Justice and Equity Centre

Submission on the National Disability Insurance Scheme Amendment (Securing the NDIS for Future Generations) Bill 2026

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQA+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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Summary of recommendations

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
1	The Committee Inquiry process be extended	The Committee should extend time for the Inquiry, including for further submissions, public hearings and Committee deliberation, until at least August 2026.	Not applicable	Introduction
2	The Bill is not passed in its current form	The Bill must be thoroughly reconsidered in light of the many serious concerns raised by the disability community. It should not be passed by Parliament unless and until it has been amended to address these concerns.	Not applicable	3.1
3	The need for the proposed Ministerial powers in Schedule 5 be clearly explained	The Government should provide a clear and more specific explanation for the circumstances in which the power provided by Schedule 5 of the Bill would be used, including the extent to which this power would still be necessary following more thorough parliamentary consideration of this Bill. To the extent possible consistent with the above explanation, the scope of this power should be narrowed.	Schedule 5	3.3.1
4	The 'functional capacity' provisions be removed	The 'functional capacity' provisions in Schedule 1, Part 1 of the Bill should be removed.	Schedule 1, Part 1	4.1.1

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
5	Changes to the test for 'permanence' be removed	Schedule 1, Part 8 of the Bill gives rise to multiple, fundamental issues that cannot be rectified by minor amendment and should therefore be rejected entirely.	Schedule 1, Part 8	4.2
6	The exclusion of other support systems be removed	The exclusion of other support systems in Schedule 1, Part 9 of the Bill should be removed. At a minimum, if Part 9 is to be retained, the rule-making power in proposed section 25B should be removed.	Schedule 1, Part 9	4.3
7	The 'whole of person' approach to funding be retained	The NDIS should retain the current to funding supports on a 'whole of person' level. Accordingly, Schedule 1, Part 3 should be removed and Schedule 4, items 6 and 10 of the Bill should be removed.	Schedule 1, Part 3 Schedule 4, items 6 and 10	5.1
8	The 'more appropriate service system' criterion be removed	The requirement for the CEO to be satisfied the support is not more appropriately provided or funded by another scheme or service system is duplicative and should be removed. Schedule 1, part 6, items 69 and 70 of the Bill should be removed.	Schedule 1, Part 6	5.2.3
9	The 'value for money' consideration in proposed subsection 34(1A) be removed	The 'value for money' consideration in proposed subsection 34(1A) should be removed from the Bill.	Schedule 1, Part 6	5.2.4

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
10	The 'effective and beneficial' considerations be removed	Proposed subsections 34(1E) and (1F) should be removed from the Bill, as the Current Supports Rules provide an appropriate structure for the 'effective and beneficial' consideration.	Schedule 1, Part 6	5.2.5
11	The 'family, carers and other supports' considerations be redrafted	Proposed subsections 34(1G)-(1K) should be amended to ensure the assessment of what is reasonable to expect of families, carers, informal networks and community appropriately accounts for: • circumstances where, while it is commonly expected that parents are responsible for providing care and support for their children, because of the child's disability the child's care needs are substantially greater than those of other children of a similar age; • the extent of any risks to the wellbeing of the participant or any other person; and • circumstances in which it is less appropriate or inappropriate for family, carers, informal networks and/or the community to provide the support.	Schedule 1, Part 6	5.2.6
12	Ministerial support determinations and caps need proper consultation, scrutiny	Proposed ss 34A, 33(2EA) and 33(2EB) should not be enacted. Before any measures that confer Ministerial power to limit supports are considered, there must be meaningful engagement with the disability community and proper scrutiny of proposed limits.	Schedule 1, Part 4 Schedule 1, Part 6	5.3

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
	and inclusion of safeguards	If the provisions are retained, the Bill should be amended to incorporate clear statutory safeguards, including that: • support determinations (s 34A) and caps (ss 33(2EA) and 33(2EB)) apply only to specified classes of supports, rather than having broad or Scheme-wide application; • participants whose plans are affected by Scheme-wide changes, including support determinations and caps, can seek variation of their plans where this creates a risk to their safety, health or functional capacity; • support determinations (s 34A) and caps (ss 33(2EA) and 33(2EB)) be made through the Category A rule process, rather than by Ministerial determination; and • any support determination (s 34A) or cap (ss 33(2EA) and 33(2EB)) be accompanied by tabled reasons, impact and financial analyses and records of consultation with the disability community, and a minimum 15 sitting day disallowance period before commencement.		
13	Broaden the circumstances in which participants can request plan reassessments	Section 48A(1) be amended as follows: For the purposes of paragraph 48(2)(b), the conditions are that: a. the participant's plan is insufficient to meet their current support needs, including where that insufficiency arises from an error in the	Schedule 1, Part 2	5.4.1

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
		underlying supports needs assessment and/or budget-setting process; and b. the participant's plan is scheduled for automatic renewal within 45 days or was automatically renewed within the preceding 45 days.		
14	The requirement that changes be 'unanticipated' be removed	The word 'unanticipated' in proposed subsection 48A(3) be removed to ensure that foreseeable changes that have serious impacts on participants can still ground a request for reassessment.	Schedule 1, Part 2	5.4.1
15	Deeming provision where CEO does not determine a reassessment request be reinstated	Section 48(4) be reinstated so that, if the CEO does not determine a reassessment request within 90 days, the CEO is deemed not to have made a decision on that request.	Schedule 1, Part 2	5.4.2
16	Immediate revocation power where participant is not contactable be removed	Proposed ss 30(1A)(a), providing a power to immediately revoke a participant's status where they are not contactable, should be removed from the Bill.	Schedule 1, Part 7	4.6.1
17	Define 'reasonable attempts' for the purpose of plan suspensions	The Bill should define what constitutes 'reasonable attempts' to contact a participant for the purposes of proposed subsections 30(1A) and s 40A. This definition should at least provide a minimum number of attempts over a minimum period of time, and require the CEO to take account of information	Schedule 1, Part 7	5.6.2

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
		the NDIA holds regarding a participant including expressed communication preferences and contact information held.		
18	Accessibility needs and risk of harm be considered before plan suspension or revocation	The powers to suspend a participant's plan or revoke a person's participant status under proposed s 30(1A) should require the CEO: • be satisfied the participant's inability to be contacted is not explained by the participant's accessibility needs as are known to the NDIA; and • should be required to consider whether the suspension or revocation is justified when weighed against any risk of harm to the participant.	Schedule 1, Part 7	5.6.3
19	Debts for record keeping failures require additional safeguards	1. Section 182 should be amended to add proposed subsection 182(5) as follows: A debt will not exist under subsection 182(4) where: a. the person is able to otherwise establish the entitlement to the NDIS amount; or b. the person has a reasonable excuse for not complying with a requirement under section 45B. 2. A decision to raise a debt due to the Agency under s 182 should be reviewable under s 99.	Schedule 2, Part 4	6.1

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
		3. Section 195(a) should be amended to add an additional circumstance in which a debt may be waived where 'the act, failure or omission was justified in the circumstances'.		
20	Reason for not granting regulatory powers to Commission be clearly explained	The Government should provide a clear explanation for why it is more appropriate for the NDIA to be granted these new regulatory powers instead of empowering the Commission with these additional powers.	Schedule 2, Part 2	6.2
21	The recommendations made in the submission by the Human Technology Institute about automated decision-making be adopted	The recommendations made by the Human Technology Institute in their submission to this Committee process, concerning the safeguards necessary to implement automated decision-making in an appropriate, fair and safe manner, should be adopted by the Committee and implemented by Parliament.	Schedule 3, Part 2	7
22	Automated decision-making only be authorised for limited purposes within old framework planning	Proposed s 59C(1)(a) be amended so as to only specify s 33(2E), and not the entirety of s 33.	Schedule 3, Part 2	7

No.	Recommendation summary	Full recommendation	Bill reference	Submission reference
23	Amendments 2 and 4 moved by Dr Monique Ryan be adopted	The amendments moved by the Member for Kooyong, Dr Monique Ryan, namely to (1) delay commencement until foundational supports are established, funded and operational; and (2) require an independent statutory review 12 months after full commencement of this Bill, should be adopted by the Committee and implemented by Parliament.	Not applicable	8

1. Executive Summary

In its current form, the National Disability Insurance Scheme Amendment (Securing the NDIS for Future Generations) Bill 2026 ('Bill') raises significant concerns and should not be passed.

In responding to concerns regarding cost pressures on the NDIS, the Bill seeks to achieve savings primarily by excluding large numbers of participants from the Scheme and by constricting access to supports for those who remain, despite the absence of adequate guarantees that other systems are capable of meeting participants' needs. It does so in a way that would radically transform the NDIS from a rights-based scheme, grounded in an entitlement to individualised, reasonable and necessary supports, into a more discretionary program in which access to supports can be broadly reduced or withdrawn.

This approach has attracted sustained and vocal criticism from the disability community. Such opposition warrants serious consideration. We urge that more time is allowed for the people most affected by these changes to be fairly and fully heard.

Beyond these global objections, many of the Bill's provisions are unworkable. Several measures seek outcomes that are impossible to operationalise consistently in practice and/or are based on conceptual misunderstandings of disability. In particular, the proposed changes to the access requirements relating to the 'permanency' of an impairment would exclude huge numbers of participants, including groups Government has indicated it does not intend to affect.

Additionally, the proposed reversal of the current approach to attributing support needs to specific impairments may lead to absurd outcomes while being incapable of consistent application. These measures rest on fundamental policy and conceptual errors and cannot be addressed through amendment. We recommend each be removed from the Bill.

The Bill also confers exceptionally broad powers on the Minister and the Executive, including powers to impose large-scale funding reductions, exclude participants from the Scheme based on broad policy assessments of the appropriateness of other support systems, and introduce automated decision-making.

If such powers are to be enacted, particularly in the face of strong community concern, they must be far more tightly constrained and subject to robust safeguards. We further endorse certain amendments proposed by Monique Ryan MP to facilitate greater parliamentary oversight.

Finally, many other provisions in the Bill require substantial amendment to avoid technical defects or operational injustice. These include the proposed definition of 'functional capacity', changes to the legal test for funding 'reasonable and necessary' supports, restrictions on plan reassessments, introduction of plan suspensions, and expanded record-keeping requirements that may expose participants to substantial debts by operation of law and without adequate review mechanisms.

2. Introduction

The Justice and Equity Centre ('JEC') welcomes the opportunity to make this submission to the inquiry by the Senate Standing Committee on Community Affairs into the Bill.

The JEC'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.

Since July 2019, we have used our legal and policy expertise to advocate for better outcomes under the National Disability Insurance Scheme ('NDIS' or 'Scheme') for people with disability. We do this in close consultation with Disability Representative Organisations ('DROs'), 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 made an initial submission to this inquiry highlighting the lack of time provided for submissions, public engagement and reporting.[1] We reiterate this timeframe does not allow for sufficient consideration, proper scrutiny and public debate concerning the significant and wide-ranging provisions of this Bill. For generational reforms to a vital support system, a truncated process of this kind is likely to result in poor policy implementation and compromised law-making. Importantly, the timeframe needs to enable genuine consultation with the disability community, which has not occurred. We urge the Committee to extend the time for this inquiry so the Bill can be properly evaluated and improved where required.

Recommendation 1 – The Committee Inquiry process be extended

The Committee should extend time for the Inquiry, including for further submissions, public hearings and Committee deliberation, until at least August 2026.

3. Overarching comments

We offer these overarching comments on the Bill's key features, recurring themes and surrounding narrative to inform our analysis and recommendations.

3.1 The disability community has rejected this Bill

The disability community has expressed overwhelming alarm and deep concern about the provisions of this Bill. In addition to the rushed parliamentary process and inadequate consultation, many of the Bill's substantive provisions and the Government's stated intentions for how its powers will be used will strip rights from people with disability, deprive them of supports that are necessary for life, and/or making life worth living. Other submissions before the

[1] Justice and Equity Centre, Submission No 82 to Senate Standing Committees on Community Affairs, Parliament of Australia, *National Disability Insurance Scheme Amendment (Securing the NDIS for Future Generations) Bill 2026* (21 May 2026).

Committee from DROs and people with disability will set out the ways this Bill risks ejecting people from the Scheme who rely on it before appropriate other systems are in place to support them; constrict availability of vital supports; pressure people to undergo unreasonable and inappropriate medical treatments; and widen existing inequalities in Australian society concerning disability, gender, cultural and linguistic diversity, regional and remote communities and age.

We urge the Committee heed these concerns. Such is their magnitude, this Bill should not pass until they are addressed.

Recommendation 2 – The Bill is not passed in its current form

The Bill must be thoroughly reconsidered in light of the many serious concerns raised by the disability community. It should not be passed by Parliament unless and until it has been amended to address these concerns.

3.2 What this Bill does and does not do

The Government has provided several justifications for this Bill and its proposed measures, in both public comments and the Explanatory Memorandum. Some of these justifications, however, are not aligned with the challenges facing the NDIS and/or rely on inaccurate assumptions.

3.2.1 Much of this Bill does not concern fraud

Since 2023, Government messaging about the NDIS has placed strong emphasis on the Scheme's vulnerability to fraud. The importance of preventing fraud and criminal conduct is not in dispute. However, as noted in a previous submission,[2] fraud prevention has been invoked to justify a wide range of changes to the Scheme (through both legislation and NDIA practice), many of which have little or no direct connection to fraud.

Despite the prominence of fraud prevention in public statements accompanying this Bill, only the amendments in Schedule 2 and, tangentially, a few parts of Schedule 1, have a clear connection to fraud. Fraud is largely irrelevant to the more substantive changes proposed by the Bill, and the way these changes will affect people with disability.

3.2.2 Poor scheme implementation, not flawed scheme design

The Government has identified 'scheme design' as a key driver of the NDIS's rising costs. As outlined below, this concern has been used to justify an extensive overhaul of the way the NDIS operates so that it no longer supports many people and substantially reduces the support available to those who remain. This includes amending the objects and principles of the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act') that represent the philosophical heart of the Scheme, and unwinding mechanisms central to access and planning that ensure people can access support they need and a person's whole life and unique disability support needs are understood.

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2 Justice and Equity Centre, Submission No 50 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Integrity of the National Disability Insurance Scheme* (24 April 2026).

In our view this argument is misconceived. Many of the measures proposed to constrain Scheme growth are only necessary because of prior and ongoing failures in Scheme *implementation*. In 2023, the Parliamentary Joint Standing Committee on the NDIS' Inquiry into the Capability and Culture of the NDIA found serious deficits in the NDIA's capability, and a culture that 'has led, in some instances, to the creation of policies and practices based on administrative convenience which are not only inflexible for participants but can be detrimental to their wellbeing'.[3] This aligns with our own observations, both prior to and since that 2023 Inquiry.

In addition to its impact on participants, the emphasis on 'administrative convenience' has also contributed to several of the cost pressures the Bill seeks to address. For example, the NDIS Act has never required participants be admitted to the Scheme on the basis of diagnostic lists. In fact, the Administrative Review Tribunal recently commented that the guideline applying these lists 'appears unhelpfully inconsistent with the legislative provisions and rules that must be applied'.[4] This diagnosis-based approach to access was not inherent in the Scheme's design; rather it was adopted and maintained by the NDIA despite repeated recommendations to the contrary.[5]

Accordingly, the provisions in Schedule 1, Part 1 of the Bill are not necessary to implement a nuanced, functional capacity assessment for Scheme access grounded in a participant's own evidence, as the Act already provides for this. Rather, these proposed provisions permit a more generalised approach based on a broad (and not yet understood) assessment tool, effectively relieving the NDIA of its current decision-making obligations.

Similar concerns apply to planning decisions. For example, the Bill's Explanatory Memorandum observes that 'unscheduled plan reassessments are a key driver of plan and whole of Scheme inflation as they frequently increase the value of a plan, even where increases are not necessary or appropriate'.[6] Yet the funding of increases that are 'not necessary' and/or 'not appropriate' demonstrates issues with the quality of decision-making within the NDIA. Instead of improving the quality of decision-making, this Bill would restrict the scope for participants to request plan reassessments. In other words, rather than focusing on implementing the Scheme as originally designed, changes in the Bill are aimed at simplifying administrative processes, at the expense of participant flexibility.

3.2.3 The 'original intention of the Scheme'

Many of the proposed changes to the Scheme are framed as restoring the NDIS to its 'original intentions', and/or addressing 'unintended' outcomes of court or tribunal decisions. In several instances, however, these characterisations are not accurate. As discussed below, the Scheme is, in these respects, operating as intended – supporting a collective commitment to promoting the rights of Australians with disability to full social and economic participation. By contrast, the

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3 Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Capability and Culture of the NDIA* (Final Report, November 2023) xvi

4 *Chi and National Disability Insurance Agency (NDIS)* [2026] ARTA 650 at [333].

5 *NDIS Review: Working together to deliver the NDIS* (Final Report, 7 December 2023) 38, 81-83, 91 (Recommendation 3).

6 Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Securing the NDIS for Future Generations) Bill 2026* (Cth) ('Explanatory Memorandum') 17.

proposed changes risk departing from these original intentions, transforming the NDIS into a weaker and less supportive system.

It is also relevant that the Senate Committee inquiry into the Bill which became the NDIS Act recommended several amendments, subsequently adopted by Parliament, to embed a rights-based approach to disability at the core of the Scheme. In making these recommendations, the Inquiry's report made clear:

> ...the committee were of the view that the language [including references to the Convention on the Rights of People with Disability] should be strengthened to coalesce with the Strategy's commitment to using the CPRD [sic] as 'a human rights instrument and a development instrument which aims to redress the social disadvantage of people with disability'.[7]

To the extent the Bill seeks to alter the way the NDIS functions, and render the supports it offers to people with disability narrower, less flexible and more conditional, this must be understood as a retreat from Parliament's original intent.

3.2.4 Eroding the rights-based philosophy of the Scheme

By contrast, we consider the Bill fundamentally alters the original conception of the Scheme as a vital mechanism for giving effect to Australia's commitments to confer concrete legal rights on people with disability in support of their realisation of full social and economic participation. This is what Australia committed to in our ratification of the Convention on the Rights of Persons with Disabilities.

The Bill proposes significant changes to the NDIS Act's objects and principles, including elevating 'financial sustainability' at the expense of more participant-centric principles. It would also alter core aspects of the Scheme to expand discretion to refuse or withdraw supports on the basis of fiscal or policy considerations, rather than a person's needs or goals. In addition, some measures shift decision-making away from lived experience of a person with disability and those close to them, towards more standardised assessment approaches that risk overlooking the different ways disability is experienced.

We share the deep concerns by many in the disability community that the measures in this Bill together create an NDIS that engages with people with disability as recipients of conditional welfare from government, rather than as rights-holders and equal participants in society.

3.3 Delegation of Ministerial powers

Significant features of this Bill provide the Minister with very wide-ranging powers. We accept some Ministerial powers are part of good administration, but the extent of the powers delegated by the Bill risk allowing a Minister to fundamentally alter the scope of the Scheme without proper

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[7] Senate Standing Committees on Community Affairs, *National Disability Insurance Scheme Bill 2012 [Provisions]*, (Final Report, March 2013) 21, [2.17].

oversight. For example, the Bill would give the Minister unilateral power, subject only to Senate disallowance, to:

- reduce available funding in plans across the Scheme;
- stipulate funding caps for particular types of supports for a group or all participants;
- permit automated decision-making across Scheme functions; and
- set pricing for all supports provided through the NDIS.

Further, the provisions regarding 'all appropriate treatment' (as discussed below at [4.2]) in the context of permanence rely heavily on the use of rules to exempt particular forms of treatment. These rules would be Category D Rules, which may be made by the Minister subsequent only to consultation with states and territories. This introduces an additional Ministerial power over a fundamental aspect of the Scheme, subject only to weak checks and balances.

We make specific recommendations below as to ways these Ministerial powers should be curtailed. As an overarching comment, however, we observe the breadth of the proposed Ministerial powers would effectively enable a Minister to shrink the Scheme as they desire. This mechanism would limit the capacity of the disability community to engage through public and political processes with such changes, and further undermine the Scheme's protections for people with disability.

3.3.1 Powers to change the NDIS Act

One of the broadest conferrals of a Ministerial power is in Schedule 5 of the Bill, which operates as a 'Henry VIII' clause by allowing the Minister to issue instruments that alter the operation of any part of the NDIS Act.[8] This power is only available for 12 months, with instruments to expire 12 months after they are made, but is otherwise subject to very limited constraints.[9] At its broadest, this clause would theoretically give the Minister the power to suspend the NDIS entirely, or authorise tranches of participants to be admitted to or removed from the Scheme.

While we do not understand broad use of the power is intended, we note this type of clause is typically treated with caution by the courts,[10] and Parliamentary committees have previously expressed concern that these clauses alter the balance of power between legislature and executive by allowing government to act without usual parliamentary accountability.[11]

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8 National Disability Insurance Scheme Amendment (Securing the NDIS for Future Generations) Bill 2026 (Cth) ('NDIS Bill'), Schedule 5, item 1.

9 Ibid.

10 See, eg, *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 355 [18] (French CJ); [2012] HCA 58; *Cvetanovski v The Queen* (2015) 250 A Crim R 191, 200–1 [53] (Priest JA, Weinberg and Beach JJA agreeing); [2015] VSCA 65; *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v New South Wales* (2014) 242 IR 338, [103]–[108] (Basten JA); [2014] NSWCA 116.

11 For two very recent examples, see Senate Standing Committee for the Scrutiny of Bills, Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026, Scrutiny Digest 6 of 2026; [2026] AUSStaCSBSD 60 [1.282]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Aged Care Legislation Amendment (2026 Measures No. 1) Rules 2026, *Delegated Legislation Monitor 4 of 2026*; [2025] AUSStaCSDLM 31 [1.8].

The Explanatory Memorandum justifies the clause as allowing the Minister to respond swiftly to transitional issues that cannot be fully anticipated.[12] However, given the breadth of the clause, this rationale sits uneasily with the very truncated nature of this committee inquiry process. Assessing proposed legislation to identify and guard against unintended consequences is ordinarily a function of Parliament, informed by public and civil society input. It is neither appropriate nor sufficient to confer such expansive powers on the Minister in place of a robust parliamentary process, as this risks shifting the balance of powers further toward the executive.

Recommendation 3 – The need for the proposed Ministerial powers in Schedule 5 be clearly explained

The Government should provide a clear and more specific explanation for the circumstances in which the power provided by Schedule 5 of the Bill would be used, including the extent to which this power would still be necessary following more thorough parliamentary consideration of this Bill.

To the extent possible consistent with the above explanation, the scope of this power should be narrowed.

4. Changes to NDIS access

4.1 Defining functional capacity

The Bill has been presented as part of a broader package of reforms intended to shift access to the Scheme towards an assessment based on functional capacity, rather than diagnosis. As outlined above at [3.2.2], this shift does not in fact require legislative change. Rather, it could be achieved by the NDIA applying the existing law as intended.

4.1.1 New provisions in Schedule 1, Part 1 are not necessary and introduce uncertainty

While Schedule 1, Part 1 of the Bill introduces a statutory definition of 'functional capacity', it does so only to supplement existing provisions, which have already been the subject of extensive and helpful judicial interpretation.[13] Importantly, the Explanatory Memorandum states, '[t]here will be no immediate impact of the new definition of functional capacity',[14] apparently on the basis that these provisions are intended to reflect the current state of the law. This is evident, for example, in the amendment to s 24(1)(c) in item 5 of this Schedule, which merely reflects the current construction given to the NDIS Act and relevant Rules by the Federal Court in *Foster*.[15]

However, notwithstanding this apparent intention, the proposed definition may have unintended and potentially significant impacts. For example, proposed s 9B(1)(a) is similar but not identical to

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12 Explanatory Memorandum 150.

13 See for example *Mulligan v National Disability Insurance Agency* [2015] FCA 544; *National Disability Insurance Agency v Foster* ('*Foster*') [2023] FCAFC 11; *National Disability Insurance Agency v Lampard* [2025] FCAFC 139.

14 Explanatory Memorandum 15.

15 See *Foster* at [65]-[67].

rule 5.8(a) of the current *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) (‘*Access Rules’)*. Rule 5.8(a) requires an assessment of a person’s ability to undertake an activity ‘without assistive technology, equipment (other than commonly used items such as glasses) or home modifications’. Proposed section 9B(1)(a) refers to ‘without assistance from other people, assistive technology or modifications’, omitting specificity like the reference to ‘commonly used items’. This divergence risks creating uncertainty – for example, should a person’s capacity be assessed with or without items such as glasses.

In this context, the proposed definition appears to have no practical utility, while introducing a real and avoidable risk of legal uncertainty.

In addition, this Part introduces a rule-making power in proposed subsection 9B(3), to be used to support use of an assessment tool for assessing functional capacity.[16] This is a major policy change and we say more about the substantive merit of this policy below at [4.1.2]. However, it is unclear why this new rule-making power is required, given the existing broad power available in s 27(1) of the NDIS Act to make rules ‘determining any matter for the purposes of section 24...or 25’ (the wide scope of which has been upheld by the Federal Court).[17]

We accordingly recommend this Part be omitted to avoid importing the very legal uncertainty it is aimed at addressing.

Recommendation 4 – The ‘functional capacity’ provisions be removed

The ‘functional capacity’ provisions in Schedule 1, Part 1 of the Bill should be removed.

4.1.2 Proposed standardised test for functional capacity risks unfairness

The Minister has indicated the provisions in Part 1 are intended to lay the groundwork for a standardised assessment tool to assess functional capacity for both prospective and existing participants (whom could potentially be removed from the Scheme).[18] This represents a substantial departure from the current approach, which requires consideration of all available evidence, including a participant’s own accounts and material from their treating medical and allied health professionals.

We have serious concerns as to the viability of any assessment tool to capture the diversity of experiences and manifestations of disability. Even if co-designed appropriately, a standardised approach will inevitably better accommodate some disability types than others. Such an outcome would entrench systematic biases and impede access to the Scheme. It also risks overlooking the complexity of individual circumstances, which would lead to substantive unfairness where people are wrongly denied access.

There is, however, another way to achieve the stated objectives of these reforms. If the Government’s concern is the misalignment between the outcomes produced by a list-based

16 Explanatory Memorandum 15.
17 *Kelly v National Disability Insurance Agency* [2024] FCA 1462.
18 Noting this would be supported in part in the Bill’s stated application by Schedule 1, item 11 of the Bill.

diagnosis approach to access, and the already-legislated standard of 'substantially reduced functional capacity', this could be addressed by properly applying the existing statutory test.

4.2 Changes to requirement for an impairment to be 'permanent'

Schedule 1, Part 8 of the Bill introduces a more restrictive approach to determining whether impairments are 'permanent' for the purpose of NDIS access. As permanence is central to both the disability and early intervention pathways, these changes will have significant consequences for who can enter the Scheme and who can remain eligible.

The Government's stated rationale is to introduce a more 'definitive test' to limit eligibility to those originally intended to benefit from the Scheme.[19] However, in our view, the measures in Part 8 go beyond this in a way that will unfairly exclude people from the Scheme. They significantly raise the access threshold and risk producing unjust, harsh and unintended outcomes. In particular, they may exclude people with genuine, lifelong disabilities, or those who require early intervention.

For the reasons below, we consider the proposed amendments are so flawed that Part 8 should be rejected in its entirety.

4.2.1 Requirement to exhaust 'all' treatment options is unclear and unfair

By making permanence contingent on exhausting 'all appropriate treatment', the Bill sets an unduly rigid and unclear threshold that risks unfairly excluding people with lifelong disabilities from access.

Proposed section 24(5) provides that an impairment will not be 'permanent' unless the person has undertaken 'all appropriate treatment'. 'Appropriate treatment' is treatment that is evidence-based, can reliably be expected to materially improve, reverse, or alleviate the impact of, the impairment and is regularly undertaken or performed in Australia.[20]

Critically, treatment may be appropriate regardless of a person's individual circumstances.[21] Concerningly, this approach effectively reverses *NDIA v Davis* [2022] FCA 1002, in which the Federal Court held that the existence of a treatment option does not preclude NDIS access if that treatment is not realistically accessible to the individual. The Court in *Davis* also clarified the term 'permanent' in section 24(1)(b) of the NDIS Act means 'enduring', rather than 'irreversible' or 'long-term'.[22] By making permanence contingent on the exhaustion of treatment options, the Bill departs from this settled interpretation and contradicts the intended meaning of 'permanent' under the NDIS Act.

Key concepts in proposed section 25A such as 'evidence-based', 'reliable' and 'regularly undertaken' are not defined. This introduces ambiguity and uncertainty in how the provisions will be applied. The Bill also makes no allowance for excluding treatments that may take many years

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19 Explanatory Memorandum 61.
20 NDIS Bill proposed section 25A(1).
21 NDIS Bill proposed section 25A(2).
22 *National Disability Insurance Agency v Davis* [2022] FCA 1002 (*'Davis'*) at [79] – [85].

to complete – not only does this increase the burden on people as the Bill requires all treatment options to be explored before an impairment is deemed 'permanent', but it would also result in people's conditions deteriorating while they attempt to demonstrate eligibility. It would also create disparate impacts between those with resources to navigate systems and those without.

The Bill requires decision-makers to disregard whether treatment is unaffordable or geographically inaccessible.[23] Although the Explanatory Memorandum emphasises the need to ensure all 'people with disability have access to mainstream services',[24] this ignores the lived experience of many people with disability, particularly those facing disadvantage or living in regional and remote areas, who often encounter barriers in accessing health services.[25] These reforms are likely to have a disproportionate and adverse impact on certain communities including Aboriginal and Torres Strait Islander participants residing in the Northern Territory who commonly face significant structural barriers to engaging with mainstream health services, especially in remote communities where interpreters and culturally safe supports are limited.[26]

By requiring people to exhaust treatment options that may exist only in theory before an impairment can be considered 'permanent,' the proposed test risks excluding people with lifelong disabilities on the basis of hypothetical future treatments options, regardless of their practical accessibility. As the Explanatory Memorandum itself recognises, many impairments require ongoing treatment to maintain functional capacity, and this should not be a barrier to NDIS access.[27]

Although proposed section 25A(3)(a) allows a treatment option to be disregarded where there is a medical reason preventing it, this is a very narrow exception. The Bill would exclude people who decline treatment for non-medical reasons. The JEC has heard concerns from our disability community partners that this approach unjustifiably interferes with the right to bodily autonomy.

The Bill does contemplate that certain circumstances, such as cultural or personal beliefs,[28] may justify exemptions from particular treatment options. However, these matters are left to be addressed through future NDIS Rules.[29] This is problematic given such exceptions will be central to the operation of the new permanence test and to determining access to the Scheme. Given the risk of unfairness, it is concerning these issues are left to future rule-making. In addition, the Explanatory Memorandum indicates that these will be Category D Rules, which are intended to be administrative rather than substantive policy instruments, and which do not require agreement (only consultation) from state and territory governments.

These new permanence provisions are not scheduled to commence until 2028. Given that timeframe, it is premature to enact such significant legislative changes now, without clarity about

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23 NDIS Bill, accompanying legislative note to proposed subsection 25A(2).
24 Explanatory Memorandum 63.
25 See for example, Firew Tekle Bobo et al, 'Disparities in access to health and support services for people with disability in Australia: a scoping review of the structural social determinants' (2026) 26 *BMC Health Services Research* 72.
26 Disability Advocacy Service, Integrated Disability Action and Darwin Community Legal Service, *Joint Submission to the NDIS Amendment (Securing the NDIS for Future Generations) Bill 2026* (29 May 2026) 11.
27 Explanatory Memorandum 62.
28 Explanatory Memorandum 64.
29 NDIS Bill proposed subsection 25A(4).

the scope of exemptions and proper analysis of unfair or unintended outcomes. These provisions should therefore be rejected.

4.2.2 Unclear treatment standards and evidence base

It is unclear how NDIA decision-makers, many of whom do not have clinical or medical qualifications, will be expected to assess whether treatments meet these criteria in individual cases.

There are already concerns about inappropriate reliance on treatment options in access decisions, noting that the existing NDIS Rules require consideration of available and appropriate evidence-based clinical, medical or other treatments likely to remedy the impairment.[30] For example, a 2025 report by the Australian Psychosocial Alliance found that non-expert assessors have, on multiple occasions, relied on inappropriate treatments to reject claims of permanence for people with psychosocial disability.[31] There have also been reports of people being denied access for not pursuing contentious treatments, including people with Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS) being refused access for not undertaking Graded Exercise Therapy and Cognitive Behavioural Therapy.[32]

Rather than clarifying the permanence test, these provisions risk generating confusion, inconsistency and clinically unsound outcomes, further underscoring the case for rejecting Part 8.

4.2.3 Amendments undermine early intervention

The requirement to undertake 'all appropriate treatment' is fundamentally at odds with the rationale for early intervention under the NDIS, which recognises that 'a person may need support to help minimise the impact of a disability from its earliest appearance, and that the provision of support may improve the person's functioning or prevent the progression of their disability over their lifetime.'[33]

The Bill also replaces 'mitigating or alleviating' in section 25(1)(c)(i) with 'reducing'. While the Explanatory Memorandum states this is intended to simplify the test,[34] it narrows access in practice. For people with degenerative or progressive conditions, early intervention is aimed at maintaining function or slowing decline, rather than reducing impairment. Under the proposed wording, access may be restricted.

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30 *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.4.

31 Australian Psychosocial Alliance, *Access Denied: Psychosocial Disability and the NDIS* (October 2025) <https://img1.wsimg.com/blobby/go/27ab207b-baf2-495e-8234-0265bac6bdcf/downloads/e21cda9b-dd7c-417d-86d6-ec1d49bb9338/J30877%20APA%20%20Report%20Access%20Denied%202024-25_%C6%923_we.pdf?ver=1776731895539> at 28: 'In some specific and concerning cases, NDIA responses as to the treatments that have not been explored have included identification of specific drugs, and also electroconvulsive therapy (ECT, or shock therapy).'

32 DSC, *Access denied over refusing medical treatment* (15 April 2024) <https://teamdsc.com.au/resources/access-denied-refusing-medical-treatment/>; SBS, *Fighting Disbelief: Chronic Fatigue Syndrome* (4 April 2018) <https://www.sbs.com.au/news/the-feed/video/fighting-disbelief-chronic-fatigue-syndrome/sdl7bfe4o>.

33 Explanatory Memorandum to the National Disability Insurance Scheme Bill 2012 (Cth) 13.

34 Explanatory Memorandum 62.

The extension of the 'appropriate treatment' requirement to 'early intervention' also risks perverse outcomes. Early intervention is designed to support people to build capacity early and reduce long-term support needs. Yet under the Bill, a person may be unable to access funding for capacity-building therapies because they have not already undertaken all 'appropriate treatments', including the very therapies they are seeking funding to access.

4.2.4 Proposed permanence test is misaligned with functional capacity

To access the NDIS, a person must establish both that their impairment is permanent and that it substantially reduces their functional capacity. It is unclear how the requirement to undertake all appropriate treatment is intended to operate alongside the functional capacity test. This risks leaving people without access to the NDIS, even where their needs are substantial and ongoing.

For example, a person may be aware of a form of rehabilitation that could lead to some improvement, but only after many years, and they continue to experience substantially reduced functional capacity in the interim. Under the proposed framework, they could be denied NDIS access during that period, despite clearly meeting the functional threshold. Denial of support in this interim period risks worsening disability and creating long-term adverse impacts.

The Bill also does not clearly define what it means for treatment to 'materially improve' an impairment. While the Explanatory Memorandum states that 'materially means noticeably or significantly',[35] this offers limited practical guidance. Without a precise definition, there is a risk people with enduring disabilities will be required to exhaust all treatment options, however marginal, before being considered eligible. The drafting does not make clear that limited or partial improvements should not preclude access where functional capacity remains substantially reduced. The note that 'a person may require ongoing treatment for some permanent impairments in order to maintain functional capacity in relation to an activity'[36] does not resolve this concern.

Moreover, the inclusion of 'alleviate'[37] in the proposed permanence test sets an impermissibly low threshold. Almost any impairment could be 'alleviated' to some degree. This risks excluding people with serious, lifelong impairments simply because some limited improvement is possible, even where overall functional capacity remains substantially reduced and their need for ongoing support is clear. The provisions may also disadvantage people with progressive conditions, where treatment may slow decline, but not reverse it, even though decline is inevitable. This risks excluding people precisely at the point where timely support is most critical.[38]

Rather than complementing the functional capacity test, these provisions undermine it by denying access on the basis of speculative or limited treatment outcomes, even where a person's need for support is clear.

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35 Explanatory Memorandum 62.
36 NDIS Bill, accompanying legislative note 2 to proposed subsection 24(5) and accompanying legislative note 2 to proposed subsection 25(1B).
37 NDIS Bill, proposed subsections 24(5)(b), 25(1B)(b) and 25A(1)(b).
38 Australian Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report Volume 1* (No. 54, 31 July 2011) 171.

4.2.5 Risk of requiring people to exhaust 'inappropriate' treatment

By introducing a requirement that extends beyond 'all appropriate treatment', proposed subsections 24(5)(b) and 25(1B)(b) create a serious risk that the permanence test will be interpreted to require the exhaustion of inappropriate treatment.

Proposed subsection 24(5)(b) provides that, for the purposes of satisfying the disability access requirements, an impairment will only be considered 'permanent' if 'any other treatment is unlikely to materially improve, reverse, or alleviate the impact of, the impairment or impairments'. Proposed section 25(1B)(b) applies an equivalent requirement for the early intervention pathway.

These provisions unnecessarily duplicate the definition of 'appropriate treatment' in proposed subsection 25A(1)(b), and risk creating uncertainty in how the permanence test is to be interpreted and applied.

Moreover, by introducing a separate requirement alongside the obligation to undertake 'all appropriate treatment', subsections 24(5)(b) and 25(1B)(b) give rise to a problematic interpretation: that a person may be required to exhaust treatments that are not appropriate before their impairment can be recognised as permanent. This would raise the access threshold in an unintended way. This risk is compounded by the absence of any rule-making power (unlike for sections 24(5)(a) and 25(1B)(a)), to clarify the intended operation of these provisions, or to provide carve-outs for circumstances where, for example, further treatment is inappropriate, futile or harmful.

4.2.6 Part 8 should be rejected in its entirety

Part 8 introduces a permanence test that is rigid, ambiguous and disconnected from the realities of living with disability. It risks excluding people based on theoretical treatment options rather than actual needs, imposes unreasonable evidentiary burdens, undermines early intervention, and departs from the foundational principles of the NDIS. These problems are not capable of being fixed through minor amendment or delegated rule-making. For the reasons above, Part 8 should be removed from the Bill in its entirety.

Recommendation 5 – Changes to the test for 'permanence' be removed

Schedule 1, Part 8 of the Bill gives rise to multiple, fundamental issues that cannot be rectified by minor amendment and should therefore be rejected entirely.

4.3 Other available support systems limiting access

Proposed section 25B proposes two ways in which people receiving support from other systems would be denied access to the NDIS. We do not think these additional restrictions are justified and could unfairly deny access to the Scheme.

In the case of *National Disability Insurance Agency v Sutherland*, the Federal Court determined the availability of other support systems that might meet a person's needs is irrelevant to

determining their access to the NDIS.[39] The effect of *Sutherland* was that access to the Scheme was not denied because other supports might be available, but those other supports were taken into account in the planning process. So, the NDIS could fill a gap between those other supports and a person's actual needs – but not double-up. This Bill overrides that decision.

4.3.1 Excluding access based on entitlement to certain compensation schemes

First, the provision imposes a blanket exclusion on access to the NDIS where a person's impairment was caused by a motor vehicle accident or work-related injury and the person is entitled to compensation under a relevant statutory scheme. We defer to those with expertise in those compensation schemes and the NDIS as to the need for any specific provision, but note:

- Those compensation schemes typically have a more limited purpose and scope than the NDIS, which is directed toward supporting independence and social and economic participation. There is no requirement to consider whether the compensation scheme would support the person in the same way as the NDIS would.
- Support under those schemes may be time-limited, in contrast to the NDIS, which is intended to provide lifetime supports where required.
- A blanket exclusion based solely on the existence of another scheme therefore risks producing inequitable outcomes if people with similar impairments are unable to access equivalent supports.
- State or territory compensations schemes are subject to law and policy reform such that the scope of future entitlements cannot be guaranteed under those schemes.
- Where a person is eligible for multiple systems of support, they should in principle be able to access each, subject to appropriate safeguards against duplication. Such safeguards already exist within the NDIS. The 'compensation reduction amount' ensures participants who receive compensation for injury-related impairments, are not funded twice for the same supports.
- The Government has not identified a significant cohort affected by this.

In that context, there is no clear justification for a blanket exclusion. It risks operating as a disproportionate response to a problem that is already addressed, and may deny people access to supports they would otherwise legitimately receive.

4.3.2 Excluding access to prescribed service systems

Second, the proposed section gives the NDIS Minister power to make Category A rules to prescribe other service systems or particular impairments as being excluded from the NDIS. This is not an appropriate mechanism for excluding access to the NDIS, for the following reasons:

- Taking the example of aged care, referred to in the Explanatory Memorandum, excluding people who can access aged care would lead to unfair outcomes and leave some people without the supports they need. This includes potentially excluding First Nations people who qualify for aged care at 50, even though they may still be eligible for the NDIS. Such

39 *NDIA v Sutherland* [2026] FCA 3.

clearly discriminatory outcomes occurred prior to the *Sutherland* decision, where the Administrative Review Tribunal in two separate decisions refused access to two Aboriginal women in their 50s.[40]

- Excluding particular impairments from the NDIS is antithetical to its objects. The Explanatory Memorandum says this may apply to impairments arising from some chronic health conditions.[41] The NDIS is built around functional impairment and individualised assessment, not categorical exclusion.

The Category A rule has the potential to significantly and disproportionately restrict access to the NDIS. Its intended operation is currently speculative, based only on indications in the Explanatory Memorandum. There is also no meaningful limitation on the rule-making power beyond its classification as Category A. A power of this breadth requires proper accountability and Parliamentary oversight, and should only be conferred by amendment to the NDIS Act.

Recommendation 6 – The exclusion of other support systems be removed

The exclusion of other support systems in Schedule 1, Part 9 of the Bill should be removed.

At a minimum, if Part 9 is to be retained, the rule-making power in proposed section 25B should be removed.

5. Changes to NDIS planning

5.1 Undoing 'whole of person' supports

The Bill's reversal of the 'whole of person' approach to support funding in section 34(1)(aa) will re-introduce ambiguity and inconsistency into support funding decisions and prevent people from getting the supports they need. Schedule 1, Part 3 of the Bill should therefore be removed.

The NDIS Review recommended the planning process and funding of supports be delivered at a 'whole of person' level.[42] Significantly, in response to this and disability community advocacy, in 2024 the Government amended the NDIS Act to ensure a 'whole of person' approach is taken to funding of supports.[43] The Explanatory Memorandum introducing that amendment in 2024 made clear the wording of section 34(1)(aa) enables the Scheme to provide funding for supports in a way that accounts for the variety of factors that may affect a participant's need for supports, including the impact of other impairments that do not meet the access criteria.[44]

The proper application of section 34(1)(aa) and the accompanying legislative note (b) was confirmed by the Federal Court in *CEO of the NDIA v Eastham* [2026] FCA 147 ('*Eastham*'). The

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40 See *Brickhill and NDIA (Practice and procedure)* [2025] ARTA 707; *Court and CEO, NDIA (NDIS)* [2025] ARTA 1650.
41 Explanatory Memorandum 66.
42 See for example, *NDIS Review: Working together to deliver the NDIS - Supporting Analysis* (Final Report, 7 December 2023) 260, 299.
43 NDIS Act s 34(1)(aa) and accompanying legislative note (b).
44 Revised Supplementary Explanatory Memorandum to National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, Revised Sheet PA112, 9.

Federal Court described the 'whole of person' approach as 'commonsense' and made clear the NDIS Act requires supports to be funded even if the need for the support has multiple causes, as long as one cause is the impairment that gave the participant access to the NDIS.

The Explanatory Memorandum to the current Bill says the outcome in *Eastham* represented an 'unintended expansion' of the Scheme.[45] However, this does not reflect the Government's position at the time of the 2024 amendments.[46]

The Bill's proposed change to section 34(1)(aa) and the repeal of the accompanying legislative note (b) means the NDIA would no longer take a whole of person approach and only fund supports that arise 'directly' from an impairment that meets the access criteria. The Explanatory Memorandum says this will involve determining 'whether the impairment is the direct and immediate source, cause or origin of the need for support as opposed to a contributory cause of the need.'[47]

In practice, this envisages NDIA delegates linking each support need to a specific impairment(s). However, this imposes artificial distinctions for a person with multiple and interrelated disabilities, and how their support needs are understood. For example, for a participant with chronic pain (which has not been accepted as an impairment satisfying access to the NDIS) and a psychosocial impairment (which had been so accepted), and who requires psychosocial supports, it is hard to see how an NDIS delegate could practically determine which components or proportion of the psychological supports 'directly arise' from each impairment.

Not only does this approach impose artificial distinctions, but would lead to participants not being supported adequately, and therefore worse outcomes.

5.1.1 Potential for misapplication of the 'directly arising' standard

In addition to producing unfair outcomes, the 'directly arising' standard would make the law less clear and harder for decision-makers to apply consistently. The current approach, as explained in *Eastham*, allows for multiple contributing causes, and asks whether the support is needed because of the relevant impairment. By contrast, requiring a support need to arise 'directly' from an impairment introduces a narrower and more evaluative test with no clear content. The difficulties in applying this kind of causation inquiry have been demonstrated in other areas of law, like tort, where the disruption to the simple necessity-based 'but for' test since the decision in *March v E & MH Stramare Pty Ltd*[48] has made it difficult to determine causation consistently.[49]

The same problem is likely to arise here. Decision-makers would be required to apply an unclear test to determine when an impairment moves from being 'a cause' to 'a direct cause' of a support

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45 Explanatory Memorandum 24.
46 Revised Supplementary Explanatory Memorandum to National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, Revised Sheet PA112, 9.
47 Explanatory Memorandum 25.
48 (1991) 171 CLR 506.
49 Justice James Edelman, 'Understanding Causation and Attribution of Responsibility' (Speech, The Supreme Court of Victoria 2015 Commercial Law Conference, 7 September 2015) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-edelman/edelman-j-20150907>.

need.[50] In practice, this this is likely to produce either inconsistent decisions or a rigid administrative approach driven by NDIA policy rather than the text of the Act. Either way, the result would be greater uncertainty and a heightened risk of legal challenge.

These issues are compounded by the fact these decisions will be made by NDIS delegates, rather than qualified health practitioners, meaning they may be ill-equipped to make assessments about what support needs directly arise from what impairments.

These challenges will defeat the intention stated in the Explanatory Memorandum, being to achieve consistency.

Additionally, the Explanatory Memorandum says, '[t]he impact of a participant's individual characteristics and environmental circumstances will be taken into account in determining need.'[51] If this is the intention, it is unclear why the legislative note to subsection 34(1) is proposed to be repealed.[52]

Even more concerningly, reversing the 'whole of person' approach is 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 participants' support needs in light of their goals across their lifetime.

We strongly recommend not removing the 'whole of person' approach as proposed in subsections 34(1)(aa) and accompanying legislative note (b) and subsection 32L(6) and accompanying note. Doing so would undermine the purpose of the Scheme and would create significant practical difficulties in its administration.

Recommendation 7 – The 'whole of person' approach to funding be retained

The NDIS should retain the current to funding supports on a 'whole of person' level. Accordingly, Schedule 1, Part 3 should be removed and Schedule 4, items 6 and 10 of the Bill should be removed.

5.2 Funding 'reasonable and necessary' supports

5.2.1 Changing principles removes people-centred planning

As outlined in [3.2.4] above, the NDIS Act's objects and principles would be significantly changed by this Bill. In respect of planning, by repealing section 31 and replacing it with amendments to section 17A and proposed section 17B, the Bill moves people and their goals and needs out of the centre of decision-making, and instead puts financial sustainability of the Scheme first.

The Bill would materially change how 'reasonable and necessary' supports are understood. In particular, new subsection 3(1)(d) replaces the reference to 'reasonable and necessary supports' with 'NDIS supports...consistent with the financial sustainability of the Scheme'. This indicates that people can no longer expect the Scheme to meet their support needs if those needs are

51 Explanatory Memorandum 25.
52 NDIS Bill, Schedule 1, Part 3, item 32.

deemed to be too expensive. By contrast, section 31 and the existing objects and principles require planning decisions to be individualised, participant-directed, and focused on choice, independence, and tailored responses to a person's goals and needs. Removing this says to people that those principles which previously distinguished the Scheme as means of achieving rights to independence, dignity and participation are no longer important.

The Government says the current objects and principles have led courts and tribunals to favour participants. But these changes risk recasting the NDIS as a fiscally constrained welfare scheme, rather than a rights-based framework for individualised support.

5.2.2 New funding criteria and reinterpretation of existing criteria

The Bill changes the criteria for funding a support and alters how existing criteria should be interpreted.

The Explanatory Memorandum says these new considerations are 'currently factors in the Supports for Participants rules but will be strengthened in the primary legislation.'[53] However, while *some* factors have been drawn from the *NDIS (Supports for Participants Rules) 2013* (Cth) ('*Supports Rules*'), these have been reflected selectively and reframed to favour financial sustainability considerations.

Further, it is unclear how the *Supports Rules* are intended to operate alongside proposed subsections 34(1A)-(1K). The apparent incorporation of some factors from the *Supports Rules* into the primary legislation – albeit in a reframed way – creates a real risk of inconsistency between the two. Rather than promoting clarity or consistency, these changes are likely to cause confusion for both delegates and participants as to the correct legal framework to apply. Delegates will have to navigate competing or duplicative considerations, while participants will face increased difficulty in understanding and appealing decisions. The drafting reflects insufficient policy design and risks undermining the administration of the Scheme.

Finally, the Explanatory Memorandum says these changes are aimed at achieving more consistency in what is otherwise a very discretionary process. However, as we explain below, the effect of the changes will be to restrict the availability of supports under the Scheme.

5.2.3 Is there a 'more appropriate system' to provide the support

The Bill reintroduces a requirement for NDIS delegates to consider if another program or service system is more appropriate to provide a support – proposed subsection 34(1)(g). This requirement is duplicative and requires evaluative judgements by decision-makers and should be rejected.

A previous version of this provision was removed in 2024 (then subsection 34(1)(f)). It was removed because a definition of 'NDIS support' was introduced which by s 10(2) of the NDIS Act requires that, before declaring a support an NDIS support, the Minister must be satisfied the

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[53] Explanatory Memorandum 46.

support is appropriately funded by the NDIS. The Explanatory Memorandum explaining this change stated under a heading of 'Appropriately funded by the NDIS':

> Intergovernmental agreements outline the supports that are appropriately provided by the NDIS and those that are more appropriately funded by other programs and service systems…
>
> This requirement already exists in the Act and is relevant to both access and the existing planning framework. For example, currently paragraph 34(1)(f) of the Act provides that reasonable and necessary supports must be more appropriately funded or provided through the NDIS.
>
> …
>
> Inserting this requirement into the definition of NDIS supports simplifies the Act so that the requirement is set out in one place, rather than intermittently throughout the NDIS Act.[54]

Given this is covered in the definition of NDIS supports, it is unclear why it should be reintroduced into section 34.

Moreover, the Administrative Appeals Tribunal has found it is not appropriate for an NDIS delegate to be evaluating an interface defined between the Commonwealth, state and territory governments. Specifically, the Tribunal said:

> 55. Determining which delivery system is 'most appropriate' to deliver a service to a citizen is not normally the province of an executive decision maker dealing with a specific item of expenditure. It clearly involves a value judgment, but it is not easy to discern on what basis the judgment is to be made.
>
> 56. The phrasing of the requirement carries with it the implication that there is some readily available means by which a decision maker can rank the appropriateness of various persons…providing a support…However, in reality, apart from the allocation of powers between the Federal government and the states found in the Constitution, there are few objective guides to assist with considering the question of relative appropriateness.[55]

As acknowledged in 2024, this requirement is already built into the planning decision-making process. To avoid unnecessary duplication and evaluative judgments by individual NDIS delegates, this amendment should be removed from the Bill.

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54 Revised Explanatory Memorandum, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) 3.

55 *XNTW and NDIA* [2023] AATA 759 (14 April 2023).

Recommendation 8 – The 'more appropriate service system' criterion be removed

The requirement for the CEO to be satisfied the support is not more appropriately provided or funded by another scheme or service system is duplicative and should be removed. Schedule 1, Part 6, items 69 and 70 of the Bill should be removed.

5.2.4 Interpreting 'value for money'

The addition of proposed subsection 34(1A), concerning whether a support is 'value for money' considering 'comparable supports', could result in participants being forced to accept inappropriate supports and should be rejected.

Subsection (1A) requires consideration of 'comparable supports' for lower cost but does not also consider comparable outcomes. It is clear in the *Supports Rules* from which this is (partly) drawn, that any comparable supports must also achieve the same outcome.[56] However, proposed subsection 34(1A) abandons that premise and instead favours decisions that achieve lower costs.

In practice, this is likely to push participants toward shared or group supports, or ineffective assistive technology, regardless of whether that is appropriate for the participant or is their preference. This risks a person's needs not being met, with potentially profound consequences for their wellbeing and capacity to participate in the community.

For these reasons, proposed subsection 34(1A) should be removed from the Bill.

Recommendation 9 – The 'value for money' consideration in proposed subsection 34(1A) be removed

The 'value for money' consideration in proposed subsection 34(1A) should be removed from the Bill.

5.2.5 Interpreting 'effective and beneficial'

The Bill at proposed subsections 34(1E)-(1F) create a hierarchy for determining whether a support is 'effective and beneficial'. It requires NDIA delegates to prioritise peer-reviewed and generalised research about the effectiveness (or not) of a support, over a participant's lived experience or evidence from their treating practitioners.

The Explanatory Memorandum says the NDIA may find a support not effective or beneficial 'if there is limited or not published or peer reviewed evidence, even if there is evidence of effectiveness of the support either generally or for the participant in particular'.[57] This approach aligns with a focus on controlling costs by favouring standardised, widely evidenced supports, but would make it harder for participants to get funding for some supports, particularly for more novel or individualised supports, even where these have delivered positive outcomes.

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56 *National Disability Insurance Scheme (Supports for Participants Rules) 2013* (Cth) ('Supports Rules') s 3.1(a).
57 Explanatory Memorandum 53.

By elevating the form of evidence over real-world effectiveness, we foresee the following undesirable outcomes:

- supports being denied because they are not widely studied;
- supports being denied because they do not have a formal academic evidence base;
- mainstream or conventional supports being favoured, when alternative or innovative supports may be more beneficial for some participants;
- supports being funded that are 'evidence-based' generally, but less effective for that participant; and/or
- decision-making become less participant-focused and more rigid.

Further, it is not clear what body of evidence NDIA delegates will rely on, or how that evidence will be identified, assessed or updated. This creates a transparency problem as participants cannot know in advance what evidentiary test they might have to meet. Also, NDIA delegates may not be qualified to make evaluative judgments about what evidence is appropriate or how conflicting evidence should be resolved. A recent Administrative Review Tribunal decision shows the NDIA can easily get this wrong.[58]

Because of the stark difference between the proposed hierarchy in the primary legislation and the existing considerations for 'effective and beneficial' in the *Supports Rules*, this is likely to cause confusion and risk undermining administration of the Scheme.

In our view, the current *Supports Rules* provide an adequate basis for the 'effective and beneficial' consideration, and the changes proposed in the Bill should not pass.

Recommendation 10 – The 'effective and beneficial' considerations be removed

Proposed subsections 34(1E) and (1F) should be removed from the Bill, as the Current Supports Rules provide an appropriate structure for the 'effective and beneficial' consideration.

5.2.6 Interpreting 'what is reasonable to expect of family, carers, informal supports and the community'

For child participants, proposed subsections 34(1G)-(1J) substantially alter the consideration of what is reasonable to expect of families, imposing unfair and rigid restrictions on the ability of families to access NDIS support for their children with disability. Again, it is not, as the Explanatory Memorandum suggests, simply an elevation of existing factors from the *Supports Rules* into the primary legislation.

These changes would shift more of the cost and burden of support for children with disability onto families, carers, informal supports and the community. This may reduce costs to the Scheme of providing necessary supports but it does not remove those needs. This risks leaving children and

[58] In *Van Kuyk and CEO, NDIA (NDIS)* [2026] ARTA 695 at [63] and [116]-[117], the NDIA relied on articles of studies of 'sauna or sauna like therapy in mice' and the Tribunal criticised the NDIA's conclusions, including conflation of sauna therapy with low-level laser therapy and inappropriate application of research to the participant's disability.

families unsupported, particularly where other service systems are not available or functional, or where families are already experiencing multiple and intersecting disadvantage.

5.2.6.1 Importance of considering needs specific to children with disability

Currently, the *Supports Rules* consider whether it is 'normal' for parents to provide substantial care and support for children, while also considering whether because of the child's disability, the child's care needs are substantially greater than those of other children of a similar age.[59] Proposed subsection 34(1G) would instead require the NDIA to consider the 'presumption' that parents are responsible for providing 'substantial care and support' for their children. 'Substantial care and support' must be assessed 'regardless of the child's disability'.[60] The definition does not consider the *inputs* required from a parent/carer to provide that care and support, and the substantial differences in those inputs that will be influenced by a child's disability.

This change would pose two compounding issues:

i. in legal terms, a 'presumption' is a higher bar than the consideration of what is 'normal', and may be difficult to rebut; and
ii. unlike the *Supports Rules*, which explicitly required considering whether a child's needs are greater because of their disability, the Bill explicitly disregards that.

The combined effect is an onerous and rigid presumption, which shifts a large portion of disability-related care onto families, even where that may not be appropriate.

We therefore recommend the consideration of parental support regarding child participants to retain the focus of the *Supports Rules* on whether the care needs of a child with disability are greater than those of other children of similar age.

5.2.6.2 Over emphasis on parental responsibilities

Proposed subsection 34(1J) should also be amended. As drafted, it risks inappropriately narrowing the supports available to children by effectively conflating disability-related needs with ordinary parental responsibilities. This approach could disproportionately impact children with higher or more complex needs and their parents.

Moreover, the use of both 'primary' and 'substantial', which have distinct meanings, introduces uncertainty and may exclude supports where a benefit to the child exists, notwithstanding that it also reduces parental burden. The provision also does not adequately accommodate legitimate parental preferences – for example, those connected with the child's dignity such as the example in the Explanatory Memorandum about supports for continence care for an older child.

5.2.6.3 Weight given to risks to participants and carers

Additionally, proposed subsection 34(1K) alters the weight given to risks of harm to a participant or carer. Such risk would only lead to funding a formal support where the risk 'cannot be

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59 Supports Rules ss 3.4(a)-(ii).
60 NDIS Bill, proposed subsection 34(1H)(b).

mitigated through informal or lower cost supports'.[61] This sets a very high bar – a risk may be mitigated to some degree, but not to a safe level, and still not meet this test. This exposes families to unnecessary risks of harm.

A similarly high bar is proposed by subsection 34(1K)(b), which directs that informal supports are to be prioritised over formal supports, except where formal supports are 'necessary'. This could lead to funding being denied despite being appropriate for the participant, for example, because this does not properly account for:

- carers who are overburdened;
- strained informal relationships which compromise informal support (while not reaching the high threshold of material risk of harm, abuse or neglect); or
- poor quality of care.

Both limbs of s 34(1K) could result in NDIA delegates unreasonably denying supports.

Additionally, these tests undermine the Scheme's objects as they:

- do not allow considering whether the funding of a support would build or improve the participant's capacity and independence (particularly in the context of ageing carers); and
- do not enable people with disability to exercise choice and control in the delivery of their supports.

In our view, the existing *Supports Rules* provide an adequate and fair structure to assess what is reasonable to expect of family, carer and other support. Given the numerous issues we have identified above, and the significant consequences of the amendments proposed, we recommend against proposed subsections 34(1G)-(1K) passing as currently drafted. In this short consultation period, although we have not been able to propose specific suggestions to address the identified issues, we make some broader recommendations to address the identified issues.

Recommendation 11 – The 'family, carers and other supports' considerations be redrafted

Proposed subsections 34(1G)-(1K) should be amended to ensure the assessment of what is reasonable to expect of families, carers, informal networks and community appropriately accounts for:

- *circumstances where, while it is commonly expected that parents are responsible for providing care and support for their children, because of the child's disability the child's care needs are substantially greater than those of other children of a similar age;*
- *the extent of any risks to the wellbeing of the participant or any other person; and*
- *circumstances in which it is less appropriate or inappropriate for family, carers, informal networks and/or the community to provide the support.*

[61] NDIS Bill, proposed subsection 34(1K)(a).

5.3 Limits on supports funding

The Bill proposes two mechanisms that would empower the Minister, by legislative instrument, to restrict the level of supports available to participants:

a. support determinations for old framework plans (proposed section 34A); and

b. caps within statements of supports (proposed subsections 33(2EA) and 33(2EB)).

These mechanisms represent a significant departure from the foundational principles of the NDIS, premised on individualised planning, choice and control, and funding supports assessed as reasonable and necessary for each participant.[62]

At the outset, we oppose any reforms empowering the Minister with broad discretion to restrict or cap supports. The disability community has expressed serious concerns about these amendments, particularly the significant risk they pose to participants' access to supports and to participant safety, including in the most severe cases, the risk of death. Before these provisions, or any provisions of this kind are enacted, Government must undertake genuine and meaningful consultation with the disability community to ensure these concerns are addressed. Our recommendations set out below are directed at reducing the likelihood of unintended and unfair outcomes arising from these reforms.

5.3.1 Support determinations for old framework plans

Proposed section 34A enables the Minister to make support determinations to address perceived 'over funding' of certain supports and promote Scheme sustainability.[63] These determinations reduce funding for groups of supports Scheme-wide, operating independently to supersede individual assessments of whether supports are reasonable and necessary.

In effect, the Minister may impose percentage-based reductions across entire categories of supports for sustainability purposes alone.[64] While the Minister must consider participant safety, including whether funding reductions could expose participants to neglect, crisis or loss of essential functioning,[65] the Bill makes clear that support determinations may apply even where the remaining funding is less than the cost of a participant's reasonable and necessary supports.[66]

It is difficult to see how broad, category-wide funding reductions can be implemented without impacting participant safety – it would create serious risks for participants, particularly those with complex or high support needs, as participants would only have partial funding for supports

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62 See for example, Angela Jackson, *Delivering on the promise of the NDIS* (27 April 2026) <https://www.pc.gov.au/media-speeches/articles/delivering-promise-ndis/>, Explanatory Memorandum to the National Disability Insurance Scheme Bill 2012 (Cth) 1, 8 and 16.
63 Explanatory Memorandum 29.
64 Explanatory Memorandum 30; NDIS Bill, proposed subsection 34A(1).
65 Explanatory Memorandum 32.
66 NDIS Bill, proposed subsection 34A(5).

already assessed as reasonable and necessary. These reforms cut directly across the Federal Court's reasoning in *McGarrigle*[67] which said reasonable and necessary supports must be fully funded. By enabling capped funding through legislative instruments of general application, the Bill introduces a funding model the Federal Court has found to be inconsistent with the statutory framework.

As well as the fear and disruption for participants caused by the prospect of sudden loss of supports, this will impact other service systems and the community. Where participants are left without sufficient funding to meet needs already assessed as reasonable and necessary, unmet need is likely to result in increased demand on other service systems, including acute health, mental health, housing and crisis services. This simply shifts these costs to other systems which may be less well equipped to provide coordinated, disability-specific supports.

Because support determinations are made by legislative instrument, any resulting reductions in funding are not reviewable decisions. Participants therefore have no access to merits review to challenge the impact of a support determination on their plan, even if it puts them at risk of serious harm. This heightens the importance of properly scrutinising these powers and ensuring adequate safeguards can be (and are) in place before any such powers are enacted.

5.3.2 Caps in statements of supports

Proposed subsections 33(2EA) and 33(2EB) allow the Minister to impose caps within participants' statements of supports, setting maximum:

- funding amounts for particular supports;
- frequency and/or duration for the provision of supports; and
- worker-to-participant ratios for specific supports or classes of supports.

These limits can apply across the Scheme or to targeted groups of participants, purportedly based on published, peer-reviewed evidence about what level of support is 'appropriate and beneficial' for participants.[68] The worked examples demonstrate that a participant's assessed needs will be overridden by Ministerial instrument, effectively standardising funding decisions.

For the reasons above, we do not support conferring on the Minister broad powers to restrict or cap supports by legislative instrument. If, notwithstanding these concerns, the Bill proceeds with these mechanisms, these powers must be amended to include, at a minimum, the following safeguards to mitigate the potentially substantial detrimental impacts on participants:

a. **Limit the scope of support determinations and caps to clearly defined classes of supports:** Any support determinations and caps should be limited to clear classes of supports, and this limitation expressed in the legislation. Government has indicted a policy intention to target only particular supports and not others – those choices should be clear in the legislation, to avoid risks of harm and unintended consequences for participants.

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67 *McGarrigle v National Disability Insurance Agency* [2017] FCA 308.
68 Explanatory Memorandum 46-7.

b. **Provide participant-level protections:** A mechanism to protect individual participants from harm caused by support determinations and caps must be introduced. The Bill should expressly provide that where Scheme-wide changes affect an individual plan, including where a support determination or funding cap applies to a participant's plan and creates, or increases, risks to the participant's health, safety or functional capacity, the participant has the right to seek variation of their plan (without needing to seek a full plan reassessment).

c. **Insert rule-making power:** Any broad reduction in funding levels or supports should not be implemented through Ministerial discretion by legislative instrument. Rather, any such changes should only occur through Category A rules, with the agreement of state and territory governments. This would provide greater scrutiny for decisions with far-reaching consequences for participants and service systems.

d. **Strengthen transparency and parliamentary oversight:** Given the breadth and significance of the proposed powers, the Bill should require that any support determination or cap be accompanied by tabled reasons, impact and financial analyses and records of consultation with the disability community, and a minimum 15 sitting day disallowance period before commencement.

The measures outlined above should also be applied to proposed sections 32K(3B) – (3E). Those provisions contemplate setting caps on funding amounts or on the level of certain NDIS supports or stated supports in the context of new framework planning. Although we understand that proposed sections 32K(3B) – (3E) would be subject to the Category A rule-making process, this alone is insufficient to address the risks associated with restricting participants' access to supports, for the reasons set out above.

Recommendation 12 – Ministerial support determinations and caps need proper consultation, scrutiny and inclusion of safeguards

Proposed ss 34A, 33(2EA) and 33(2EB) should not be enacted. Before any measures that confer Ministerial power to limit supports are considered, there must be meaningful engagement with the disability community and proper scrutiny of proposed limits.

If the provisions are retained, the Bill should be amended to incorporate clear statutory safeguards, including that:

- *support determinations (s 34A) and caps (ss 33(2EA) and 33(2EB)) apply only to specified classes of supports, rather than having broad or Scheme-wide application;*
- *participants whose plans are affected by Scheme-wide changes, including support determinations and caps, can seek variation of their plans where this creates a risk to their safety, health or functional capacity;*
- *support determinations (s 34A) and caps (ss 33(2EA) and 33(2EB)) be made through the Category A rule process, rather than by Ministerial determination; and*

- *any support determination* (s 34A) *or cap* (ss 33(2EA) and 33(2EB)) *be accompanied by tabled reasons, impact and financial analyses and records of consultation with the disability community, and a minimum 15 sitting day disallowance period before commencement.*

5.4 Plan reassessments

5.4.1 Narrowing access to reassessments

Currently, participants can request a plan reassessment at any time.[69] The Bill significantly narrows this right by limiting unscheduled reassessments to where there has been a significant change in the participant's ongoing support needs.[70] This risks leaving participants without timely access to supports when their plan is not meeting their needs.

New section 48A states that the 'significant and ongoing' change must relate to either:

a. functional capacity – that is, changes directly relating to an existing impairment, or a new impairment, which meets the access criteria, and cause a substantial reduction in the person's ability to do daily activities; or

b. personal or environmental circumstances – defined as 'unanticipated' changes, such as losing a primary informal carer, changes in living, work and/or education arrangements.

The Explanatory Memorandum makes clear that if a participant exhausts their funding early, but their needs have not changed in a way that meets this narrow test, their reassessment request will be refused.[71]

Reassessments are one of the few mechanisms available to participants to respond to changes in their lives or situations where a plan no longer works in practice.[72] Restricting reassessments to tightly defined statutory thresholds risks leaving participants without timely assistance, even where their supports are plainly inadequate. Further, given Agency-initiated plan reviews only made up 1% of unscheduled reassessments in 2025, participants cannot rely on the Agency to identify when their plans need to be updated.[73]

The requirement that changes be 'significant and ongoing' sets an unduly high threshold. In practice, support needs often change gradually or in combination with factors such as service withdrawal. The proposed change risks restricting reassessment to crisis points, rather than enabling timely intervention to prevent harm. This language should therefore be removed and replaced with a more flexible test that allows participants to seek reassessment where their plan no longer meets their needs.

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69 NDIS Act s 48.
70 NDIS Bill, proposed subsection 48A(1).
71 Explanatory Memorandum 22.
72 Grattan Institute, *The NDIS reform package is a step forward* (22 April 2026) <https://grattan.edu.au/news/the-ndis-reform-package-is-a-step-forward/>.
73 Explanatory Memorandum 226.

We therefore recommend section 48A be broadened to ensure participants, or their nominees, can seek reassessment when needed, for example, where:

a. a plan is insufficient to meet current support needs, including where funding has been exhausted earlier than expected despite reasonable use; or the mix, level or type of supports no longer enable the participant to achieve their stated goals; and

b. a participant's plan is scheduled for automatic renewal within 3 months (as explained below at [5.5]).

In addition, we recommend the requirement that changes be 'unanticipated' be removed, as foreseeable changes, including progressive conditions or carer fatigue, can still have severe impacts on participants such that a reassessment would be warranted.

Although the Explanatory Memorandum suggests short-term spikes in participants' needs could be addressed through plan variation rather than assessment,[74] the proposed amendment to note 1 to section 47(1) inadvertently creates uncertainty as to whether variations are also subject to the same restrictive criteria in section 48A. This note is unnecessary and potentially confusing and should be removed.

Recommendation 13 – Broaden the circumstances in which participants can request plan reassessments

Section 48A(1) be amended as follows:

For the purposes of paragraph 48(2)(b), the conditions are that:

a. the participant's plan is insufficient to meet their current support needs, including where that insufficiency arises from an error in the underlying supports needs assessment and/or budget-setting process; and

b. the participant's plan is scheduled for automatic renewal within 45 days or was automatically renewed within the preceding 45 days.

Recommendation 14 – The requirement that changes be 'unanticipated' be removed

The word 'unanticipated' in proposed subsection 48A(3) be removed to ensure that foreseeable changes that have serious impacts on participants can still ground a request for reassessment.

5.4.2 Removing safeguards and increasing delay

The Bill extends the timeframe for the NDIA to decide a reassessment request from 21 to 90 days and, by repealing section 48(4), limits participants' rights to review.

[74] Explanatory Memorandum 17.

We recommend reinstating the deeming provision in section 48(4) to ensure participants have clear review pathways where their reassessment requests are delayed or refused.

Recommendation 15 – Deeming provision where CEO does not determine a reassessment request be reinstated

Section 48(4) be reinstated so that, if the CEO does not determine a reassessment request within 90 days, the CEO is deemed not to have made a decision on that request.

5.5 Automatic renewals

The Bill introduces a fixed 'end date'[75] for old framework plans, removing the ability for unspent funding to carry over from one plan to the next. It then establishes an automatic plan renewal process in proposed section 50A. This removes the opportunity for participants to identify changes or unmet needs (which can currently occur at a scheduled reassessment date).[76]

Under the new process, when a participant's plan reaches its end date, it will automatically be 'renewed' as a new plan. It appears that renewed plans will largely mirror old ones, including in relation to funding periods, except:

a. renewed plans will last for a further 12 months;
b. one-off supports from old plans will not carry over, such as funding for assistive technology or home modifications; and
c. the Minister may make additional 'alterations' to new plans by legislative instrument, meaning that time-limited funding or temporary variations may not continue.[77]

There is no requirement to prepare a new statement of supports with the participant. This means a plan may be renewed for a further 12 months without the participant having the opportunity to identify changes in their circumstances or unmet needs.[78] Any such issues would need to be addressed through reassessment or plan variation. However, as noted above, the Bill significantly restricts the circumstances in which participants can request reassessment of their plans.

Automatic renewals are also not reviewable decisions. The Explanatory Memorandum suggests this is because renewed plans simply repeat earlier planning decisions.[79] However, the scope of possible 'alterations' made by legislative instrument is unclear, including whether such changes might substantially affect participants' supports.

Given the absence of reassessment at plan renewal and the proposed restrictions to unscheduled reassessment, participants may not have their support needs reconsidered after their initial plan. We therefore recommend amendments to give participants the ability to seek reassessment within 45 days either side of their plan being scheduled for automatic renewal (per our **Recommendation 13,** above). This would create a clear safeguard to ensure participants are

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75 NDIS Bill, proposed section 9 and subsection 33(2)(ba).
76 NDIS Act s 33(2)(c).
77 NDIS Bill, proposed subsection 50A(2).
78 NDIS Bill, proposed subsection 50A(4).
79 Explanatory Memorandum 35.

not locked into plans that no longer cater to their circumstances and support needs, prior to their plan automatically being renewed.

5.6 Plan suspensions and revocations

Several elements of the proposed provisions relating to plan suspension must be addressed to avoid unfairness.

5.6.1 New revocation powers in proposed s 30(1A)

The NDIA should not be given the power to revoke a person's participant status immediately and solely on the basis the person has not been contactable. Section 30(1A)(a) proposes this power, despite proposed s 40A providing a mechanism for suspension (before revocation) if someone is not contactable.

Rather than also giving the NDIA the option to revoke immediately after making reasonable attempts to contact a participant and finding them uncontactable, the more appropriate escalatory framework would be to first suspend their plan and give the opportunity to reconnect. Then, after a further 90 days, the NDIS can consider revoking their participant status under s 30(1A)(b). Proposed subsection 30(1A)(a) is unfair and should be removed.

Recommendation 16 – Immediate revocation power where participant is not contactable be removed

Proposed ss 30(1A)(a), providing a power to immediately revoke a participant's status where they are not contactable, should be removed from the Bill.

5.6.2 'Reasonable attempts' is currently undefined

The suspension power is conditioned on the NDIA having made 'reasonable attempts' to contact a participant. The Bill provides no definition of 'reasonable attempts', despite this condition being an important safeguard around use of this power. The Bill should provide a minimum standard for 'reasonable attempts' that stipulates a minimum number of attempts that must be made over a minimum period of time, and taking account of the information available to the NDIA about the participant (for example, their expressed communication preferences and the contact information the NDIA holds about them).

Recommendation 17 – Define 'reasonable attempts' for the purpose of plan suspensions

The Bill should define what constitutes 'reasonable attempts' to contact a participant for the purposes of proposed subsections 30(1A) and s 40A.

This definition should at least provide a minimum number of attempts over a minimum period of time, and require the CEO to take account of information the NDIA holds regarding a participant including expressed communication preferences and contact information held.

5.6.3 The suspension and revocation powers require structured consideration of participant needs and risks

Both plan suspension, and especially revocation of participant status, can have very significant impacts for participants and their wellbeing. To ensure these new powers are used appropriately, the NDIA should be required to consider a participant's accessibility needs, and whether these might explain a participant's failure to respond to attempts to contact them. Additionally, the Bill should require the NDIA to consider whether exercise of the power is justified when weighed against any risk of harm to the participant that might follow.

Recommendation 18 – Accessibility needs and risk of harm be considered before plan suspension or revocation

The powers to suspend a participant's plan or revoke a person's participant status under proposed s 30(1A) should require the CEO:

- *be satisfied the participant's inability to be contacted is not explained by the participant's accessibility needs as are known to the NDIA; and*
- *should be required to consider whether the suspension or revocation is justified when weighed against any risk of harm to the participant.*

6. Fraud measures

6.1 Retention of records and debt raising

We are concerned the provisions which automatically raise a debt when records are not kept are unfair and unnecessary.

6.1.1 Automatic debts for failure to keep records need further safeguards

Proposed section 45B adds new requirements for the kinds of records or evidence that need to be kept in relation to claims and the length of time such records or evidence must be retained. If a claim is paid and a person does not keep a specified record, under proposed subsection 182(4), a debt will be payable to the NDIA. This means the debt arises automatically and simply because of the absence of records. We are not aware of any other framework in Australian law that automatically gives rise to a debt upon a failure to keep records.

This reform is likely to disproportionately impact certain communities including Aboriginal and Torres Strait Islander participants in the Northern Territory, where record-keeping is difficult to maintain in practice, including because 'phones are lost…housing is overcrowded, physical documents are easily misplaced…and receipts or invoices in English may not be recognised as important documentation at the time they are received.'[80]

[80] Disability Advocacy Service, Integrated Disability Action and Darwin Community Legal Service, *Joint Submission to the NDIS Amendment (Securing the NDIS for Future Generations) Bill 2026* (29 May 2026) 25.

Participants should be afforded procedural fairness before a debt is raised to avoid unnecessary stress or unfairly or incorrectly incurring a debt. While s 195 of the NDIS Act enables debt waiver in 'special circumstances', this is not an adequate safeguard.

As such, we recommend that a debt under proposed subsection 182(4) should not exist where:

- a person is able to otherwise establish the entitlement to the NDIS amount; or
- a person has a reasonable excuse for not complying with a record-keeping requirement (eg to account for inadvertent loss, natural disaster, as a result of disability, etc).

These additional safeguards are consistent with other legislative schemes penalising people who fail to keep or retain records where the reasons for doing so are beyond their control.[81]

6.1.2 Debt decisions should be reviewable

Where a debt is raised, there is currently no process under the NDIS Act for a participant to seek review of that decision. Given the potential significant consequences for participants where they incur a debt, the decision to raise a debt under section 182 should be reviewable under s 99 of the NDIS Act.

6.1.3 Debt waiver should be available when circumstances justified the act or omission

Further, section 195 should be amended to broaden the circumstances when a debt may be waived, in line with this Government's recent changes to social security law.[82] The Explanatory Memorandum introducing those social security law reforms acknowledged:

> An unintended consequence of this regime is that the waiver may not be applied even where the debtor's circumstances demonstrate it was justified for them to have knowingly provided false information, or failed to comply with relevant laws, in connect with the debt.
>
> ...
>
> The measures...will allow a person's broader circumstances to be considered by the Secretary (or delegate) when deciding whether to apply special circumstances waivers ...While this is not limited to any particular circumstances, relevant examples may include consideration of issues such as financial abuse and coercion, the person's mental capacity, the impact of natural disasters, homelessness or serious dependence on drugs and alcohol.[83]

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81 See for example, *Health Insurance Act 1973* (Cth) s 19AF*; Bankruptcy Act 1966* (Cth) s 270.
82 *Social Security Act 1991* (Cth) s 1237AAD.
83 Explanatory Memorandum, Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025 (Cth) 34.

Accordingly, subsection 195(a) should permit debt waiver where the act, failure or omission was justified in the circumstances.

Recommendation 19 – Debts for record keeping failures require additional safeguards

1. *Section 182 should be amended to add proposed subsection 182(5) as follows:*

   A debt will not exist under subsection 182(4) where:

   (a) the person is able to otherwise establish the entitlement to the NDIS amount; or

   (b) the person has a reasonable excuse for not complying with a requirement under section 45B.

2. *A decision to raise a debt due to the Agency under s 182 should be reviewable under s 99.*

3. *Section 195(a) should be amended to add an additional circumstance in which a debt may be waived where 'the act, failure or omission was justified in the circumstances'.*

6.2 Regulatory powers and civil penalty provisions

Parts 2 and 3 of Schedule 2 to the Bill would confer new investigative and enforcement powers on the NDIA.

Ordinarily, there is a functional separation between administration and regulation. Vesting both roles in the same body risks concentrating substantial power in the NDIA as both Scheme administrator and regulator, raising concerns about independence.

These new regulatory powers would also operate alongside those of the NDIS Quality and Safeguards Commission ('Commission'). While the Commission's jurisdiction is presently limited to registered providers, it is already established and resourced as the regulator within the NDIS framework. For clarity and consistency for both participants and providers, it would be preferable for single body to have regulatory authority. It is unclear why these additional regulatory functions could not instead be conferred on the Commission, rather than expanding the NDIA's remit and blurring the distinction between administration and regulation.

Recommendation 20 – Reason for not granting regulatory powers to Commission be clearly explained

The Government should provide a clear explanation for why it is more appropriate for the NDIA to be granted these new regulatory powers instead of empowering the Commission with these additional powers.

7. Automation

We have had the opportunity to review the submission of the Human Technology Institute ('HTI') and its recommendations. We commend that submission to the Committee for its thoughtful and

thorough consideration of the Bill's provisions authorising automated decision-making ('ADM') within the NDIS, and the necessary safeguards to prevent their misuse. We endorse HTI's submission and adopt its recommendations.

We further note proposed subsection 59C(1)(a) of the Bill designates section 33 of the NDIS Act as a provision for which decisions may be automated. The Explanatory Memorandum explains this is to 'facilitate the grouping of supports under section 33(2E)'.[84] However, s 33 authorises decisions to approve statements of participant supports in old framework plans in general, not simply decisions regarding the grouping of supports. This proposed provision would therefore authorise the entirety of the old framework planning process to be conducted by ADM without requiring further Ministerial designation. This authorisation goes far beyond the Bill's stated intent and would permit significant expansion of ADM use in the NDIS without the necessary parliamentary scrutiny.

We accordingly recommend, in addition to the steps proposed by HTI, this proposed subsection of the Bill be amended to appropriately confine the scope of the ADM authorisation to its stated purpose.

Recommendation 21 – The recommendations made in the submission by the Human Technology Institute about automated decision-making be adopted

The recommendations made by the Human Technology Institute in their submission to this Committee process, concerning the safeguards necessary to implement automated decision-making in an appropriate, fair and safe manner, should be adopted by the Committee and implemented by Parliament.

Recommendation 22 – Automated decision-making only be authorised for limited purposes within old framework planning

Proposed s 59C(1)(a) be amended so as to only specify s 33(2E), and not the entirety of s 33.

8. Other safeguards for transparency and oversight

We support two amendments moved by the Member for Kooyong, Dr Monique Ryan, to introduce appropriate safeguards to the Bill. We endorse amendment 2 to ensure that key provisions do not commence until foundational supports are established, funded and operational. This approach is consistent with the NDIS Review, which made clear that '[c]hanges to access and budget setting processes can only be implemented once the recommended foundational supports are in place'.[85] By reflecting that recommendation, the amendment acknowledges that the operation of these provisions depends on the availability and accessibility of such supports across jurisdictions. The requirement for the Minister to table a statement to Parliament strengthens transparency, accountability and informed oversight prior to commencement.

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84 Explanatory Memorandum 132.
85 *NDIS Review: Working together to deliver the NDIS* (Final Report, 7 December 2023) 273.

We also support amendment 4 moved by Dr Monique Ryan to require an independent review of the operation of amendments passed by this Bill within 12 months of their full commencement, to assess the impact on people with disability.

Recommendation 23 – Amendments 2 and 4 moved by Dr Monique Ryan be adopted

The amendments moved by the Member for Kooyong, Dr Monique Ryan, namely to (1) delay commencement until foundational supports are established, funded and operational; and (2) require an independent statutory review 12 months after full commencement of this Bill, should be adopted by the Committee and implemented by Parliament.