Public Interest Advocacy Centre

Submission to Senate Community Affairs Legislation Committee

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

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice

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The Government should explain the intent and structure behind the new NDIS Rules it intends to develop, including by:

- *outlining the general content and structure of intended Rules, and the policy purposes it intends to achieve by them;*
- *outlining the processes it will follow to develop these Rules, including its plans to ensure the perspectives of people with disability are reflected in the Rules; and*
- *incorporating its intended policy purposes and processes into the Explanatory Memorandum.*

Recommendation 2 – The Bill require Ministerial determinations be prepared in consultation with Disability Representative Organisations

Insert provisions referring to legislative instruments made under proposed subsections 32L(8) and 32K(2), requiring that:

(a) Prior to making a determination under the relevant subsection, the Minister must make all reasonable efforts to consult with Disability Representative Organisations, and obtain their views on the proposed determination.

(b) When the Minister tables a legislative instrument pursuant to the relevant subsection, the instrument must be accompanied by a consultation statement setting out the views of Disability Representative Organisations as determined pursuant to subsection (a).

(c) A consequence of a failure to comply with (a) or (b) is that the legislative instrument will be invalid. This will be the case notwithstanding the effect of section 19 of the Legislation Act 2003 (Cth).

Recommendation 3 – Government provide information about who will conduct the needs assessment

Needs assessments should be conducted by suitably trained and qualified professionals with relevant disability expertise. During the current Committee process, the Government should provide information about who it intends to conduct needs assessments. This information should include whether the needs assessors will be employed or contracted by the NDIA, or operate independently of the NDIA.

Recommendation 4 – Proposed subsection 32L(10) be removed from the Bill

Proposed subsection 32L(10) should be removed from the Bill.

Recommendation 5 – The NDIA identify and record eligible impairment(s)

The Bill should require the NDIA to identify and record the impairment(s) for which a participant is found to meet the disability and/or early intervention requirements for access to the Scheme.

Recommendation 6 – Proposed subsection 32L(3) be amended to require assessment of support needs on a 'whole of person' basis

Proposed subsection 32L(3) should be amended to ensure a needs assessment assesses a participant's 'whole of person' support needs.

Recommendation 7 – Proposed subsection 34(1)(aa) be removed or amended

Proposed subsection 34(1)(aa) should be removed from the Bill, or amended to explicitly confirm that supports should be funded for participants on a 'whole of person' basis.

Recommendation 8 – Proposed subsection 32K(3) be removed from the Bill

Proposed subsection 32K(3) should be removed from the Bill.

Recommendation 9 – The Bill provide draft plans be made available to participants prior to approval

The Bill should be amended to require draft plans to be provided to participants prior to approval, and participants be given the opportunity to comment on the draft plan.

Recommendation 10 – Proposed subsection 10(a) be amended to make broad reference to constitutional heads of power, rather than enumerating selected elements of the CRPD

Proposed subsection 10(a) should be amended to list in general terms the constitutional heads of power that may be relied upon to support funding of NDIS supports.

The Government, in collaboration with State and Territory Governments, should first determine the appropriate division of funding for disability supports between the NDIS and 'foundational supports' programmes; and then develop Rules which implement this division of funding and outline any necessary constitutional basis for it. This should involve seeking any necessary constitutional referrals of power from the States required to implement the agreed model.

Recommendation 11 – The Explanatory Memorandum be amended so as not to rule out categories of NDIS supports

Amend the Explanatory Memorandum to avoid pre-emptively ruling out categories of supports. Any exclusions to the definition of NDIS supports should be subject to consultation with Disability Representative Organisations and the agreement of State and Territory Governments.

Recommendation 12 – NDIS Rules made to define the scope of 'NDIS supports' should be developed with caution to ensure they are not inappropriately narrow

The Explanatory Memorandum should indicate the intention that NDIS Rules made for the purposes of proposed subsections 10(b) and (c) will:

- *not exclude supports from funding on the basis that they are more appropriately funded by foundational supports programmes unless and until those foundational supports are actually in place;*
- *be made in consultation with Disability Representative Organisations and the disability community;*
- *avoid undue exclusions of categories of supports from NDIS funding; and*
- *allow participants to make innovative and efficient use of flexible funding.*

Recommendation 13 – APTOS not be adopted as an interim measure

The APTOS tables should not be adopted as an interim measure, or directly incorporated into the NDIS legislative scheme. Instead of the APTOS tables, Government should either:

- *adopt a more appropriate set of transitional provisions, while Rules for the purposes of proposed subsections 10(b) and (c) are developed; or*
- *sequence planned reforms such that the relevant Rules can be negotiated and developed between Commonwealth and State and Territory Governments, before changes to what supports the NDIS will fund come into effect for participants.*

Recommendation 14 – Information-gathering powers not impose consequences on participants where a third party fails to comply with a request for information

Each of the information-gathering powers in proposed sections 30, 30A and 36 should be amended to provide that, where a request for information requires the assistance or compliance of a third party, a failure to comply with the request should not result in negative consequences for the participant.

Recommendation 15 – Information-gathering powers be limited to information that would not be unduly burdensome for a participant to produce

Each of proposed sections 30(3), 30A(5) and 36(2) should be amended to require that the CEO may only make a request for information where compliance would not be unduly burdensome for a participant.

This requirement should direct attention to the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

Where a request for information is made and the request is subsequently shown to be unduly burdensome within the terms above, the Bill should require that the request be withdrawn.

Recommendation 16 – Requests for a participant to undergo a medical, psychiatric, psychological or other examination should be subject to tight constraints

Each of proposed subsections 30(3)(b)(ii), 30A(5)(b)(ii) and 36(2)(b)(ii) should be amended to require that the CEO may only make a request for a participant to undergo an examination where the CEO is satisfied that:

- *there is no other reasonable means to obtain the necessary information; and*
- *the examination would not cause undue harm, distress or upset to the participant.*

Where a request is made and the request is subsequently shown not to meet either of the terms above, the Bill should require that the request be withdrawn.

Recommendation 17 – All consequences for non-compliance with a request for information be discretionary, rather than mandatory

Each of proposed subsections 30A(5) and 36(2) should be amended to provide that consequences for non-compliance with an information request are at the discretion of the CEO.

The Bill should provide that, in the exercise of such discretion, the CEO must consider all the circumstances of the participant.

Recommendation 18 – The CEO be able to withdraw a request for information once made

Each of proposed sections 30, 30A and 36 should be amended to provide that the CEO can withdraw a request for information at any time once made.

Recommendation 19 – Subsection 36(3) provide for withdrawal of a request where non-compliance with the request is shown to be reasonable

Proposed subsection 36(3)(b)(ii) should be amended to insert the words 'or withdraw the request' after 'make a further request under subsection (2)'.

Recommendation 20 – The conditions potentially imposed under proposed section 32H be limited

Proposed subsection 32H(1) should be amended to replace the words 'in relation to' with the word 'for'.

Proposed subsection 32H(2) should be amended to remove the words 'Requirements specified under subsection (1) may include the following' and instead insert the words 'For the purposes of subsection (1), the requirements are as follows'.

Recommendation 21 – Requirements under proposed section 32H only be imposed where it is not unduly burdensome to do so

Proposed section 32H should be amended to require that the CEO may only impose a requirement on a participant's use of funding where it is necessary to achieve a specific purpose consistent with the objects of the Scheme and to do so would not be unduly burdensome for a participant.

In imposing a requirement, the NDIA should consider the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

Recommendation 22 – Proposed subsections 32F(7)(b) and 43(2C)(b) be amended to raise the threshold of non-compliance required before consequences are imposed

Amend each of proposed subsections 32F(7)(b) and 43(2C)(b) to the following:

Intentional and repeated non-compliance with section 46 (acquittal of NDIS amounts) in relation to the plan or any of the participant's previous plans.'

Recommendation 23 – The Explanatory Memorandum be amended to explain the intention behind Rules to be made concerning flexible funding and plan management

Amend the Explanatory Memorandum to incorporate the policy purpose the Government intends to achieve by the Rules proposed in subsections 32F(7)(c) and 43(2C)(c), and explain how the Government will engage with the disability community to ensure the community's perspectives are reflected in those Rules.

Recommendation 24 – Proposed subsection 32L(5) be amended to ensure a needs assessment report is prepared with the participant and provided to the participant before it is given to the CEO

Amend proposed subsection 32L(5) to require a needs assessment report be prepared with the participant and provided to the participant before it is finalised and given to the CEO.

Recommendation 25 – Proposed subparagraph 32L(7) provide rights for participants to obtain and/or request a replacement assessment

Proposed subsection 32L(7) should be amended to provide:

- *participants with the right to obtain one replacement assessment in relation to each statement of participant supports ('second assessment') where they do not agree with the first needs assessment; and*

- *participants with the right to request an additional replacement assessment ('subsequent assessment') – the CEO must consider this request, and decide whether to order the subsequent assessment.*

Recommendation 26 – Section 99(1) provide a decision not to order a subsequent assessment is a reviewable decision

Section 99(1) of the NDIS Act should be amended to include a decision not to order a subsequent assessment (per Recommendation 25 above) as a reviewable decision.

Recommendation 27 – A decision about whether a participant meets the disability and/or early intervention requirements be reviewable

Subsection 99(1) of the NDIS Act should be amended to establish that a decision about whether a participant meets the disability requirements and/or early intervention requirements is a reviewable decision.

Recommendation 28 – A decision to not pay an NDIS amount under proposed subsection 45(4) be reviewable

A decision not to pay an NDIS amount under proposed subsection 45(4) should be included as a reviewable decision under subsection 99(1) of the NDIS Act.

Recommendation 29 – Participants be able to seek partial review of a statement of participant supports

Subsection 99(1) of the NDIS Act should be amended to enable participants to seek partial review of a statement of participant supports.

Recommendation 30 – Proposed subsection 30(4) include a 14-day timeframe

Proposed subsection 30(4) should be amended to insert, after 'the CEO must', the words ', within 14 days after the last information or report is received'.

Recommendation 31 – Proposed subsection 32D(2)(c) be removed

Proposed subsection 32D(2)(c), which requires the CEO to be satisfied a participant meets the disability and/or early intervention requirements when approving the participant's statement of participant supports, should be removed. The Bill should instead provide for this information could be recorded elsewhere in the participant's plan.

Recommendation 32 – Proposed subsection 47A(1AB) be amended to include an additional circumstance to vary a new framework plan

Proposed subsection 47A(1AB) should be amended to include a minor variation that results in an increase to the funding of supports. This would ensure the circumstances available to vary old framework plans would be available to new framework plans.

Recommendation 33 – The rule-making power in proposed subsection 47A(1AB)(j)(iii) be removed

Proposed subsection 47A(1AB)(j)(iii) should be removed.

1. Introduction

The Public Interest Advocacy Centre ('PIAC') welcomes the opportunity to make this submission to the Senate Community Affairs Legislation Committee ('Committee') inquiry into the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* ('Bill').

PIAC's work focuses on tackling barriers to justice and fairness experienced by marginalised communities. We have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability.

The National Disability Insurance Scheme ('NDIS' or 'Scheme') is a transformational social reform that improves lives. It holds out the hope of full and equal participation for people with disability and must continue to deliver on its promise for the people who rely on it.

Since July 2019, we have used our legal and policy expertise to advocate for better outcomes under the NDIS. We do this in close consultation with national peak disability rights organisations, as well as legal and advocacy groups with similar expertise and reform concerns. This submission draws on our direct experience representing applicants in external reviews of decisions of the National Disability Insurance Agency ('NDIA' or 'Agency') and our experience in policy development related to the NDIS.

We are pleased the Bill implements elements of the Government's responses to the NDIS Review Final Report released in December 2023. However, we consider the Bill requires amendments to ensure it achieves the goals of the NDIS Review, avoids unintended legal consequences, and addresses the priorities and concerns of the disability community.

Our submission provides recommendations with respect to :

- the Bill's reliance on delegated legislation
- changes to planning and budgets;
- the definition of 'NDIS supports';
- new information-gathering powers for the NDIA;
- changes to spending NDIS funds;
- challenging or reviewing processes and decisions; and
- other drafting issues/unintended legal consequences.

We understand this Bill is the Government's first legislative step in a planned series of reforms to implement its response to the NDIS Review. These changes will be complex and significant and will take some time to show results. In addition to our recommendations on this Bill, the Government should consider providing for structured review of the reformed legislative framework after the 5-year transition period, and/or other ongoing review mechanisms over the 5-year implementation period.

Our submission variously refers to the Bill's proposed sections of the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act'), and to clauses of the Bill itself. Unless otherwise specified, all references to clauses are to Schedule 1 of the Bill.

2. Reliance on delegated legislation

The Bill introduces several new powers for the NDIS Minister to make Rules and determinations that do not need to be passed by Parliament and so are subject to limited parliamentary scrutiny.

We understand in some cases this reflects a recommendation of the NDIS Review Final Report that important policy positions should be enacted in law, rather than in NDIS Operational Guidelines and internal guidance.[1] Where this is the case, PIAC welcomes the move away from internal Agency policy and into law to provide greater transparency and accountability.

Nonetheless, it remains vital this delegated legislation be made in an open and transparent way, and, where appropriate, through co-design with the disability community.

2.1 Development of new NDIS Rules

The Bill gives power to the Minister to develop new NDIS Rules to:

- determine what types of supports the NDIS will fund (proposed subsections 10(b)-(c));
- set decision-making processes about disability requirements and early intervention requirements (proposed subsection 27);
- prescribe circumstances where a participant's eligibility for the NDIS would be reassessed (proposed subsection 30A);
- determine which types of supports should be 'stated supports', and/or whether there should be requirements for obtaining certain supports (proposed section 32J); and
- specify when a participant's plan management request may be denied (proposed subsections 43(2C)(c) – (2D)).

It is generally appropriate to use delegated legislation to address administrative or technical details, or to provide greater flexibility on issues where more regular change might be required. In the case of the NDIS, NDIS Rules can also provide for negotiation between Commonwealth, State and Territory Governments.

Nevertheless, reliance on yet-to-be-made Rules for substantive elements of the Bill's reforms makes it 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. This is a crucial question for participants or potential participants in understanding the scope of the Scheme and how the reforms will impact their access to necessary supports, which cannot be properly answered without more detail about the proposed Rules.

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[1] Independent Review into the National Disability Insurance Scheme, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme Final Report* (Final Report, October 2023) ('NDIS Review Final Report'), Action 21.2, page 253.

While Rules will take time to negotiate and develop, greater transparency regarding the process envisaged for rule-making and the Government's intentions for these new Rules would allow the Committee and the public to better consider these reforms and the impact of this Bill. Accordingly, the Committee should seek from the Government as much information as possible about the intended content of planned Rules.

For example, the Government could clarify its intention as to:

- how the Rules to be made for the purposes of proposed subsections 10(b)-(c) will be structured, and how it expects NDIS supports at proposed subsection 10(b) will be described;
- whether there are any immediate intentions to make Rules that prescribe matters for inclusion in a participant's plan pursuant to proposed subsection 32D(8), or whether this power is intended to facilitate responses to future potential policy developments; and
- the types of circumstances that might be prescribed by Rules under proposed subsection 32F(7)(c) which would restrict the use of flexible funding.

Importantly, the Government should explain how it intends to ensure NDIS Rules reflect the views and experiences of people with disability by outlining which Rules will be developed through consultation and/or co-design, and the processes it intends to follow for this.

This information will assist the Committee to understand the likely impact of the changes proposed by the Bill and may help allay community concerns.

The Committee should also consider the extent to which the Explanatory Memorandum could reflect the policy intent that will guide the development of the Rules. This may help ensure future decision-making is consistent with the intent behind the current changes.

Recommendation 1 – Government provide further information as to the intended content of the NDIS Rules to be made pursuant to the Bill

The Government should explain the intent and structure behind the new NDIS Rules it intends to develop, including by:

- *outlining the general content and structure of intended Rules, and the policy purposes it intends to achieve by them;*
- *outlining the processes it will follow to develop these Rules, including its plans to ensure the perspectives of people with disability are reflected in the Rules; and*
- *incorporating its intended policy purposes and processes into the Explanatory Memorandum.*

2.2 Minister's power to make legislative instruments

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

- determining how needs assessments are undertaken including the assessment tools to be used (proposed subsection 32L(8)); and

- setting the 'method' to work out funding amounts in a reasonable and necessary budget (proposed subsection 32K(2)).

The Senate Standing Committee on Regulations and Ordinances has previously urged caution in relation to the overuse of legislative instruments notwithstanding the potential for review and disallowance of such instruments by the Senate, stating:

> …in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation (despite the warnings of the Senate Standing Committee for the Scrutiny of Bills). While the committee draws its technical scrutiny concerns about delegated legislation to the Senate's attention, there is no consistent scrutiny of its policy implications.[2]

We share these general concerns regarding the limits of accountability for delegated legislation. The determinations regarding needs assessments and budget-setting methods concern features fundamental to the Scheme's operation and the rights of participants. The typical form and process of ministerial determinations does not provide sufficient oversight for matters of such importance.

The Explanatory Memorandum refers to section 17 of the *Legislation Act 2003* (Cth) ('Legislation Act'), which requires rule-makers to be satisfied that appropriate consultation has been undertaken, including with experts and persons likely to be affected by the proposed instrument, before a legislative instrument is made. A description of the nature of that consultation must be included in an Explanatory Statement for each instrument. The Explanatory Memorandum to the Bill assures stakeholders this requirement provides for the disability community, States and Territories to be consulted and make comment on any planned legislative instrument.

However, the Explanatory Memorandum does not refer to section 19 of the Legislation Act, which provides legislative instruments will be valid and enforceable even where the Minister does not consult. The Explanatory Memorandum's assurances of consultation would be undermined if this was relied on to shortcut or avoid meaningful consultation.

Accordingly, we consider stronger guarantees are needed in the Bill to enshrine the Government's stated commitment to develop delegated legislation following 'genuine consultation with the disability community'.[3] The Bill should require the Minister to consult with Disability Representative Organisations when preparing each determination relating to needs assessments and budget-setting methods. Where the Minister does not so consult, the Bill should provide the ministerial instrument containing the determination will be invalid, notwithstanding section 19 of the Legislation Act. The Bill should require the Minister to demonstrate compliance with this requirement by preparing a 'consultation statement' to accompany each instrument, setting out the views of the Disability Representative Organisations as obtained via the consultation process.

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2 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of delegated legislation* (Final Report, 3 June 2019), x.

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2024, 19 (Bill Shorten, Minister for the NDIS) ('Minister's Second Reading Speech').

These strengthened guarantees of consultation are necessary to give the disability community confidence in the Government's assurances of appropriate engagement and co-design of these vital elements of the Scheme.

Recommendation 2 – The Bill require Ministerial determinations be prepared in consultation with Disability Representative Organisations

Insert provisions referring to legislative instruments made under proposed subsections 32L(8) and 32K(2), requiring that:

(a) Prior to making a determination under the relevant subsection, the Minister must make all reasonable efforts to consult with Disability Representative Organisations, and obtain their views on the proposed determination.

(b) When the Minister tables a legislative instrument pursuant to the relevant subsection, the instrument must be accompanied by a consultation statement setting out the views of Disability Representative Organisations as determined pursuant to subsection (a).

(c) A consequence of a failure to comply with (a) or (b) is that the legislative instrument will be invalid. This will be the case notwithstanding the effect of section 19 of the Legislation Act 2003 (Cth).

3. Changes to planning and budgets

3.1 Needs assessment

The Bill provides for 'needs assessments', which are to form a fundamental part of the new process for developing participants' NDIS budgets.

3.1.1 People with disability must be involved in co-designing assessment tools

The Explanatory Memorandum says the needs assessment tool(s) under proposed subsection 32L(8) will be developed in consultation, including with the disability sector. The Second Reading Speech also refers to collaboration with the disability sector on the design of the legislative instruments.[4]

In PIAC's view, the Government's commitment to develop needs assessment tools with the disability sector should be expressly reflected in the NDIS Act. As we observe above at [2.2], legislative instruments of such importance require greater guarantees of engagement with the disability community than those provided by the Legislation Act. Our Recommendation 2 above would help achieve this objective.

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[4] Minister's Second Reading Speech: 'These rules, together with all legislative instruments provided for in the bill, will be developed with all states and territories following genuine consultation with the disability community. Collaboration with the disability sector on design is essential. This was a clarion call from the NDIS Review panel.'

Additionally, in preparing a ministerial determination under proposed subsection 32L(8), the needs assessment process should be co-designed so as to reflect the views of the disability community, as required by subsection 4(9A) of the NDIS Act. Co-design will be important to ensure the tool(s) incorporate participants' goals and aspirations, avoid inappropriate deficit-based approaches, and are well adapted to understand the lives and needs of people with disability.

While the most appropriate framework for co-design of these tools may vary over time, the Government should commit to engaging in co-design as part of its future processes for implementing needs assessments. The Committee should therefore seek the Governments' public commitment to co-design the needs assessment tool(s) with the disability community.

3.1.2 More information is needed about who will conduct needs assessments

The Bill does not make it clear who will conduct the needs assessment. Proposed subsection 32L(1) says '[t]he CEO must *arrange* for an assessment of a participant's need for supports…', which suggests the needs assessment will be conducted by a person employed or contracted by the NDIA.

The NDIS Review, which proposed the implementation of needs assessments, said these assessments should be conducted by a skilled and qualified NDIA Needs Assessor with disability expertise who is a trained allied health practitioner, social worker, youth worker or similar.[5]

When considering a previous proposal for similar assessments in 2021, the Tune Review Report concluded that, 'fundamentally', the success of such assessments would be dependent on the willingness of participants to work with NDIA-approved assessors and those assessors conducting truly independent assessments. In this regard, the Tune Review found it was particularly vital the assessors are not perceived as agents of the NDIA, or the assessment seen as a tool designed to cut supports from participants.[6] In PIAC's view, those observations remain relevant; lessons learned from that 2021 process require needs assessments to be conducted by health professionals who understand the participant's history and needs.

To address the 'warnings' in the Tune Review Report, the needs assessment process must be designed with the disability community, as discussed above and at Recommendation 2. Co-design must include working with the community to ensure assessments are conducted by suitably trained and qualified professionals with relevant disability expertise.

2For the benefit of the disability community, the Government should provide information during the current Committee process about who it intends to conduct needs assessments, so the community can properly consider these proposed reforms. This should include any plans the Government has to employ or contract needs assessors.

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5 Independent Review into the National Disability Insurance Scheme, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme Final Report Supporting Analysis* (Final Report (Supporting Analysis), October 2023) ('NDIS Review Final Report Supporting Analysis'), 273.

6 David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2023: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019 ('Tune Review Report'), [4.33].

Recommendation 3 – Government provide information about who will conduct the needs assessment

Needs assessments should be conducted by suitably trained and qualified professionals with relevant disability expertise. During the current Committee process, the Government should provide information about who it intends to conduct needs assessments. This information should include whether the needs assessors will be employed or contracted by the NDIA, or operate independently of the NDIA.

3.1.3 Duplication of applicable principles should be removed

Proposed subsection 32L(10) identifies specific principles the Minister must have regard to in making the legislative instrument under proposed subsection 32L(8). These principles are drawn from section 4 of the NDIS Act. However, subsection 4(17) already provides that any functions and powers exercised under the NDIS Act are to accord with these principles. Proposed subsection 32L(10) therefore selectively duplicates obligations that already exist in section 4 - this raises questions about the prioritisation of existing principles and has the potential to cause confusion. The provision should be removed.

Recommendation 4 – Proposed subsection 32L(10) be removed from the Bill

Proposed subsection 32L(10) should be removed from the Bill.

3.1.4 The needs assessment must take a 'whole of person' approach

3.1.4.1 Proposed subsection 32L(3) is inconsistent with a 'whole of person' approach

In the Second Reading Speech, Minister Shorten said 'your needs assessment will look at your support needs as a whole…'[7]

We are therefore concerned that proposed subsection 32L(3) limits the needs assessment to only assess support needs in respect of impairments that meet the disability or early intervention requirements. This position departs from a 'whole of person' approach and imposes artificial distinctions in the way a person with multiple and interrelated disabilities accesses supports.

Proposed subsection 32L(3) is also at odds with the intentions of the Scheme. It is contrary to the NDIS Act's objects, principles and structure, which envisage an approach that considers a participant's support needs across their lifetime, their changing support needs and the interrelationship between a participant's multiple impairments. The NDIA's adoption of a similar position to that in proposed subsection 32L(3) has been criticised and rejected by a number of bodies that have considered the issue:

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[7] Minister's Second Reading Speech.

- The Administrative Appeals Tribunal ('AAT') has rejected the position in proposed subsection 32L(3) in at least five decisions.[8] In *HRZI and NDIA*, in relation to the approach proposed by subsection 32L(3), the AAT said:

> Under this construction, it would be necessary to identify which impairment or impairments (and the effects of impairments) are instrumental in the *participant* meeting the *disability requirements*, and to distinguish other impairments (and their effects) which do not meet the *disability requirements* or the *early intervention requirements*, in order to determine if a particular support can be funded. Setting the likely practical and evidentiary difficulties of such a requirement to one side, including the burden this would place on participant's [sic] and decision makers, the construction assumes a narrow meaning of *disability* which is confined to an im*pairment of a particular kind as set out in s 24 or s 25*.
>
> …
>
> A narrow construction of *disability* is not consistent with the plain language and the meaning of the words used in the legislation. It is not consistent with the principles set out in s 4, s 17A, s 31 and it does not best serve the objectives set out in s 3.[9]

Most recently in *ZJSG and NDIA,* the AAT said:

> The object of the NDIS Act is not to address impairments, but disability…it is a person's disability to which the supports to be provided must relate. This, as a concept, sits at a higher level than a person's impairment and is essentially the sum of their impairments, having regard to how the impairments interrelate and affect each other at any point in time.[10]

- The Joint Standing Committee on the NDIS also recommended the NDIA *assess* people according to the totality of their disabilities.[11]
- The NDIS Review recommended a 'needs assessment should take account of all of people's disabilities'.[12] In doing so, it observed:

> The NDIA appears to take the view that a participant's disability is the specific diagnosis or impairment that access to the NDIS was granted for. This is confusing for participants with multiple disabilities who justifiably understand their needs more holistically and expect the same from the NDIS.[13]

3.1.4.2 Proposed subsection 32L(3) raises significant practical issues

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8 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]; *ZJSG and NDIA* [2023] AATA 2784.

9 *HRZI and NDIA* [2023] AATA 481 at [144], [146] [emphasis in original].

10 *ZJSG and NDIA* [2023] AATA 2784 at [71]-[72].

11 Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Capability and Culture of the NDIA* (Final Report, November 2023), Recommendation 1 [6.11].

12 NDIS Review Final Report Supporting Analysis, 299.

13 Ibid, 260.

Proposed subsection 32L(3) would also lead to several practical difficulties based on the need to limit assessment of participant needs to specific impairments.

First, nothing in the NDIS Act's access criteria requires reference to a specific impairment (this includes the changes to 'access' proposed in the Bill). In order for the needs assessment to only assess support needs in respect of impairments that meet the disability or early intervention requirements, those specific impairments would need to be identified and recorded – this does not occur at present, and the Bill does not provide for this to occur. Regardless of whether proposed subsection 32L(3) is enacted, the Bill should be amended to require the NDIA to record and inform a participant which of their impairments have formed the basis for their access to the Scheme.

Second, even if a participant's specific impairments were identified and recorded, proposed subsection 32L(3) envisages the assessor linking each support need to a specific impairment(s). As noted above, this would impose artificial distinctions upon the lives of people with multiple and interrelated disabilities, and how their support needs are understood; this would likely present a difficult task for an assessor. For example, for a participant with chronic pain (which had not been accepted as an impairment substantiating access to the NDIS) and a psychosocial impairment (which had been so accepted), and who required psychological supports, it is hard to see how a needs assessor could meaningfully determine which components or proportion of the psychological supports were attributable to each impairment.

Third, as identified in *McLaughlin and NDIA*, 'one can expect that over a lifetime a person's impairments may change, whereas their application for access to the NDIS occurs once, at a particular point in time.'14 When a participant's impairments change, proposed subsection 32L(3) would essentially require the participant to be freshly assessed for access to the Scheme. This is impractical and inefficient, particularly for impairments that fluctuate over time such as many psychosocial disabilities.

3.1.4.3 Proposed subsection 32L(3) would result in inadequate budgets for participants

Even if the above practical challenges could be overcome, the narrow approach of proposed subsection 32L(3) would in many cases result in an inadequate budget being set by artificially excluding many of a participant's disability-related needs. This would inevitably lead to participants with multiple impairments being forced to forgo needed supports and care.

The flexibility envisaged by a participant's 'flexible funding' budget will not remedy the problems with this proposed subsection. Where a participant has multiple impairments, but only some impairments are considered in calculating their budget, the total quantum of the budget will be inadequate for their overall disability support needs. Accordingly, even if a participant were to choose to spend some of their funding on addressing impairments that were excluded from consideration by proposed subsection 32L(3), this would mean they will be left with less funding than necessary to manage their needs relating to those impairments that *were* so considered.

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14 *McLaughlin and NDIA* [2021] AATA 496 at [53].

For a budget to be set at a 'whole of person level', a person's needs must be assessed at a 'whole of person level'. Proposed subsection 32L(3) poses a serious problem and must be amended. Instead, the Bill should provide for needs assessments to assess a participant's 'whole of person' support needs. Where a participant has multiple impairments, the Bill should consider relevant AAT jurisprudence in crafting a framework that ensures a person's disability support needs are considered holistically, rather than on an impairment-by-impairment basis.[15]

Recommendation 5 – The NDIA identify and record eligible impairment(s)

The Bill should require the NDIA to identify and record the impairment(s) for which a participant is found to meet the disability and/or early intervention requirements for access to the Scheme.

Recommendation 6 – Proposed subsection 32L(3) be amended to require assessment of support needs on a 'whole of person' basis

Proposed subsection 32L(3) should be amended to ensure a needs assessment assesses a participant's 'whole of person' support needs.

3.1.5 The Bill should not depart from a 'whole of person' approach for 'old framework plans'

In addition to the effect of proposed subsection 32L(3) on needs assessments conducted for 'new framework plans', proposed subsection 34(1)(aa) provides that 'old framework plans' could only provide funding for supports relating to impairments which form the basis of a participant meeting the disability and/or early intervention requirements.

This is inappropriate for the same reasons as set out above at [3.1.4] and should be rejected.

Recommendation 7 – Proposed subsection 34(1)(aa) be removed or amended

Proposed subsection 34(1)(aa) should be removed from the Bill, or amended to explicitly confirm that supports should be funded for participants on a 'whole of person' basis.

3.2 Budgets

3.2.1 Ensuring the 'method' is co-designed

Proposed subsection 32K(1) of the Bill provides for a 'method' to be applied to quantify a 'reasonable and necessary budget', which will result in a dollar amount for flexible funding and/or funding for stated supports. The method is to be determined by the Minister.

The Explanatory Memorandum says relevant stakeholders will be consulted on the legislative instrument setting out the 'method' to be determined. As we note at [2.2], and similar to our observations about needs assessment tools at [3.1.1], we consider the Legislation Act's consultation requirements to be insufficient for such a vital component of the Scheme. We repeat

[15] See for example, *HRZI and NDIA* [2023] AATA 481; *Spires and NDIA* [2023] AATA 1230.

Recommendation 2 above, which seeks to ensure adequate consultation with Disability Representative Organisations.

Additionally, in making the ministerial determination under proposed subsection 32K(2), the budget-setting method should be co-designed and reflect the views of the disability community, as required by subsection 4(9A) of the NDIS Act. Failure to properly co-design would risk replicating the concerning features of the proposed 2021 reforms to introduce 'independent assessments', which were rejected by the community and which the NDIS Review and Government have made clear are not intended to be replicated here.

Similar to our observations about proposed subsection 32L(10) in [3.1.3], proposed subsection 32K(3) duplicates existing obligations in section 4 of the NDIS Act and should be removed.

Recommendation 8 – Proposed subsection 32K(3) be removed from the Bill

Proposed subsection 32K(3) should be removed from the Bill.

3.2.2 Draft plans

The Bill does not provide for a draft plan to be provided to a participant before it is approved by the NDIA.

Provision of full draft plans has been a longstanding recommendation from successive reviews and inquiries.[16] Granting participants the right to see and comment on draft plans will improve NDIA decision-making, including by providing an opportunity to correct oversights or errors. In turn, this would reduce the number of reviews or appeals of plans after they take effect. The Bill should require draft plans to be provided to participants prior to approval.

Recommendation 9 – The Bill provide draft plans be made available to participants prior to approval

The Bill should be amended to require draft plans to be provided to participants prior to approval, and participants be given the opportunity to comment on the draft plan.

4. The definition of 'NDIS supports'

Proposed section 10 introduces a new concept of 'NDIS supports', which sets the parameters of the NDIS and the types of supports it will fund. The Bill provides the NDIS will only fund supports within the definition of 'NDIS supports'.

For new framework plans, the definition of 'NDIS supports' will replace the gatekeeping functions in section 34(1) of the NDIS Act – that legal test includes consideration of whether the support is

[16] See for example, Tune Review Report [3.60]-[3.69], Recommendation 25d; Joint Standing Committee on the National Disability Insurance Scheme, *NDIS Planning* (Final Report, December 2020), Recommendation 1; Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Capability and Culture of the NDIS Interim Report* (March 2023) [3.82]-[3.89].

'value for money', 'effective and beneficial', and 'most appropriately funded or provided through the NDIS' (instead of another government program or community source).

The definition in proposed section 10 has two key parts:

- subsection 10(a) lists eight categories of supports, which an 'NDIS support' must fall within; and
- subsections 10(b)-(c) provide that NDIS Rules will be made to further define (and constrain) the scope of 'NDIS supports'.

As currently drafted, the Bill's definition of 'NDIS supports' is:

- too narrow, and so will reduce choice and control for people with disability and prevent them from receiving appropriate NDIS funding to support their individual needs; and
- legally ambiguous, in a way likely to introduce serious unintended and unpredictable consequences to the NDIS.

At [4.3] below, we raise similar issues about the Bill's chosen transitional provisions, and the sequencing of the reforms (including in relation to the rollout of promised 'foundational supports'). These transitional provisions risk leaving serious gaps in service provision, and producing inappropriate legal and policy results for the NDIS.

4.1 'NDIS supports' – support categories in proposed subsection 10(a)

4.1.1 Constitutional basis for NDIS supports

The Government states that the proposed definition of NDIS supports 'provides a constitutional underpinning for the new planning framework by setting out the kinds of supports that the Commonwealth is constitutionally capable of funding.'[17]

While we recognise legislation must be linked to a Constitutional basis, the current approach in proposed section 10 is flawed. It results in an unduly narrow and restrictive scope for 'NDIS supports'. Further, the way elements of the United Nations Convention on the Rights of Persons with Disabilities ('CRPD') have been selectively transposed does not accurately reflect Australia's CRPD obligations and would distort the operation of the Scheme.

The NDIS Act already makes reference to implementation of the CRPD in section 3. To the extent a more specific basis is required in relation to NDIS supports, consideration should be given to the Act making simple reference to the constitutional heads of power relied upon (as is the case in, for instance, section 16 of the *Disability Services and Inclusion Act 2023* (Cth)). Further references to more specific obligations under the CRPD, or other heads of power, could be left for the Rules to be made for the purposes of proposed subsections 10(b) and (c). We explain the rationale and what we see as the benefits of this approach below.

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17 Explanatory Memorandum, Bill, 2.

4.1.2 Subsection 10(a) inaccurately represents the CRPD and leads to absurd results

The new definition limits 'NDIS supports' to those falling within eight categories, found at proposed subsections 10(a)(i)-(viii)).

The majority of these categories are based on selected elements in the CRPD. However, the scope of the categories are unduly narrow in ways that do not reflect the intention of the CPRD or the obligations it creates for States Parties. To illustrate:

- Article 19 of the CRPD says States Parties shall take 'effective and appropriate measures' which include 'in-home, residential and other community support services, *including* personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.' Article 19 in the CRPD is inclusionary and contemplates a broad scope of support services to facilitate community participation. In contrast, the drafting of subsection 10(a)(i) appears to require that to be a NDIS support, a support must be *both* 'necessary to support the person to live and be included in the community', *and* '[necessary] to prevent isolation or segregation of the person from the community'. In other words, supports that only support community inclusion, but are not necessary to prevent isolation or segregation, will not qualify as NDIS supports under this category. Subsection 10(a)(i) misstates Article 19 of the CRPD.

- The chapeau to Article 25 of the CRPD says States Parties shall take 'all appropriate measures' to ensure access to health services. It then particularises some specific measures that must be taken, including the provision of 'health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities.' The selective reference in subsection 10(a)(iv) to a health service the person 'needs' misrepresents the breadth of the obligation on States Parties and may significantly restrict the range of health services that fall within the definition of a NDIS support. Many health services covered by the NDIS would be directed at improving an individual's capacity and quality of life, rather than preserving their ongoing survival; this category could therefore be interpreted to exclude a wide range of, particularly, allied health services.

Undesirable consequences such as these will be difficult to avoid where the CRPD is transposed so selectively. If the Government is to rely on the CRPD as a framework for defining NDIS supports, it should be viewed holistically and not transposed selectively and inaccurately. By selecting some elements of the CRPD and leaving out others, the provisions may be interpreted to exclude from NDIS funding all supports linked to elements of the CRPD that are not included. We are therefore concerned proposed subsection 10(a) significantly narrows the supports that participants would be able to access and arbitrarily excludes supports contemplated by these and other articles of the CRPD.

Even beyond the legal interpretive consequences this approach to selectively incorporating parts of the CRPD could create a chilling effect for the NDIA in its administration of the Scheme, or for

participants in their expenditure of plan funding, as they seek to avoid the consequences of inadvertently spending funds outside of the scope of the 'NDIS supports' as defined.

Further, this partial incorporation of the CRPD leads to confusing and absurd interpretive consequences. For instance, current proposed subsection 10(a) purports to allow funding for categories of support that would then be expressly excluded by other parts of NDIS legislation:

- It is unclear what meaning 'health services' in subsection 10(a)(iv) will be given, since the policy intent of the Scheme (as expressed in the current *NDIS (Supports for Participants) Rules 2013* (Cth) ('*Supports Rules'*), and APTOS tables (discussed further below)) is for State and Territory Governments to remain primarily responsible for administration of the public health system.
- Article 26 of the CRPD says States Parties shall 'organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes...' While subsection 10(a)(v) purports to cover supports in this category, the current *Supports Rules* specifically state that rehabilitation services will not be funded by the NDIS;[18] as does APTOS.[19]

These examples demonstrate the problems inherent in relying on these selected components of the CRPD to lead policy for the Scheme.

4.1.3 NDIS Rules should outline an appropriate federal division of responsibilities, along with any necessary constitutional bases

Instead of the Bill inserting specific clauses of the CRPD, with the attendant risks of misrepresentation and confusion, we suggest proposed subsection 10(a) is limited to providing a general outline of the constitutional heads of power relied upon, for example by providing that an NDIS support includes a support which is provided within the scope of Australia's implementation of its international obligations under the CRPD.

This approach would allow subsequent development of Rules made pursuant to proposed subsections 10(b)-(c) to occur without undue constraints on the range of supports the NDIS will fund.

This will support appropriate Scheme design. The NDIS' federal partnership structure requires the Commonwealth, State and Territory Governments to discuss and determine the most effective and efficient way to, between them, deliver all of the supports people with disability need. Once these federal discussions have determined the appropriate policy approach to the range of supports that should be funded by the NDIS, the Rules that will implement this approach can also specify any more specific constitutional bases required to support the Commonwealth's obligations under the NDIS.

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18 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth), r 7.5(c).

19 *Applied Principles and Tables of Support to Determine the Responsibilities of the NDIS and other Service Systems*, (27 November 2015), available https://www.dss.gov.au/sites/default/files/documents/02_2024/ndis-principles-determine-responsibilities-ndis-and-other-service.pdf, ('APTOS') at 3-4.

At that stage, these constitutional bases may involve making specific reference to particularised CRPD obligations. However, where State and Commonwealth Governments agree the NDIS should fund at least some supports that are not clearly grounded in a CRPD obligation or another existing constitutional head of power, the Commonwealth should seek – and we would expect States would agree – that States refer the necessary power to fund these supports pursuant to section 51(xxxvii) of the Constitution.

Our proposed approach would design the Scheme's federal interface around policy considerations that prioritise appropriate service delivery, and allow the Commonwealth, State and Territory Governments to build this system together without the need to awkwardly work around artificial limits imposed by the current proposed subsection 10(a).

Recommendation 10 – Proposed subsection 10(a) be amended to make broad reference to constitutional heads of power, rather than enumerating selected elements of the CRPD

Proposed subsection 10(a) should be amended to list in general terms the constitutional heads of power that may be relied upon to support funding of NDIS supports.

The Government, in collaboration with State and Territory Governments, should first determine the appropriate division of funding for disability supports between the NDIS and 'foundational supports' programmes; and then develop Rules which implement this division of funding and outline any necessary constitutional basis for it. This should involve seeking any necessary constitutional referrals of power from the States required to implement the agreed model.

4.2 'NDIS supports' – NDIS Rules

To be funded by the NDIS, a support will also need to comply with new 'Category A' NDIS Rules. These Rules will specify both what is 'in' (proposed subsection 10(b)) and 'out' (proposed subsection 10(c)) of the NDIS.[20] Rules made pursuant to proposed subsections 10(b)-(c) could dramatically reduce what the NDIS will fund. While this may form part of the necessary interface between the NDIS and other systems of service delivery, it is vital they are not framed so narrowly as to leave 'gaps' in which people with disability in need of support are unable to access it from any source (whether the NDIS or elsewhere).

The Government has not released information about the form these Rules will take and we recommend the Committee request further detail about the Government's intention (in accordance with our Recommendation 1 above). These details should include how the Rules to be made for the purposes of proposed subsections 10(b)-(c) will be structured, and how NDIS supports prescribed per proposed subsection 10(b) are expected to be described.

We additionally note that, in determining which types of supports are the responsibility of the Commonwealth Government through the NDIS and which are the responsibility of State and Territory Governments, the development of 'foundational supports' to be funded by the States

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20 The framing of these provisions appears designed to address comments by Justice Mortimer in *National Disability Insurance Agency v Davis* [2022] FCA 1002, [73].

and Territories will be an essential pre-requisite to the design of these Rules. The Government should provide as much information as possible about the development of foundational supports programs, and how it intends to ensure that vital disability needs are not left unmet.

4.2.1 NDIS Rules should not impose blanket exclusions for funding of supports that may be necessary to address participants' disability needs

While no information has been released as to the proposed form or content of the Rules, the Explanatory Memorandum says things like holidays, cosmetics and 'standard household appliances and whitegoods' will not qualify as NDIS supports.[21]

We are concerned the potential blanket exclusion of items, without reference to the specific needs of participants, could:

- significantly limit choice and control;
- prevent participants from accessing vital disability-related supports; and
- introduce inefficiencies in the NDIS.

In circumstances where the Rules are yet to be developed or agreed to by the State and Territory Governments, the Explanatory Memorandum should be amended to avoid pre-emptively ruling out categories of supports.

The pitfalls of such an approach are helpfully demonstrated by previous AAT decisions, which have shown the importance and benefit of flexible approaches to funding under the NDIS.

In *MKKX and National Disability Insurance Agency* [2024] AATA 805, the AAT found the Applicant, who experiences 'significant temperature dysregulation' as a result of Ehlers Danlos Syndrome and other impairments, would receive significant benefits from an air conditioner (particularly given the hot and humid climate at her home in Brisbane). This mirrors the reasoning adopted in the previous case of *McKenzie and National Disability Insurance Agency* [2019] AATA 3275, in which the AAT also found a participant should be funded for an air-conditioner.

These cases are particularly significant in light of the reference in the Explanatory Memorandum to Rules made for the purposes of proposed subsection 10(b) ruling out the NDIS paying for 'standard household appliances and whitegoods'.[22] In these above cases, an air-conditioner had clear value as a support for the participant's disabilities, and particularly in circumstances when they may have struggled to meet this cost themselves. If the NDIS were prevented from covering this cost, these participants could have experienced serious consequences to their health and wellbeing as a result of the impacts of heat upon their impairments, which might also have imposed substantial costs on the NDIS and/or health systems to remedy.

These cases warn against adopting an unduly restrictive approach in Rules defining 'NDIS supports' which could prevent participants from accessing vital disability-related supports and

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21 Explanatory Memorandum, Bill, 4.
22 Ibid.

highlights the importance of engaging with Disability Representative Organisations in the development of such Rules.

Recommendation 11 – The Explanatory Memorandum be amended so as not to rule out categories of NDIS supports

Amend the Explanatory Memorandum to avoid pre-emptively ruling out categories of supports. Any exclusions to the definition of NDIS supports should be subject to consultation with Disability Representative Organisations and the agreement of State and Territory Governments.

4.2.2 Principles to guide the definition of NDIS Supports

While the NDIS Rules made to define the scope of 'NDIS supports' will need to be negotiated between the Federal, and State and Territory Governments, we propose the following principles should guide the development of these Rules:

- The development of foundational supports should precede the design of NDIS support Rules, and a new definition of 'NDIS supports' should not restrict funding of certain supports through the Scheme until appropriate foundational supports are in place to ensure needs are met.
- Government should consult with Disability Representative Organisations and the disability community to design these Rules.
- Any exclusions from the definition of 'NDIS supports' should be made prudently and cautiously, and should only exclude supports if actually funded by other systems.
- The Rules should not prevent participants from making innovative and efficient use of flexible funding.

The Government should commit to these principles, and this commitment should be reflected in the Explanatory Memorandum to the Bill to assist future interpretation of the Act and Rules made for this purpose.

Recommendation 12 – NDIS Rules made to define the scope of 'NDIS supports' should be developed with caution to ensure they are not inappropriately narrow

The Explanatory Memorandum should indicate the intention that NDIS Rules made for the purposes of proposed subsections 10(b) and (c) will:

- *not exclude supports from funding on the basis that they are more appropriately funded by foundational supports programmes unless and until those foundational supports are actually in place;*
- *be made in consultation with Disability Representative Organisations and the disability community;*
- *avoid undue exclusions of categories of supports from NDIS funding; and*
- *allow participants to make innovative and efficient use of flexible funding.*

4.3 APTOS should not be used as an interim measure

Clause 124 of the Bill provides for the use of the *Applied Principles and Tables of Support* ('APTOS') as an interim measure to determine the scope of 'NDIS supports' until NDIS Rules are developed to define the respective responsibilities of the Federal, and State and Territory Governments. Proposed subsection 10(b) as currently drafted requires an interim measure, as otherwise no supports would qualify as an 'NDIS support' until such Rules are made.

However, the APTOS principles are not appropriate for this purpose, and must not be adopted. To do so would cause enormous policy disruption, potentially unintended legal consequences, and uncertainty or gaps in service provision which could seriously impact the ability of people with disability to access supports they need. Instead, if suitable existing alternative principles cannot be found, the commencement of these reforms should be delayed to allow new Rules to be developed to govern the interface between the NDIS and other service systems.

4.3.1 The APTOS principles do not provide a workable interface between service systems

The APTOS principles document states that 'Governments agree that the principles outlined in this document will be used to determine the funding and delivery responsibilities of the NDIS in achieving this vision.'[23] It is clear the principles were developed to be broad guiding ideals which would serve as a foundation for more detailed policy negotiations between service systems. They are not clear or precise enough for use in the way proposed in the Bill and could lead to serious gaps in service provision.

The APTOS principles document also acknowledges ongoing review and renegotiation would be required as the NDIS matured.[24] Yet the APTOS principles were developed in 2013, and last updated in 2015, while the NDIS was still in its infancy and had not even begun its national rollout. They reflect a near-decade-old understanding of the Scheme and intergovernmental relationships, taking no account of what has been learned about the NDIS and its functions in the ensuing years.

In that time, the APTOS principles have failed to resolve significant and entrenched interface issues between the NDIS and other service systems. Their drafting is often unclear, and has led to enduring gaps in service delivery resulting in people with disability being left without support from any source. For example, in the criminal justice system, the tables broadly assign responsibility to the NDIS for supports that are 'disability-related', and to criminal justice system agencies for supports that are 'criminogenic'.[25]The Disability Royal Commission's final report found this distinction has created unresolved problems in practice:

> The APTOS is not intended to cover every circumstance. Nonetheless, the evidence in Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', and Public hearing 15 showed that it is not effectively achieving its object of defining parties'

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23 APTOS, para 2.
24 APTOS, para 2.
25 See APTOS, '10. Justice'.

> responsibilities to fund supports for a cohort of people with cognitive disability and complex needs in the criminal justice system.
>
> There should be a review of, and potential reforms to, the APTOS, as well as other NDIS guidelines and relevant documents, to clarify 'reasonable and necessary' supports. In particular, the distinction between 'criminogenic-related supports' and 'disability-related supports' in the APTOS should be clarified.[26]

PIAC is aware of a number of cases in which people with disability in the criminal justice system are denied support for their undoubted needs by both the NDIS and justice agencies as a result of the unclear APTOS interface.

The DRC also found the APTOS principles did not provide a clear framework in relation to housing and homelessness, stating this results in '…a lack of clarity about which agencies are responsible for supporting people with disability experiencing or at risk of homelessness.'[27] PIAC has seen this interface fail participants in practice. The recent decision of *HTDD and NDIA* [2024] AATA 725, in which PIAC acted for the Applicant, concerned an NDIS participant for whom:

- the Queensland Department of Communities, Housing and Digital Economy said it was unable to provide housing suitable for her disability needs; and
- the NDIA had taken the position that providing appropriate housing to the Applicant was not the responsibility of the NDIS.[28]

While the AAT ultimately determined the NDIS should fund Specialist Disability Accommodation to address the Applicant's disability housing needs, the institutional positions taken by each agency led to her being homeless for effectively the 10 years prior to the AAT's decision and 'without a basic standard of habilitability'.[29] The failure of APTOS to appropriately delineate responsibilities in this area meant the Applicant was required to pursue a series of appeals, which took over two and a half years to resolve, in order to receive the supports she required.

These examples illustrate the serious lack of clarity provided by the APTOS principles which, in our view, render them unfit for even their current purpose. These issues would only be compounded if they were included as a transitional measure in the Bill.

4.3.2 The APTOS principles are inappropriate for use in the new Bill

The APTOS principles do not exhaustively set out all areas where the NDIS should provide support, or where other service systems should apply; instead, they operate at a relatively high level of generality, and with a particular focus on areas that are likely to be in dispute between agencies (such as with respect to education, employment and healthcare). The APTOS tables accordingly make very limited reference to supports for household life, daily living, and social and community participation – presumably because these are areas for which the NDIS' responsibility

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26 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, (Final Report, September 2023), Vol. 8, 217.
27 Ibid, Vol. 7, 590.
28 See [307]-[308].
29 At [1], [226].

has been considered more clear, and inter- and intragovernmental disputes less likely. However, as subclause 124(2)(b) provides only supports listed in APTOS tables listing NDIS responsibilities will be funded, many traditional NDIS support responsibilities could be entirely *excluded* from funding during these transitional arrangements. While this is likely unintended, this would be a disastrous result, affecting most participants immediately following passage of the Bill.

The language used in the APTOS tables is also insufficiently precise for the use envisaged by the Bill. Even beyond the examples provided above in relation to criminal justice and housing, the interaction between the APTOS tables, the Bill's provisions, and the NDIS Act context could create even greater confusion. For example:

- Under the tables concerning part '1. Health', the table includes an item 'Provision of specialist allied health, rehabilitation and other therapy…' as a responsibility of 'Other Parties', which subclause 124(3) of the Bill would therefore bar from being funded to any extent as an NDIS support. However, a chapeau to that APTOS item reads '[Jointly with NDIS]', which appears to express an entirely different policy intention.
- Relatedly, the Bill's proposed subsection 10(a)(v) draws upon the CRPD in defining an NDIS support as including 'a habilitation or rehabilitation service'. However, APTOS at part '1. Health' refers to 'rehabilitation' as being the responsibility of 'Other Parties' (clearly envisaging the health system). In this context, it is unclear whether the term 'rehabilitation' would be understood based on its context in the CRPD, the NDIS Act, or the APTOS tables.
- Under the tables concerning part '3. Child Protection and Family Support', the NDIS is to be responsible for 'Funding disability-specific family supports…', while 'Other Parties' are to be responsible for 'Family support, including general supports for families where a parent has a disability.' With 'disability-specific family supports' being a subset of 'family supports', the drafting of clause 124 of the Bill would appear to rule out the funding by the NDIS of *any* type of family supports, even those that relate to disability.

If APTOS is incorporated into NDIS legislation in the way proposed by the Bill, the above and many other areas are likely to give rise to further lack of clarity and compound unresolved interactions between service systems.

As a further overarching concern in this regard, we note the imprecision of parts of APTOS could create potential 'overlaps' where supports are expressed as both the responsibility of the NDIS and other services. The drafting of subclause 124(2) and (3) of the Bill means that, in *all* such cases, such overlaps would be resolved by excluding the support from NDIS funding. This, again, could result in undue exclusion of supports from NDIS funding, without a concomitant acceptance of responsibility by other service systems.

4.3.3 Importing inappropriate APTOS principles impacts several parts of the NDIS

The Bill proposes using the APTOS principles to delimit the scope of the proposed concept of 'NDIS supports'. This concept is crucial to the Bill that the flow-on effects of the above could impact upon:

- assessment of access to the NDIS (proposed sections 24 and 25);

- how a participant's support needs and NDIS funding are assessed (proposed subsections 32E(2)-(3), 32K(1), and 34(1)(f)); and
- how a participant spends their funding (proposed subsection 46(1)).

In light of the problems with APTOS we have identified above, these consequences are serious and concerning for people with disability. The proposed incorporation of APTOS could significantly distort areas of policy and jurisprudence concerning the NDIS.

PIAC strongly recommends against APTOS being incorporated into the Bill.

Instead, Government should consider alternatives, such as:

- use of another set of transitional provisions, while Rules for the purposes of proposed subsections 10(b) and (c) are developed (although PIAC is not aware of any existing instrument that would be appropriate); or
- sequencing the reforms such that the relevant Rules can be negotiated and developed between Commonwealth and State and Territory Governments, before changes to what supports the NDIS will fund come into effect for participants.

Recommendation 13 – APTOS not be adopted as an interim measure

The APTOS tables should not be adopted as an interim measure, or directly incorporated into the NDIS legislative scheme. Instead of the APTOS tables, Government should either:

- *adopt a more appropriate set of transitional provisions, while Rules for the purposes of proposed subsections 10(b) and (c) are developed; or*

- *sequence planned reforms such that the relevant Rules can be negotiated and developed between Commonwealth and State and Territory Governments, before changes to what supports the NDIS will fund come into effect for participants.*

5. Information-gathering powers

The Bill would establish three new powers for the CEO to request information or documents from a participant, and impose consequences for failures to comply with such requests. PIAC considers the powers to request information are framed too broadly, and with insufficient protections for participants.

Proposed subsections 30(2)-(7) would allow the CEO to request information where they are considering whether a person continues to meet the access requirements and, if not, whether their participant status should be revoked. Failure to comply with this request within a set timeframe (for which the default is 90 days) would result in the CEO having the discretion to revoke participant status, regardless of whether the person continued to meet the access criteria – unless the participant can satisfy the CEO this non-compliance was reasonable.

Proposed subsections 30A(4)-(7) would apply, similarly, where NDIS Rules establish circumstances for the CEO to reconsider a participant's early intervention status. Where an

information request made under this section is not complied with in time, and the person cannot satisfy the CEO to show the non-compliance was reasonable, the CEO *must* revoke the participant's status (with no discretion to consider otherwise).

The third power amends section 36, which currently allows the CEO to request information or assessments to assist in the preparation of a participant's plan but does not impose sanctions on a participant who refuses or otherwise fails to comply with the request. The proposed amendments would alter the section so that participants who will receive new framework plans, and who fail (without reasonable excuse) to comply with a request for information, would experience automatic consequences for this failure. These consequences are that:

- the preparation of their new plan would be suspended; and
- any existing plan they have would also be suspended.

These suspensions would remain in place until the participant complied with the request.

5.1 The information-gathering powers are too broad

We observe at the outset that the consequences for non-compliance in each case are severe. Revocation of participant status (in the case of proposed sections 30 and 30A) is considerable – and, in the case of participants who have turned 65 since entering the Scheme, would be permanent as they would become ineligible for readmission. Likewise, plan suspension (in the case of proposed subsections 36(3)-(4)) could have very serious consequences, such as cutting off a participant's funding for vital supports. The magnitude of these consequences means that each power must be formulated and exercised with restraint.

Each of the powers allows the CEO to request information from the participant, or another person (such as a participants' therapist or family member). It then imposes consequences on the participant for non-compliance, even if the participant did not have any control over this. The Bill should be amended to avoid unfairness to participants in such circumstances.

Similarly, the information that can be requested by the CEO should be more limited. The proposed powers permit the CEO to request any 'information that is reasonably necessary for' the CEO to perform the relevant function, which could capture a very broad range of information, for example, the CEO could ask a participant to produce their personal diary; provide an account of their whereabouts and personal relationships; or provide years' worth of therapy records. Even if the legislation is not intended to facilitate such requests, the language should be amended to constrain the information that can be requested.

Each information-gathering power should be amended to limit the information and/or documents that can be requested to material that would not be unduly burdensome on the participant to produce, taking into account potential burdens of cost, impracticality, the distress that may be caused to the participant by the request, etc.

Recommendation 14 – Information-gathering powers not impose consequences on participants where a third party fails to comply with a request for information

Each of the information-gathering powers in proposed sections 30, 30A and 36 should be amended to provide that, where a request for information requires the assistance or compliance

of a third party, a failure to comply with the request should not result in negative consequences for the participant.

Recommendation 15 – Information-gathering powers be limited to information that would not be unduly burdensome for a participant to produce

Each of proposed sections 30(3), 30A(5) and 36(2) should be amended to require that the CEO may only make a request for information where compliance would not be unduly burdensome for a participant.

This requirement should direct attention to the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

Where a request for information is made and the request is subsequently shown to be unduly burdensome within the terms above, the Bill should require that the request be withdrawn.

5.2 Mandatory medical assessments should be tightly constrained

Each power permits the CEO to request the participant 'undergo an assessment' and provide the resulting report to the CEO; and/or undergo a 'medical, psychiatric, psychological or other examination' by a qualified person, potentially of the CEO's designation. PIAC is aware of significant concerns held within the disability community at the prospect of mandatory medical assessments, due to their potentially invasive nature, particularly where they are carried out by a person other than a person's treating professional(s).

People with disability have reported finding such assessments harmful, distressing and intimidating. Prior to the decision of *LPSP v Minister for Immigration*,[30] the AAT had taken the view it had the power to order that participants submit to a medical assessment by a professional selected by the NDIA.[31] PIAC has encountered matters where a participant preferred to withdraw their review before the AAT (and have the initial decision they disagreed with remain in place) rather than participate in such an examination. This underscores the strength of the concern many participants hold with such assessments.

In other AAT cases decided prior to *LPSP*, the AAT heard of consequences of mandatory medical assessments that included 'exacerbated anxiety and loss of confidence',[32] 'a real risk of [the person] suffering physical injury',[33] and 'severe depression that may even result in her taking her life if the assessment was to go ahead'.[34] In each of these cases, the NDIA sought an order compelling the participant to undergo the mandatory medical assessment, notwithstanding the participant's view of those risks.

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30 *LPSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1563. Upheld on appeal: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LPSP* [2023] FCAFC 24.

31 See, for instance, *MDCT and National Disability Insurance Agency* [2020] AATA 6036.

32 *BKQQ and NDIA* [2021] AATA 732 at [25].

33 *Liddle and NDIA* [2018] AATA 5071 at [18].

34 *PRLT and NDIA* [2021] AATA 3148 at [22].

The Explanatory Memorandum to the Bill appears to recognise this, stating in relation to Item 30:

> 'As is the case throughout the NDIS, the participant is able to choose the person from whom they obtain information and reports, as long as that information is provided in the form requested by the CEO.'

However, subsections 30(3)(b)(ii), 30A(5)(b)(ii) and 36(2)(b)(ii) allow the CEO to request a participant to undergo a medical assessment 'at a particular place' which would empower the CEO to effectively select the assessor and require the participant to comply (because if they do not, they will be subject to potentially severe consequences).

Any powers to compel medical assessments should be carefully constrained. These powers should be amended to require the CEO only make such a request if satisfied there is no other reasonable means to obtain the necessary information. They should additionally establish that, if the CEO is satisfied that the request would cause harm, distress or undue upset to the participant, the CEO must not make the request; or, if the request has already been made, must withdraw the request. These requirements should operate in addition to the requirement that a request not be 'unduly burdensome', as per above Recommendation 15.

Recommendation 16 – Requests for a participant to undergo a medical, psychiatric, psychological or other examination should be subject to tight constraints

Each of proposed subsections 30(3)(b)(ii), 30A(5)(b)(ii) and 36(2)(b)(ii) should be amended to require that the CEO may only make a request for a participant to undergo an examination where the CEO is satisfied that:

- *there is no other reasonable means to obtain the necessary information; and*
- *the examination would not cause undue harm, distress or upset to the participant.*

Where a request is made and the request is subsequently shown not to meet either of the terms above, the Bill should require that the request be withdrawn.

5.3 Automatic consequences risk harsh and unfair outcomes

Although the consequences for a failure to comply with a request made under proposed subsection 30(3) are discretionary, consequences under proposed subsections 30A(5) and 36(2) would be mandatory, absent a reasonable excuse for non-compliance. This means the CEO would have no discretion not to apply these very serious consequences. Such a situation would allow no room for leniency where, for instance, a participant failed to comply with a request for information, but would suffer serious personal or health consequences if they were exited from the NDIS or had their plan suspended. This lack of discretion would also bind the AAT on any prospective review.

The consequences for non-compliance established by proposed subsections 30A(5) and 36(2) should be made discretionary. Additionally, all three powers should establish that, in the exercise of such discretion, the CEO should be directed to consider all the circumstances of the participant before suspending their plan or exiting them from the NDIS.

Recommendation 17 – All consequences for non-compliance with a request for information be discretionary, rather than mandatory

Each of proposed subsections 30A(5) and 36(2) should be amended to provide that consequences for non-compliance with an information request are at the discretion of the CEO.

The Bill should provide that, in the exercise of such discretion, the CEO must consider all the circumstances of the participant.

5.4 The CEO should be able to withdraw a request

The Bill should contain provisions explicitly providing for the CEO to withdraw a request if they subsequently form the view that the request is not appropriate or reasonable. This would be a simple amendment, and would ensure participants can bring an unreasonable request to the CEO's attention for remedy early.

Finally, the power in proposed subsection 36(3) should be amended to provide greater flexibility. Currently, proposed subsection 36(3)(b)(ii) provides that where the CEO is satisfied non-compliance is reasonable, the CEO must make a further request. In other words, the CEO has no option to simply withdraw their request (as would be appropriate where, for instance, the CEO determines they already have sufficient information to make the required decision). This power to withdraw should be made available to the CEO via a simple amendment to the proposed subsection.

Recommendation 18 – The CEO be able to withdraw a request for information once made

Each of proposed sections 30, 30A and 36 should be amended to provide that the CEO can withdraw a request for information at any time once made.

Recommendation 19 – Subsection 36(3) provide for withdrawal of a request where non-compliance with the request is shown to be reasonable

Proposed subsection 36(3)(b)(ii) should be amended to insert the words 'or withdraw the request' after 'make a further request under subsection (2)'.

6. Changes to using and spending NDIS funds

6.1 Requirements for obtaining certain supports

Proposed section 32H proposes 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. Proposed subsection 32H(2) states the requirements 'may include the following':

(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;

(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.

The Bill is not clear about when these requirements may be imposed. The Explanatory Memorandum describes examples for when these requirements could apply – for instance, requirements for supports that have been designed through an alternative commissioning approach may be necessary to allow creative solutions to 'thin markets' and/or a lack of culturally appropriate services.

However, the potential scope of proposed section 32H is much broader than the examples in the Explanatory Memorandum. Proposed subsection 32H(1) says requirements need only be '*in relation to* the acquisition or provision of the supports', which could extend to a very broad range of matters.[35] Proposed subsection 32H(2) then provides a non-exhaustive list of the kinds of requirements that could be imposed, including those to be specified in Rules but also potentially others that are not specified in this list or the Rules.

In our view this provides an inappropriately broad range of potential constraints on participants' choice and control over their funding and supports, particularly where the discretion to impose these would lie with the NDIA alone. The NDIS Review said there should be greater flexibility in how participants can spend their budget, with minimal exceptions.[36] The expansive range of requirements that can be imposed on participants under proposed section 32H does not appear consistent with this 'greater flexibility with minimal exceptions'.

We recommend proposed section 32H be amended to limit the range of conditions that can be imposed to those listed in proposed subsection 32H(2), and provide certainty to participants about the kinds of requirements that may be imposed.

Additionally, there should be constraints on the circumstances when requirements under proposed section 32H could be imposed. Specifically, we recommend the NDIA should only impose a requirement where it is necessary to achieve a specific purpose consistent with the objects of the Scheme, and the NDIA is satisfied doing so would not be unduly burdensome for a participant. As we set out above at Recommendation 15, the concept of 'unduly burdensome' should encompass a variety of potential negative impacts of imposing the condition.

Recommendation 20 – The conditions potentially imposed under proposed section 32H be limited

Proposed subsection 32H(1) should be amended to replace the words 'in relation to' with the word 'for'.

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35 In *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 374, Toohey and Gaudron JJ said the expression is 'of broad import'. In the same case at [228], McHugh J said the phrase 'requires no more than a relationship, whether direct or indirect, between two subject matters'.

36 NDIS Review Final Report, Action 3.5, 93-94.

Proposed subsection 32H(2) should be amended to remove the words 'Requirements specified under subsection (1) may include the following' and instead insert the words 'For the purposes of subsection (1), the requirements are as follows'.

Recommendation 21 – Requirements under proposed section 32H only be imposed where it is not unduly burdensome to do so

Proposed section 32H should be amended to require that the CEO may only impose a requirement on a participant's use of funding where it is necessary to achieve a specific purpose consistent with the objects of the Scheme and to do so would not be unduly burdensome for a participant.

In imposing a requirement, the NDIA should consider the potential separate and/or cumulative effects of financial costs, practical efforts required, and/or emotional and psychological distress imposed on the participant.

6.2 Restrictions on spending flexible funding and plan management

The Bill proposes allowing the NDIA to restrict how a participant can spend flexible funding in a new framework plan (proposed subsections 32F(6)-(7)), and gives the NDIA more power to deny a participant's plan management request (proposed subsection 43(2A)). The Bill would allow the NDIA to do this in any of the 'circumstances' listed in proposed subsection 43(2C), as follows:

(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; or
(c) a circumstance to be prescribed in new 'Category A' NDIS Rules.

The NDIS Review said there should be a more trust-based approach to how participants use their budget, and how the NDIA oversees budget use.[37] It also said compliance with rules should be encouraged through guidance and support, with more hands-on involvement only ever used where there are very significant risks or issues.[38] In terms of when the NDIA may have more 'hands-on involvement' or implement controls over a participant's budget, the NDIS Review said it should do so gradually and proportionally – and as a last resort where a person has chosen not to comply with the rules, repeatedly not complied or extreme risks of non-compliance have been identified.[39] The Review added that participants should not be penalised for genuine mistakes or errors.[40]

Use of these powers by the NDIA could substantially restrict participants' choice over what supports they get and who provides them. Given the significant consequences for participants, each of the circumstances in proposed subsections 32F(7) and 43(2C), including the Rules prescribing further circumstances, should only be enlivened as a 'last resort'.

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37 NDIS Review Final Report Supporting Analysis, 272.
38 Ibid, 272.
39 Ibid, Action 3.6, 273.
40 Ibid, 299.

In relation to circumstance (b) – where NDIS funds have not been spent in accordance with a plan – there are no parameters on when this circumstance would be enlivened. As presently drafted, the circumstance in (b) would allow restrictions to be applied following a single instance of non-compliance, including even accidental instances. This is far broader than is appropriate for the Review's recommendation of a 'last resort' power. Instead, PIAC suggests circumstance (b) should be significantly narrower, such as to apply only in cases of intentional and repeated non-compliance.

In relation to circumstance (c), there is no guidance on what other circumstances could be included in the Rules. Acknowledging these are 'Category A' Rules to be agreed between the Commonwealth and all States and Territories, the Government should explain the policy purpose it intends to achieve by these Rules, so the disability community can fully understand the impact of proposed subsections 32F(6)-(7) and 43(2C) (as discussed above at Recommendation 1). Noting the adverse impact the use of these powers could have on participants, the Government should also explain how it will ensure the perspectives of people with disability are reflected in the Rules. The Government should amend the Explanatory Memorandum for the Bill to incorporate the policy purpose it intends to achieve, and to explain how it will work with the disability community, in making these Rules.

Additionally, we note the NDIS Review sets out a graduated approach to compliance at Figure 45 of its Supporting Analysis – stepping through four 'attitudes to compliance' and the corresponding compliance strategy. In line with that graduated approach, and before employing the powers in proposed subsections 32F(6) and 43(2A), the NDIA should encourage compliance by providing participants with guidance and support. While this may not be necessary to stipulate in legislation, this approach should be set out in NDIA policy.

Recommendation 22 – Proposed subsections 32F(7)(b) and 43(2C)(b) be amended to raise the threshold of non-compliance required before consequences are imposed

Amend each of proposed subsections 32F(7)(b) and 43(2C)(b) to the following:

Intentional and repeated non-compliance with section 46 (acquittal of NDIS amounts) in relation to the plan or any of the participant's previous plans.'

Recommendation 23 – The Explanatory Memorandum be amended to explain the intention behind Rules to be made concerning flexible funding and plan management

Amend the Explanatory Memorandum to incorporate the policy purpose the Government intends to achieve by the Rules proposed in subsections 32F(7)(c) and 43(2C)(c), and explain how the Government will engage with the disability community to ensure the community's perspectives are reflected in those Rules.

7. Challenging or reviewing processes and decisions

7.1 No opportunity for participants to view and comment on needs assessments

As drafted, the Bill does not ensure a participant has the opportunity to see the needs assessment before it is 'given to the CEO'. Proposed subsection 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.' It does not require, and may prevent, provision of a draft needs assessment to the participant before it is sent to the CEO.

The NDIS Review heard the current planning process does not give participants equal access to the information sent to the delegate by the planner, denying the opportunity to check, amend or approve all information about them.[41] The NDIS Review said '[t]his process gap is disempowering for participants'.[42] To alleviate these issues, the NDIS Review explicitly envisaged a needs assessment report should be provided to the participant before it is finalised, including so the participant could correct or provide any information.[43] If the needs assessment is not provided to the participant before it is finalised, it could result in inappropriate budgets being set based on an inaccurate or incomplete needs assessment report. This is even more pertinent if the needs assessment is conducted by an assessor who is not a participant's treating practitioner (see above at 3.1.2]).

The Bill should be amended to make clear that a needs assessment report is prepared with the participant, which includes providing the needs assessment report to the participant before it is finalised and given to the CEO. The participant should have a reasonable opportunity to provide any comments on the report, suggest corrections to errors and ensure the report accurately reflects their needs and circumstances, before the report is given to the CEO.

Recommendation 24 – Proposed subsection 32L(5) be amended to ensure a needs assessment report is prepared with the participant and provided to the participant before it is given to the CEO

Amend proposed subsection 32L(5) to require a needs assessment report be prepared with the participant and provided to the participant before it is finalised and given to the CEO.

7.2 Challenges to needs assessments, and/or replacement assessments

The Bill does not clearly explain if or how a participant can seek review where they do not agree with the outcome of a needs assessment or the report of the needs assessment.

Under the Bill, the needs assessment report would not be a 'reviewable decision' under section 99 of the NDIS Act, and so could not be reviewed through internal or external review. This means

41 Ibid, 262.
42 Ibid, 262.
43 Ibid, 293, 298.

a participant would have no way to challenge an incorrect/inappropriate needs assessment – and therefore no way to prevent an inadequate budget being set based on that needs assessment.

Although participants will still have a right to seek review of the statement of participant supports, which includes the budget, the Bill does not make clear whether such a review would allow a participant to challenge the needs assessment, or simply the budget-setting decision made based on that needs assessment. If the latter, any budget set based on an inappropriate needs assessment could not be suitably corrected on review.

Further, even if a review of a participant's statement of participant supports were able to revisit an incorrect needs assessment, it would be belated and inefficient to use that process to detect issues with the needs assessment report, which would often be immediately apparent to the participant.

Proposed subsection 32L(7) of the Bill provides for a 'replacement assessment', but does not outline when these would be available, or if/when a participant would be able to request one. Instead, proposed subsection 32L(7)(b) says new 'Category A' NDIS Rules will outline the circumstances where the NDIA will arrange a replacement assessment.

At present there is no guidance as to the broad policy purpose(s) replacement assessments are intended to serve.[44] For example, it is not clear from the Bill or Explanatory Memorandum:

- whether replacement assessments would be used to address an outdated or inaccurate needs assessment;
- whether a participant could request a replacement assessment (or if this would be solely at the discretion of the CEO);
- whether there would be a particular threshold to be met (such as demonstrating a 'clear and obvious error' in a previous assessment) before a replacement assessment could be ordered; and/or
- if the Rules would establish a limit to the number of replacement assessments that can be undertaken.

At a minimum, in our view the Bill must provide that:

- a participant should have the right to access one replacement assessment (a 'second assessment') in relation to each NDIS plan developed for them and
- following a second assessment, the CEO should also have the discretion, when requested by a participant, to arrange a further replacement assessment (a 'subsequent assessment') where this is considered appropriate.

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[44] We note the Department of Social Services website indicates the intent that a needs assessment be prepared in conjunction with a participant, and a new needs assessment could be requested by a participant where they disagree with the initial assessment. However, this suggested process is not reflected in the Bill, and it is unclear what assurance the public can have that it will be implemented by future Rules. Such review rights are of sufficient importance to be included in the head legislation. See Department of Social Services, 'The NDIS Amendment Bill – questions and answers', *Disability and Carers*, (10 April 2024), available https://www.dss.gov.au/disability-and-carers-programs-services-ndis-reforms/the-ndis-amendment-bill-questions-and-answers#06a.

We consider these rights are necessary, given the significance of a needs assessment in determining the funding for supports contained in a potential multi-year NDIS plan for a participant and the nuance and sensitivity required (such that there are many ways in which a participant may recognise a needs assessment has miscarried). These considerations also justify the cost of arranging further needs assessments, given the importance of getting them correct.

Each new assessment would replace the previous assessment, including where the new assessment determined a lower assessment of a participant's support needs. In these circumstances, a participant would only request a fresh assessment where they took the view that a more appropriate result would be reached through obtaining a further assessment.

In relation to external reviews concerning a participant's budget, we understand the AAT would have the power to order a fresh needs assessment as part of exercising the powers of the CEO necessary to prepare that part of a participant's NDIS plan.

However, at present, a decision of the CEO under proposed subsection 32L(7)(b) about whether a replacement assessment should be undertaken would not currently be reviewable pursuant to section 99(1) of the NDIS Act. The Bill should be amended to provide that a decision by the CEO not to order a 'subsequent assessment' be subject to internal and external review.

Recommendation 25 – Proposed subparagraph 32L(7) provide rights for participants to obtain and/or request a replacement assessment

Proposed subsection 32L(7) should be amended to provide:

- *participants with the right to obtain one replacement assessment in relation to each statement of participant supports ('second assessment') where they do not agree with the first needs assessment; and*

- *participants with the right to request an additional replacement assessment ('subsequent assessment') – the CEO must consider this request, and decide whether to order the subsequent assessment.*

Recommendation 26 – Section 99(1) provide a decision not to order a subsequent assessment is a reviewable decision

Section 99(1) of the NDIS Act should be amended to include a decision not to order a subsequent assessment (per Recommendation 25 above) as a reviewable decision.

7.3 Review of other proposed processes and decisions

7.3.1 Decision about whether a participant meets the disability and/or early intervention requirements

Under proposed subsection 21(2), when a participant is granted access to the NDIS, they will be notified whether the CEO decided they met the disability requirements and/or the early intervention requirements. This would be a positive change, as participants benefit from knowing the basis upon which they were granted access.

However, the decision as to the basis of the grant of access would not be reviewable. Currently, under subsection 99(1) a reviewable decision about an access decision includes 'a decision that a person does not meet the access criteria'. A participant who has been granted access but on a basis with which they disagree (eg the CEO decides the participant meets the early intervention requirements when the participant considers they meet the disability requirements) would have no right to seek review of that decision. The Bill should be amended to provide such review rights.

Recommendation 27 – A decision about whether a participant meets the disability and/or early intervention requirements be reviewable

Subsection 99(1) of the NDIS Act should be amended to establish that a decision about whether a participant meets the disability requirements and/or early intervention requirements is a reviewable decision.

7.3.2 Decision that no 'exceptional circumstances' exist to pay an NDIS amount

Proposed subsection 45(4) would prevent the NDIA from paying an NDIS amount where the payment would result in exceeding the participant's allocated funding. This would apply to both old and new framework plans. It would not apply if the CEO is satisfied there are exceptional circumstances justifying the making of the payment (proposed subsection 45(5)).

For proposed subsection 45(5) to apply:

- 'Category D' Rules prescribing what constitutes exceptional circumstances must be made; and
- the CEO would have to evaluate whether there are exceptional circumstances.

We observe two issues with this framework.

First, 'Category D' Rules to be made under proposed subsection 45(6) must be made and in place upon commencement of this provision. If the Rules are not in place, the CEO would not be able to exercise their discretion under proposed subsection 45(5), as the CEO would never be able to find exceptional circumstances exist. This could be detrimental to a participant who requires funding urgently, such as due to a crisis or health needs.

Second, the CEO's evaluative decision under proposed subsection 45(4) should be subject to review.

Recommendation 28 – A decision to not pay an NDIS amount under proposed subsection 45(4) be reviewable

A decision not to pay an NDIS amount under proposed subsection 45(4) should be included as a reviewable decision under subsection 99(1) of the NDIS Act.

7.3.3 Ability to review specific aspects of a statement of participant supports

While most participants seek review of the NDIA's decision to decline additional funding for supports, the review process currently enables any aspect of the statement of participant

supports to be reviewed. This situation occurred in *Gabriela and Chief Executive Officer, NDIA* [2024] AATA 741 where the participant sought review to challenge the non-approval of funding for additional supports, and the NDIA subsequently brought into issue her plan management arrangements.

A statement of participant supports contains various elements and is the product of several subsidiary decisions about funding and plan management. Participants should have the ability to seek review of those subsidiary decisions made in respect of the statement of participant supports ('partial review'), rather than the whole statement of participant supports being automatically subject to review in each case. This would enable a participant to, for example, seek review of the CEO's decision to change their plan management preference under proposed subsection 43(2A)(a) without also putting into issue their budget amount.

Recommendation 29 – Participants be able to seek partial review of a statement of participant supports

Subsection 99(1) of the NDIS Act should be amended to enable participants to seek partial review of a statement of participant supports.

8. Other drafting issues/unintended legal consequences

8.1 Timeframe to consider revocation under proposed section 30

Proposed section 30 would allow the CEO to request information if the CEO is considering revoking a participant's status. The Explanatory Memorandum says the CEO must, within 14 days, make a determination whether to revoke the participant's status or request further information.[45] However, the Bill does not establish the 14-day timeframe.

Recommendation 30 – Proposed subsection 30(4) include a 14-day timeframe

Proposed subsection 30(4) should be amended to insert, after 'the CEO must', the words ', within 14 days after the last information or report is received'.

8.2 Avoid requiring participants to re-prove their disability

Proposed subsection 32D(2) sets out the various elements of a SOPS to be approved by the CEO with each participant plan. In particular, proposed subsection 32D(2)(c) requires the SOPS to specify whether the participant meets the disability and/or early intervention requirements. The Explanatory Memorandum says the purpose of recording this is to ensure that participants are receiving supports that meet their needs, particularly once the early intervention pathway is established.

However, one consequence of this drafting is that for the CEO to approve the SOPS, the CEO must be satisfied the participant meets the disability and/or early intervention requirements. On its face, this could require the CEO to reconsider a participant's status when approving each new

[45] Explanatory Memorandum, Bill, 9.

plan. Noting the NDIS Review was clear participants should not have to re-prove their disability, and the Explanatory Memorandum directly states this is not the intention of the Bill,[46] this seems to be an unintended consequence of drafting and should be remedied by recording information about whether the participant meets the disability and/or early intervention requirements elsewhere in the participant's plan (ie not in the statement of participant supports).

Recommendation 31 – Proposed subsection 32D(2)(c) be removed

Proposed subsection 32D(2)(c), which requires the CEO to be satisfied a participant meets the disability and/or early intervention requirements when approving the participant's statement of participant supports, should be removed. The Bill should instead provide for this information could be recorded elsewhere in the participant's plan.

8.3 Appropriate scope of variation power

Proposed subsections 47A(1AA) and (1AB) largely mirror the current variation power under subsection 47A(1A). However, there is one circumstance in proposed subsection 47A(1A)(d)(iv) – a minor variation that results in an increase to the funding of supports – which is not in the Bill for new framework plans. This circumstance for variation should be also applicable to new framework plans.

Further, proposed subsection 47A(1AB)(j)(iii) would allow 'Category A' rules to specify further circumstances when a budget could be varied. When the current variation power in section 47A was initially introduced in the *National Disability Insurance Scheme Amendment (Participant Service Guarantee Bill) 2021*, the Coalition Government proposed that NDIS Rules would prescribe circumstances when a plan could be varied. In response, and consistent with stakeholder feedback, we submitted the circumstances in which plans could be varied should be certain, clear and confined in the NDIS Act rather than in Rules. This feedback was adopted, and ultimately the NDIS Act now includes all circumstances in which plans can be varied. We maintain our previous position – proposed subsection 47A(1AA) and (1AB) would provide a broad range of circumstances when plans could be varied. Rules prescribing further circumstances to vary a participant's budget are not necessary and would not provide certainty for participants.

Recommendation 32 – Proposed subsection 47A(1AB) be amended to include an additional circumstance to vary a new framework plan

Proposed subsection 47A(1AB) should be amended to include a minor variation that results in an increase to the funding of supports. This would ensure the circumstances available to vary old framework plans would be available to new framework plans.

Recommendation 33 – The rule-making power in proposed subsection 47A(1AB)(j)(iii) be removed

Proposed subsection 47A(1AB)(j)(iii) should be removed.

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46 Ibid, 9.