

Explainer: Amendments to the ‘Getting the NDIS Back on Track No. 1’ Bill

1. Introduction

Parliament has been considering the Government’s [National Disability Insurance Scheme Amendment \(Getting the NDIS Back on Track No. 1\) Bill 2024](#) (‘Bill’) since it was introduced on 27 March 2024. We explained why the Bill was introduced, and what it proposes to change, in our [previous Explainer from 18 April](#) (published under our former name, the ‘Public Interest Advocacy Centre’ or PIAC).

Since then, there have been important developments:

- On 5 June 2024, the House of Representatives amended parts of the Bill. Most of the changes were proposed by the Government. The House passed the Bill with those amendments, sending it to the Senate.
- A [Senate Committee inquiry](#) then considered the Bill, taking submissions and holding public hearings. (We made [a submission](#), and [a supplementary submission](#), and appeared at public hearings.) On 20 June 2024, the Senate Committee published its [report on the Bill](#), suggesting a few changes to the Bill and recommending the Bill be passed with those changes.
- Since that report was released, some Senators have proposed further amendments to the Bill. The Senate has not yet voted on these amendments.
- On 27 June 2024, the Senate voted to send the Bill for a [second Committee inquiry](#), to consider the amendments already made and those proposed, and the views of state and territory governments.

The Committee is taking submissions until 12 July 2024.

In this Explainer, we summarise and analyse the amendments made to the Bill so far, and amendments now proposed, that may have the broadest impact on the disability community.

2. Co-design and consultation for legislative instruments

The Bill gives the NDIS Minister powers to make Rules and determinations (‘legislative instruments’) relating to the NDIS. The Government says it is committed to genuine consultation and co-design with the disability community to make those legislative instruments, but that commitment is not contained in the Bill. For many in the disability community, locking in that commitment is a priority issue.

What has been amended?

The Government responded to concerns about the lack of explicit commitment to co-design in the Bill with amendments which passed the House of Representatives on 5 June 2024. These amendments require the Minister to have regard to the principle of co-design in subsection 4(9A) of the NDIS Act when making legislative instruments establishing:

- how needs assessments will be conducted; and

- the method to be used in calculating a participant's budget.

These amendments do not legally require the Minister to co-design these instruments – they would only require the Minister to *have regard to the value of co-design*.

While the amendments are helpful statements of principle, they do not fully address concerns that the disability community could be excluded from development of these legislative instruments, if, for example, a future Minister does not maintain that commitment.

What other amendments have been proposed?

The Committee recommended the Bill require the Minister to be more transparent about what consultation with the disability community has taken place when developing each legislative instrument. This would then enable Parliament to make more considered decisions about whether to veto ('disallow') a particular legislative instrument because of lack of consultation. Accordingly, the Committee recommended a 'consultation statement' be tabled with all legislative instruments made under the NDIS Act.

To implement the Senate Committee's recommendation, the Government proposed a further amendment in the Senate. The amendment would require the Minister to provide a statement describing the nature of the consultation, the people and organisations consulted, and a summary of the views expressed by those people and organisations, for *all* legislative instruments made under the NDIS Act. The [Supplementary Explanatory Memorandum](#) addressing these amendments notes the importance of Disability Representative Organisations ('DROs'), and their role in consultation and co-design activities with the disability community.

This proposed amendment would provide greater likelihood that DROs will be engaged in developing legislative instruments and would enable Parliament to conduct its oversight functions more effectively. The Senate is yet to consider and vote on this proposed amendment.

3. The definition of 'NDIS supports'

3.1 Proposed section 10 and the CRPD

When the Bill was introduced, many stakeholders raised concerns about the wording and structure of proposed section 10, which defined 'NDIS supports' (explained at part 3 of our [previous Explainer](#)). These concerns included legal problems that could stem from including only selected elements of the United Nations Convention on the Rights of Persons with Disabilities ('CRPD') and leaving out other parts of the CRPD. Other concerns were about the way the section could inappropriately restrict supports the NDIS might fund, and the burden placed on participants to work out what they could and could not spend their NDIS funding on.

What has been amended?

The Government recognised these concerns and amended the Bill to address them. The amended section 10 says 'NDIS supports' will be defined entirely by NDIS Rules to be made after the Bill passes. The Government says it will engage with the disability community to develop the Rules defining an 'NDIS support', which should guard against the definition of 'NDIS supports' being inappropriately narrow.

These amendments seem to have addressed the concerns raised about this part of the Bill.

3.2 Transitional provisions and APTOS

Our previous Explainer set out how the Bill proposed using the *Applied Principles and Tables of Support* ('APTOS') as a transitional measure, and the major problems this could create. Many other submissions to the first Senate Committee inquiry echoed our concerns with APTOS.

What has been amended?

The Government has removed APTOS as a transitional measure. Instead, the Bill would require the Minister to make a transitional rule to define 'NDIS supports' until a permanent NDIS Rule can be developed for this purpose.

This approach is an improvement, as it will avoid the serious legal and policy problems with APTOS.

4. Needs assessments

4.1 'Whole of person' funding

Another priority issue for the community is the Bill's failure to assess and fund participants at a 'whole of person' level.

The Bill proposes that the needs assessment and budget-setting method would be limited to considering needs that stem from impairments that meet the disability or early intervention requirements for entry to the Scheme. This approach would impose artificial distinctions in the way a person with multiple and interrelated disabilities accesses supports and could result in them receiving inadequate funding for supports.

What has been amended?

Nothing yet.

What amendments have been proposed?

The disability community has raised serious concerns about this part of the Bill, leading to amendments proposed in the House of Representatives by Dr Monique Ryan MP. Although these amendments did not get Government support at that time, the Government has since responded to the community's strong calls that this issue be addressed.

In the Senate, the Government has proposed amendments to clarify that needs assessments and budget calculations will take into account a participant's support needs:

- arising from an impairment that meets the disability or early intervention requirements; and
- where that impairment is impacted by another impairment that does not meet the disability or early intervention requirements. The [Supplementary Explanatory Memorandum](#) explains an impairment may be 'impacted' where it is 'compounded or changed by other factors'.

The Government has also proposed a similar amendment when determining whether a support is 'reasonable and necessary' for old framework plans.

The Senate is yet to consider and vote on these proposed amendments.

We consider these amendments would bring the Bill more into line with the intentions of the Scheme, recommendations made by the NDIS Review and the Joint Standing Committee on the NDIS, as well as decisions of the AAT regarding the need to take a whole of person approach to funding.

However, for this approach to be workable, the Bill still needs to be amended to ensure participants are told which of their impairments the NDIA believes meet the disability or early intervention requirements.

4.2 Right to receive needs assessment report

Many people raised concerns the Bill did not give participants the right to view and comment on their needs assessment report before it is finalised.

What has been amended?

The Government responded to these concerns with an amendment that requires the CEO, upon receiving a needs assessment report, to give a copy to the participant as soon as practicable. The [Supplementary Explanatory Memorandum](#) explains '[i]t is necessary for the participant to receive the report after the CEO, as the CEO cannot provide it until it has been received from the assessor.'

The Supplementary Explanatory Memorandum also says participants will have the 'opportunity to review the report and provide input and feedback before the CEO makes any planning decisions' and clarifies that 'a participant's plan [is] to be prepared with the participant' (emphasis in original).

This amendment seems to have addressed concerns about this issue.

4.3 Replacement assessments

As we set out in our previous Explainer, the Bill did not initially make clear what rights a participant would have to challenge or replace an inappropriate needs assessment. This was raised as a concern by many submissions to the initial Senate Committee inquiry. It does not appear to have been fully resolved.

What has been amended?

The Government made several amendments to clarify how the Bill would approach needs assessments. These amendments and [accompanying Explanatory Memoranda](#) clarified that a needs assessment itself would not be subject to review. This is likely because it would be too difficult for an NDIA reviewer (on internal review), or a Tribunal member (on external review), to review the method or conclusions within a report without the skills and expertise of the health professional who prepared it.

Instead, the Bill says if a participant is unhappy with conclusions in their needs assessment report, they can request a replacement needs assessment. The Government's amendments also subtly shifted the legal test for considering whether to order a replacement needs assessment. Initially, NDIS Rules were to prescribe when a replacement needs assessment could be arranged. Now, the amendments enable a replacement needs assessment to be arranged where the CEO 'is satisfied...it should be undertaken' – although NDIS Rules may still dictate how the CEO decides whether or not it should be undertaken.

The amendments also made clear that if a participant disagrees with the funding provided in their NDIS plan, they can seek review of that funding decision; and an internal reviewer or Tribunal member would have the power to order a replacement needs assessment as part of that review process. However, a decision as to whether or not to order a replacement needs assessment would not be a reviewable decision.

What other amendments have been proposed?

Because the NDIS Rules could still shape or curtail the circumstances in which a person can get a replacement needs assessment, many submissions (including ours) pressed for the Bill to clearly define a participant's right to a replacement needs assessment. In the House of Representatives, Dr Ryan proposed an amendment that would have established a participant's right to obtain a replacement assessment upon request. This amendment would not have required a participant to show any problem with the initial assessment.

Dr Ryan also proposed an amendment to allow a participant who had requested a second (or subsequent) replacement assessment, but had that request refused by the NDIA, to seek review of that decision.

In many respects, these amendments aligned with the recommendations about replacement needs assessments in our submission. Both amendments were not passed by the House of Representatives.

We maintain that a participant's right to at least one replacement assessment should be legislated in the Bill.

5. 'Exceptional circumstances' for additional funding

The Bill proposes preventing the NDIA from paying any money in relation to a participant's NDIS plan if the participant has already spent their allocated funds. The NDIA would only provide additional funding to a participant if 'exceptional circumstances' (as defined in NDIS Rules) applied. This meant that until those Rules were made, there was a risk the NDIA would be legally barred from providing additional funds to a participant who urgently needed supports.

This issue appears to have been resolved.

What has been amended?

The Bill now includes a list of circumstances that allow a payment to be made above the budgeted amount.

These include allowing a participant to seek a plan variation where they need more funding because they have experienced fraud or financial exploitation, or where a variation is needed to protect a participant from a threat to their life, health or safety.

The Government's amendments also provide for the NDIA to make additional payments in some circumstances to protect participants, despite a participant's plan funds being exhausted.

Together, these amendments provide protection for participants who might be at risk of experiencing harm if additional NDIS funding is not provided. It also provides greater certainty by including these circumstances in the NDIS Act itself, rather than leaving them to NDIS Rules.

6. Information-gathering powers

Our previous Explainer raised concerns about the proposed new and broad powers allowing the NDIA to request information or documents from a participant (including by way of a mandatory medical assessment), and the consequences of not complying with such requests. These concerns were echoed in many other submissions from the disability community to the Senate Committee Inquiry.

These issues have not been fully resolved.

What has been amended?

The Bill has been amended to limit when the NDIA can compel a participant to undergo a mandatory medical assessment if the NDIA is considering whether to revoke their participant status. The amendments mean the NDIA could only use these powers where the information could not be reasonably obtained in any other way.

While this is an important constraint, the NDIA will still be able to require mandatory medical assessments for the purposes of preparing an NDIS plan.

What other amendments have been proposed?

The Government has proposed further amendments in the Senate to require requests for information to be made in writing, as well as adding legislative notes to clarify the NDIA can withdraw or vary a request for information. These are useful clarifications.

The amendments also list several factors the NDIA must consider in deciding whether it was reasonable for a participant to have failed to comply with an information request. Consequences for non-compliance (a person's NDIS participant status being revoked, or the suspension of their current NDIS plan and new plan preparation processes) would only apply if, after considering these factors, the NDIA decided the non-compliance was not reasonable. The factors include:

- how long the person was given to comply with the request;
- whether the person has previously failed to comply with requests for information;
- if the NDIA has other recent information they could rely on (instead of the requested information);
- if the non-compliance was beyond the person's control because they hadn't been able to obtain the requested information in time.

The NDIA would also have to consider any other factor it thought was relevant, as well as any other factor listed in NDIS Rules for this purpose.

These amendments provide some further clarity and protection against harsh consequences of information-gathering requests. The Senate has not yet voted on these amendments.

However, these amendments do not constrain the range and types of requests for information the NDIA can make; they only limit the risk of a participant facing adverse consequences for non-compliance. The NDIA would still be allowed to request a very broad range of information; and decisions on how to respond to non-compliance may not take into account reasons why a participant might be reluctant to comply with an NDIA request (such as if the request was invasive, distressing or expensive).

Notably, the Senate Committee Inquiry report recommended the 'Government further clarify the circumstances' under which the NDIA's new powers will be used.

One way this recommendation could be implemented would be through Government proposing further amendments to the Bill and providing further detail in Explanatory Memoranda. This has not yet happened.

7. Constraints on obtaining supports, spending funds and plan management

The Bill proposes new powers allowing the NDIA to impose conditions on how a participant obtains supports, restrict spending of flexible funding, or override a participant's plan management request. Many in the disability community have expressed concern that these powers are too broad. The community called for the Bill to provide more guidance and safeguards on their use.

What has been amended?

Nothing yet.

What amendments have been proposed?

An amendment from Dr Ryan proposed that the power to impose conditions on how a participant obtains supports should only be used by the NDIA where it is 'reasonably necessary' to achieve a specific purpose consistent with the objects of the Scheme, and where to do so would not be 'unduly burdensome' for a participant. Dr Ryan's amendment reflected the substance of our recommendation to the Senate Committee. However, this amendment was not passed by the House of Representatives.

The Senate Committee acknowledged the community is very concerned about the potential impact of these new powers. Accordingly, the Committee recommended the Government provide clarity on the circumstances in which the new NDIA powers will be used.

The Government has not introduced amendments or provided further clarity on these other new NDIA powers.

8. Review of reforms after 5 years

What has been amended?

An amendment proposed by Dr Ryan, which passed the House of Representatives, requires a review of the reforms made by the Bill after five years (the time in which the Government estimates participants will transition to 'new framework plans'). This independent review must involve consultation with the public, and be completed within 9 months, with the NDIS Minister tabling a written report in Parliament.

Given the scale and significance of the reforms being proposed, we agree it is appropriate for an independent review to properly consider whether the reforms are working effectively for participants.

9. Other proposed amendments

Amendments have been proposed by Senator Lidia Thorpe which relate to consultation with the First Peoples Disability Network when making legislative instruments and NDIS Rules, enshrining representation of a First Nations member on the NDIA's Board, and access to supports for people with disability in custodial settings. The Senate has not yet voted on these amendments.

10. Issues raised by States and Territories

As the NDIS is delivered jointly by the Commonwealth, State and Territory Governments, reforms to the Scheme have been subject to ongoing discussions and negotiations between Disability Ministers and at National Cabinet since the NDIS Review concluded in December 2023.

State and Territory Governments commented on the Bill in a submission to the Senate Committee Inquiry from the Council for the Australian Federation ('CAF'), a body that represents these governments. The CAF submission raised several concerns about the Bill – many of which overlap significantly with matters discussed in this and our previous Explainer. Broadly, these are:

- the Bill was developed too quickly to allow proper consideration of the NDIS Review's recommendations, and to allow proper and full consultation with States, Territories, and the disability community;
- the pace and sequence of the reforms in the Bill might leave gaps for people with disability, particularly if they come into effect before States and Territories have established systems for foundational supports;
- the Bill gives more power to the NDIS Minister to make legislative instruments, and to the NDIA to administer the Scheme, with limited input from State and Territory Governments, and could expose participants to negative consequences; and
- the CAF did not consider the Bill would address issues of fraud, misconduct and poor service providers in the NDIS.

We understand the views of State and Territory Governments will be the subject of the Committee's further inquiry into the Bill.