

Explainer: Getting the NDIS Back on Track No. 1 Bill

1. Introduction

On 27 March 2024, the Government introduced the [National Disability Insurance Scheme Amendment \(Getting the NDIS Back on Track No. 1\) Bill 2024](#) ('Bill'). This is the Government's first legislative response to the [NDIS Review Final Report](#) released in December 2023.

A [Senate Committee inquiry](#) is taking submissions on the Bill until 17 May 2024.

In this Explainer, we summarise and analyse the main changes being proposed, to assist the disability community to engage in the Senate Committee inquiry process.

The Bill proposes the most significant changes to the NDIS since it started more than a decade ago. This includes how participants access the Scheme and how their support needs will be assessed and funded. For example, the Bill introduces needs assessments and budget-setting (explained in more detail in section 2) and tightens the kinds of supports the NDIS will fund (explained in more detail in section 3).

Importantly, if the Bill passes, new NDIS Rules will be written including to detail how participants gain access to the Scheme, what supports the NDIS will fund and how participants can spend their NDIS funding. The Minister will also make a range of legislative instruments ('determinations') that will determine the method for calculating budgets and how needs assessments are conducted. This gives the Minister significant power with limited oversight by Parliament.

The Government has not released drafts of these Rules or determinations so we do not know what they will include. Much of the practical impact on participants will turn on the content of these Rules and determinations, so it will be essential that they are developed in close consultation with people with disability.

2. Changes to planning and budgets

The NDIS Review recommended transformative changes to the planning process and the way participants receive funding. Specifically, it recommended using a 'needs assessment' to determine a 'reasonable and necessary' budget, built at the 'whole-of-person' level, rather than line-by-line for each support.

2.1 New framework plans: needs assessment and reasonable and necessary budgets

The Bill introduces 'new framework plans', which will be developed in a very different way to current NDIS plans.

The National Disability Insurance Agency ('NDIA') will no longer determine whether each support a participant seeks funding for is reasonable and necessary. Instead, it will develop a more flexible budget for each participant, based on a 'needs assessment' designed to determine what supports a person needs.

The Bill says a needs assessment tool(s) will be used to assess a participant's need for supports (subclause 32L(2)). The tool(s) will be determined by the Minister (subclause 32L(8)). The [Explanatory Memorandum](#) released with the Bill says the tool(s) will be highly technical and it will consult with the disability community and experts in creating the tool(s).

The needs assessment is limited to impairments that meet the disability or early intervention requirements (subclause 32L(3)). We are concerned this may fail to achieve a 'whole of person' approach by imposing artificial distinctions in the way a person with multiple and interrelated disabilities accesses supports. This approach also appears to codify a position taken by the NDIA, which has been rejected by the Administrative Appeals Tribunal.¹

The Bill does not make it clear who will conduct the needs assessment. The NDIS Review indicated it should be an allied health practitioner or social worker with disability expertise, who would be employed or contracted by the NDIA. It seems this will also be determined by the Minister (subclause 32L(8)(b)). It will be important the Minister's determination ensures needs assessments are conducted by health professionals who understand the participant's history and needs.

It is not clear from the Bill what a participant can do if they do not agree with the outcome of the needs assessment (as explained in section 6 below).

Once the needs assessment has identified the participant's NDIS support needs, a 'method' will be applied to quantify a 'reasonable and necessary budget', resulting in a dollar amount for flexible funding and/or funding for stated supports (clause 32E).

- **Flexible funding:** gives participants choice and control to identify and pay for supports they need. This would include funding for NDIS supports that are not stated supports.
- **Funding for stated supports:** funding for specific high-cost items that can only be spent on that support. 'Category A' NDIS Rules will prescribe the types of stated supports which could include high-cost assistive technology, home modifications and supported independent living.

The 'method' will also be determined by the Minister (subclause 32K(2)).

The proposed 'new framework plan' will also specify 'funding periods' so a participant's total funding is released in stages over the 'maximum period' of the plan (subclauses 32F(2) and 32G(3)). The introduction of funding periods is the Government's response to 'intraplan inflation' – where funding in a plan is spent before the expiry of the plan and needs to be topped up.

As noted in the introduction, the practical impact of these changes on participants will turn in large part on the determinations made by the Minister. Section 7 below notes some of the issues with this approach.

The NDIS Review and Government have made clear this more standardised approach to needs assessment based on tools and budget-setting methods is not intended to replicate the Independent Assessments proposed by the previous Coalition Government. To ensure these reforms deliver fair and equitable plans for participants, and avoid pitfalls of those proposed

¹ See for example *McLaughlin and NDIA* [2021] AATA 496 at [46], [61]; *HRZI and NDIA* [2023] AATA 481 at [154]; *YBLR and NDIA* [2023] AATA 1472 at [129], [132]; *Spires and NDIA* [2023] AATA 1230 at [23], [26].

2021 reforms, it will be vital for Government to genuinely co-design the proposed assessment and budget-setting process with the disability community.

2.2 When will people get new framework plans?

Given the significance of these changes and the processes to be developed, it will take time to transition participants to new framework plans. The Government estimates the transition will take five-years and will be staged, with participants transitioned by 'identified cohorts' eg participants with similar characteristics such as age, location and types of supports (clause 32B).

In the meantime, some existing plans will still change. The Bill will limit funding to identified 'NDIS Supports' (as discussed below at section 3) and in some plans, the NDIA may also specify (subclause 33(2A):

- a total funding amount: the total funding for all reasonable and necessary supports under the plan;
- a total component amount: the total funding in relation to a class of reasonable and necessary supports under the plan; and/or
- funding periods: to apportion a participant's total funding over specified periods (as also contemplated under a new framework plan).

3. 'NDIS Supports' and the limits of the NDIS

Section 34(1) of the NDIS Act currently uses a series of legal tests to define the 'reasonable and necessary' supports the NDIS will fund, including that a support be 'value for money', 'effective and beneficial', and 'most appropriately funded or provided through the NDIS' (instead of another government program or community source). The Review heard these concepts are technical, complex and discretionary, contributing to inconsistent and inequitable funding decisions and disputes between participants and the NDIA.

The Bill abolishes these existing legal tests for new framework plans, and replaces them with a single definition of 'NDIS supports' in clause 10:

A support is an NDIS support for a person who is a participant or prospective participant if:

(a) the support:

- (i) is necessary to support the person to live and be included in the community, and to prevent isolation or segregation of the person from the community; or
- (ii) will facilitate personal mobility of the person in the manner and at the time of the person's choice; or
- (iii) is a mobility aid or device, or assistive technology, live assistance or intermediaries that will facilitate personal mobility of the person; or
- (iv) is a health service that the person needs because of the person's impairment or because of the interaction of the person's impairment with various barriers; or
- (v) is a habilitation or rehabilitation service; or
- (vi) is a service that will assist the person to access a support covered by subparagraph (iv) or (v); or
- (vii) will minimise the prospects of the person acquiring a further impairment or prevent the person from acquiring a further impairment; or

- (viii) is provided by way of sickness benefits; and
- (b) the support is declared by National Disability Insurance Scheme rules made for the purposes of this paragraph to be a support that is appropriately funded or provided through the National Disability Insurance Scheme:
 - (i) for participants or prospective participants generally; or
 - (ii) for a class of participants or prospective participants that includes the person; and
- (c) the support is not a support declared by National Disability Insurance Scheme rules made for the purposes of this paragraph to be a support that is not appropriately funded or provided through the National Disability Insurance Scheme:
 - (i) for participants or prospective participants generally; or
 - (ii) for a class of participants or prospective participants that includes the person.

This definition is very important, as:

- a) the NDIS would only provide funding for things that meet this definition; and
- b) participants would only be able to spend their funding on things that met this definition.

There are two key parts to the definition of 'NDIS supports':

- a) support categories; and
- b) NDIS Rules.

3.1 'NDIS supports' – support categories

The new definition says the NDIS will only fund eight *categories* of supports (subclause 10(a)(i)-(viii)). These are based on selected elements in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD'). However, by leaving out other elements of the CRPD, the Bill may exclude some supports from NDIS funding. For example, the CRPD recognises the right to work and employment, however section 10 does not appear to include supports that would specifically facilitate a participant's economic participation.

PIAC is also concerned the current categories are too restrictive, and have been drafted in a way that could have unintended legal consequences.

For example, subclause 10(a)(i) requires that a support must be both 'necessary to support the person to live and be included in the community', *and* 'to prevent isolation or segregation of the person from the community'. This significantly limits the range of supports that a person may otherwise decide they need to support their social or economic participation.

Similarly, subclause 10(a)(iv) refers to health services that a person 'needs because of the person's impairment or because of the interaction of the person's impairment with various barriers.' The requirement of 'need' may significantly restrict the range of health services that a person can access, including those that would provide a significant benefit to a person.

3.2 'NDIS supports' – NDIS Rules

To be funded by the NDIS, a support will also need to comply with new NDIS Rules (which will be 'Category A' Rules to be negotiated with State and Territory Governments – see below).

These Rules will specify both what is 'in' (subclause 10(b)) and 'out' (subclause 10(c)) of the NDIS.

The [Explanatory Memorandum](#) says things like holidays, cosmetics and 'standard household appliances and whitegoods' will not qualify as NDIS supports.

We also anticipate these Rules will focus on defining in detail which types of supports are the responsibility of the Commonwealth Government through the NDIS, and which are the responsibility of State and Territory Governments (ie 'foundational supports'). The development of foundational supports is an essential pre-requisite to the design of these Rules.

These Rules could dramatically reduce what the NDIS will fund, so it will be particularly important they are not too prescriptive and do not attempt to be exhaustive, to avoid leaving gaps.

Additionally, the Bill says that until these Rules are written the NDIS will use the *Applied Principles and Tables of Support* ('APTOS') to decide what will be funded by the NDIS and what will be left for State and Territory Governments to provide (subclause 71B(2)).

The APTOS principles were developed in 2015 as broad policy guidance for governments. They were never intended to be inserted into legislation, and in some places are very unclear and difficult to apply. This can leave both the NDIS and State/Territory Governments believing they are not responsible for providing a type of support, with participants not receiving support they need.

PIAC considers the APTOS principles are not fit for purpose and should not be used as an interim measure. The Rules should be developed and negotiated between Commonwealth and State and Territory Governments before changes are made to what supports the NDIS will fund.

Clause 10 is a potentially significant departure from the current system, where any type of support could be funded as long as it met the 'reasonable and necessary' criteria (set out in section 34(1) of the current NDIS Act) and seems aimed at narrowing the focus of the NDIS.

If the definition of NDIS Supports and the new Rules are too narrow, this approach may reduce choice and control for people with disability, and their ability to receive NDIS funding in a way that supports their individual needs and lives.

4. Information-gathering powers

The Bill proposes giving the NDIA new powers to request information or documents from a participant, and to impose punitive consequences where the participant does not provide this information. This includes:

- If the NDIA is considering revoking a participant's status, it can request information or make a participant undergo a health assessment (which could include medical, psychological or other assessments). If the information is not received within 90 days, the CEO can revoke the participant's status, excluding them from the Scheme's support (clauses 30 and 30A).
- In preparing a new framework plan, the NDIA can request any 'information that is reasonably necessary' for this purpose, or ask a person to undergo a medical assessment. If the person does not comply within 28 days without a good reason, both

their existing NDIS plan *and* upcoming new NDIS plan will be suspended until they comply with the request (subclause 36(3)).

These powers are very broad, giving the NDIA the ability to make a person speak to or be examined by a health professional chosen by the NDIA; or to ask for a range of personal information, such as treating notes from the person's psychologist. The consequences of not complying are also potentially severe for participants.

These information-gathering powers could be far more limited, with greater limits on the type of information that can be requested, and restrictions on the negative consequences of failing to comply.

5. Changes to spending NDIS funds

While the proposed 'reasonable and necessary budget' is intended to allow greater flexibility in how participants spend their funding, the Bill introduces several new powers for the NDIA to constrain or supervise participant spending.

5.1 Requirements for obtaining certain supports

A reasonable and necessary budget may specify that funding (flexible funding or funding for a stated support) will only be provided where certain requirements are met (clause 32H). The requirements could include:

- (a) a requirement that the supports be provided by a specified person or persons in a specified class;
- (b) a requirement that a specified process be undertaken before the supports are acquired or provided; [*eg a requirement to obtain a certain number of quotes for home modification*]
- (c) a requirement that specified conditions be satisfied in relation to the participant before the supports are acquired or provided;
- (d) a requirement to comply with any requirements specified in the National Disability Insurance Scheme rules for the purposes of this paragraph [*these Rules are yet to be written*].

The [Explanatory Memorandum](#) says these requirements may also be relevant for future NDIS reforms eg reforming the early intervention pathway and alternative commissioning approaches in First Nations communities. For example, NDIS rules may specify what evidence-based supports are appropriate for participants receiving early intervention support, or what supports have been co-designed with First Nations communities.

5.2 Restrictions on plan management and spending flexible funding

The NDIS Review said there should be a trust-based approach in how participants spend their budget. It also said the focus should be on providing participants with guidance and support, with controls over a participant's budget only used as a last resort such as where a person has *chosen* not to comply, or extreme risks of non-compliance have been identified.

In contrast, the Bill proposes allowing the NDIA to restrict how a participant can spend flexible funding in a new framework plan and gives the NDIA more power to deny a participant's plan

management request (subclauses 32F(6)-(7) and 43(2C)). The Bill allows the NDIA to do this where:

- (a) the participant would likely suffer physical, mental or financial harm;
- (b) NDIS funds have previously not been spent in accordance with a participant's plan; and/or
- (c) a circumstance to be prescribed in new 'Category A' Rules.

The circumstance in (b) seems broader than is appropriate for what should be a 'last resort' power, as it would allow a single accidental instance of non-compliance to result in restrictions and controls. PIAC suggests this circumstance should be significantly narrower, for example to apply only in cases of intentional and repeated non-compliance.

There is no guidance on what other circumstances could be included in the Rules for (c). We note these controls could restrict participants' choice over what supports they get and who provides them, so will require close scrutiny.

6. Challenging or reviewing processes and decisions

Under the Bill's proposals, participants will still have the right to seek review of the statement of participant supports, which includes the reasonable and necessary budget. However, participants will not have a right to seek a review of some of the new processes the Bill creates, either internally by the NDIA or externally by a Tribunal.

Most importantly, a 'needs assessment' would not be a 'reviewable decision' under section 99 of the NDIS Act and cannot be reviewed through internal or external review. This means the Bill does not provide a way for a participant to challenge an inappropriate needs assessment – and therefore to prevent an inadequate budget being set based on that needs assessment.

Further, the Bill does not currently ensure a participant has the opportunity to see the needs assessment report before it is 'given to the CEO'. Section 32L(5) says 'a report of the assessment must be prepared and given to the CEO *as soon as practicable* after the assessment is completed.' The NDIS Review explicitly said the needs assessment report should be provided to the participant before it is finalised. This should be expressed in the legislation so it is clear that participants will be provided with the needs assessment report before it is given to the CEO.

While the Bill provides for 'replacement assessments', it does not say when these would happen, or if the participant will be able to request one (clause 32L(7)). Instead, new NDIS 'Category A' Rules will define when the NDIA should arrange a replacement assessment (clause 32L(7)(b)). If a participant was to ask for a replacement assessment and the NDIA refused to arrange one, the participant would also have no way to review or challenge that refusal.

[DSS suggests](#) that, if a participant seeks a review of a decision on a statement of participant supports, the review will be able to consider the needs assessment and whether it accurately reflects the participant's needs and circumstances. DSS also says a participant will be able to request that a new needs assessment be conducted as part of the review. The current drafting of the Bill does not reflect this process.

PIAC considers this is a major issue with the Bill. If needs assessments are to be used as the basis for setting budgets, legislation must provide clear and straightforward rights for a

participant to receive the needs assessment before it is finalised to ensure it accurately reflects their needs and circumstances, and to request a new needs assessment where appropriate.

7. Reliance on delegated legislation

As noted above, the Bill introduces several new powers for the NDIS Minister to make Rules and determinations that do not need to be passed by Parliament. This 'delegated legislation' will be vital to the way the proposed reforms will work. Some of the proposed NDIS Rules and determinations are intended to codify existing NDIS operational guidelines and policies – as was recommended in the NDIS Review Final Report. Where that is the case, the move away from policy and into law should provide greater transparency and accountability.

NDIS Rules are developed with State and Territory Governments. The Bill gives power to the Minister to develop new Rules to, for example:

- determine what types of supports the NDIS will fund (subclauses 10(b)-(c));
- set decision-making processes about disability requirements and early intervention requirements (clause 27);
- determine which types of supports should be 'stated supports', and/or whether there should be requirements for obtaining certain supports (clause 32J); and
- specify when a participant's plan management request may be denied (subclause 43(2C)(c)).

Most of the new NDIS Rules would be 'Category A', which means the Rules must be agreed between the Commonwealth Government and all States and Territories. This provides more oversight of the drafting of 'Category A' Rules than 'Category C' Rules which only require agreement from a majority of States and Territories or 'Category D' Rules which only require the Commonwealth to consult with the States and Territories.

The Bill also provides for the Minister to make 'determinations' on very significant issues, such as:

- determining how needs assessments are undertaken (subclause 32L(8)); and
- setting the 'method' to work out funding amounts in a reasonable and necessary budget (subclause 32K(2)).

There is a process for either House of the Commonwealth Parliament to veto (or disallow) a legislative instrument, but they are not passed by the Commonwealth Parliament and do not require any agreement by State and Territory Governments.

While the Minister should consult (where appropriate and practicable) before making a legislative instrument, the legislative instrument will be valid and enforceable even if the Minister does not consult. Given the [Government's commitment](#) to develop delegated legislation following 'genuine consultation with the disability community', this commitment should be reflected in the NDIS Act.

In general, the use of 'delegated legislation' such as rules, regulations and determinations may be appropriate to deal with administrative or technical detail or provide greater flexibility on issues where more regular change might be required.

Nevertheless, reliance on rules and determinations in this context does raise a number of concerns:

1. **It is difficult to understand the full impact of the Bill and the changes it proposes.**
For example, the power to make Rules specifying the supports the NDIS will fund means the public does not know how the Government will limit what is funded under the NDIS and what will be funded by States and Territories through foundational supports. The Government should release the draft Rules for consideration.
2. **Delegated legislation may not be appropriate for all aspects of the changes** made under the Bill. On significant matters of policy there should be greater public scrutiny than is required to make law via rules or determinations. For example, the proposed new section 27 provides for a rule-making power about access which is fundamental to the Scheme and should be included in the primary legislation. We can't determine whether the Bill strikes the right balance between what is included in the NDIS Act and in delegated legislation without knowing the content of the delegated legislation.
3. Given **co-design is meant to be at the heart of reforms to the NDIS**, the disability community should consider whether it is appropriate for some of the proposed major changes to the NDIS to happen through delegated legislation.