capacity building</i>	<ul style="list-style-type: none"> • But policy changes [in the Bill, and to expand foundational supports] alone will not be enough to realign the system.... prioritising supports that can be brought into community settings, like childcare, the community library or the local sports club is vital. This focus might be different to what families and those providing a diagnosis have become used to expecting.

<i>Uncertainty</i>	<ul style="list-style-type: none"> • The method for how budgets are calculated is yet to be determined. • "People say, 'We don't know everything about the future and you won't tell us everything about the future right now, so we won't go forward.' But on the other hand, if we told everyone that we had everything worked out, we'd be accused of not co-designing." – Minister Shorten.
<i>Need for more DRO funding to support consultations on foundational supports and DRC changes</i>	<ul style="list-style-type: none"> • Disability groups say federal budget funding cuts will leave them less able to support vulnerable Australians as the government rolls out widespread changes to services and supports. AFDO says some of the groups it represents are on 'life support'. • AFDO says the \$10.6 million over two years for DROS to co-design the changes to the NDIS aren't enough, as the work of their organisation goes beyond the scheme and their ability to contribute to the review and service changes that will occur over the next decade.
<i>State and territory matters</i>	<ul style="list-style-type: none"> • "They're being asked by the federal government to begin delivering services and support which they have not delivered for 10 years," he said. • "They have made a submission to the inquiry saying the bill is not what they agreed to."

Overall media narrative and media headlines

The main and enduring focus of media attention on the NDIS continues to be on the costs of the scheme, and perceptions of fraud and rorts. Media attention on the specifics of the Bill was initially focused on the impact on states and territories health funding, along with concerns from disability representatives around the lack of consultation and concerns about what services would be cut, and that the legislation would allow debts to be raised against PWD. This focus then shifted, firstly onto the Ministers concerns about the referral back to Committee by the opposition which delayed the Bill, and then on the Ministers statements around specific measures to prevent people with disability from accessing a range of supports such as sex workers and sex toys.

Over the period, non-bill or cost related NDIS headlines have included a focus on NDIA procurement and contract management practices; accepting gifts, as well as the NDIS pricing review, with reporting focusing on the risk that support coordinators will exit the market.

Time period	Headlines
Day of last hearing, to the end of the following week (14 June to 23 June)	<p>Focus costs and fraud/rorts</p> <ul style="list-style-type: none"> • NDIS beyond Shorten’s skills, so what about Ukraine • Dirty money laws to stem NDIS fraud • block the wild west of the NDIS • The NDIS is going to ‘cripple’ the economy <p>Focus state impacts including health system</p> <ul style="list-style-type: none"> • Shorten calls on worried states to back wide-ranging NDIS reforms • States slam sick delay • United call for feds to act now on ‘national crisis’ in health • Patients sicker as health system buckles in 'national crisis' • Health ministers across Australia pen furious demands in open letter to Anthony Albanese • States and territories receive hospital funding negotiation pause to 'catch up' on NDIS reform • Funding plea as health system faces 'national crisis' • Patients are flooding NSW hospitals in record numbers. The solution might be a bitter pill
<p>Late June to early July (24 June to 8 July)</p> <p><i>Focus on cost of delaying the legislation</i></p>	<p>Focus cost of delaying the Bill</p> <ul style="list-style-type: none"> • NDIS delay to cost \$1.1b as senators fly off to Brazil: Shorten • NDIS vote delay to cost taxpayers \$1bn: Shorten • Delay ‘to cost the NDIS \$1m per hour’ • Shorten furious over NDIS reform delay • 'Disingenuous' NDIS delay to cost \$1 billion

	<ul style="list-style-type: none"> • Bill Shorten 'horrified' after Coalition and Greens team up and propose delay to NDIS bill • NDIS to cost more than age pension • Meter ticking on NDIS cost delay • NDIS reform delays to 'burn \$1 billion' taxpayer funds • '\$1bn delay': Shorten angry at NDIS reform bill hold-up over human rights concerns • 'Ripping the guts out of it': Pauline Hanson set to target NDIS abusers • NDIS top-ups costing \$5.5m more a day • Coalition can stop the NDIS rorts. Why wait? <p>Focus, impact of the Bill on PWD</p> <ul style="list-style-type: none"> • Disability groups urge government to tread carefully with NDIS changes as minister gets in a tangle with the senators over Brazil trip • Bill Shorten looks to reassure disabled Australians over NDIS overhaul • Labor-led committee raises human rights concerns over NDIS bill as Shorten blasts delays • NDIS 'unsustainable, out of control': Swan <p>Focus, NDIA matters not related to the Bill</p> <ul style="list-style-type: none"> • NDIA's procurement practices unacceptable, parliamentary committee finds • NDIS cost pressure eases, as do checks • Disability organisations 'on life support' say budget cuts will force them to wind back services
<p>Early July onwards (from 9 July)</p>	<p>Focus, funding of sex workers</p> <ul style="list-style-type: none"> • Shorten wants payments for sex work, steam rooms, crypto banned on NDIS • NDIS Minister Bill Shorten said government-funded sex work will be scrapped under reform • Sex work access under NDIS to be banned, removing supports for 'ordinary life', say disability advocates • 'Sex toys' in Hansard, Hanson in his suite as Shorten turns up heat • No more charging sex work on NDIS • Sex service 'fails NDIS test': Shorten says rules too loose, open to rorting • Bill to shorten NDIS subsidy list by axing sex worker allowance • NDIS reform vital • Shorten teaming up with Hanson on the NDIS tacitly endorses her views of disability • Disability groups decry exclusion of sex work from NDIS. Bill Shorten is wrong. NDIS clients need sex workers like us • Why are sexual services being banned from the NDIS?

- 'Nobody swipes right for people in wheelchairs': NDIS sex worker speaks on proposed reform
- Scrapping sex support won't save NDIS
- Try a little tenderness regarding NDIS sex work
- Why people with disability believe sex work should be part of the NDIS
- William uses NDIS funding to see sex workers. He says before that, isolation left him in 'absolute despair'
- Report does not go far enough to save this scheme from breaking the taxpayer bank

Ban part of broader move to rein in spending

The ban is being sought as part of wider reforms to what funding can be used for, and a crackdown over rorting in the scheme, as the government [seeks to save billions in projected future spending](#) that threatens the sustainability of the NDIS.

In order to ban funding from being used for sex work, the federal government will need to pass its reforms through parliament and then seek the agreement of state and territory governments.

William says if sex work is banned, it would reduce his opportunities for touch and intimacy — but he worries more for others who might lose that completely.

"It needs to be looked at in the deeper sense of the mental health and the physical health of people who need to engage with sexual services through the NDIS because they have no other way of socially or intimately engaging with other people," he said.

"Again, it just seems like it's a matter of, 'Oh, you don't deserve that interaction with people, you don't deserve to have a normal life'.