

The Senate

Community Affairs Legislation
Committee

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

June 2024

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ISBN 978-1-76093-680-8 (Printed version)

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Contents

Members	iii
Abbreviations	ix
List of recommendations	xi
Chapter 1—Introduction	1
Structure of the report	1
Purpose of the bill	1
Background	4
The NDIS Review and further context for these reforms	6
Relevant NDIS Review recommendations	6
Financial impact	8
Key provisions of the bill	8
Commencement	9
Schedule 1 – Main amendments	9
Schedule 2 – Quality and safeguard amendments	23
Amendments to the bill during the course of the inquiry	25
Compatibility with human rights	30
Consideration by other committees	31
Parliamentary Joint Committee on Human Rights.....	31
Senate Standing Committee for the Scrutiny of Bills.....	34
Conduct of the inquiry	36
Note on references	37
Acknowledgement.....	37
Chapter 2—Views on the bill	39
Introduction	39
NDIS reforms.....	39
NDIS Review	39
NDIS Rules and legislative instruments.....	42
Types of rules	42
Role of the states and territories	43
Visibility of the rules and timing considerations	43

Co-design	45
Definitional considerations.....	46
Co-design of NDIS Rules.....	48
Government commitment to co-design.....	49
Definition of NDIS supports	52
Proposed amendment released on 22 May 2024	53
Amendments agreed by the House of Representatives	54
Needs assessment	55
Assessment tools and assessors.....	56
Access to the needs assessment report	58
Right to review a needs assessment.....	60
Budget flexibility.....	62
Information-gathering powers of the CEO	62
Compliance with requests for information	63
Result of revocation of participant status.....	65
Use and limits of the CEO’s powers.....	65
Ability of participants to review a revocation of status	67
Other issues.....	68
Foundational supports.....	68
Psychosocial disability supports and early intervention pathways	68
Protections for whistleblowers.....	69
Committee view	70
Context for reform	70
Use of delegated legislation.....	71
Commitment to co-design and consultation.....	72
Definition of NDIS supports	73
Replacement needs assessment	73
CEO powers.....	74
Conclusion	75
Additional Comments - Coalition Senators.....	77
Dissenting Report - Australian Greens.....	79
Appendix 1— Submissions and Additional Information.....	95

Appendix 2 – Public Hearings..... 103

Abbreviations

APTOS	Applied Principles and Tables of Supports
CAF	Council for the Australian Federation
CEO	Chief Executive Officer
Commissioner	NDIS Quality and Safeguards Commissioner
committee	Senate Community Affairs Legislation Committee
CRPD	Convention on the Rights of Persons with Disabilities
DSS	Department of Social Services
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MYEFO	Mid-Year Economic and Fiscal Outlook
NACCHO	National Aboriginal Community Controlled Health Organisation
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Act	<i>National Disability Insurance Scheme Act 2013</i>
NDIS Commission	National Disability Insurance Scheme Quality and Safeguards Commission
NDIS Review	Independent Review into the NDIS
needs assessment	support needs assessment
needs assessment report	report of the needs assessment
PJCHR	Parliamentary Joint Committee on Human Rights
Scrutiny of Bills committee	Senate Standing Committee for the Scrutiny of Bills
SES	Senior Executive Service

the Agencies	Department of Social Services, the National Disability Insurance Agency and the National Disability Insurance Scheme Quality and Safeguards Commission
the bill	The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024
the Department	Department of Social Services
the Minister	The Hon Bill Shorten MP, Minister for the National Disability Insurance Scheme
the Scheme	National Disability Insurance Scheme
the statement	Statement of Compatibility with Human Rights

List of recommendations

Recommendation 1

2.150 The committee recommends the bill include amendments so that First Ministers are also recognised as Ministers for the purposes of Category A rule-making.

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Chapter 1

Introduction

- 1.1 The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the bill) was introduced to the House of Representatives on 27 March 2024.¹
- 1.2 On 27 March 2024, the Senate referred the provisions of the bill to the Senate Community Affairs Legislation Committee (committee) for inquiry and report by 20 June 2024.²
- 1.3 On 5 June 2024, the bill passed the House of Representatives with 29 government amendments and one amendment circulated by the Member for Kooyong, Dr Monique Ryan MP.³ Whilst these provisions have not been referred to the committee for inquiry and report, they are discussed throughout this report as many amend key aspects of the bill, and directly relate to concerns raised by inquiry participants.

Structure of the report

- 1.4 This report contains two chapters. This chapter sets out:
 - the purpose of the bill;
 - background information relating to the National Disability Insurance Scheme (NDIS, the Scheme) and the context for these reforms;
 - an overview of the bill's key provisions;
 - an overview of amendments made to the bill during the course of the inquiry; and
 - general information outlining the conduct of the inquiry and other committees' consideration of the bill.
- 1.5 Chapter 2 examines the key issues raised by submitters and concludes with the committee's view and recommendations.

Purpose of the bill

- 1.6 In a joint submission, the Department of Social Services (the Department, DSS), the National Disability Insurance Agency (NDIA) and the NDIS Quality and Safeguards Commission (NDIS Commission) (together, the Agencies), outlined that the bill addresses 'priority recommendations' from the NDIS Review (see

¹ *House of Representatives Votes and Proceedings*, No. 116, 27 March 2024, p. 1484.

² *Journals of the Senate*, No. 108, 27 March 2024, p. 3235; Senate Standing Committee for Selection of Bills, *Report No. 4 of 2024*, 27 March 2024, [p. 3].

³ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610; Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, pp. 46–47.

below) and ‘represents the first tranche of amendments’ to the *National Disability Insurance Scheme Act 2013* (NDIS Act) to improve participant experience.⁴

1.7 As the Agencies’ submission outlines, NDIS reform has been the focus of all state and territory First Ministers through National Cabinet, reflecting the importance all jurisdictions placed on Scheme certainty and sustainability for participants and their providers.⁵

1.8 The Hon Bill Shorten MP, Minister for the NDIS (the Minister) explained these objectives further in his second reading speech:

The legislative approach taken is that we seek to establish an enabling architecture for rules and future reforms to restore the original intent, integrity, consistency and transparency of the scheme.

... it's a first step in responding to the NDIS review findings, and to the disability community who so generously of themselves gave their experiences and insights.⁶

1.9 The Minister further underlined the role of National Cabinet in the second reading speech:

The review's final report, released publicly on 7 December 2023, made 26 recommendations and 139 supporting actions to government, all based on what the panel heard from more than 10,000 people and organisations, and what they read in almost 4,000 submissions.

National Cabinet considered the final report and, as part of the initial response, agreed that the Commonwealth would work with state and territory governments to implement legislative and other changes.

I do acknowledge the remarkable goodwill of state premiers and territory chief ministers in agreeing to work as one for Australians with disability.

I certainly applaud their commitment last December to finance additional disability services outside the NDIS program—the ‘foundational supports’ that we speak of—and I also acknowledge that they have agreed to contribute more to the NDIS from 1 July 2028.

Australians with disability are relying on us to make good on our promises.⁷

1.10 As the Minister explained, this bill is the beginning of the journey towards an improved NDIS and addressing priority recommendations from the NDIS

⁴ Department of Social Services (DSS), the National Disability Insurance Agency (NDIA) and the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission), *Submission 42*, [p. 5].

⁵ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, p. 10.

⁶ The Hon Bill Shorten MP, Minister for the NDIS, *House of Representatives Hansard*, 27 March 2024, p. 22.

⁷ The Hon Bill Shorten MP, Minister for the NDIS, *House of Representatives Hansard*, 27 March 2024, pp. 21–22.

Review that was jointly commissioned by all jurisdictions and provided a road map for reform.

- 1.11 Over the course of 2023, National Cabinet agreed to a new Sustainability Framework and an initial tranche of reforms, including the introduction of this bill by the Commonwealth:

First Ministers committed to an *NDIS Financial Sustainability Framework* to ensure the NDIS can continue to provide life-changing outcomes for future generations of Australians with disability.

... The Framework is the next step, and will provide an annual growth target in the total costs of the Scheme of no more than 8 per cent by 1 July 2026, with further moderation of growth as the scheme matures.

Governments share the goal of reaching long term sustainability for the Scheme and have elevated this objective to National Cabinet. A sustainable growth trajectory for the NDIS will support equity and fairness for all Australians living with disability, including for those not eligible for the NDIS, and ensure that every dollar goes to those who need it most.⁸

- 1.12 At its December 2023 meeting, National Cabinet ‘acknowledged the need for reforms to secure the future of the NDIS, ensuring it can continue to provide life-changing support to future generations of Australians with a disability’.⁹

- 1.13 Further:

As an initial response to the NDIS Review, National Cabinet agreed to work together to:

- Implement legislative and other changes to the NDIS to improve the experience of participants and restore the original intent of the Scheme to support people with permanent and significant disability, within a broader ecosystem of supports.
- Adjust state and territory NDIS contribution escalation rates, increasing from 4 per cent to be in line with actual Scheme growth, capped at 8 per cent, with the Commonwealth paying the remainder of Scheme costs growth, commencing from 1 July 2028.

... An initial tranche of legislation will be introduced into the Commonwealth Parliament in the first half of 2024, with rule changes phased in as developed.

... These commitments demonstrate Governments’ ongoing commitment to the NDIS. Discussions with the disability community will continue over the

⁸ The Hon Anthony Albanese MP, Prime Minister of Australia, ‘Meeting of the National Cabinet - A Better Future for the Federation’, [Media Release](#), 28 April 2024.

⁹ The Hon Anthony Albanese MP, Prime Minister of Australia, ‘Meeting of National Cabinet – the Federation working for Australia’, [Media Release](#), 6 December 2023.

coming months as we work together to make the positive changes needed for people with disability.¹⁰

- 1.14 The Agencies outlined that the bill follows agreement by National Cabinet that the Federal Government would work with state and territory governments to implement legislative and other changes to ‘return the NDIS to its original intent of supporting people with permanent and significant disability, within a broader ecosystem of supports’.¹¹
- 1.15 The Agencies added that the changes are critical to the experience of people with disability currently participating in the Scheme, whilst also ensuring the long-term sustainability of the NDIS, ‘so that it is available to support Australians with disability for many years to come’.¹²
- 1.16 More specifically, the bill seeks to make various amendments to the NDIS Act, including to:
- introduce a new definition of ‘NDIS supports’;
 - clarify entry pathways into the Scheme;
 - expand NDIS rules relating to access requirements;
 - provide for new framework plans;
 - create a new reasonable and necessary budget framework for the preparation of NDIS participants’ plans;
 - provide for a needs assessment process and the method for calculating the total amounts for participants’ ‘flexible funding’ and ‘stated supports’, to be specified in NDIS rules and legislative instruments;
 - clarify the requirement that an NDIS participant who receives NDIS amounts for NDIS supports, may only spend that money in accordance with their plan;
 - enable the NDIA to change the plan management type, as well as imposing shorter funding periods; and
 - insert quality and safeguard amendments to enable the imposition of conditions on approval of quality auditors.¹³

Background

- 1.17 On 1 July 2013, the NDIS was launched with unanimous support from all political parties and all Australian governments.¹⁴

¹⁰ The Hon Anthony Albanese MP, Prime Minister of Australia, ‘Meeting of National Cabinet – the Federation working for Australia’, [Media Release](#), 6 December 2023.

¹¹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 5].

¹² DSS, NDIA and NDIS Commission, *Submission 42*, [p. 5].

¹³ National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Explanatory Memorandum* (Explanatory Memorandum), pp. 1–2.

¹⁴ NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 19.

- 1.18 According to the NDIA, the NDIS ‘provides funding to eligible people with disability to gain more time with family and friends, greater independence, access to new skills, jobs, or volunteering in their community, and an improved quality of life’.¹⁵
- 1.19 The Scheme is jointly funded and governed by all Australian governments.¹⁶
- 1.20 As at 30 June 2023, the NDIS supported over 610 000 participants, at a cost of \$35 billion in 2022–23.¹⁷ Latest figures as at 31 March 2024, indicate that more than 649 000 participants are currently receiving support from the NDIS, with payments in the 9 months to 31 March 2024 totalling \$30.9 billion.¹⁸
- 1.21 Over a decade since its establishment, the Scheme continues to be life-changing for thousands of people with disability, as well as their family and carers. However, well-established issues and challenges regarding the operations and financial sustainability of the Scheme continue to persist.¹⁹
- 1.22 These matters have been the subject of numerous inquiries and reviews, including, for example:
- The Productivity Commission’s 2017 report regarding NDIS Costs;²⁰
 - Various inquiries and reports from the Parliamentary Joint Standing Committee on the NDIS;²¹
 - The review of the NDIS Act in 2019, known as the ‘Tune Review’.²²

¹⁵ NDIA, *What is the NDIS?*, 17 April 2024, www.ndis.gov.au/understanding/what-ndis (accessed 4 June 2024).

¹⁶ NDIS Review, *Working together to deliver the NDIS: The Final Report*, 7 December 2023, p. 238.

¹⁷ NDIS Review, *Working together to deliver the NDIS: The Final Report*, 7 December 2023, p. 238.

¹⁸ NDIA, *NDIS Quarterly report to disability ministers: 31 March 2024*, May 2024, pp. 14 and 58.

¹⁹ NDIS Review, *Working together to deliver the NDIS: The Final Report*, 7 December 2023, pp. 20 and 21; Eleanor Malbon and Susan Pennings, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Bills Digest No. 71, 2023–24*, Parliamentary Library, Canberra (Parliamentary Library, *Bills Digest No. 71, 2023–24*), 15 May 2024, p. 4.

²⁰ Productivity Commission, *National Disability Insurance Scheme (NDIS) costs: Final report*, 19 October 2017, www.pc.gov.au/inquiries/completed/ndis-costs#report (accessed 19 June 2024).

²¹ Parliament of Australia, *Joint Standing Committee on the National Disability Insurance Scheme*, www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme (accessed 19 June 2024). See also, Parliament of Australia, *Joint Standing Committee on the National Disability Insurance Scheme: Completed inquiries*, www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/Completed_inquiries (accessed 19 June 2024).

²² DSS, *NDIS Legislative Reforms*, 2 August 2021, www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/ndis-legislative-reforms (accessed 18 June 2024); David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013*, December 2019.

1.23 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which was established on 5 April 2019,²³ and which tabled its final report on 29 September 2023, also considered a number of issues relating specifically to the NDIS, within the broader scope of its inquiry.²⁴

The NDIS Review and further context for these reforms

1.24 More recently, the Minister announced an Independent Review into the design, operations and sustainability of the NDIS (NDIS Review) on 18 October 2022.²⁵ The Terms of Reference for the NDIS Review provided three overarching objectives:

- put people with disability and their families back at the centre of the NDIS to create a more personal experience;
- restore trust and confidence;
- ensure the long-term sustainability of the NDIS.²⁶

1.25 Co-chaired by Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM, the NDIS Review heard from over 10 000 people and organisations, through virtual and face-to-face consultations, phone interviews, and online submissions.²⁷

1.26 The NDIS Review delivered its final report ‘Working together to deliver the NDIS’ to Australian governments in December 2023. The final report made 26 recommendations and 139 supporting actions,²⁸ which according to DSS, the NDIA and the NDIS Commission, were intended to ‘provide a blueprint to renew the promise of the NDIS and deliver a more accessible and inclusive Australia’.²⁹

Relevant NDIS Review recommendations

1.27 According to the Explanatory Memorandum, the amendments in the bill give effect to NDIS Review recommendation 3 and ‘interconnected elements’ in

²³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report: Executive Summary, Our vision for an inclusive Australia and Recommendations*, September 2023, p. x.

²⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report: Executive Summary, Our vision for an inclusive Australia and Recommendations*, September 2023.

²⁵ Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 4; NDIS Review, *About the NDIS Review*, www.ndisreview.gov.au/about (accessed 23 May 2024).

²⁶ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 5].

²⁷ Explanatory Memorandum, pp. 2–3.

²⁸ NDIS Review, *Working together to deliver the NDIS: The Final Report*, 7 December 2023, pp. ii, 4–16; Explanatory Memorandum, p. 3; DSS, NDIA and NDIS Commission, *Submission 42*, [p. 5].

²⁹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 5].

recommendations 5, 6, and 7. The amendments also support the partial implementation of recommendation 17.³⁰

1.28 These recommendations of the NDIS Review are listed below:

- **Recommendation 3:** Provide a fairer and more consistent participant pathway.³¹
- **Recommendation 5:** Provide better support for people with disability to make decisions about their lives.³²
- **Recommendation 6:** Create a continuum of support for children under the age of 9 and their families.³³
- **Recommendation 7:** Introduce a new approach to NDIS supports for psychosocial disability, focused on personal recovery, and develop mental health reforms to better support people with severe mental illness.³⁴
- **Recommendation 17:** Develop and deliver a risk-proportionate model for the visibility and regulation of all providers and workers, and strengthen the regulatory response to long-standing and emerging quality and safeguards issues.³⁵

1.29 Noting that the Government has stated that the NDIS Review recommendations will take years to implement, the Agencies submitted that changes made by the bill are ‘an important first step’ in implementing these recommendations, but ‘are not intended to be the only step’.³⁶

1.30 The Agencies further explained the enabling functions of the bill in their joint submission:

The amendments made by the Bill enable progress of key NDIS Review recommendations to clarify the NDIS access requirements and the supports that the NDIS will provide a participant, to create a new budget-based planning framework, and provide more flexibility on how the NDIS

³⁰ Explanatory Memorandum, p. 3.

³¹ NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 6; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 4.

³² NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 7; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 4.

³³ NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 8; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 4.

³⁴ NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 8; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 4.

³⁵ NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. 13; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 5.

³⁶ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 6].

Commissioner can take regulatory actions to protect NDIS participants from abuse, harm and neglect.³⁷

Financial impact

- 1.31 The Explanatory Memorandum states that the changes in the bill are ‘expected to contribute to decisions made by National Cabinet to moderate cost growth of the NDIS in the medium to long-term and meet the 8 per cent sustainability target by 1 July 2026’. It also states that the immediate changes arising from the bill ‘can be operationalised’ by the NDIA from early 2024–25.³⁸
- 1.32 Based on data up to December 2023, it is projected that without further action, NDIS payments would increase by \$14.4 billion over four years from 1 July 2024, compared with 2023-24 Mid-Year Economic and Fiscal Outlook (MYEFO).³⁹
- 1.33 As outlined in a supplementary submission from the Agencies, the NDIS reforms being undertaken by the Government are expected to moderate this additional growth, and ensure the Scheme ‘remains on track’ to achieve the NDIS Sustainability Framework growth target agreed by National Cabinet from 1 July 2026. The Agencies explained that the introduction of this bill ‘provides the scaffolding for these reforms, including the NDIS Review recommendations and clarifying legislation and rules to return the Scheme to its original intent’.⁴⁰

Key provisions of the bill

- 1.34 This bill comprises two schedules, each containing multiple parts:
- Schedule 1 – Main amendments
 - Part 1: Amendment of the *National Disability Insurance Scheme Act 2013*
 - Part 2: Consequential amendments
 - Part 3: Application and transitional provisions
 - Schedule 2 – Quality and safeguards amendments
 - Part 1: Amendments
 - Part 2: Application and transitional provisions

³⁷ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 6].

³⁸ Explanatory Memorandum, p. 3.

³⁹ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, p. 13; Department of the Treasury, Budget 2024–25, *Budget Measures: Budget Paper No. 2*, Part 2: Social Services, p. 173.

⁴⁰ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, p. 13; Department of the Treasury, Budget 2024–25, *Budget Measures: Budget Paper No. 2*, Part 2: Social Services, p. 173.

Commencement

1.35 If passed by the Parliament, the whole of the Act would commence on the 28th day after the Act receives Royal Assent.⁴¹

1.36 Further, according to the Agencies, many of the aspects of the bill are operationalised by legislative instruments, and ‘do not practically commence until these instruments are made’.⁴²

Schedule 1 – Main amendments

1.37 According to the Explanatory Memorandum, Schedule 1 of the bill establishes:

- the new definition of NDIS supports;
- the process for reassessment of participant status;
- provision for participants to transition to a new framework plan;
- provision for new framework plans that include a flexible budget, and budget for stated supports;
- old framework plans to have a total funding amount;
- updates to circumstances in which the NDIA will manage funds;
- specification of the requirement that participants spend money only on NDIS supports and in accordance with their plan; and
- exemptions for NDIS rules from sunseting.⁴³

1.38 Key provisions are outlined further in the sections below.

Amendments to the outline and definition of the NDIS Act

1.39 Item 3 would amend the simplified outline of the NDIS Act, as provided in section 8. It repeals paragraph (c) of the simplified outline’s first paragraph which makes reference to ‘reasonable and necessary supports’, and replaces it with a new proposed paragraph which would outline that the NDIS comprises, amongst other things, ‘individual plans under which certain supports (called NDIS supports) will be funded for certain people (called participants)’.⁴⁴

1.40 Items 4 to 13 would amend section 9 of the NDIS Act which deals with definitions, inserting new definitions for the following terms, to deal with amendments made by the bill:

- flexible funding;
- funding component amount;
- funding period;
- NDIS supports (see also item 14);
- needs assessment report;

⁴¹ Explanatory Memorandum, p. 2.

⁴² DSS, NDIA and NDIS Commission, *Submission 42*, [p. 7].

⁴³ Explanatory Memorandum, p. 2.

⁴⁴ Explanatory Memorandum, p. 2; Proposed paragraph 8(c), NDIS Amendment Bill 2024.

- new framework plan;
- old framework plan;
- reasonable and necessary budget (see also item 36);
- stated support; and
- total funding amount.⁴⁵

1.41 The following existing definitions would also be amended to deal with the proposed provisions made by this bill:

- NDIS amount;
- participant;
- reassessment date; and
- statement of participant supports.⁴⁶

Definition of NDIS support

1.42 Item 14 inserts proposed section 10 which provides a definition for ‘NDIS support’, as referenced in item 6.⁴⁷ Proposed paragraph 10(a) establishes that a support can only be an NDIS support, if the support:

- (i) is necessary to support the person to live and be included in the community, and to prevent isolation or segregation of the person from the community;
- (i) will facilitate personal mobility of the person in the manner and at the time of the person’s choice;
- (ii) is a mobility aid or device, or assistive technology, live assistance or intermediaries that will facilitate personal mobility of the person;
- (iii) is a health service that the person needs because of the person’s impairment or because of the interaction of the person’s impairment with various barriers;
- (iv) is a habilitation or rehabilitation service;
- (v) is a service that will assist the person to access a support covered by subparagraph (iv) or (v);
- (vi) will minimise the prospects of the person acquiring a further impairment or prevent the person from acquiring a further impairment;
- (vii) is provided by way of sickness benefits.⁴⁸

⁴⁵ Explanatory Memorandum, pp. 2–3.

⁴⁶ Explanatory Memorandum, pp. 2–3.

⁴⁷ Explanatory Memorandum, p. 3; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 11; Proposed section 10, NDIS Amendment Bill 2024.

⁴⁸ Explanatory Memorandum, p. 3; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 11; Proposed paragraph 10(a), NDIS Amendment Bill 2024.

- 1.43 According to the Explanatory Memorandum, the definition serves two purposes:
- (i) to provide a constitutional underpinning for the new planning framework (see item 36)⁴⁹ by outlining the kinds of supports the Commonwealth is constitutionally capable of funding; and
 - (ii) via proposed paragraphs (b) and (c), allow NDIS rules to be made to narrow the scope of these constitutionally valid supports to those that are appropriately funded by the NDIS.⁵⁰
- 1.44 NDIS rules made for the purposes of proposed paragraphs 10(b) and 10(c) will be 'Category A' rules, therefore requiring the unanimous agreement of all States and Territories before they can be made.⁵¹
- 1.45 According to the Explanatory Memorandum, this new definition assists participants by 'providing clear guidance' on what supports they can access through the NDIS. It states that, for example, things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports.⁵²
- 1.46 On 22 May 2024, the Department provided a proposed exposure draft amendment to the bill's definition of 'NDIS supports' to the committee. On 5 June 2024, the Minister tabled, amongst other amendments, an amendment to these provisions of the bill, which subsequently passed the House of Representatives.⁵³ These amendments are discussed later in this chapter, as well as in Chapter 2 of the report.

Clarification of entry pathways into the scheme

- 1.47 Currently, the Chief Executive Officer (CEO) of the NDIA makes an access decision under section 21 of the NDIS Act, by being satisfied that a participant meets the age requirements, the residence requirements, and either the disability requirements, early intervention requirements, or both. Under existing legislation, there is no requirement for the CEO to separately decide whether a person meets the disability requirements or early intervention requirements.⁵⁴

⁴⁹ Explanatory Memorandum, pp. 13–25.

⁵⁰ Explanatory Memorandum, p. 3.

⁵¹ Explanatory Memorandum, p. 4.

⁵² Explanatory Memorandum, p. 4.

⁵³ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1609–1610.

⁵⁴ Explanatory Memorandum, p. 5.

- 1.48 Item 18 would amend subsection 21(2) of the NDIS Act to require the CEO to separately consider and decide whether or not a participant meets the disability requirements, the early intervention requirements, or both.⁵⁵
- 1.49 Relevantly, item 26 amends subsection 28(2) to require the CEO to give written notice to new participants, to specify whether they have become a participant under section 24 (by meeting the disability requirements), or section 25 (by early intervention requirements), or both.⁵⁶

Powers to end participation in the NDIS

- 1.50 Section 30 of the NDIS Act deals with the revocation of participant status under the scheme, if a participant no longer meets the access criteria, including the residence requirements, the disability requirements, or the early intervention requirements.⁵⁷
- 1.51 Item 30 repeals subsection 30(2) and would insert new, proposed subsections 30(2) to 30(8).⁵⁸
- 1.52 Proposed paragraph 30(3)(a) would allow the CEO to request information from a participant or other person if the CEO is considering revoking a person's status as a participant in the NDIS.⁵⁹
- 1.53 Proposed subparagraph 30(3)(b)(i) would allow the CEO to request that a participant undergo an assessment and provide the CEO the report, if the CEO is considering revoking a person's status as a participant in the NDIS.⁶⁰
- 1.54 Proposed subparagraph 30(3)(b)(ii) would allow the CEO to request that a participant undergo a medical, psychiatric, psychological or other examination, conducted by an appropriately qualified person, and provide the CEO the report, if the CEO is considering revoking a person's status as a participant in the NDIS.⁶¹
- 1.55 Proposed subsections 30(4) and 30(5) specify the time period in which such information must be provided to the CEO.⁶²

⁵⁵ Explanatory Memorandum, p. 5; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 10; Proposed subsection 21(2), NDIS Amendment Bill 2024.

⁵⁶ Explanatory Memorandum, pp. 5, 8; Proposed subsection 28(2), NDIS Amendment Bill 2024.

⁵⁷ Explanatory Memorandum, p. 9; *National Disability Insurance Scheme Act 2013* (NDIS Act), s. 30.

⁵⁸ Explanatory Memorandum, p. 9.

⁵⁹ Explanatory Memorandum, p. 9; Proposed paragraph 30(3)(a), NDIS Amendment Bill 2024.

⁶⁰ Explanatory Memorandum, p. 9; Proposed subparagraph 30(3)(b)(i), NDIS Amendment Bill 2024.

⁶¹ Explanatory Memorandum, p. 9; Proposed subparagraph 30(3)(b)(ii), NDIS Amendment Bill 2024.

⁶² Explanatory Memorandum, p. 10; Proposed subsections 30(4) and 30(5), NDIS Amendment Bill 2024.

- 1.56 Subsection 30(6) clarifies that the CEO must not revoke the participant's status under the scheme if the CEO is satisfied that it was reasonable for the participant (or other relevant person), not to have complied with the request made by the CEO.⁶³ The Explanatory Memorandum further explains circumstances under which this would apply, for example, if the participant was hospitalised, or could not obtain an appointment with a relevant medical professional within the stated period.⁶⁴
- 1.57 Item 31 would insert proposed section 30A into the NDIS Act, which requires the CEO to consider the status of participants and decide, in certain circumstances to be prescribed by the NDIS rules, whether or not an existing participant meets the early intervention requirements, and if not, whether they meet the disability requirements.⁶⁵
- 1.58 Proposed paragraph 30A(1)(c) provides that if the CEO decides that the participant does not meet either of the early intervention or disability requirements, the CEO must revoke the participant's status as an NDIS participant.⁶⁶
- 1.59 Proposed subsection 30A(2) establishes that the requirements with which the CEO must comply, the criteria which the CEO must apply, and the matters to which the CEO must, or must not have regard, are to be set out in the NDIS rules.⁶⁷
- 1.60 Under this proposed section, proposed subsections 30A(4) to 30A(7) make provision for the CEO to request information and reports, and proposed subsection 30A(8) outlines requirements of the CEO regarding the notice of decisions.⁶⁸
- 1.61 Some government amendments regarding these provisions were passed during the course of this inquiry, as outlined later in this chapter and discussed in Chapter 2.

⁶³ Explanatory Memorandum, p. 10; Proposed subsection 30(6), NDIS Amendment Bill 2024.

⁶⁴ Explanatory Memorandum, p. 10.

⁶⁵ Proposed section 30A, NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 10.

⁶⁶ Proposed paragraph 30A(1)(c), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 10.

⁶⁷ Explanatory Memorandum, p. 11; Proposed subsection 30A(2), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 10.

⁶⁸ Explanatory Memorandum, p. 11; Proposed subsections 30A(4) to 30A(8), NDIS Amendment Bill 2024.

New planning framework

- 1.62 Section 32 of the NDIS Act deals with the situation in which the CEO must facilitate the preparation of a participant's plan.⁶⁹ Items 32 to 36 amend section 32 of the NDIS Act to deal with the addition of new framework plans.⁷⁰
- 1.63 Item 36 provides for new framework plans.⁷¹ Proposed section 32A clarifies that there will be two kinds of plans under the NDIS, which according to the Explanatory Memorandum are:
- new framework plans, which are prepared in accordance with Subdivision B
 - old framework plans, which are a plan prepared in accordance with Subdivision C.⁷²
- 1.64 Proposed section 32B provides that the Minister may determine, by legislative instrument, the classes of participants who are to receive new framework plans, and the period within which the CEO must give notice of the transition to each participant within that class.⁷³
- 1.65 The Explanatory Memorandum explains that all participants will eventually transition to a new framework plan, and that the 'transition to new framework plans will be gradual and occur by class of participants'. The Explanatory Memorandum also outlines that '[it] is envisaged that the timeframe for transition of NDIS participants from old framework plans to new framework plans will take up to 5 years'.⁷⁴
- 1.66 Proposed section 32D sets out matters that must be included in a participant's new framework plan.⁷⁵
- 1.67 Firstly, proposed subsection 32D(1) establishes that a participant's plan must include a statement, prepared by the participant, which outlines their goals, objectives and aspirations, as well as their environmental and personal context, including living arrangements, community supports, and social and economic participation.⁷⁶

⁶⁹ Explanatory Memorandum, p. 12; NDIS Act, s. 32.

⁷⁰ Explanatory Memorandum, p. 12.

⁷¹ Explanatory Memorandum, p. 13.

⁷² Explanatory Memorandum, p. 13.

⁷³ Explanatory Memorandum, p. 13; Proposed section 32B, NDIS Amendment Bill 2024.

⁷⁴ Explanatory Memorandum, p. 13.

⁷⁵ Explanatory Memorandum, p. 14; Proposed section 32D, NDIS Amendment Bill 2024.

⁷⁶ Explanatory Memorandum, p. 14; Proposed subsection 32D(1), NDIS Amendment Bill 2024.

- 1.68 Subsection 32D(2) provides that a participant's plan must include a 'statement of participant supports' that is prepared with the participant and approved by the CEO.⁷⁷
- 1.69 Proposed paragraphs under subsection 32D(2) would require the statement of participant supports to specify:
- the participant's 'reasonable and necessary budget' (see Item XX)
 - the general supports (if any) that will be provided;
 - in regards to the needs assessment report (see Item XX) for the plan, whichever of the following applies:
 - that the participant meets the disability requirements;
 - that the participant meets the early intervention requirements;
 - that the participant meets both the disability and early intervention requirements;
 - the plan's maximum period of effect, starting on the day the plan is approved;
 - any circumstances in which the NDIA must reassess the plan;
 - the management of the funding for supports under the plan; and
 - the management of other aspects of the plan.⁷⁸
- 1.70 Proposed subsection 32D(3) establishes how general supports may be specified in a plan, proposed subsections 32D(4) and 32D(5) deal with time limits for the approval of statements of participant supports, and proposed subsection 32D(6) provides requirements for the CEO regarding the approval of statements of participant supports.⁷⁹
- 1.71 Proposed subsection 32D(7) establishes a requirement that where funding for supports under a participant's plan is managed by the NDIA, supports are to be provided by a registered NDIS provider only.⁸⁰
- 1.72 Item 78 of the bill sets out the circumstances for permitted variations for new framework plans, and item 83 provides requirements for the CEO when varying the statement of participant supports in a new framework plan.⁸¹

⁷⁷ Explanatory Memorandum, p. 14; Proposed subsection 32D(2), NDIS Amendment Bill 2024.

⁷⁸ Explanatory Memorandum, p. 15; Proposed paragraphs 32D(2)(a) to 32D(2)(g), NDIS Amendment Bill 2024.

⁷⁹ Explanatory Memorandum, pp. 15–16; Proposed subsections 32D(3) to 32D(6), NDIS Amendment Bill 2024.

⁸⁰ Explanatory Memorandum, p. 16; Proposed subsection 32D(7), NDIS Amendment Bill 2024.

⁸¹ Explanatory Memorandum, pp. 37–40.

Reasonable and necessary budgets

- 1.73 As outlined earlier, item 9 inserts a reference to the term ‘reasonable and necessary budget’ into the list of definitions in section 9 of the NDIS Act.⁸²
- 1.74 Under item 36, the bill’s proposed sections 32E to 32K establish how reasonable and necessary budgets will be developed under the Act.⁸³
- 1.75 Proposed subsection 32E(1) provides that a participant’s reasonable and necessary budget is made up of ‘flexible funding’ or ‘stated supports’ or both,⁸⁴ as outlined further below.

Flexible funding

- 1.76 Proposed subsection 32E(2) establishes that flexible funding will be available to a participant where their needs assessment report indicates they require at least some NDIS supports that are not stated supports (see section below). Flexible funding up to a specified ‘total funding amount’ will be provided under the plan for those supports.⁸⁵
- 1.77 Provisions establish that a participant may spend their flexible funding on any NDIS supports, taking into account any restrictions on how this funding may be spent as established under subsections 32F(6) and 32F(7).⁸⁶
- 1.78 Provisions under proposed section 32F also provide that flexible funding is to be allocated within a participant’s plan to a specified ‘funding period’ of no more than 12 months.⁸⁷
- 1.79 Proposed subsection 32F(5) establishes that if a participant does not spend the entirety of their flexible funding amount in that period, the next funding period will be increased by the excess amount that was not spent in the preceding period – that is that the excess amount will ‘roll over’.⁸⁸

⁸² Explanatory Memorandum, pp. 2–3; Proposed subsections 32D(3) to 32D(6), NDIS Amendment Bill 2024.

⁸³ Explanatory Memorandum, pp. 16–23; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

⁸⁴ Explanatory Memorandum, p. 16; Proposed subsections 32E(1) to 32E(3), NDIS Amendment Bill 2024.

⁸⁵ Explanatory Memorandum, p. 17; Proposed subsection 32E(2), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

⁸⁶ Explanatory Memorandum, p. 17; Proposed subsections 32F(6) and 32F(7), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

⁸⁷ Explanatory Memorandum, pp. 18–19; Proposed subsections 32F(1) to 32F(3), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

⁸⁸ Explanatory Memorandum, p. 19; Proposed subsections 32F(5), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

1.80 The Explanatory Memorandum states that funding would not roll-over from the end of a plan, into a new plan.⁸⁹

Stated supports

1.81 Proposed subsection 32E(3) establishes that if a participant's needs assessment indicates that the participant requires a particular support or class of supports, and such supports are both an NDIS support and a stated support for the participant, the reasonable and necessary budget must provide for such supports.⁹⁰

1.82 Proposed paragraph 32E(3)(d) provides that funding for stated supports can only be spent on:

- the support, or class of supports, for which the particular funding is provided; and
- supports that are NDIS supports for the participant.⁹¹

1.83 According to the Explanatory Memorandum, funding for stated supports cannot be spent for any other purpose, including acquiring other NDIS supports.⁹²

1.84 The Explanatory Memorandum also clarifies that stated supports are provided under a reasonable and necessary budget for 'specific high-cost items' and that NDIS rules will prescribe supports that are stated supports for participants or classes of participants.⁹³ Further, it outlined that high-cost assistive technology, home modifications, and supported independent living may all be stated supports.⁹⁴

1.85 As with provisions relating to flexible funding, under proposed section 32G, the bill establishes that funding for a stated support is to be allocated within a participant's plan to a specified 'funding period' of no more than 12 months'.⁹⁵

1.86 However, proposed subsection 32G(4) establishes that NDIS rules may prescribe certain supports that are not required to have funding periods.⁹⁶

⁸⁹ Explanatory Memorandum, p. 19.

⁹⁰ Proposed subsections 32E(3), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 12.

⁹¹ Explanatory Memorandum, p. 18; Proposed paragraph 32E(3)(d), NDIS Amendment Bill 2024.

⁹² Explanatory Memorandum, p. 18.

⁹³ Explanatory Memorandum, p. 17; Proposed subsection 32E(4), NDIS Amendment Bill 2024.

⁹⁴ Explanatory Memorandum, p. 18.

⁹⁵ Explanatory Memorandum, p. 20; Proposed subsections 32G(1), 32G(3) and 32G(5), NDIS Amendment Bill 2024.

⁹⁶ Explanatory Memorandum, p. 20; Proposed subsection 32G(4), NDIS Amendment Bill 2024.

1.87 Also similar to provisions relating to flexible funding, proposed subsection 32G(6) provides that any unused funds for a stated support, or class of stated supports, may be rolled-over to the next funding period.⁹⁷

Requirements relating to the acquisition or provision of supports

1.88 Proposed section 32H establishes that a participant's reasonable and necessary budget may specify that funding (either flexible funding or for a stated support) will only be provided where certain requirements are met.⁹⁸

1.89 Proposed subsection 32H(2) sets out that these requirements may include the following:

- that supports are provided by a specified person or class of persons;
- that a specified process be undertaken prior to the supports being acquired or provided;
- that specified conditions be satisfied in relation to the participant, before the supports are acquired or provided;
- that any requirements specified in new NDIS rules are complied with.⁹⁹

1.90 In relation to these provisions, the Explanatory Memorandum explains that for example, a requirement may be that a participant obtain a certain number of quotes for home modifications or major assistive technology.¹⁰⁰

NDIS rules relating to reasonable and necessary budget provisions

1.91 Proposed section 32J establishes a new NDIS rule-making power which sets out requirements with which the CEO must comply; methods or criteria that the CEO is to apply; and matters that the CEO may, must, or must not, take into account in making decisions under proposed sections 32F, 32G and 32H about reasonable and necessary budgets.¹⁰¹

Calculating total funding amounts

1.92 Proposed section 32K provides that total funding amounts in a participant's reasonable and necessary budget must be determined by applying information contained in the needs assessment report (see proposed section 32L explained

⁹⁷ Explanatory Memorandum, p. 20; Proposed subsection 32G(6), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 13.

⁹⁸ Explanatory Memorandum, p. 20; Proposed subsection 32H, NDIS Amendment Bill 2024.

⁹⁹ Explanatory Memorandum, pp. 20–21; Proposed subsection 32H(2), NDIS Amendment Bill 2024.

¹⁰⁰ Explanatory Memorandum, p. 21.

¹⁰¹ Explanatory Memorandum, p. 21; Proposed section 32J, NDIS Amendment Bill 2024.

below), in accordance with methods for working out such amounts, which may be determined by the Minister, by legislative instrument.¹⁰²

- 1.93 Proposed subsection 32K(3) establishes that the Minister must, in making such a determination, have regard to the guiding principles set out in subsections 4(5) and 4(11) of the NDIS Act, as well as the ‘need to ensure the financial sustainability’ of the NDIS.¹⁰³
- 1.94 Proposed subsection 32K(5) clarifies that the legislative instrument, as determined by the Minister, may establish different methods for different classes of participants, or classes of stated supports. This is without limiting subsection 33(3A) of the *Acts Interpretation Act 1901*.¹⁰⁴

Needs assessments

- 1.95 Proposed subsection 32L(1) provides that the CEO must arrange for an assessment of a participant’s need for supports to be undertaken as soon as practicable, after the CEO commences the preparation of a plan for a participant.¹⁰⁵
- 1.96 Proposed subsections 32L(2) to (4) deal with what an assessment covers and how an assessment may be undertaken, with subsection 32L(5) establishing that a report of the assessment must be prepared and provided to the CEO, as soon as practicable after the assessment is completed. Proposed subsection 32L(6) sets out that the report must include any information and meet any requirements determined by the Minister under proposed subsection 32L(8).¹⁰⁶
- 1.97 Proposed subsection 32L(7) deals with replacement assessments and establishes that when deciding whether or not to approve a statement of participant supports, the CEO may decide that a replacement assessment of the participant’s needs should be undertaken.¹⁰⁷
- 1.98 Proposed paragraph 32L(7)(c) provides that if the CEO decides that a replacement assessment should be undertaken, then the CEO must arrange for that assessment, with proposed paragraph 32L(7)(d) establishing that the

¹⁰² Explanatory Memorandum, p. 21; Proposed subsections 32K(1) and (2), NDIS Amendment Bill 2024.

¹⁰³ Explanatory Memorandum, p. 22; Proposed subsection 32K(3), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 13.

¹⁰⁴ Explanatory Memorandum, pp. 22–23; Proposed subsection 32K(5), NDIS Amendment Bill 2024.

¹⁰⁵ Explanatory Memorandum, p. 23; Proposed subsection 32L(1), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 13.

¹⁰⁶ Explanatory Memorandum, p. 23; Proposed subsections 32L(2) to (6) and (8), NDIS Amendment Bill 2024.

¹⁰⁷ Explanatory Memorandum, p. 23; Proposed subsection 32L(7), NDIS Amendment Bill 2024.

replacement assessment must be undertaken in accordance with proposed subsections 32L(2) to (6).¹⁰⁸

1.99 Proposed subsection 32L(8) allows the Minister to determine, by legislative instrument, the following:

- assessment tools to be used in undertaking needs assessments;
- requirements for undertaking needs assessments;
- information that must be included in a needs assessment report;
- requirements that a needs assessment report must satisfy.¹⁰⁹

1.100 Proposed subsection 32L(9) provides that in making a determination under proposed subsection 32L(8), the Minister may make different provision for different classes of participants, and under proposed subsection 32L(10), must have regard to the guiding principles set out in subsections 4(5) and 4(11) of the NDIS Act, as well as the 'need to ensure the financial sustainability' of the NDIS.¹¹⁰

1.101 Some government amendments regarding these provisions were passed during the course of this inquiry, as outlined later in this chapter.

Requests for information and reports for certain purposes

1.102 Section 36 of the NDIS Act deals with information and reports for the purposes of preparing and approving a participant's plan.¹¹¹ Item 52 of the bill inserts an additional purpose for which the CEO may make a request under subsection 36(2) of the NDIS Act, specifically to undertake an assessment under newly proposed section 32L.¹¹²

1.103 Proposed subsection 36(3), as inserted by item 54, provides that such a request made by the CEO, must specify a 28-day minimum timeframe for the information or reports to be received by the CEO, and if these are not received within this timeframe, the CEO must suspend the preparation of the new framework plan. This is unless the CEO is satisfied that it was reasonable for the person to have not complied with the request within the established timeframe, as per proposed subparagraph 36(3)(b)(ii).¹¹³

¹⁰⁸ Explanatory Memorandum, p. 24; Proposed paragraphs 32L(7)(c) and (d), NDIS Amendment Bill 2024.

¹⁰⁹ Explanatory Memorandum, p. 24; Proposed subsection 32L(8), NDIS Amendment Bill 2024.

¹¹⁰ Explanatory Memorandum, p. 24; Proposed subsections 32L(9) and (10), NDIS Amendment Bill 2024.

¹¹¹ NDIS Act, s. 36.

¹¹² Explanatory Memorandum, p. 29; Proposed subsection 36(1), NDIS Amendment Bill 2024.

¹¹³ Explanatory Memorandum, p. 29; Proposed subsection 36(3), NDIS Amendment Bill 2024.

1.104 Proposed subsection 36(4) sets out a notification requirement if preparation of a new framework plan is suspended as a result of non-compliance with the timeframe set out under proposed subsection 36(3), and proposed subsection 36(5) deals with requests for information for the purposes of preparing, or deciding whether to approve a statement of participant supports for a participant.¹¹⁴

Plan management changes

1.105 Subsection 44(3) of the NDIS Act currently provides for NDIS rules that may prescribe criteria that the CEO is to have regard to in considering whether giving effect to certain plan management requests would pose an unreasonable risk to a participant.¹¹⁵

1.106 Item 70 inserts proposed paragraph 44(2A)(c) which applies to a request that a participant's plan be managed by a plan nominee. This amendment establishes that a plan nominee may not manage the funding under a plan if the CEO is satisfied that section 46 (dealing with the acquittal of NDIS amounts) would be unlikely to be complied with.¹¹⁶

1.107 Item 71 amends the rule-making power in sections 44(3) of the NDIS Act, so that NDIS rules may also prescribe matters that the CEO is not to have regard to in deciding whether giving effect to certain plan management requests would pose an unreasonable risk to a participant.¹¹⁷

1.108 Item 73 inserts two new NDIS rule-making powers:

- Proposed subsection 44(4) will allow NDIS rules to prescribe circumstances in which the management of funds under a plan by a participant, a registered plan management provider, or a plan nominee would be taken to present an unreasonable risk to the participant.
- Proposed subsection 44(5) will allow NDIS rules to prescribe criteria that the CEO is to apply, and matters to which the CEO is, or is not, to have regard to in considering whether section 46 (dealing with the acquittal of NDIS amounts) would be unlikely to be complied with if funding for supports was managed under the plan by any of the following:
 - the participant;
 - a registered plan management provider;

¹¹⁴ Explanatory Memorandum, pp. 29–30; Proposed subsection 36(4) and (5), NDIS Amendment Bill 2024.

¹¹⁵ Explanatory Memorandum, p. 34; NDIS Act, ss. 44(3).

¹¹⁶ Explanatory Memorandum, p. 34; Proposed paragraph 44(2A)(c), NDIS Amendment Bill 2024.

¹¹⁷ Explanatory Memorandum, p. 34; Proposed subsection 44(3), NDIS Amendment Bill 2024.

– a plan nominee.¹¹⁸

- 1.109 Section 45 of the NDIS Act deals with the payment of amounts under the NDIS. Item 74 inserts proposed subsections 45(4) to (6) which establish circumstances where and NDIS payment amount should not be paid under a participant's plan.¹¹⁹
- 1.110 In relation to proposed subsection 45(4), the Explanatory Memorandum explains that for a participant's new framework plan, the NDIA is not permitted to pay an NDIS amount to a person if the payment would result in the total amount of flexible funding in a plan being exceeded, or the total amount of funding for a stated support in a plan being exceeded. For a participant's old framework plan, the NDIA is not permitted to pay an NDIS amount to a person if the payment would result in a total funding amount or total component amount in a participant's plan being exceeded.¹²⁰
- 1.111 Proposed subsection 45(5) establishes that 45(4) would not apply in relation to the payment of an NDIS amount if the CEO is satisfied that there are exceptional circumstances justifying the making of the payment without varying or replacing the participant's plan. Proposed subsection 45(6) provides that NDIS rules may prescribe what constitutes exceptional circumstances.¹²¹
- 1.112 Section 46 of the NDIS Act deals with the acquittal of NDIS amounts, including spending of those amounts and the retention of records.¹²²
- 1.113 Item 75 repeals and replaces subsection 46(1) of the NDIS Act, so that a participant who receives an NDIS amount, or a person who receives an NDIS amount on behalf of a participant, may only spend the money on NDIS supports for the participant and in accordance with the participant's plan.¹²³
- 1.114 Section 74 of the NDIS Act deals with the management of plans for children by persons with parental responsibility. Item 96 deals with a choice regarding plan management type. It permits a person with parental responsibility to make a plan management request that a child's plan is managed wholly or partly by

¹¹⁸ Explanatory Memorandum, pp. 34–35; Proposed subsections 44(4) and (5), NDIS Amendment Bill 2024.

¹¹⁹ Explanatory Memorandum, p. 35; NDIS Act, s. 45; Proposed subsections 45(4) to (6), NDIS Amendment Bill 2024.

¹²⁰ Explanatory Memorandum, p. 35; Proposed subsection 45(4), NDIS Amendment Bill 2024.

¹²¹ Explanatory Memorandum, p. 35; Proposed subsections 44(5) and (6), NDIS Amendment Bill 2024.

¹²² Explanatory Memorandum, p. 36; NDIS Act, s. 46.

¹²³ Explanatory Memorandum, p. 36; Proposed subsection 46(1), NDIS Amendment Bill 2024; Parliamentary Library, *Bills Digest No. 71, 2023–24*, 15 May 2024, p. 11.

that person, a plan manager, or the NDIA. Except in certain circumstances, the CEO must comply with that request.¹²⁴

Review rights

1.115 Items 100 to 102 of the bill amend subsection 99(1) of the NDIS Act which sets out a table of reviewable decisions, to ensure that newly created decisions established by the bill, are capable of being reviewed.¹²⁵

Categories of NDIS rule-making powers

1.116 Items 115 to 122 insert new NDIS rule-making powers into the table at subsection 209(8) of the NDIS Act, to identify the category of the NDIS rule-making powers inserted by the bill.¹²⁶

Consequential, application and transitional provisions

1.117 Item 123 amends section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2013* by inserting a new item into the table, specifically providing that NDIS rules and any other instrument made under the Act are exempt from sunseting.¹²⁷

1.118 Items 124 to 138 provide for a range of application and transitional provisions.¹²⁸

Schedule 2 – Quality and safeguard amendments

1.119 According to the Explanatory Memorandum, the NDIS Review identified that gaps exist in the oversight of NDIS providers. To address these issues, the Review recommended that the NDIS Commission ‘develop and deliver a risk proportionate model of regulation and strengthen the regulatory response to long-standing and emerging quality and safeguards issues’.¹²⁹

1.120 Schedule 2 of the bill enables the NDIS Commission to attach conditions to the approval of an approved quality auditor, and the strengthening of the NDIS Commissioner’s ability to take regulatory actions by delegating certain compliance and enforcement powers and functions.¹³⁰

¹²⁴ Explanatory Memorandum, pp. 41–42; Proposed subsections 74(3A) to (3D), NDIS Amendment Bill 2024.

¹²⁵ Explanatory Memorandum, pp. 42–44; DSS, NDIA and NDIS Commission, *Submission 42*, p. 23.

¹²⁶ Explanatory Memorandum, p. 43.

¹²⁷ Explanatory Memorandum, p. 44.

¹²⁸ Explanatory Memorandum, pp. 46–49.

¹²⁹ Explanatory Memorandum, p. 50.

¹³⁰ Explanatory Memorandum, p. 50.

Approval of quality auditors

- 1.121 Item 1 inserts proposed subsection 73U(4A) which establishes a new power to make NDIS rules which specify conditions of the approval for a person or body to become an approved quality auditor.¹³¹
- 1.122 Item 2 inserts proposed subsection 73U(5A) which specifically authorises conditions that restrict the employment or engagement of a person, against whom a banning order has been made, by an approved quality auditor. This amendment also provides for conditions that require the approved quality auditor to not have, or to continue to have, such a person against whom a banning order has been made, as a member of their key personnel.¹³²
- 1.123 Item 4 of Schedule 2 establishes proposed subsection 73U(9A) which enables NDIS rules to prescribe requirements with which the NDIS Quality and Safeguards Commissioner (Commissioner) must comply, criteria that the Commissioner is to apply, or matters to which the Commissioner may, must, or must not have regard to, in deciding:
- whether to give, or refuse to give an approval to a quality auditor;
 - whether or not to make an approval that is subject to conditions; and
 - whether or not to vary or revoke an approval.¹³³
- 1.124 Item 5 inserts a new requirement under proposed paragraph 73ZN(9)(d), for the Commissioner to notify an approved quality auditor, when a banning order is made against a person who is employed, or otherwise engaged by the approved quality auditor.¹³⁴

Delegation of powers

- 1.125 Item 6 inserts proposed subsections 73U(4A) and (9A) as provisions for which the Minister may, in writing, delegate to the Commissioner their power under section 209 of the NDIS Act, to make NDIS rules.¹³⁵
- 1.126 Item 7 repeals and replaces subsections 202B(1) and (2), to allow the Commissioner to delegate certain powers and functions to specified non-Senior Executive Service (SES) employees. In exercising this decision, the Commissioner must take into account whether the Australian Public Service employee's position or office is sufficiently senior, or whether the employee has

¹³¹ Explanatory Memorandum, p. 51; Proposed subsection 73U(4A), NDIS Amendment Bill 2024.

¹³² Explanatory Memorandum, p. 51; Proposed subsection 73U(5A), NDIS Amendment Bill 2024.

¹³³ Explanatory Memorandum, pp. 51–52; Proposed subsection 73U(9A), NDIS Amendment Bill 2024.

¹³⁴ Explanatory Memorandum, p. 52; Proposed paragraph 73ZN(9)(d), NDIS Amendment Bill 2024.

¹³⁵ Explanatory Memorandum, p. 52; Proposed subsections 73U(4A) and (9A), NDIS Amendment Bill 2024.

the appropriate qualifications or expertise to perform the power or function, when making the decision to delegate.¹³⁶

1.127 Item 8 inserts a new NDIS rule-making power into the table at subsection 209(8) of the NDIS Act, to establish the category of NDIS rule-making powers inserted by Part 1 of Schedule 2 of the bill.¹³⁷

1.128 Items 9 to 11 set out application and transitional provisions for the key amendments under Schedule 2 of the bill.¹³⁸

Amendments to the bill during the course of the inquiry

1.129 On 22 May 2024, the Department provided the committee with an exposure draft copy of an amendment to the bill dealing with proposed section 10, at item 14 of Schedule 1, relating to the definition of NDIS supports.¹³⁹

1.130 At a public hearing of the inquiry on 22 May 2024, Ms Robyn Shannon, Deputy Secretary of the Disability and Carers Stream at the Department, foreshadowed further government amendments to the bill.¹⁴⁰

1.131 On 5 June 2024, the Minister moved government amendments (1) to (8) on sheet PA110, and government amendments (1) to (21) on sheet SK113 and presented two supplementary Explanatory Memoranda in relation to each sheet.¹⁴¹

1.132 Ms Kate Chaney MP, Member for Curtin, also moved amendments (1), (2), (4), (5), (6), (9) and (13) as circulated in the name of Dr Monique Ryan MP, Member for Kooyong.¹⁴²

1.133 Copies of these documents are available on the bill's website.¹⁴³

¹³⁶ Explanatory Memorandum, p. 52; Proposed subsections 202B(1) and (2), NDIS Amendment Bill 2024.

¹³⁷ Explanatory Memorandum, p. 53.

¹³⁸ Explanatory Memorandum, p. 54.

¹³⁹ Department of Social Services (DSS), Exposure draft proposed amendment - Section 10 - Definition of NDIS support, Additional information received 22 May 2024.

¹⁴⁰ Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream, DSS, *Committee Hansard*, 22 May 2024, p. 41.

¹⁴¹ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1609–1610

¹⁴² *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1609–1610; Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, pp. 43–44 and 46–47.

¹⁴³ Parliament of Australia, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7181 (accessed 19 June 2024).

1.134 Subsequently, the bill, as amended by all 29 government amendments, and amendment (1) moved in the name of the Member for Kooyong, was agreed to, and passed the House of Representatives.¹⁴⁴

1.135 As mentioned at the beginning of this chapter, these amendments have not been referred to the committee for inquiry and report. However, given many of them amend key aspects of the bill, and directly relate to concerns raised by a number of inquiry participants, an overview of these provisions is provided below, primarily based on the supplementary Explanatory Memoranda.

Government amendments (1) to (8) on sheet PA110

1.136 According to the Supplementary Explanatory Memorandum, this sheet ‘provides for a number of amendments designed to address key concerns that have been raised by the disability community, stakeholders and other parliamentarians’ since the bill was introduced on 27 March 2024, including feedback provided in the context of this inquiry.¹⁴⁵

Information gathering powers

1.137 Amendments (1) to (4) relate to information gathering powers for the CEO and requests for assessments and examinations for the purposes of considering whether to revoke a person’s status as a participant in the Scheme, proposed by items 30 and 31 of the bill.¹⁴⁶ As outlined in the Supplementary Explanatory Memorandum, these amendments will impose a further limitation in that the CEO can only make such requests, ‘if there is no other reasonable alternative way of obtaining the information’. Further, this limitation will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination.¹⁴⁷

Co-design of legislative instruments

1.138 Amendments (5) and (8) provide an explicit requirement for the Minister to have regard to the principle of co-design, as established in subsection 4(9A) of the NDIS Act, when making a legislative instruments under proposed sections 32K and 32L, as inserted by item 36 of the bill.¹⁴⁸

¹⁴⁴ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610.

¹⁴⁵ Supplementary Explanatory Memorandum relating to sheet PA110, [p. 2].

¹⁴⁶ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 2–3 and 5]; Amendments (1) to (4), Sheet PA110.

¹⁴⁷ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 2–3].

¹⁴⁸ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 3 and 5–6]; Amendments (5) and (8), Sheet PA110; NDIS Act, ss. 4(9A).

Provision of the needs assessment report to participants

1.139 Amendment (6) inserts a new, proposed subsection 32L(6A) in item 36 of the bill, establishing a specific requirement for the CEO to provide a participant a copy of their needs assessment report ‘as soon as practicable’ after the CEO receives the report.¹⁴⁹

Review of needs assessment report

1.140 Amendment (7) inserts a new legislative note under proposed subsection 32L(7), clarifying how internal and external review applies under this provision.¹⁵⁰

1.141 According to the Supplementary Explanatory Memorandum, this note:

... confirms that the requirement for the CEO to arrange a replacement needs assessment if they are satisfied that it should be done must also be exercised upon review. This includes upon internal review (see section 100 of the Act) and external review by the Administrative Appeals Tribunal.¹⁵¹

Government amendments 1 to 21 on sheet SK113

1.142 According to the Supplementary Explanatory Memorandum, amendments in sheet SK113 make a number of clarifications to the bill.¹⁵²

NDIS supports

1.143 Amendment (5) omits and replaces proposed section 10, as inserted by item 14 of the bill, and which provides a definition of ‘NDIS supports’. The Supplementary Explanatory Memorandum outlines the effect of this amendment in detail, but at a high level, it states that this new definition:

- provides clarity around the supports that can be funded by the NDIS and those that cannot;
- makes clear the constitutional basis for the new budget-based planning framework that was recommended by the NDIS Review; and
- provides clarity and consistency across the entirety of the NDIS Act.¹⁵³

1.144 Consequential to this amendment, new amendment (3) amends the definition of NDIS support in item 6 of Schedule 1 of the bill.¹⁵⁴

¹⁴⁹ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 3–4 and 6]; Amendment (6), Sheet PA110.

¹⁵⁰ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 3–4 and 6]; Amendment (7), Sheet PA110.

¹⁵¹ Supplementary Explanatory Memorandum relating to sheet PA110, [p. 6].

¹⁵² Supplementary Explanatory Memorandum relating to sheet SK113, [p. 2].

¹⁵³ Supplementary Explanatory Memorandum relating to sheet SK113, [pp. 2–3 and 7–9]; Amendment (5), Sheet SK113.

¹⁵⁴ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 6]; Amendment (3), Sheet SK113.

1.145 Amendment (15) makes a minor amendment to item 115 of Schedule 1 of the bill, to establish that NDIS rules made under proposed subsections 10(1) and (4) are both Category A rules, within the meaning of section 209 of the NDIS Act, requiring agreement of the Commonwealth and all state and territory governments.¹⁵⁵

1.146 Amendment (17) also provides for a transitional rule that will be in place only until final rules under proposed section 10 can be agreed.¹⁵⁶

Replacement assessments

1.147 Amendments (7) and (8) amend proposed section 32L, which is inserted by item 36 of Schedule 1 of the bill, which provide that the CEO must arrange for an assessment of a participant's need for supports for the purposes of preparing a new framework plan.¹⁵⁷

1.148 Amendment (7) amends proposed paragraph 32L(7) to remove the reference to the CEO being satisfied 'in accordance with [NDIS] rules made for the purposes of this paragraph', and amendment (8) inserts a new proposed subsection 32L(7A) which clarifies the rule-making power relating to how the CEO decides whether another needs assessment should be undertaken.¹⁵⁸

1.149 Amendment (16) updates item 116 of schedule 1 of the bill, consequential to these amendments. According to the Supplementary Explanatory Memorandum, this will ensure that NDIS rules relating to replacement needs assessment reports, will be Category A rules.¹⁵⁹

Old framework plans

1.150 Amendments (1), (2), (4), (9), (10), (12) and (13) relate to old framework plans.¹⁶⁰

1.151 According to the Supplementary Explanatory Memorandum, amendments are proposed to clarify the operation of new subsections 33(2A) to 33(2E) and to ensure these provisions operate in the manner with which they were intended. It also states that these amendments will require the CEO to:

¹⁵⁵ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 16]; Amendment (15), Sheet SK113.

¹⁵⁶ Supplementary Explanatory Memorandum relating to sheet SK113, [pp. 3 and 17]; Amendment (17), Sheet SK113.

¹⁵⁷ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 9]; Amendments (7) and (8), Sheet SK113.

¹⁵⁸ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 10]; Amendments (7) and (8), Sheet SK113.

¹⁵⁹ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 17]; Amendment (16), Sheet SK113.

¹⁶⁰ Amendments (1), (2), (4), (9), (10), (12) and (13), Sheet SK113.

- Specify a total funding amount for all reasonable and necessary supports funded in a participant's plan,
- Categorise reasonable and necessary supports into 'groups' of supports, with each group having an associated funding component amount, and
- Either specify funding periods for all reasonable and necessary supports, taken as a whole, or for each group of supports.¹⁶¹

1.152 The Supplementary Explanatory Memorandum further advises that the primary change made by these amendments is the introduction of the concept of a 'group' of reasonable and necessary supports.¹⁶²

1.153 Amendments (18) to (21) establish transitional amendments relating to old framework plans.¹⁶³

Other amendments

1.154 Amendment (6) inserts a legislative note at the end of proposed subsection 32E(4) which relates to stated supports, and specifically provides that a support will be a stated support if it is declared in the NDIS rules. This note advises the reader that NDIS rules may declare a support for this purpose by identifying a class of supports, and refers to subsection 13(3) of the *Legislation Act 2003*.¹⁶⁴

1.155 Amendment (11) amends item 78 of Schedule 1 of the bill to include proposed subparagraphs (ia) and (ib) in proposed paragraph 47A(1AB)(j). Subparagraph 47A(1AB)(j)(ia) 'provides that the CEO can vary a participant's reasonable and necessary budget if they are satisfied that the participant requires funding because the participant has experienced fraud or financial exploitation'. Further, new subparagraph 47A(1AB)(j)(ib) provides that the CEO can vary a participant's reasonable and necessary budget if the CEO is satisfied that the variation is necessary to prevent or lessen a threat to the participant's life, health or safety (whether current or future).¹⁶⁵

1.156 Amendment (14) amends item 99 of Schedule 1 of the bill to insert a legislative note to proposed subsection 74(6), to provide an example of the types of rules that may be made under new subsection 74(6).¹⁶⁶

¹⁶¹ Supplementary Explanatory Memorandum relating to sheet SK113, [pp. 4–5].

¹⁶² Supplementary Explanatory Memorandum relating to sheet SK113, [p. 5].

¹⁶³ Amendments (18) to (21), Sheet SK113.

¹⁶⁴ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 9]; Amendment (6), Sheet SK113.

¹⁶⁵ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 14].

¹⁶⁶ Supplementary Explanatory Memorandum relating to sheet SK113, [p. 16]; Amendment (14), Sheet SK113.

Amendment agreed to as circulated in the name of Dr Monique Ryan MP

1.157 On 5 June 2024, Ms Kate Chaney MP, Member for Curtin, moved amendment (1), as circulated in the name of Dr Monique Ryan MP, Member for Kooyong, as outlined below:

(1) Page 2 (after line 16), after clause 3, insert:

4 Review

(1) The Minister must cause an independent review of the amendments made by this Act to be conducted as soon as practicable after the end of the 5-year period starting on the day this Act receives the Royal Assent.

(2) The persons who conduct the review must:

(a) consult with the public in conducting the review; and

(b) give the Minister a written report of the review in sufficient time to enable the Minister to comply with subsection (3).

(3) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 9 months after the end of that 5-year period.¹⁶⁷

1.158 According to Ms Chaney MP, the amendment ‘relates to requiring an independent review after a five-year period that involves consultation with the public, with a written report to be tabled within nine months’.¹⁶⁸

Compatibility with human rights

1.159 The bill’s Statement of Compatibility with Human Rights (the statement) notes that the bill engages the following rights:

- Right to equality and non-discrimination
 - Articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD); and
 - Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).
- Rights of people with disability
 - Articles 4(3) and 7 of the CRPD.
- Rights to social security
 - Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
 - Article 28 of the CRPD
- Right to health
 - Article 12(1) of the ICESCR; and
 - Article 25 of the CRPD.
- Right to privacy and reputation

¹⁶⁷ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610; Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, pp. 46–47.

¹⁶⁸ Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, p. 47.

- Article 17 of the ICCPR; and
- Article 22 of the CRPD.¹⁶⁹

1.160 The statement concludes that the bill is compatible with human rights because it ‘advances the protection of the rights of people with disability in Australia, consistent with the CRPD, ICCPR and ICESCR’. To the extent that the bill may limit human rights, the statement declares that those limitations are ‘reasonable, necessary and proportionate’ to ensure the long-term integrity and sustainability of the NDIS, for the benefit of all persons with disability who have access to the NDIS.¹⁷⁰

Consideration by other committees

1.161 Both the Parliamentary Joint Committee on Human Rights, and the Senate Standing Committee for the Scrutiny of Bills made a number of comments on the bill. Key issues raised by both committees are outlined in the following sections.

Parliamentary Joint Committee on Human Rights

1.162 The Parliamentary Joint Committee on Human Rights (PJCHR) raised a number of concerns regarding the bill in its Report 4 of 2024, which tabled on 15 May 2024.¹⁷¹ These matters are summarised below.

Definition of NDIS support

1.163 The PJCHR noted that proposals to introduce a new definition of NDIS support, and allow NDIS rules to potentially narrow the scope of that definition, may have the effect of reducing the type of supports that will be funded by the NDIS, and therefore available to participants.¹⁷²

1.164 In its consideration of these provisions, the PJCHR reported that this measure would engage and may limit the rights of persons with disability, the rights to an adequate standard of living and health, the right to social security. To the extent that the measure applies to children, the PJCHR also outlined that the rights of the child would be engaged and possibly limited.¹⁷³

¹⁶⁹ The bill’s Statement of Compatibility with Human Rights is attached at the end of the bill’s Explanatory Memorandum. National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Statement of Compatibility with Human Rights* (Statement of Compatibility with Human Rights), p. 2.

¹⁷⁰ Statement of Compatibility with Human Rights, p. 7.

¹⁷¹ Parliamentary Joint Committee on Human Rights (PJCHR), *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, pp. 24–45.

¹⁷² PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 31.

¹⁷³ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 31.

1.165 Whilst the PJCHR acknowledged that the measure appears to pursue a legitimate objective and be rationally connected to that objective, it noted that ‘questions arise as to proportionality’.¹⁷⁴

1.166 The PJCHR was of the view that further information is needed to assess the compatibility of these provisions with these human rights. It outlined four key matters for the Minister to provide additional advice on.¹⁷⁵

NDIS rules relating to access requirements

1.167 The PJCHR noted that to the extent that the NDIS rules relate to access requirements for the Scheme, the measure engages the rights of persons with disability, the rights to an adequate standard of living, health and social security, and the rights of the child (insofar as the measure applies to children).¹⁷⁶

1.168 The PJCHR outlined that whether such rights would be promoted or limited, would depend on the content of any NDIS rules made for the purposes of the measure, and therefore reported ‘it is not possible to conclude on the human rights compatibility of the measure as such an assessment will depend on the content of future NDIS rules’.¹⁷⁷

1.169 The PJCHR concluded by drawing these human rights concerns to the attention of the Minister and Parliament, noting that as part of its usual scrutiny process, it would scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights.¹⁷⁸

Requests for information

1.170 The PJCHR outlined that allowing the CEO to request information and reports from an NDIS participant, such as sensitive medical information, engages and may limit the right to privacy.¹⁷⁹

1.171 It continued by acknowledging that whilst this measure appears to pursue a legitimate objective, and be rationally connected to that objective, questions arise in relation to proportionality.¹⁸⁰

¹⁷⁴ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 31.

¹⁷⁵ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, pp. 31–32.

¹⁷⁶ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 34.

¹⁷⁷ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 34.

¹⁷⁸ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 34.

¹⁷⁹ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 38.

¹⁸⁰ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, pp. 38–39.

1.172 The PJCHR concluded that further information is required to assess the compatibility of this measure with the right to privacy, and therefore set out five key matters for the Minister to provide further advice on.¹⁸¹

Working out total funding amounts for NDIS participants

1.173 In regards to proposed section 32K of the bill, the PJCHR noted that the measure requires the Minister to have regard to the financial sustainability of the Scheme in determining matters relating to working out total funding amounts and assessing participants' needs for supports.¹⁸²

1.174 The PJCHR noted that to the extent that this results in fewer supports approved and funded for NDIS participants, and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security, as well as the rights of the child (if the measures applied to children).¹⁸³

1.175 The PJCHR pointed out that the statement of compatibility with human rights for the bill, did not address these measures. It considered that further information is required to assess the human rights implications of these measures, and therefore sought the Minister's advice in relation to six further matters.¹⁸⁴

Approved quality auditor conditions

1.176 In regards to the bill's amendments to section 73U of the NDIS Act, which relates to approved quality auditors, the PJCHR noted that proposals requiring an approved quality auditor to terminate an employee or key personnel against whom a banning order has been made, engages and may limit the right to work.¹⁸⁵

1.177 The PJCHR considered that the measure likely pursues a legitimate objective, but outlined that it is not clear that the measure is rationally connected to the stated objective. Further, the PJCHR raised concerns regarding proportionality, and noted that much will depend on individual circumstances of each case.¹⁸⁶

¹⁸¹ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 39.

¹⁸² PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, pp. 39–40 and 42.

¹⁸³ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 34.

¹⁸⁴ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, pp. 42–43.

¹⁸⁵ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 45.

¹⁸⁶ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 45.

1.178 The PJCHR concluded by drawing these human rights concerns to the attention of the Minister and Parliament.¹⁸⁷

Senate Standing Committee for the Scrutiny of Bills

1.179 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) outlined a number of concerns regarding the bill in its Scrutiny Digest 6 of 2024, tabled on 15 May 2024.¹⁸⁸ These matters are summarised below.

Exemptions from sunseting; and significant matters in delegated legislation

1.180 The Scrutiny of Bills committee noted some concerns in relation to Item 123 of Schedule 1 of the bill, which would establish that the NDIS rules and any other instrument made under the NDIS Act, are exempt from sunseting.¹⁸⁹

1.181 The Scrutiny of Bills committee noted the explanation provided within the bill's Explanatory Memorandum regarding these amendments, but did not consider that the fact that an instrument is made to facilitate an intergovernmental scheme, is a reason in itself, for exempting an instrument from the usual sunseting process. Further, it outlined:

... the committee does not consider the fact that a number of executive governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement ... the committee is of the view that it would be entirely appropriate for the Commonwealth Parliament to maintain oversight of such instruments made and remade through the sunseting process.¹⁹⁰

1.182 The Scrutiny of Bills committee also noted that its concerns were 'heightened' given the 'extensive rule-making powers that exist in the NDIS Act and which are proposed to be expanded in the bill'.¹⁹¹

1.183 It considered that if these matters remain in the rules, at a minimum, specific consultation requirements regarding the development of the NDIS rules with individuals affected should be included in the bill.¹⁹²

¹⁸⁷ PJCHR, *Human rights scrutiny report: Report 4 of 2024*, 2 August 2023, p. 45.

¹⁸⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 26–32.

¹⁸⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 26.

¹⁹⁰ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 27–28.

¹⁹¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 28. Citation omitted.

¹⁹² Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 28.

1.184 Noting these concerns, the Scrutiny of Bills committee requested the Minister's detailed advice in regard to three particular aspects of these matters.¹⁹³

Broad delegation of administrative powers; and availability for independent merits review

1.185 The Scrutiny of Bills committee also commented on the bill's amendments seeking to expand the decisions that the CEO can make. It outlined that it 'prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated' – preferably to holders of nominated offices or to members of the SES.¹⁹⁴

1.186 The Scrutiny of Bills committee noted that whilst the bill does not introduce or amend the power of the CEO to delegate powers and functions, numerous provisions of the bill expand the scope of the CEO to make decisions on various matters. Therefore, the Scrutiny of Bills committee queried if consideration was given to whether the breadth of the existing delegation power remains appropriate, or whether it would be appropriate to legislatively constrain the delegation power in respect to the new powers and functions.¹⁹⁵

1.187 The Scrutiny of Bills committee also noted that it is unclear whether these decisions, such as those provided for in items 36, 63 and 96 to 98, for example, are subject to independent merits review. It outlined its general expectation that if a bill empowers a decision-maker to make decisions which may affect rights, liberties or obligations, such decisions should ordinarily be subject to independent merits review.¹⁹⁶

1.188 The Scrutiny of Bills committee also noted that its concerns were 'heightened' given the 'breadth of the power for the CEO to delegate their administrative powers or functions, including the power to make decisions'. Noting these concerns, the Scrutiny of Bills committee requested the Minister's detailed advice in regard to four particular aspects of these matters.¹⁹⁷

Incorporation of external materials

1.189 In relation to items 114, 36 and 39 of Schedule 1 of the bill, the Scrutiny of Bills committee noted its general concern regarding bills which allow the

¹⁹³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 28–29.

¹⁹⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 29.

¹⁹⁵ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 30.

¹⁹⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, p. 30.

¹⁹⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 30–31.

incorporation of legislative provisions by reference to other documents, where such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny;
- can create uncertainty in the law; and
- means that those obliged to obey the law, may have inadequate access to its terms.¹⁹⁸

1.190 The Scrutiny of Bills committee outlined its ‘consistent scrutiny view’ that where material is incorporated by reference into the law, it should be freely and readily available to all those who may be interested in the law. It requested the Minister’s further advice in regard to three particular aspects of this matter.¹⁹⁹

Conduct of the inquiry

1.191 Details of the inquiry were made available on the committee’s website and the committee contacted organisations and individuals to invite them to make a submission to the inquiry. The committee received 205 submissions, and a number of supplementary submissions, which are listed at Appendix 1.

1.192 The committee held three public hearings in Canberra, and via videoconference on 21 May, 22 May and 14 June 2024. Witnesses are listed at Appendix 2.

1.193 On 22 May 2024, the Department provided a correction to the Explanatory Memorandum to the committee.²⁰⁰ The Minister then tabled this correction in the House of Representatives on 5 June 2024.²⁰¹

1.194 As mentioned earlier, on 5 June 2024, 29 government amendments and seven amendments in the name of Dr Monique Ryan MP, Member for Kooyong, were moved in the House of Representatives.²⁰²

1.195 Subsequently, the bill, as amended by all 29 government amendments, and amendment (1) moved in the name of the Member for Kooyong, was agreed to, and passed the House of Representatives.²⁰³

¹⁹⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 31–32.

¹⁹⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024*, 15 May 2024, pp. 32–33.

²⁰⁰ DSS, Correction to Explanatory Memorandum, Additional information received 17 April 2024.

²⁰¹ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, p. 1608.

²⁰² *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610; Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, pp. 46–47.

²⁰³ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610; Ms Kate Chaney MP, Member for Curtin, *House of Representatives Hansard*, 5 June 2024, pp. 46–47.

Note on references

- 1.196 References to Committee Hansard in this report are to proof transcripts. Page numbers may vary between proof and official transcripts.
- 1.197 References to the Explanatory Memorandum in this report are to the Replacement Explanatory Memorandum with corrections, as provided to the committee on 17 April 2024. Page numbers may vary between the original Explanatory Memorandum and the replacement.²⁰⁴

Acknowledgement

- 1.198 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information, and appearing at public hearings. The committee is grateful to all those who have shared their expertise, knowledge, ideas, and personal stories with the aim of improving the Scheme for the future.
- 1.199 In particular, the committee acknowledges the contributions of people with disability, their families and carers who shared their experiences and perspectives throughout the inquiry. The evidence of people with lived experience is crucial to identifying issues within the NDIS and improving its operation. The committee appreciates the time and effort that people have taken to share their often very personal stories.

²⁰⁴ The Replacement Explanatory Memorandum with corrections is available on the committee's [webpage](#). See, Department of Social Services, *Replacement Explanatory Memorandum - with corrections*, Additional information received 17 April 2024. The original Explanatory Memorandum, along with the correction to the Explanatory Memorandum that was tabled on 5 June 2024, are available at: Parliament of Australia, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7181 (accessed 19 June 2024).

Chapter 2

Views on the bill

Introduction

- 2.1 The committee received evidence which reflected the diverse range of views on the bill as well as more broadly on the current approach to reforming the National Disability Insurance Scheme (NDIS, the Scheme). Whilst some submitters were supportive of the bill, many inquiry participants raised concerns about some of the bill's provisions and recommended amendments to strengthen the bill.
- 2.2 The chapter first discusses the bill in the context of the NDIS reforms and implementation of the NDIS Review recommendations.
- 2.3 It then explores key issues raised by submitters including matters related to co-design; NDIS rules; definition of NDIS supports; needs assessments; new National Disability Insurance Agency (NDIA) Chief Executive Officer (CEO) powers; and other concerns. It also outlines the government amendments which directly respond to these concerns.

NDIS reforms

- 2.4 Many submitters recognised the need for reforms¹ and acknowledged the government's efforts to ensure the scheme is sustainable into the future.² Submitters outlined priority areas needing reforms and acknowledged that the bill is the first step in the NDIS reform process.³

NDIS Review

- 2.5 As discussed in Chapter 1, the NDIS Review made 26 recommendations and 139 supporting actions to achieve a more inclusive and fairer Australia for all people with disability.⁴ In their joint submission, the Department of Social Services, (the

¹ See, for example, Queenslanders with Disability Network, *Submission 44*, p. 2; Multicultural Disability Advocacy Association of NSW, *Submission 32*, p. 2; Kiind, *Submission 17*, p. 3, Health Services Unions, *Submission 99*, p. 3.

² See, for example, Deafness Forum Australia, *Submission 10*, p. 5; Royal Australian College of General Practitioners, *Submission 1*, p. 1; Kiind, *Submission 17*, p. 3; Queenslanders with Disability Network, *Submission 44*, p. 2; Hireup, *Submission 66*, p. 2.

³ See, for example, Professor Bruce Bonyhady, Former Co-Chair, National Disability Insurance Scheme Review, *Committee Hansard*, 21 May 2024, p. 1; AIEOU Foundation, *Submission 37*, [p. 2]; Aruma and Alliance20, *Submission 20*, [p. 4]; Victorian Mental Illness Awareness Council, *Submission 19*, p. 22; Amaze, *Submission 85*, p. 1.

⁴ See, Chapter 1, pp. 4–6 and NDIS Review, [Working together to deliver the NDIS: The Final Report](#), 7 December 2023, p. ii.

Department, DSS), the National Disability Insurance Agency (NDIA) and the NDIS Quality and Safeguards Commission (NDIS Commission) (together, the Agencies) outlined that the bill addresses priority recommendations from the Independent Review into the NDIS (NDIS Review) and represents the first tranche of amendments to the *NDIS Act 2013* (NDIS Act) to improve participant experience.⁵

- 2.6 Many submitters acknowledged that the bill directly responded to some of the NDIS review recommendations and were broadly supportive of its intent to enable the implementation of key recommendations.⁶
- 2.7 For example, Ability First pointed out that the bill if passed ‘will directly address some of the recommendations of the NDIS Review’ and stated its broad support of the bill.⁷
- 2.8 However, some inquiry participants expressed concerns that a formal response from the government should have been made before the introduction of legislative changes.⁸ At a hearing, Mr Darryl Steff, the CEO of Down Syndrome Australia told the committee:

...the chronological approach, or the lack of a chronological approach, concerns us slightly, in that we don’t yet have a government response to the NDIS review report, yet we have legislation before us that enacts parts of the NDIS review.⁹

Essential step

- 2.9 The Agencies described the bill as an essential step to enable the implementation of the NDIS Review recommendations, which will take years to implement.¹⁰

⁵ Department of Social Services (DSS), the National Disability Insurance Agency (NDIA) and the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission), *Submission 42*, [p. 5].

⁶ See, for example, Mental Health Australia, *Submission 6*, p. 2; National Disability Services, *Submission 68*, p. 5; Brotherhood of St Laurence, *Submission 41*, p. 2; Australian Association of Social Workers, *Submission 30*, p. 4; Professor Bruce Bonyhady, Former Co-Chair, National Disability Insurance Scheme Review, *Committee Hansard*, 21 May 2024, p. 1; Public Interest Advocacy Centre, *Submission 57*, p. 7.

⁷ Ability First Australia, *Submission 51*, p. 4.

⁸ See, for example, National Legal Aid, *Submission 81*, p. 8; Dr Siyat Abdi, Systemic Advocate, Kin Disability Advocacy Inc., *Committee Hansard*, 21 May 2024; p. 26; Queensland Council of Social Service, *Submission 33*, [p. 3]; Rare Voices Australia, *Submission 77*, p. 3; Mind Australia, *Submission 73*, p. 3; People With Disability Australia, *Submission 63*, p. 6.

⁹ Mr Darryl Steff, Chief Executive Officer, Down Syndrome Australia, *Committee Hansard*, 21 May 2024, p. 20.

¹⁰ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 6].

- 2.10 This was echoed by Professor Bruce Bonyhady who Co-chaired the NDIS Review:

The legislation currently before you is consistent with our recommendations and gives effect to a number of our highest priority reforms. ... My key point, however, is that the passage of this legislation is an essential step in the implementation of the NDIS review. We need the new structures described in this bill to be put in place as a first step towards the outcomes people with disability described to the review, like more consistency in budgets and flexibility in how they use their budgets.¹¹

- 2.11 The Health Services Unions stated that ‘the changes proposed in the bill are sensible changes that give effect to the NDIS Review’s recommendations, which came from years of broad consultation’ and added:

We believe these changes avoid trade-offs between access to disability supports and limiting spending growth, ensure states and territories get back into the business of service provision, and ensure appropriate regulatory powers ... these changes are just the scaffolding for future NDIS changes.¹²

Cost control

- 2.12 Some submitters recognised the need for cost control measures to ensure the sustainability of the scheme and were supportive of legislative changes that would reduce cost growth.¹³

- 2.13 For example, Aruma and Alliance20, which support the bill, believe it would ‘improve total scheme cost control arising from more people entering the scheme than it was originally designed for’.¹⁴

- 2.14 Similarly, Vision Australia explained its broad support for the bill in order to improve cost control:

Vision Australia appreciates the need to ensure future sustainability of the NDIS and we are broadly supportive of changes that will ensure that people with permanent and significant disability can access the supports they need to live, work and participate in their communities for many decades to come. Our support for the passage of the Bill is to improve total scheme cost control arising from more people entering the Scheme than it was originally designed for.¹⁵

¹¹ Professor Bruce Bonyhady, Former Co-Chair, National Disability Insurance Scheme Review, *Committee Hansard*, 21 May 2024, pp. 1–2.

¹² Health Services Union, *Submission 99*, p. 7.

¹³ See, for example, People in Nursing Homes National Alliances, *Submission 75*, p. 6; Vision Australia, *Submission 72*, [p. 2]; Health Services Union, *Submission 99*, p. 7.

¹⁴ Aruma and Alliance20, *Submission 20*, [p. 2].

¹⁵ Vision Australia, *Submission 72*, [p. 2].

2.15 Professor Bruce Bonyhady stressed the need to pass the bill to achieve cost control and ensure the sustainability of the scheme:

The scheme, as it is today, is not sustainable. Without the sustainability of the scheme, people with disability and their families have no certainty and have no rights. This legislation absolutely needs to pass.¹⁶

NDIS Rules and legislative instruments

2.16 Inquiry participants raised a range of concerns in relation to the NDIS Rules that are referred to within the bill's provisions.¹⁷ These are examined below.

Types of rules

2.17 The Agencies informed the committee that the bill inserts 30 new NDIS rule making powers and six new legislative instrument making powers. The Agencies stated that all new NDIS Rules and instruments 'will be the subject of considered and detailed consultation and input from stakeholders, and the states and territories'.¹⁸

2.18 In an attachment to its submission, the Agencies also provided a table that outlines the NDIS rule and legislative instrument making powers that the bill would introduce. NDIS Rules are classified by topic, the rule amendment, the bill reference and the category of NDIS Rules.

2.19 The new rules are classified under the following categories:

- Category A (requires unanimous agreement from the states and territories);
- Category C (requires a majority agreement from the states and territories and the Commonwealth);
- Category D (requires consultation with states and territories); or
- Disallowable Legislative instruments.¹⁹

¹⁶ Professor Bruce Bonyhady, Former Co-Chair, National Disability Insurance Scheme Review, Committee Hansard, 21 May 2024, p. 3.

¹⁷ See, for example, NDIS Occupational Therapy Community of Practice, *Submission 2*, p. 2; Assistive Technology Suppliers Australia, *Submission 14*, pp. 5 and 10; Kiind, *Submission 17*, p. 3; Disability Advocacy Network Australia, *Submission 21*, p. 10; Emerge Australia, *Submission 25*, [p. 3]; Neurological Alliance Australia, *Submission 29*, pp. 2 and 3; Australian Centre for Disability Law, *Submission 31*, p. 6; Council for the Australian Federation, *Submission 46*, p. 21; Every Australian Counts, *Submission 50*, pp. 3 and 14; Australian Federation of Disability Organisations, *Submission 54*, p. 12; South West Autism Network, *Submission 59*, pp. 15–16; National Disability Services, *Submission 68*, p. 11; Australian Psychological Society, *Submission 74*, pp. 1–2; Dr George Taleporos, Independent Chair, Every Australian Counts, *Committee Hansard*, 22 May 2024, p. 11; Ms Rosemary Kayess, Disability Discrimination Commissioner, Australian Human Rights Commission, *Committee Hansard*, 22 May 2024, p. 29.

¹⁸ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 24].

¹⁹ DSS, NDIA and NDIS Commission, *Submission 42*, [pp. 28–32].

Role of the states and territories

2.20 The Council for the Australian Federation (CAF) includes the First Ministers of all Australian states and territories and was ‘formed to support and enhance the Australian federal system by providing an intergovernmental forum for state and territory leaders in Australia’.²⁰

2.21 In its submission, the CAF highlighted the elevated focus of all First Ministers on NDIS reform. The reforms have naturally risen up to reflect the need for governments to be joined up in their decision-making, reflecting the fact that the broader care economy and provision social services is interconnected across sectors and providers, impacting a range of portfolios and Ministers.²¹

2.22 As the CAF noted:

The NDIS operates in a cooperative, interconnected social services system. Reforms to the NDIS may have a significant impact on mainstream services, such as hospitals, schools and community service organisations. It is also vital that state and territory governments are given the opportunity for detailed cross-portfolio consultation on reforms in this space, to avoid unintended impacts to other essential service systems and to ensure service systems work together to achieve the best outcomes for people with disability.²²

Visibility of the rules and timing considerations

2.23 Some submitters raised the difficulty of commenting on the proposed reforms within the bill, as the relevant NDIS Rules and instruments have not yet been drafted or released for public consideration.²³ For instance, Disability Discrimination Commissioner, Ms Rosemary Kayess, said at a public hearing:

It’s very difficult to make an assessment of these provisions without an understanding of what’s going to be in the rules. It’s very unusual for a bill to be going through parliament without an understanding of what the rules that will operationalise it will be. That’s a major concern. Without the rules, it’s very difficult to make an assessment.²⁴

2.24 Disability Advocacy Victoria and Victorian Rural Advocacy Network similarly noted the difficulty of evaluating the impact of the reforms in the absence of the Rules:

²⁰ Council for the Australian Federation, *Submission 46*, p. 2.

²¹ Council for the Australian Federation, *Submission 46*, p. 7.

²² Council for the Australian Federation, *Submission 46*, p. 7.

²³ See, for example, Disability Advocacy Victoria and Victorian Rural Advocacy Network, *Submission 4*, [p. 1]; Assistive Technology Suppliers Australia, *Submission 14*, p. 5; Kiind, *Submission 17*, p. 4; Emerge Australia, *Submission 25*, [p. 3]; Public Interest Advocacy Centre, *Submission 57*, [p. 12].

²⁴ Ms Rosemary Kayess, Disability Discrimination Commissioner, Australian Human Rights Commission, *Committee Hansard*, 22 May 2024, p. 29.

However, it is difficult to understand the full impact of the Bill and the changes that it proposes given the yet to be written Rules and other details, which have been committed to delegated legislation to be developed in co-design with people with disability.²⁵

2.25 The NDIS Occupational Therapy of Community Practice also contended that the bill ‘relegates essential Scheme architecture to the legislative instruments[s] (the Rules), rather than placing this architecture in the primary legislation’.²⁶

2.26 Further, some submitters raised concerns regarding the level of scrutiny that the NDIS Rules would be subject to.²⁷ Kiind, a peer support organisation in Western Australia commented that:

... this bill is delegated legislation, and the rules and other details are delegated to the Minister and/or CEO of the NDIA (National Disability Insurance Agency) to be figured out at a later stage without the need to go through parliamentary processes. This delegated authority is not democratic, and it is not co-design. Even if there is a good faith intention to use codesign methodology, the delegated power is held with the Minister, who could override any co-design process.²⁸

2.27 The NDIS Occupational Therapy of Community Practice also contended that the use of the Rules:

creates risk of loss of Scheme integrity, and less visibility, accountability and parliamentary oversight of the development of key scaffolding for the future NDIS.²⁹

2.28 The Department highlighted important timing considerations for the implementation of the NDIS reforms. Ms Robyn Shannon, Deputy Secretary of the Disability and Carers stream, explained that NDIS rules will be made after following a process of co-design and engagement with the disability community. Ms Shannon stressed that the bill ‘provides the architecture to enable the time to carefully co-design rules to commence alongside foundational supports’³⁰ and acknowledged that:

In some ways the work to get this piece of legislation up has been at pace and quite critical—and we acknowledge that—but that’s because we need to set up the framework so that we can take the time to work through the

²⁵ Disability Advocacy Victoria and Victorian Rural Advocacy Network, *Submission 4*, [p. 1].

²⁶ NDIS Occupational Therapy Community of Practice, *Submission 2*, p. 2.

²⁷ See, for example, Every Australian Counts, *Submission 50*, p. 15; Public Interest Advocacy Centre, *Submission 57*, p. 8; South West Autism Network, *Submission 59*, p. 16; Advocacy for Disability Access and Inclusion Inc., *Submission 67*, p. 1; National Disability Services, *Submission 68*, p. 6.

²⁸ Kiind, *Submission 17*, p. 3.

²⁹ NDIS Occupational Therapy Community of Practice, *Submission 2*, p. 2.

³⁰ Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream, Department of Social Services, *Committee Hansard*, 22 May 2024, p. 45.

rules with people with disability and, indeed, states and territories. We recognise—and, indeed, the review recognised—that those are things that will take time to build.³¹

2.29 Aruma and Alliance20 similarly recognised that the bill itself does not give effect to immediate change, and instead creates the opportunity for the NDIA to create future rules.³²

2.30 At a public hearing of the inquiry, Mr James MacIsaac, Group Manager of the NDIS Participants and Performance Group at the Department provided further clarification around how the government would engage with states and territories regarding category A rules:

Category A rules would be part of a process. We would be working with states and territories in terms of their involvement in the consideration of those rules. Usually most of the rules that are category A go to questions of access, and reasonable and necessary arrangements in the scheme, where there are clear state and territory interests in terms of their shared policy responsibility for the scheme.³³

Co-design

2.31 The committee received evidence which highlighted the importance of co-design between government and people with disability when developing NDIS reforms.³⁴

2.32 For example, Down Syndrome NSW cited that the NDIS was ‘borne from codesign’ and that ‘it is this principle that must remain at the heart of the scheme and proposed reforms.’³⁵ Similarly, Ms Maryke Jonkers, President of People with Disability Australia called for:

³¹ Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream, Department of Social Services, Committee Hansard, 22 May 2024, p. 47.

³² Aruma and Alliance 20, *Submission 20*, [p. 4].

³³ Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group, DSS, Committee Hansard, 14 June 2024, p. 29.

³⁴ See, for example, Disability Rights Advocacy Service, *Submission 5*, [p. 4]; Deafness Forum Australia, *Submission 10*, p. 6; Kiind, *Submission 17*, p. 7; Disability Advocacy Network Australia, *Submission 21*, pp. 9 and 11; Deafblind Australia, *Submission 36*, p. 4; Every Australian Counts, *Submission 50*, p. 9; Australian Federation of Disability Organisations, *Submission 54*, pp. 12–14; Professor Helen Dickinson, *Submission 55*, [pp. 1–2]; Public Interest Advocacy Centre, *Submission 57*, pp. 11–12; Women with Disabilities Australia, Women With Disabilities Vicotria and Women with Disabilities ACT, *Submission 58*, p. 11; Rare Voices Australia, *Submission 77*, p. 5.

³⁵ Down Syndrome NSW, *Submission 62*, p. 14.

... meaningful co-design, which means a seat at the table while each of these decisions is being made. This is a once-in-a-lifetime chance to get this right and make life better for people who live with disability.³⁶

Definitional considerations

2.33 Some inquiry participants drew the committee's attention to the issue of what the term 'co-design' entails.³⁷ For example, Deaf Australia emphasised that 'consultation is not co-design',³⁸ and Cat Walker and Uli Cartwright provided that instead, 'co-design is a mechanism for us to take back control of our own stories'.³⁹

2.34 On this point, Ms Maeve Kennedy, Senior Manager, Policy and Projects at Inclusion Australia, raised that there are different perspectives on what the term 'co-design' means, and noted that often the term 'co-design' is used when referring to consultation. Ms Kennedy expanded that:

We tend to think less about technical definitions and more about practice – that is, it's actually about the practice of including people and working in an accessible way ... It's not, 'We have an idea and want to get your feedback about it.' It's about starting together right from the beginning; what ideas do we collectively have and how can we make them happen in a way that works for everyone?⁴⁰

2.35 In additional information provided to the committee, Mr Peter Gregory similarly noted that both consultation and co-design are approaches to involving stakeholders in decision-making processes, however they 'differ significantly in terms of depth of engagement, power dynamics, and outcomes.'⁴¹ Mr Gregory concluded that consultation is not co-design.⁴²

2.36 Mr Gregory provided 10 key co-design principles to guide the development of social policies in collaboration with people with disabilities, which are as follows:

³⁶ Ms Marayke Jonkers, President, People with Disability Australia, *Committee Hansard*, 22 May 2024, p. 2.

³⁷ See, for example, National Disability Services, *Submission 68*, pp. 5–6; Cat Walker and Uli Cartwright, *Submission 80*, pp. 18, 19 and 21; Ms Maeve Kennedy, Senior Manager, Policy and Projects, Inclusion Australia, *Committee Hansard*, 21 May 2024, pp. 12–13, Ms Samantha Connor, Private capacity, *Committee Hansard*, 21 May 2024, p. 31.

³⁸ Deaf Australia, *Submission 93*, [p. 6].

³⁹ Cat Walker and Uli Cartwright, *Submission 80*, p. 21.

⁴⁰ Ms Maeve Kennedy, Senior Manager, Policy and Projects, Inclusion Australia, *Committee Hansard*, 21 May 2024, pp. 12–13.

⁴¹ Mr Peter Gregory, *What is Co-Design*, additional information received 28 May 2024, p. 2.

⁴² Mr Peter Gregory, *What is Co-Design*, additional information received 28 May 2024, p. 3.

- **Equality and empowerment:** Ensure that people with disabilities have equal power and influence in the policy development process, fostering an environment where their voices are heard and valued.
- **Accessibility:** Provide accessible materials, venues, and communication methods to accommodate people with various disabilities to ensure full participation.
- **Inclusion:** Actively involve a diverse range of people with disabilities to capture a broad spectrum of experiences and needs.
- **Respect and dignity:** Treat all participants with respect, recognising their expertise in their own lived experiences and value their contributions.
- **Transparency:** Maintain clear and open communication about the process, goals, and how feedback will be used, to build trust among participants.
- **Collaboration:** Foster a collaborative environment where stakeholders, including people with disabilities, policymakers, and service providers, work together towards common goals. This can also mean that the voice of people with disabilities is privileged beyond other stakeholders because it is they who are the focus.
- **Flexibility:** Be adaptable in methods and approaches to accommodate different needs and preferences of participants.
- **Capacity building:** Provide resources, training, and support to empower people with disabilities to effectively participate in the policy development process.
- **Contextual safety:** Understand and incorporate the social, cultural, and economic contexts in which people with disabilities live, ensuring that processes and policy responses are relevant and effective.
- **Sustainability:** Aim for long-term impact by designing policies that are sustainable and adaptable, ensuring continued benefit to people with disabilities.

2.37 The Department noted that engagement with the disability community will include ‘discussions papers on DSS Engage, face-to-face workshops and roundtables, as well as online engagement’, and that the NDIA:

... has been working with Disability Representative and Carer Organisations (DRCOs), our Independent Advisory Council (IAC) and Participant Reference Group (PRG) to improve their approach and confirm the next set of priority topics for co-design.⁴³

⁴³ Department of Social Services, *The NDIS Amendment Bill – questions and answers*, 4 June 2024, www.dss.gov.au/the-ndis-amendment-bill-questions-and-answers#accessibleway (accessed 5 June 2024).

Co-design of NDIS Rules

- 2.38 Some inquiry participants welcomed the commitment to co-design outlined in the Explanatory Memorandum,⁴⁴ and noted the Minister's reference to collaboration and co-design in his second reading speech.⁴⁵ However, many inquiry participants expressed concern that there is no commitment to co-design within the provisions of the bill itself.⁴⁶
- 2.39 The Agencies explained that co-design would occur for NDIS rules and instruments,⁴⁷ as reflected in the Explanatory Memorandum which states that 'the new NDIS Rules will be designed and implemented with extensive consultation and co-design with the disability community'.⁴⁸
- 2.40 However, some inquiry participants were of the view that a commitment to co-design was insufficient.⁴⁹ For example, Mr Darryl Steff, CEO of Down Syndrome Australia, stated that the organisation would like to see a requirement in the bill's provisions for consultation and co-design, which he contended would be 'futureproofing the legislation.'⁵⁰ Mr Steff expanded that without legislating co-design and consultation on the NDIS Rules:

... we would absolutely have a concern that the current government might be saying the right things about how they're going to approach that, but it's not futureproofed for everybody going forward.⁵¹

⁴⁴ See, for example, Women With Disabilities Vicotria and Women with Disabilities ACT, *Submission 58*, p. 16; Mr Darryl Steff, Chief Executive Officer, Down Syndrome Australia, *Committee Hansard*, 21 May 2024, p. 20.

⁴⁵ See, for example, Australian Association of Social Workers, *Submission 30*, p. 6; Public Interest Advocacy Centre, *Submission 57*, p. 11.

⁴⁶ See, for example, Deafness Forum Australia, *Submission 10*, p. 11; Assistive Technology Suppliers Australia, *Submission 14*, p. 10; Women With Disabilities Vicotria and Women with Disabilities ACT, *Submission 58*, p. 11; South West Autism Network, *Submission 59*, p. 5; Disability Representative Organisations (National Coordination Function), *Submission 60*, p. 8; Mr Daniel Flynn, Private capacity, *Committee Hansard*, 21 May 2024, p. 35; Ms Nicole (Nick) Avery, Deputy Chair, Every Australian Counts, *Committee Hansard*, 22 May 2024, p. 4; Professor Helen Dickinson, Professor of Public Service Research, University of New South Wales, Canberra, *Committee Hansard*, 22 May 2024, p. 26.

⁴⁷ DSS, NDIA and NDIS Commission, *Submission 42*, [pp. 7 and 13].

⁴⁸ National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Explanatory Memorandum* (Explanatory Memorandum), p. 5.

⁴⁹ See, for example, Public Interest Advocacy Centre, *Submission 57*, p. 10; Deafness Forum Australia, *Submission 10*, p. 5; Mr Darryl Steff, Chief Executive Officer, Down Syndrome Australia, *Committee Hansard*, 31 May 2024, p. 20.

⁵⁰ Mr Darryl Steff, Chief Executive Officer, Down Syndrome Australia, *Committee Hansard*, 31 May 2024, p. 20.

⁵¹ Mr Darryl Steff, Chief Executive Officer, Down Syndrome Australia, *Committee Hansard*, 31 May 2024, p. 25.

2.41 Deafness Forum Australia appreciated that the Minister had stated his commitment to developing NDIS rules with the disability community.⁵² However, it also identified that the proposed reforms will occur over several years and highlighted that:

... we are now less than 18 months away from a federal election, and stewardship of the NDIS reforms will undoubtedly change across the next 5 years. It will be imperative for us to need to lock in a commitment to a codesign process with the Disability community in the Bill itself, to ensure that the voices of the disability community are front and centre across the reform process.⁵³

2.42 Consequently, some inquiry participants recommended that section 4 of the bill, which currently outlines the general principles guiding actions under the Act,⁵⁴ be amended to require co-design with people with disability.⁵⁵ For example, Dr George Taleporos recommended:

Amend Section 4 of the bill to legislate a requirement for meaningful co-design and consultation with people with disability and their representative organizations [sic] in designing and implementing NDIS reforms.⁵⁶

2.43 Similarly, Women with Disabilities Australia, Women with Disabilities Victoria and Women with Disabilities ACT called for section 4 to:

mandate the involvement of people with disabilities in a leadership capacity throughout the design and implementation phases of NDIS reforms and any associated legal and regulatory frameworks.⁵⁷

Government commitment to co-design

2.44 The Department noted that the current NDIS Act includes a general principle that 'people with disability are centre to the National Disability Insurance

⁵² Deafness Forum Australia, *Submission 10*, p. 5.

⁵³ Deafness Forum Australia, *Submission 10*, p. 5.

⁵⁴ *National Disability Insurance Scheme Act 2013*, s. 4.

⁵⁵ See, for example, Every Australian Counts, *Submission 50*, p. 16; Women with Disabilities Australia, Women with Disabilities Victoria and, Women with Disabilities ACT, *Submission 58*, p. 7; South West Autism Network, *Submission 59*, p. 17; Disability Representative Organisations (National Coordination Function), *Submission 60*, p. 5; Belong Network & Disability Resources Centre, *Submission 82*, [p. 13].

⁵⁶ Dr George Taleporos, *Submission 48*, [p. 3].

⁵⁷ Women with Disabilities Australia, Women with Disabilities Victoria and, Women with Disabilities ACT, *Submission 58*, p. 11.

Scheme and should be included in a co-design capacity'. The Department emphasised that the bill does not change this principle in the Act.⁵⁸

- 2.45 Further, the Department stressed that the government 'will keep the voices and needs of people with disability at the heart of all NDIS reforms' and acknowledged that 'co-design is how we get better outcomes for people with disability'.⁵⁹
- 2.46 Additionally, on 5 June 2024, an amendment to the bill regarding the principle of co-design was passed.⁶⁰ As discussed in Chapter 1, government amendments (5) and (8) provide an explicit requirement for the Minister to have regard to the principle of co-design, as established in subsection 4(9A) of the NDIS Act, when making legislative instruments under proposed sections 32K (calculating total funding amounts) and 32L (needs assessments) of the bill.⁶¹
- 2.47 The associated Supplementary Explanatory Memorandum identified the comments and concerns raised in the committee's inquiry regarding the co-design of legislative instruments, and acknowledged that 'assurances have been sought that delegated legislation is developed in genuine consultation with the disability community'.⁶²
- 2.48 In response to these concerns, the Supplementary Explanatory Memorandum noted that the new amendments made the co-design requirement in the Act more explicit, which:
- ... ensures that the requirement to include the disability community in co-design must be at the forefront of the Minister's mind when making these instruments.⁶³
- 2.49 According to the Supplementary Explanatory Memorandum, the Minister will also be required under the *Legislation Act 2003* to 'provide an explanation of the nature of the consultation that has occurred' when making legislative instruments, which means that 'the Minister will be required to inform

⁵⁸ Department of Social Services, *The NDIS Amendment Bill – questions and answers*, 4 June 2024, www.dss.gov.au/the-ndis-amendment-bill-questions-and-answers#accessibleway (accessed 5 June 2024).

⁵⁹ Department of Social Services, *The NDIS Amendment Bill – questions and answers*, 4 June 2024, www.dss.gov.au/the-ndis-amendment-bill-questions-and-answers#accessibleway (accessed 5 June 2024).

⁶⁰ *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610.

⁶¹ Supplementary Explanatory Memorandum relating to sheet PA110, [pp. 3 and 5–6]; Amendments (5) and (8), Sheet PA110; NDIS Act, ss. 4(9A).

⁶² Supplementary Explanatory Memorandum relating to sheet PA110, [p. 3]

⁶³ Supplementary Explanatory Memorandum relating to sheet PA110, [p. 3].

Parliament, and the public, of the nature and extend of consultation' that occurred.⁶⁴

- 2.50 In regards to these amendments, Ms Sheetal Balakrishnan, Senior Solicitor at the Public Interest Advocacy Centre told the committee that 'the amendments on co-design are helpful statements of principle but do not mitigate the community's concerns that a future minister insufficiently committed to co-design could easily circumvent them'.⁶⁵ She explained that from a legal perspective, the requirement to have regard to the co-design principle does not make co-design a legislative requirement. She added:

Additionally, in our view, the legislation act does not offer sufficient safeguards to ensure consultation. We, therefore, maintain our view that when tabling a ministerial determination there should be an accompanying consultation statement setting out the views of disability representative organisations.⁶⁶

- 2.51 Her colleague, Senior Solicitor Mr Mitchell Skipsey considered that 'more concrete mechanisms' could be put forward, suggesting that mandatory requirements for consultation statements be provided with legislative instruments when such instruments are tabled in the Senate. He outlined how this proposal could help to ensure transparency and accountability regarding co-design efforts from the Minister:

... [this could] really work with those Senate accountability mechanisms to make sure that, where the minister does consult appropriately and does engage in the right sort of engagement and co-design processes with the community, that's reflected and open for all to see. Where the minister perhaps hasn't done so, the Senate can pick that up and the public can pick that up and hold the government of the day accountable for that.⁶⁷

- 2.52 Mr James MacIsaac, Group Manager of the NDIS Participants and Performance Group at the Department provided further detail around the co-design of NDIS rules. He explained how the government would work the disability community throughout this process:

The co-design processes that we would be working through with the disability community would go to a range of activities where we would be working with the NDIA around a number of their processes and their reference groups that have a focus on a number of scheme policy areas. They will involve activities such as various projects to help define problems and

⁶⁴ Supplementary explanatory memorandum relating to sheet PA110, [p. 3].

⁶⁵ Ms Sheetal Balakrishnan, Senior Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 14 June 2024, p. 17.

⁶⁶ Ms Sheetal Balakrishnan, Senior Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 14 June 2024, p. 17.

⁶⁷ Mr Mitchell Skipsey, Senior Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 14 June 2024, pp. 18–19.

to help work through what the solutions might look like in terms of refining and implementing them over time. They'd involve co-design workshops in terms of specific issues and processes.

It could entail focus groups, interviews or engagement with participants, families and carers. There might be broader engagement events that would involve broader members of the public and stakeholders, webinars and information sessions. It could involve surveys, discussion papers and submissions. It would also, of course, involve any particular technical advice and support where appropriate and where needed—where we might be providing the need to assist with some of the technical elements of any rule-making arrangements. There would also be targeted approaches to underrepresented groups in terms of that broader strategy.⁶⁸

2.53 Ms Catherine McAlpine, Chief Executive Officer of Inclusion Australia, also told the committee at a public hearing that:

I'm absolutely prepared to say that not everything in every detail of every rule or everything the government does needs to be co-designed. I think we really need to work out which are the primary things that do need co-design and which things can be done via other consultation and consultation methods.⁶⁹

Definition of NDIS supports

2.54 As the vast majority of submitters expressed serious concerns around the proposed definition of NDIS supports in section 10 of the bill⁷⁰, on 22 May 2024 the department released an exposure draft for a proposed amendment on the department's website.⁷¹ On 5 June 2024, an amendment to insert a new definition of NDIS support was passed in the House of Representatives.⁷²

2.55 Key concerns in relation to the first iteration of the definition of NDIS supports included that it was too prescriptive, relied on the Applied Principles and Tables

⁶⁸ Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group, DSS, *Committee Hansard*, 14 June 2024, p. 29.

⁶⁹ Ms Catherine McAlpine, Chief Executive Officer, Inclusion Australia, *Committee Hansard*, 14 June 2024, p. 6.

⁷⁰ See, for example, Ms El Gibs, Acting Chief Executive Officer, Disability Advocacy Network Australia, *Committee Hansard*, 21 May 2024, p. 8; Ms Sophie Cusworth, Acting Chief Executive Officer, Women With Disabilities Australia, *Committee Hansard*, 21 May 2024, p. 14; National Disability Services, *Submission 68*, p. 9; Tandem, *Submission 76*, p. 15; Assistive Technology Suppliers Australia, *Submission 14*, pp. 5 and 6.

⁷¹ Exposure Draft – section 10 amendments, Department of Social Services, [Exposure draft - section 10 amendments | Department of Social Services, Australian Government \(dss.gov.au\)](https://www.dss.gov.au/exposure-draft-section-10-amendments) (accessed 1 June 2024).

⁷² *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610.

of Support (APTOS tables) and did not cover all the rights entrenched in the UN CRPD.⁷³

2.56 For example, the Queenslanders with Disability Network stated:

Of concern to QDN is that the NDIS supports are not benchmarked against all elements of the United Nations Convention on the Rights of Persons with Disability (UNCRPD). Additionally, QDN members have expressed concern that the eight new categories of supports outlined in the Bill will be too restrictive [...] QDN does not consider the APTOS principles fit-for-purpose and does not support APTOS being used as an interim measure.⁷⁴

2.57 In relation the APTOS tables, some submitters expressed the view that their use was not fit-for-purpose during the transition phase.⁷⁵ For example, Multicultural Disability Advocacy Association of NSW stated:

In regard to APTOS principles being used as an interim measure, we believe that using a set of principles that have been in place since 2015 and proven to be consistently challenging to apply, will be detrimental for participants. We call for an alternative interim solution to be put in place.⁷⁶

2.58 Further, a number of submitters recommended the review of the definition of NDIS support to ensure all rights under the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) are explicitly included in the bill.⁷⁷

Proposed amendment released on 22 May 2024

2.59 At the public hearing on 22 May 2024, Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream from the department explained that ‘the government has listened carefully to feedback on the drafting and intended

⁷³ See, for example, Public Interest Advocacy Centre, *Submission 57*, p. 18; Disability Advocacy Network Australia, *Submission 21*, pp. 19-20, Ms Sophie Cusworth, Acting Chief Executive Officer, Women With Disabilities Australia, *Committee Hansard*, 21 May 2024, p. 14; Ms Diana Piantedosi, Director, Policy, Advocacy and Community Engagement, Women With Disabilities Victoria, *Committee Hansard*, 21 May 2024, p. 6; Professor Helen Dickinson, Professor of Public Service Research, University of New South Wales, Canberra, *Committee Hansard*, 22 May 2024, pp. 26-27; Australian Centre for Disability Law, *Submission 31*, p. 4; NSW Disability Advocacy Network, *Submission 83*, p. 2; Queensland Alliance for Mental Health, *Submission 69*, p. 6; Council for Intellectual Disability, *Submission 61*, p. 7; ARATA, *Submission 133*, p. 5.

⁷⁴ Queenslanders with Disability Network, *Submission 44*, pp. 5 and 6.

⁷⁵ See, for example, Every Australian Counts, *Submission 50*, p. 10; Queenslanders with Disability Network, *Submission 44*, pp. 5 and 6; Council for the Australian Federation, *Submission 46*, p. 14; Mr Peter Gregory, *Submission 47*, p. 1.

⁷⁶ Multicultural Disability Advocacy Association of NSW, *Submission 32*, pp.6-7.

⁷⁷ See, for example, Australian Centre for Disability Law, *Submission 31*, p. 5; South West Autism Network, *Submission 59*, p. 12; Rare Voices Australia, *Submission 77*, p. 10; Advocacy for Disability Access and Inclusion Inc, *Submission 67*, p. 1; Every Australian Counts, *Submission 50*, p. 17.

operation of specific provisions in the bill'.⁷⁸ She advised in the relation to the proposed definition of NDIS supports:

On this issue, the government has agreed to introduce parliamentary Rights of Persons with Disabilities, or the CRPD, the definition will generally amendments that, if adopted, will replace the definition of NDIS support currently in the bill to clarify it and make it more accessible.

The proposed amendment to the NDIS supports provision will mean that, instead of making reference to specific articles under the Convention on the the Rights of Persons with Disabilities, or the CRPD, the definition will generally reference Australia's obligations under the convention. The new structure of the section requires the minister to assess whether particular supports fall within the relative articles of the CRPD rather than the onus being placed on the participant, which was not the intention.⁷⁹

2.60 Further, Mr James MacIsaac from the Department explained that:

The key change that we've made in regard to the provisions that the government is proposing to amend goes to taking out the specific reference to specific articles and to have the convention broadly apply, in terms of that definition. There will be category (a) rules that will be developed in regard to NDIS supports, going forward, that will be agreed with all states and territories, and there will be a co-design and engagement process around the development of those rules.⁸⁰

2.61 At the hearing on 22 May 2024, Ms Sheetal Balakrishnan from the Public Interest Advocacy Centre shared her first impression of the proposed revised definition of NDIS supports with the committee:

...in relation to the definition of NDIS supports, our submission identified issues with proposed section 10(a) and the way it selectively incorporated the CRPD. We understand the committee has just this afternoon been provided with amendments proposed by the government, and those amendments would address the issues we identify in our submission.⁸¹

Amendments agreed by the House of Representatives

2.62 As discussed in Chapter 1, on 5 June 2024, government amendments in relation to the definition of NDIS supports were introduced and passed in the House of Representatives.⁸² The Supplementary Explanatory Memorandum explains that

⁷⁸ Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream, Department of Social Services, *Committee Hansard*, 22 May 2024, p. 41.

⁷⁹ Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream, Department of Social Services, *Committee Hansard*, 22 May 2024, p. 41.

⁸⁰ Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group, Department of Social Services, *Committee Hansard*, 22 May 2024, p. 42.

⁸¹ Ms Sheetal Balakrishnan, Senior Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 22 May 2024, p. 34.

⁸² *House of Representatives Votes and Proceedings*, No. 125, 5 June 2024, pp. 1608–1610.

these amendments address the concerns raised by the disability community about:

- a lack of clarity in the drafting of the provision, requiring participants to undertake a complex analysis of whether a support may be considered an NDIS support for them;
- the fact that the original drafting of proposed section 10 listed certain articles of the Convention on the Rights of Persons with Disabilities (CRPD); and
- the use of the Applied Principles and Tables of Supports agreed by First Ministers in 2015 (APTOS) as an interim approach to defining NDIS supports.⁸³

2.63 According to the Supplementary Explanatory Memorandum, the concerns about the fact that the APTOS table is out of date and not sufficiently clear have been addressed through amending item 124 of Schedule 1 to the Bill to provide for a transitional rule that will be in place only until final rules under section 10 can be agreed. Further, it states that ‘this transitional approach will provide an opportunity for deep engagement with the disability community on the future approach to NDIS supports’.⁸⁴

Needs assessment

2.64 The EM draws attention to the NDIS Review’s recommendation of creating new needs assessment processes,⁸⁵ which the bill introduces in its provisions. The Agencies explained that ‘a participant’s reasonable and necessary budget will be based on a wholistic assessment of their support needs’, which may also identify necessary supports that are not funded or provided by the NDIS.⁸⁶

2.65 The committee received significant evidence relating to the provisions on the support needs assessment (needs assessment), with many submitters holding concerns regarding new section 32L and its relevant subsections.⁸⁷ These concerns, and the government’s response and amendments where relevant, are explored further below.

⁸³ Supplementary Explanatory Memorandum to sheet SK113, [p. 3].

⁸⁴ Supplementary Explanatory Memorandum to sheet SK113, [p. 3].

⁸⁵ Explanatory Memorandum, p. 1.

⁸⁶ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 14].

⁸⁷ See, for example, Mental Health Australia, *Submission 6*, p. 5; Assistive Technology Suppliers Australia, *Submission 14*, p. 7; Disability Advocacy Network Australia, *Submission 21*, p. 12; Australian Centre for Disability Law, *Submission 31*, p. 3; Occupational Therapy Australia, *Submission 49*, p. 9; Dr Darren O’Donovan, *Submission 56*, p. 28; Public Interest Advocacy Centre, *Submission 57*, p. 8; South West Autism Network, *Submission 59*, p. 14; Australian Psychological Society, *Submission 74*, p. 3; Action on Disability within Ethnic Communities, *Submission 101*, p. 4.

Assessment tools and assessors

2.66 Section 32(L)(8) allows the Minister, via legislative instrument, to determine assessment tools to be used when undertaking a needs assessment.⁸⁸ The EM explained that the tool(s) will be:

- highly technical;
- developed in consultation with the disability sector, and medical and professional experts;
- reliant on international learning and best practice; and
- evidence-based.⁸⁹

2.67 The EM stated that it is expected that the tools will need to be changed and updated with use of experience, as well as other updates, like medical standards.⁹⁰

Co-design of the tools

2.68 Noting that the needs assessment tool will be developed via legislative instrument, inquiry participants re-emphasised the need for the tool(s) to be the product of consultation and co-design with the disability community.⁹¹

2.69 For example, People with Disability Australia recommended that:

Any processes or tools developed for the purpose of assessing people with disability tools should be evidence-based, participant-centred, and developed via a genuine co-design process with the disability community to ensure they meet the needs of all participants effectively.⁹²

2.70 South West Autism Network similarly commented that co-design, alongside research and testing, is essential to ensuring that the assessment tools are 'reliable, accurate, and accessible for people with various communication, sensory, cognitive, cultural, language and literacy needs'.⁹³

2.71 In his second reading speech, the Minister reaffirmed the government's commitment to co-design of and consultation of the rules, stating:

⁸⁸ Explanatory Memorandum, p. 23.

⁸⁹ Explanatory Memorandum, p. 23.

⁹⁰ Explanatory Memorandum, p. 23.

⁹¹ See, for example, Disability Advocacy Victoria and Victorian Rural Advocacy Network, *Submission 4*, [p. 2]; Kiind, *Submission 17*, p. 4; Blind Citizens Australia, *Submission 27*, p. 7; Council for the Australian Federation, *Submission 46*, p. 9; Australian Federation of Disability Organisations, *Submission 54*, p. 8; Public Interest Advocacy Centre, *Submission 57*, p. 11; South West Autism Network, *Submission 59*, p. 11; Disability Representative Organisations (National Coordination Function), *Submission 60*, p. 8; People with Disability Australia, *Submission 63*, p. 8; Rare Voices Australia, *Submission 77*, p. 6; Belong Network & Disability Resources Centre, *Submission 82*, [p. 2].

⁹² People with Disability Australia, *Submission 63*, p. 8.

⁹³ South West Autism Network, *Submission 59*, p. 8.

I need to be clear: the needs assessment tools—there will need to be several—will be developed through an extensive consultation and co-design process with deep engagement with the disability community and relevant experts. We'll use an iterative process of designing and testing with people with disability, as well as allied health professionals and people with technical expertise in the development of needs assessments. The process will be transparent. It'll involve extensive testing of existing supports needs assessments with groups and disability types for whom they're validated to inform the design of any new needs assessment.⁹⁴

2.72 In its Supplementary Submission to the committee, the Agencies echoed that:

The needs assessment tool (or tools) will be developed through an extensive consultation and co-design process, involving deep engagement with the disability community and relevant experts.⁹⁵

Application of the tools and the standards/qualifications of assessors

2.73 In addition to emphasising the need for co-design, submitters also acknowledged the Explanatory Memorandum's reference to the tools being 'highly technical'.⁹⁶ Consequently, some submitters raised concerns on the potential limitations regarding the needs assessments,⁹⁷ with the National Disability Services specifically highlighting concerns relating to the tools being able to capture 'the needs of individuals with multiple and interrelated disability'.⁹⁸

2.74 On this point, Disability Advocacy NSW raised whether the tools will be flexible and responsive:

Further explanation is needed about how the assessment tools will create a budget that is truly individualised and needs based. Particularly participants with multiple, complex and/or lesser-known disabilities would be disadvantaged by an assessment model that is not responsive or flexible to individual needs.⁹⁹

⁹⁴ The Hon. Bill Shorten MP, Minister for the National Disability Insurance Scheme and Minister for Government Services, *House of Representatives Hansard*, 5 June 2024, p. 36.

⁹⁵ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [p. 7].

⁹⁶ See, for example, MND Australia, *Submission 7*, [p. 3]; Blind Citizens Australia, *Submission 27*, p. 7; JFA Purple Orange, *Submission 39*, [p. 4]; Every Australian Counts, *Submission 50*, p. 5; MS Australia, *Submission 125*, p. 4.

⁹⁷ See, for example, Kin Disability Advocacy, *Submission 43*, p. 4; Every Australian Counts, *Submission 50*, p. 5; South West Autism Network, *Submission 59*, p. 6; Disability Representative Organisations (National Coordination Function), *Submission 60*, p. 12.

⁹⁸ National Disability Services, *Submission 68*, p. 10.

⁹⁹ Disability Advocacy NSW, *Submission 84*, p. 9.

2.75 As such, submitters stressed the importance of ensuring that assessors appropriately use the tools to ensure that participant needs are supported.¹⁰⁰ Every Australian Counts, a grassroots campaign for the NDIS, contended that both tools and assessors alike must be flexible:

There must be a flexible approach to the needs assessment process and the tools chosen. Disability is diverse, and it's common for people with disability to have more than one disability. A one-size-fits-all approach will not work, and the assessments must be holistic in nature. Assessors must be flexible and responsive to the participant's needs, varying the assessment process and tools used as required.¹⁰¹

2.76 Occupational Therapy Australia also identified that the person undertaking the needs assessment must be appropriately skilled and qualified,¹⁰² which was echoed by the South West Autism Network, who emphasised that assessors must be 'suitably qualified, knowledgeable, and experienced in the participant's disability type(s)'.¹⁰³

2.77 In its Supplementary Submission to the inquiry, the Agencies provided further information on the tools and assessors, noting that some tools will require assessors to hold specific qualifications:

The individuals undertaking the needs assessment will be trained in the use of the instrument, with some assessment tools requiring specific qualifications for use. Training will also ensure that individuals are able to work with people with disability in a culturally informed way that is respectful of their dignity and individual autonomy.¹⁰⁴

Access to the needs assessment report

2.78 A number of inquiry participants discussed section 32(L)(5), which would require a report of the needs assessment (needs assessment report) to be prepared and provided to the CEO as soon as practicable after the assessment has been completed.¹⁰⁵

2.79 Concerns were raised that the bill's provisions do not ensure that the participant would be provided the needs assessment report prior to it being given to the

¹⁰⁰ See, for example, Every Australian Counts, *Submission 50*, p. 6, Occupational Therapy Australia, *Submission 49*, p. 7, Belong Network & Disability Resources Centre, *Submission 82*, [p. 4].

¹⁰¹ Every Australian Counts, *Submission 50*, p. 6.

¹⁰² Occupational Therapy Australia, *Submission 49*, p. 7.

¹⁰³ South West Autism Network, *Submission 59*, p. 7.

¹⁰⁴ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [p. 7].

¹⁰⁵ See, for example, Every Australian Counts, *Submission 50*, pp. 6 and 13; Public Interest Advocacy Centre, *Submission 57*, p. 35; South West Autism Network, *Submission 59*, p. 14; Disability Representative Organisations (National Coordination Function), *Submission 60*, p. 11; Belong Network & Disability Resources Centre, *Submission 82*, [p. 3]; Disability Advocacy NSW, *Submission 84*, p. 11.

CEO. For example, Disability Advocacy Victoria and Victorian Rural Advocacy Network contended that this provision:

... is in conflict with the findings of the NDIS Review which stated that the needs assessment report should be provided to the participant before it is finalised. This needs to be added into the legislation so it is clear that participants will be provided with the needs assessment report before it is given to the CEO.¹⁰⁶

2.80 Mental Health Australia similarly commented that the NDIS' central policy imperative is 'choice and control', and that it would be more aligned with this policy to:

... offer the participant and family, carers and supporters (where this is the preference of the participant) the opportunity to not only receive, but also review, their needs assessment before it is provided to the NDIA.¹⁰⁷

2.81 Sharing similar concerns, Disability Advocacy Network Australia recommended that the bill be amended to require the assessor to provide a copy of the final report to the participant, as well as the NDIA.¹⁰⁸

2.82 In its original submission, the Agencies stated that the needs assessment report may be provided to the participant, allowing them to 'clarify any points which they think have been misunderstood by the assessor, particularly where they do not accurately reflect their needs and circumstances'.¹⁰⁹ The Agencies noted that this was consistent with the requirement that the needs assessment plans be prepared with the participant.¹¹⁰

Government response and amendments

2.83 The government amendments to the bill address the concern that the requirement for the CEO to provide a participant with a copy of their assessment report is not explicit in the legislation.¹¹¹

2.84 The Supplementary Explanatory Memorandum acknowledged the significant evidence received by the committee on the importance of the needs assessment being provided to participants, and noted that:

... there has been significant concern expressed about the fact that the legislation does not specifically require the CEO to provide a participant with a copy of their own needs assessment report.

¹⁰⁶ Disability Advocacy Victoria and Victorian Rural Advocacy Network, *Submission 4*, [p. 3].

¹⁰⁷ Mental Health Australia, *Submission 6*, p. 5.

¹⁰⁸ Disability Advocacy Network Australia, *Submission 21*, p. 13.

¹⁰⁹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 15].

¹¹⁰ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 15].

¹¹¹ Supplementary Explanatory Memorandum relating to sheet PA110, [p. 4].

To address this, proposed amendments will insert this specific requirement. The amendment will require the CEO to give a participant a copy of their needs assessment report as soon as practicable after the CEO receives the report.¹¹²

2.85 At a public hearing held after such amendments had passed the House of Representatives, Mr Mitchell Skipsey, Senior Solicitor at Public Interest Advocacy Centre welcomed the clarification that needs assessment reports would be provided to participants:

In relation to giving a copy of the needs assessment to the participant, we think that the amendments do a good job of addressing that. In particular, there's a helpful provision there about the CEO giving a copy of the report to the participant and giving them the opportunity to comment. There's also helpful commentary in the explanatory memorandum that I think makes clear what the legislative intention is. So, on that front, we welcome those amendments; we think they're positive.¹¹³

Right to review a needs assessment

2.86 Inquiry participants also argued that participants must have the right to review a needs assessment.¹¹⁴

2.87 For example, the Multicultural Disability Advocacy Association of NSW submitted that the bill's provisions do not indicate whether a participant will be able to flag whether their needs assessment 'is appropriate or truly reflective of their needs' and that it is concerned that a needs assessment 'would not be a reviewable decision', either via internal or external review.¹¹⁵

2.88 Professor Helen Dickinson, Professor of Public Service Research at the Public Service Research Group, University of New South Wales Canberra, similarly submitted that the bill does not state whether the needs assessment would be a reviewable decision. As such, Professor Dickinson explained that:

This means there is also a lack of a mechanism for decisions to be internally reviewed by the Agency (Section 99). There should be a clear provision within the legislation to allow individuals to appeal if a needs assessment has been of poor quality. Without there is a lack of ability to refer to the Administrative Appeals Tribunal for external review.¹¹⁶

¹¹² Supplementary Explanatory Memorandum relating to sheet PA110, [p. 4].

¹¹³ Mr Mitchell Skipsey, Senior Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 14 June 2024, p. 18.

¹¹⁴ See, for example, Griffith University, *Submission 3*, p. 10; Deafness Forum Australia, *Submission 10*, p. 6; Disability Advocacy Network Australia, *Submission 21*, p. 13; Advocacy for Disability Access and Inclusion Inc., *Submission 67*, p. 1; Rare Voices Australia, *Submission 77*, p. 11.

¹¹⁵ Multicultural Disability Advocacy Association of NSW, *Submission 32*, pp. 3–4.

¹¹⁶ Professor Helen Dickinson, *Submission 55*, [p. 3].

2.89 At a public hearing, Mr Matthew Swainson, Chief Counsel at the National Disability Insurance Agency, provided further clarification on the review process of a needs assessment decision:

Firstly, that support-needs assessment will be provided to the participant to comment on and to correct information before the planning process is finished. Once the planning process is finished, they get an outcome. If they're not happy with it or there's something that is still not right, they'll have a right to seek a section 100, and subsequently go to the AAT on that decision. Once it's before the AAT, the AAT will absolutely be able to review the support-needs assessment and make a view as to whether or not that support-needs assessment will be correct, and we'll be able to take steps to have that amended.

2.90 In its supplementary submission to the inquiry, the Agencies reaffirmed that participants can seek a review of the statement of participant supports, in which they would be able to seek a review of all aspects of the statement, including their reasonable and necessary budget.¹¹⁷

2.91 The Agencies further explained that this does not mean that the entire assessment needs to be reconducted, and that it could 'be a simple change to certain aspects of the needs assessment report'.¹¹⁸ In its supplementary submission, the Agencies also stressed that the Administrative Appeals Tribunal will be able to require the undertaking of a replacement needs assessment.¹¹⁹

2.92 The Minister also emphasised that the bill's provisions do not change participant rights to external or internal review rights of the needs assessment:

This bill makes no changes to internal or external review rights in regard to participants' plans. Under the proposed new planning framework, participants can seek internal and external review of their plan, which includes their reasonable and necessary budget based on a holistic needs assessment.¹²⁰

2.93 However, to provide clarity, the Agencies explained that the government moved amendments to insert a legislative note, that make it clear that 'decision makers on internal and external review can arrange for a replacement needs assessment', which was agreed by the House of Representatives on 5 June 2024.¹²¹

¹¹⁷ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [p. 8].

¹¹⁸ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [p. 8].

¹¹⁹ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [pp. 8–9].

¹²⁰ The Hon. Bill Shorten MP, Minister for the National Disability Insurance Scheme and Minister for Government Services, *House of Representatives Hansard*, 5 June 2024, p. 35.

¹²¹ DSS, NDIA and NDIS Commission, *Supplementary Submission 42.1*, [p. 9].

Budget flexibility

- 2.94 A number of submitters expressed support for the provisions of the bill which enabled greater flexibility for individual participants' budgets.¹²²
- 2.95 For example, the National Aboriginal Community Controlled Health Organisation (NACCHO) expressed its support for 'greater flexibility of funding,' stating that:
- ... changes to the bill, around specifying funding, is required to support the introduction of alternative commissioning models for Aboriginal and Torres Strait Islander and remote communities, which NACCHO strongly supports.¹²³
- 2.96 Additionally, the Health Services Union stated that its members had been concerned about pressure from plan managers to "'spend down," funding left over in plans on items participants do not want,' and that these changes to funding 'will decrease anxiety for participants and workers and cut down on waste'.¹²⁴
- 2.97 The Specialist Disability Accommodation Alliance also drew particular attention to this area, stating that it welcomed this more flexible approach to funding, which would 'offer participants more choice and control to determine and pay for the supports they require'.¹²⁵
- 2.98 On this point, the Agencies outlined that flexible funding would give participants 'a much higher level of choice and control' around tailoring their supports to their own needs.¹²⁶ The Agencies elaborated that, under these changes:
- ... participants will no longer be constrained by line by-line plans that specify particular supports and support intensity.¹²⁷

Information-gathering powers of the CEO

- 2.99 A number of submitters discussed item 30 of the bill relating to the process for revoking a person's status as an NDIS participant. Under the proposed reforms, the CEO of the NDIA would have the power to request information from a participant or other individual if the CEO is considering revoking an NDIS

¹²² See, for example, JFA Purple Orange, *Submission 39*, [p. 3]; NSW Disability Advocacy Network, *Submission 83*, [p. 1]; Brotherhood of St. Laurence, *Submission 41*, p. 3.

¹²³ National Aboriginal Community Controlled Health Organisation (NACCHO), *Submission 79*, p. 4.

¹²⁴ Health Services Union, *Submission 99*, p. 6.

¹²⁵ Specialist Disability Accommodation Alliance, *Submission 45*, [p. 2].

¹²⁶ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 12].

¹²⁷ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 12].

participant's status.¹²⁸ The government responded to these concerns in amendments that were passed in the House of Representatives on 5 June 2024.

Compliance with requests for information

2.100 A number of submitters expressed concern about the ability of NDIS participants to comply with CEO's requests for additional information.¹²⁹

2.101 In its submission, the Australian Centre for Disability Law described the potential issues its clients may face in obtaining requested documents, including 'excessive wait times for appointments with specialists, high fees associated with appointments and lack of guidance as to what should be included in these further medical reports.'¹³⁰ It recommended that 'clear guidelines,' are given as to what information can be requested by the CEO.¹³¹

2.102 Disability Advocacy NSW also stated that it was concerned about the ability of the following cohorts to comply with these powers:

- Participants with multiple and complex disabilities;
- Participants with literacy issues and/or cognitive impairments;
- Participants in Rural Regional Remote (RRR) areas who face additional barriers engaging with the NDIA.¹³²

2.103 In addition to generally seeking more clarity about participants' compliance with the CEO powers, Disability Advocacy NSW specifically asked that any notifications for information requests be delivered in a way that is timely and accessible, as well as allowing the participant sufficient time to respond.¹³³

2.104 Mental Health Australia expressed concern about the ability of individuals with psychosocial disability to fulfil a request from the CEO for information:

People with psychosocial disability can face multiple barriers to complying with information requests. For example, there are long wait times for services across the mental health sector, which could significantly delay the provision mental health-related information to the NDIA. In addition,

¹²⁸ Explanatory Memorandum, p. 5; Eleanor Malbon and Susan Pennings, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Bills Digest No. 71, 2023–24*, Parliamentary Library, Canberra (Parliamentary Library, Bills Digest No. 71, 2023–24), 15 May 2024, p. 10; Proposed subsection 21(2), NDIS Amendment Bill 2024.

¹²⁹ See, for example, Professor Helen Dickinson, *Submission 55*, [p. 5.]; Queensland Independent Disability Advocacy Network, *Submission 40*, p. 11; Positive Pathways Occupational Therapy Mental Health Service, *Submission 12*, [p. 2]; and NDIS Occupational Therapy Community of Practice, *Submission 2*, p. 5.

¹³⁰ Australian Centre for Disability Law, *Submission 31*, p. 5.

¹³¹ Australian Centre for Disability Law, *Submission 31*, p. 6.

¹³² Disability Advocacy NSW, *Submission 84*, p. 14.

¹³³ Disability Advocacy NSW, *Submission 84*, p. 14.

people with psychosocial disability are also subject to structural stigma, which, in the health system, can result in inequitable distribution of resources, undertreatment of health problems, withholding of services, and fragmented care, which can in turn impede a person's ability to obtain the requested information from health professionals in a timely manner.¹³⁴

2.105 Mental Health Australia went on to describe these provisions as 'overly punitive',¹³⁵ and proposed that the bill be amended so that any decisions to revoke a participant's status 'would only be taken as a last resort and after support is provided to assist the person to comply with the request for information'.¹³⁶

2.106 Voicing similar concerns, Dr Darren O'Donovan, Senior Lecturer in Administrative Law at La Trobe University, proposed that the relevant provisions be amended to ensure that any request for information would not 'result in or represent an undue burden on the participant',¹³⁷ and that:

... information-gathering powers must not impose consequences on participants where a third party fails to comply with a request for information.¹³⁸

2.107 Some submitters drew particular attention to the 90 days allotted to a participant to respond to a request from the CEO for information.¹³⁹ For example, Disability Advocacy Network Australia made the following recommendations:

- Amend section 36 (3)(a) to extend the timeframe to respond to requests for information relating to a plan review to 90 days as a minimum and preserving the flexibility to amend in the event an extension is required; and
- Amend sections 30 and 36 to provide flexibility in timeframes and the request where a person must rely on others to request information or is unable to provide that information for reasons outside of their control.¹⁴⁰

2.108 However, the Agencies clarified in their submission that the powers of the CEO in this case are 'discretionary',¹⁴¹ explaining that:

... the CEO must not revoke the participant's status if satisfied it was reasonable for the relevant person not to have complied with the CEO's

¹³⁴ Mental Health Australia, *Submission 6*, pp. 4–5. Citations omitted.

¹³⁵ Mental Health Australia, *Submission 6*, p. 5.

¹³⁶ Mental Health Australia, *Submission 6*, p. 5.

¹³⁷ Dr Darren O'Donovan, *Submission 56*, p. 5.

¹³⁸ Dr Darren O'Donovan, *Submission 56*, p. 5.

¹³⁹ See, for example, Mr Jarrod Marrinon, *Submission 22*, [p. 7]; NDIS Occupational Therapy Community of Practice, *Submission 2*, p. 5.; Disability Rights Advocacy Services, *Submission 5*, p. 7.

¹⁴⁰ Disability Advocacy Network Australia, *Submission 21*, p. 24.

¹⁴¹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 22].

request during the required timeframe. This ensures flexibility where a participant is unable to provide information due to their personal circumstances, for example because they are in hospital or because their disability has impacted on their ability to obtain the evidence requested within the appropriate timeframe, and also ensures the participant will not be penalised if another person, such as their treating medical professional, does not provide the requested information within the relevant timeframe.¹⁴²

2.109 The Explanatory Memorandum provides further details regarding the kinds of circumstances under which the CEO would have discretion not to exercise these powers:

The CEO must not revoke the participant's status if the CEO is satisfied that it was reasonable for the participant (or other relevant person) not to have complied with the request made by the CEO within 90 days. This may include for example, because they are hospitalised during that period or cannot obtain an appointment with a relevant medical professional within the stated period.¹⁴³

Result of revocation of participant status

2.110 Additionally, some submitters raised questions over the processes for participants whose status has been revoked by the CEO.¹⁴⁴

2.111 For example, the Queensland Council of Social Service recommended that a duty be imposed on the CEO 'to ensure the accessibility of the format and language' in which the notice of revocation is given.¹⁴⁵

Use and limits of the CEO's powers

2.112 Some inquiry participants expressed concern about the extent and application of the CEO's powers to gather information from current NDIS participants.¹⁴⁶

2.113 The Public Interest Advocacy Centre described these powers as 'too broad,' and characterised the consequences for non-compliance as 'severe.'¹⁴⁷

2.114 Accordingly, the Public Interest Advocacy Centre proposed the following changes to limit said powers:

¹⁴² DSS, NDIA and NDIS Commission, *Submission 42*, [p. 22].

¹⁴³ Explanatory Memorandum, p. 9.

¹⁴⁴ See, for example, Disability Advocacy Victoria and Victorian Rural Advocacy Network, *Submission 4*, [p. 4]; Mental Health Australia, *Submission 6*, p. 4; Australian Centre for Disability Law, *Submission 31*, p. 5; Queenslanders with Disability Network, *Submission 44*, p. 7; Every Australian Counts, *Submission 50*, p. 12.

¹⁴⁵ Queensland Council of Social Service, *Submission 33*, [p. 3].

¹⁴⁶ See, for example, Every Australian Counts, *Submission 50*, p. 12; South West Autism Network, *Submission 59*, p. 13.

¹⁴⁷ Public Interest Advocacy Centre, *Submission 57*, [p. 32].

- Information-gathering powers not impose consequences on participants where a third party fails to comply with a request for information;
- Information-gathering powers be limited to information that would not be unduly burdensome for a participant to produce;
- Requests for a participant to undergo a medical, psychiatric, psychological or other examination should be subject to tight constraints;
- All consequences for non-compliance with a request for information be discretionary, rather than mandatory; and
- The CEO be able to withdraw a request for information once made.¹⁴⁸

Government response

2.115 In their joint submission, the Agencies made clear that these powers were created to remedy a flaw in the existing policy framework:

At present, if a participant or their nominee does not respond to a request from the CEO to provide information for the purposes of eligibility reassessment, the NDIA must consider ongoing eligibility based on existing information, which is often out of date and no longer valid.¹¹⁴⁹

2.116 This previous limitation on the powers of the CEO is described as ‘inconsistent’ with the powers granted to the CEO in regards to initial requests to access the NDIS.¹⁵⁰ The Agencies also described potential issues arising from this inconsistency:

If participants fail to engage with the Agency when their ongoing access to the Scheme is being considered, the CEO is required to make a decision about their ongoing access on the basis of previously provided evidence which can be scant and is often outdated. This can lead to people remaining participants in the Scheme who would not be eligible if current information was available but could also result in participants who should remain eligible having their status revoked due to a lack of current evidence.¹⁵¹

2.117 Thus, these new powers are explained by the Agencies as a tool which will allow the CEO to make more informed and up-to-date decisions in regards to participants’ access to the scheme.¹⁵²

2.118 Furthermore, the government amendments to the bill make clear that such an assessment could only be requested when the CEO is satisfied that the information could not otherwise be reasonably obtained.¹⁵³

¹⁴⁸ Public Interest Advocacy Centre, *Submission 57*, [pp. 7–8].

¹¹⁴⁹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 21].

¹⁵⁰ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 21].

¹⁵¹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 21].

¹⁵² DSS, NDIA and NDIS Commission, *Submission 42*, [p. 21].

¹⁵³ Supplementary Explanatory Memorandum to sheet PA110, p. [5].

Ability of participants to review a revocation of status

- 2.119 Some submitters also sought clarity about the ability of NDIS participants to review any decision made to revoke their status.¹⁵⁴
- 2.120 For example, National Legal Aid expresses concern over the wording of Section 99, and recommended that ‘section 99 of the NDIS Act is amended to refer to s30A(1) in its entirety,’ so that it is clear what decisions participants are entitled to review.¹⁵⁵
- 2.121 However, in his public hearing testimony, Professor Bruce Bonyhady AM, Co-chair of the NDIS Review, made clear that a needs assessment which ‘does not accurately reflect people’s needs and circumstances’ must be reviewable, and indicated the presence of such a mechanism within the legislation.¹⁵⁶
- 2.122 Furthermore, the Agencies clarified in their joint submission that a decision to revoke a participant’s status is ‘reviewable,’ referring to item 100, which categorises the decision as such.¹⁵⁷
- 2.123 The Agencies elaborated that an individual dissatisfied with the decision may request the CEO ‘to conduct a review of that decision’; this is the second tier of the decision-making model, known as an ‘internal review decision’.¹⁵⁸ Should a participant wish to appeal the CEO’s review of the decision, they will have recourse to the Administrative Appeals Tribunal, which is ‘the third, and final, tier in the decision-making model’.¹⁵⁹
- 2.124 In a subsequent amendment to the bill, the government inserted a legislative note to clarify the means of review, which reads:

In reviewing a decision to approve a statement of participant supports, a reviewer or the Administrative Appeals Tribunal has all the powers of the CEO in making the original decision and must therefore arrange for a replacement assessment to be undertaken if satisfied as mentioned in paragraph (b) (subject to any applicable National Disability Insurance Scheme rules).¹⁶⁰

¹⁵⁴ See, for example, Disability Rights Advocacy Services, *Submission 5*, p. 7; National Legal Aid, *Submission 81*, p. 9; Villamanta Disability Rights Legal Service, *Submission 92*, p. 20.

¹⁵⁵ National Legal Aid, *Submission 81*, p. 37.

¹⁵⁶ Professor Bruce Bonyhady AM, Former Co-Chair, National Disability Insurance Scheme Review, *Committee Hansard*, 21 May 2024, p. 2.

¹⁵⁷ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 22].

¹⁵⁸ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 23].

¹⁵⁹ DSS, NDIA and NDIS Commission, *Submission 42*, [p. 23].

¹⁶⁰ Amendment (7), Sheet PA110.

Other issues

2.125 Some submitters raised concerns that were not explicit in the bill's provisions, which are explored below.

Foundational supports

2.126 Some inquiry participants noted the lack of clarity in the bill's provisions surrounding what foundational supports will look like.¹⁶¹ For example, Ms Sophie Cusworth, Acting Chief Executive Officer of Women with Disabilities Australia identified that the bill had been introduced 'before we have clarity on the design of foundational supports, including their availability and eligibility criteria'.¹⁶² Relatedly, Ms Nicole Rogerson, Director of Autism Awareness Australia, raised that 'in this point in time there is no definition or list' of foundational supports, which consequently creates difficulty in commenting on whether foundational supports will be appropriate or not, as 'we simply don't know what they are'.¹⁶³

2.127 Ms Cusworth therefore stressed that the design of foundational supports should occur simultaneously, in collaboration with state and territory governments and representative organisations, to ensure that participants are 'not left without essential supports and services'.¹⁶⁴

Psychosocial disability supports and early intervention pathways

2.128 Some submitters also noted the NDIS Review's acknowledgement of the need for change for people with lived experience of psychosocial disability and commented on the need to improve psychosocial supports.¹⁶⁵

2.129 For example, the Queensland Alliance for Mental Health stressed the need for a 'strong, diverse system of foundational psychosocial supports' that is co-designed and 'comprehensively' resourced.¹⁶⁶ The National Mental Health Consumer and Carer Forum also contended 'a common and consistent

¹⁶¹ See, for example, Ms Michelle Moss, Chief Executive Officer, Queenslanders with Disability Network, *Committee Hansard*, 21 May 2024, p. 17; Mrs Michelle Oliver, General Manager, Occupational Therapy, Occupational Therapy Australia, *Committee Hansard*, 21 May 2024, p. 46; Ms Lauren Henley, Senior Systemic Advocate, Australia Federation of Disability Organisations, *Committee Hansard*, 22 May 2024, p. 3.

¹⁶² Ms Sophie Cusworth, Acting Chief Executive Officer, Women With Disabilities Australia, *Committee Hansard*, 21 May 2024, p. 5.

¹⁶³ Ms Nicole Rogerson, Director, Autism Awareness, *Committee Hansard*, 21 May 2024, p. 16.

¹⁶⁴ Ms Sophie Cusworth, Acting Chief Executive Officer, Women With Disabilities Australia, *Committee Hansard*, 21 May 2024, pp. 5–6.

¹⁶⁵ See, for example, Mental Health Australia, *Submission 6*, pp. 2 and 3, Victorian Mental Illness Awareness Council, *Submission 19*, pp. 7–8; Queensland Alliance for Mental Health, *Submission 69*, pp. 4, 11 and 12.

¹⁶⁶ Queensland Alliance for Mental Health, *Submission 69*, p. 11.

understanding of psychosocial supports' is necessary to improved outcomes for participants with psychosocial disability.¹⁶⁷

2.130 In regards to early intervention pathways, Speech Pathology Australia noted concern regarding the definition of early intervention and its associated pathways, which it considered will have 'far reaching impacts upon access to the NDIS'.¹⁶⁸

2.131 Further, Consumers of Mental Health WA cited that consumers have made the inference that this pathway will lead to participants with psychosocial disability being 'pushed into early intervention pathways that have delimited budgets and less available supports'.¹⁶⁹

2.132 In response to concerns raised regarding the impact of the bill on psychosocial disability supports and early intervention pathways, Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group at the Department informed the committee:

... the bill does not make any changes in relation to the provision of psychosocial supports. The bill establishes new rule-making powers that could enable the introduction of an early intervention pathway. The Australian government will work with the disability community to consider the recommendation in the NDIS review about the new early intervention pathways.¹⁷⁰

Protections for whistleblowers

2.133 The Human Rights Law Centre raised that the current whistleblower protections under the existing Act are 'stifling the voices of would-be NDIS whistleblowers'¹⁷¹ and raised concerns that the bill does not address:

... underlying concerns about participant welfare, financial sustainability, fraud and eligibility without providing adequate safeguards for individuals who witness wrongdoing by workers and providers to speak up about their concerns.¹⁷²

2.134 Ms Marie Johnson also commented that it is 'not clear how and if Whistle-blower protections apply' and suggested that there are individuals who

¹⁶⁷ National Mental Health Consumer and Carer Forum, *Submission 103*, p. 5.

¹⁶⁸ Speech Pathology Australia, *Submission 95*, p. 1.

¹⁶⁹ Consumers of Mental Health WA, *Submission 96*, p. 2.

¹⁷⁰ Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group, Department of Social Services, *Committee Hansard*, 14 June 2024, p. 28.

¹⁷¹ Human Rights Law Centre, *Submission 146*, p. 3.

¹⁷² Human Rights Law Centre, *Submission 146*, p. 2.

might want to provide evidence, 'but are reluctant to do so due to concerns about protections'.¹⁷³

2.135 Mr MacIsaac, Group Manager at the Department confirmed at a public hearing of the inquiry, that bill does not make any changes in relation to protections for whistleblowers.¹⁷⁴

Committee view

2.136 The committee thanks all participants for their input to the inquiry. We acknowledge that many participants provided detailed submissions and proposals with recommendations to strengthen the bill and to ensure the proposed legislation appropriately enables the implementation of key recommendations of the NDIS Review. We thank them for their engagement.

2.137 In particular, the committee recognises the significant contribution of witnesses who appeared across the three days of hearings, particularly those with disability, their family members and carers.

Context for reform

2.138 The committee recognises that the bill is a part of a broader package of reforms necessary to setting the NDIS on a sustainable trajectory, and ensuring every dollar of NDIS funding goes to those who need it most.

2.139 The committee recognises that the bill represents one step in the context of a wider and ongoing process of reforms to the NDIS agreed by all Australian jurisdictions through National Cabinet over the course of 2023 to ensure the long-term sustainability of the Scheme so that it can continue to provide life-changing outcomes for future generations of Australians.

2.140 As outlined in the Minister's second reading speech, the bill establishes an enabling framework for rules and future reforms with the objective of restoring the original intent of the Scheme and ensuring its sustainability for future generations of Australians.

2.141 The committee notes that the majority of the changes outlined in this bill do not take effect until activated by future changes to NDIS rules and instruments. The committee acknowledges evidence received from the Department that these changes will be subject to co-design and engagement with the disability community and the states and territories to develop and agree these rules and instruments.

2.142 The committee notes that while the NDIS is jointly funded by the Commonwealth and the states and territories, the Commonwealth is the

¹⁷³ Ms Marie Johnson, *Submission 15*, p. 23.

¹⁷⁴ Mr James MacIsaac, Group Manager, NDIS Participants and Performance Groups, Department of Social Services, *Committee Hansard*, 14 June 2024, p. 28.

majority funder and, as a result of limits on state and territory funding contributions, is currently solely exposed to cost escalation.

2.143 Further, the committee notes the assurances from the Minister, and as outlined in evidence provided by the Agencies, that these rules will be co-designed with both the states and territories and the disability community.

Use of delegated legislation

2.144 The committee heard that the bill enables new and expanded rule and instrument-making powers. Evidence received from the Department of Social Services describes the bill as establishing a framework for rules and future reforms. Practically, the committee understands that this means that the majority of the major reforms foreshadowed by the bill will only commence following the development of the new rules and instruments, rather than when the bill receives Royal Assent.

2.145 While the committee acknowledges that this process is not unusual, it also heard concerns that, as this delegated legislation has not yet been released publicly, it presents difficulties for the disability community and the public to consider the impact these rules will have.

2.146 The committee also notes that, as noted by the Council for the Australian Federation, the 'NDIS operates in a cooperative, interconnected social services system'¹⁷⁵ and that Scheme decisions, and in particular rule changes enabled by the bill, may have impacts on other mainstream services.

2.147 In light of this, increasingly First Ministers, via the National Cabinet, have been directly involved in decision making, and are likely to continue to be closely engaged as the reform detail is finalised following the passage of the bill.

2.148 As National Cabinet has been more involved in decision making around the scheme, elevating decision-making would provide alternative pathways for rule-making.

2.149 Given the significance of the NDIS rules, the committee is of the view that the government should provide additional detail and descriptions of the rules, as well as an explanation of the consultation and co-design process it intends to undertake to develop them, as soon as possible. The committee believes that this will support the disability community and public to better understand the impact of the bill and would provide some reassurance to the community before the rules are fully developed.

¹⁷⁵ Council for the Australian Federation, *Submission 46*, p. 7.

Recommendation 1

2.150 The committee recommends the bill include amendments so that First Ministers are also recognised as Ministers for the purposes of Category A rule-making.

Commitment to co-design and consultation

2.151 The significant use of delegated legislation in the bill underlines the importance of consultation and co-design of these rules, and the committee acknowledges the uncertainty raised by witnesses in their evidence to the committee about how this consultation and co-design will be undertaken.

2.152 The committee acknowledges the government's stated commitment to involve people with disability and the disability sector in the co-design of the NDIS rules. While the committee heard evidence that this commitment on its own may fail to ensure meaningful co-design and consultation with people with disability and disability organisations, the committee notes the assurances of the government and the Department on this matter.

2.153 There was also recognition from some witnesses that not all reforms require a full co-design process and that consultation may be sufficient for reforms of less significance or complexity.

2.154 The committee notes that the government has already responded to these concerns by introducing an amendment, which was agreed to in the House of Representatives, to explicitly require the Minister to have regard to the principle of co-design when making legislative instruments under proposed sections 32K and 32L.

2.155 The committee is of the view that these amendments, as agreed by the House of Representatives, are a measured and appropriate response to the concerns regarding co-design raised by inquiry participants and other stakeholders. The committee also accepts that the Minister will be required to provide an explanation of the nature and extent of the consultation that has occurred when making legislative instruments.

2.156 There was evidence provided to the committee that the process of rule-making provided a level of assurance that proper consultation and co-design would occur.

2.157 The Committee notes proposals from inquiry participants to ensure appropriate consultation occurs for disallowable instruments and that there was transparency on the outcomes of this consultation. The committee is of the view that additional transparency on the outcomes of consultation on the substance of the instrument will allow Parliament to make more considered decisions when instruments are tabled.

Recommendation 2

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

Definition of NDIS supports

2.159 The committee heard significant concerns from a number of participants about the proposed new definition of NDIS supports. In particular, submitters raised concerns about the lack of clarity about what constitutes an NDIS support, the listing of certain but not all articles of the UN CRPD and the reliance on the APTOS tables as an interim measure.

2.160 The committee acknowledges that the government has since introduced amendments aimed at addressing these concerns, which have been agreed to by the House of Representatives.

2.161 The committee believes these amendments are a step in the right direction until the rules can be agreed. The committee urges the Department to engage as early and comprehensively as possible with the disability community on the future approach to defining an NDIS support.

2.162 The committee is of the view that the government should provide additional detail on the rule-making process for the transitional rule to define NDIS supports and make public a draft of the transitional rule as soon as possible.

Replacement needs assessment

2.163 The NDIS Review recommended the introduction of a new needs assessment process to determine the level of need more consistently for each participant and set budgets on that basis. The committee heard that this was a key recommendation of the NDIS Review, to improve the current planning process and provide greater flexibility to participants by providing a 'whole of person' budget.

2.164 The committee welcomes the commitment to develop the needs assessment tools with experts and the disability community. The committee also notes that this will be an iterative process of co-design and testing with people with disability, researchers and other professionals.

2.165 However, inquiry participants also made clear to the committee that needs assessment reports must be provided to participants. The government moved amendments specifying that a needs assessment report must be given to a participant, which was agreed to by the House of Representatives on 5 June 2024.

2.166 The committee further acknowledges evidence that inquiry participants are concerned about ensuring the right to review a needs assessment. Inquiry participants highlighted the significance of the needs assessment in determining

a participant's budget in the future and whether they have sufficient funding to meet their disability needs.

- 2.167 The Agencies explained that the bill's provisions do not change participant rights to external or internal review of the needs assessment. To provide clarity on the matter, the government moved amendments, which were agreed to on 5 June 2024 by the House of Representatives.
- 2.168 The Committee is of the view that the bill, as agreed to by the House of Representatives on 5 June 2024, has been adequately strengthened through appropriate amendments moved by the government.

CEO powers

- 2.169 The bill provides the CEO of the NDIA with a range of powers. This includes information-gathering powers, imposition of conditions on funding, and the power to adjust a participants' plan management preferences.
- 2.170 The committee notes the concerns raised by inquiry submitters about the requirement to provide information to the NDIA CEO for the purpose of considering a participant's status within 90 days. The committee acknowledges that it may, at times, be difficult for some participants to access the relevant professionals to obtain the required information within this timeframe.
- 2.171 The committee acknowledges evidence received from the Department of Social Services that these additional powers are required for the effective administration of the NDIS. However, the committee also heard evidence from inquiry participants that the significance of these powers means that there must be additional guidance and safeguards within the primary legislation on how these powers can and cannot be used. This was of significant concern to a number of inquiry participants because of the potential impact of these powers being exercised, including a participant having their status in the NDIS revoked.
- 2.172 However, the committee is reassured by evidence received from the Agencies that the CEO must not revoke the participant's status if satisfied it was reasonable for the person not to have complied with the request during the required timeframe. The committee agrees that this will ensure flexibility where a participant is unable to provide information due to personal circumstances, for example because of a hospital admission, if their disability has impacted on their ability to obtain the evidence requested, or because of other circumstances out of their control.
- 2.173 The government also addressed some concerns raised by inquiry participants about the requirement for individuals to undergo assessments or examinations in amendments moved and agreed to in the House of Representatives on 5 June 2024. These amendments impose a further limitation to ensure that the CEO can only make such requests if there is no other reasonable alternative way of obtaining the information. This requirement will require the CEO to have regard

to other alternatives before making the request for an assessment or examination.

2.174 Nevertheless, adding more detail to when the powers are intended to be used would provide greater assurances to the disability community and the public on how these powers will and will not be used.

Recommendation 3

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

Conclusion

2.176 The committee is of the view that the bill, as agreed to by the House of Representatives on 5 June 2024, has been strengthened through the 29 amendments moved by the government as detailed in this report in recognition of concerns raised by the disability community, sector, and experts. Additionally, the amendment moved by Dr Monique Ryan MP, Member for Kooyong, requiring an independent review of the amendments made by this bill to be conducted in five years' time, is another safeguard to ensure the NDIS Act remains fit-for-purpose into the future.

2.177 The committee agrees that the NDIS needs to get back on track and is of the view that this bill is the beginning of the journey towards an improved NDIS and addressing priority recommendations from the NDIS Review. The committee is of the view that its prompt passage is necessary to restore certainty and sustainability for participants and their providers and to tackle fraudulent practices.

Recommendation 4

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

Senator Marielle Smith
Chair

Additional Comments - Coalition Senators

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

Senator Hollie Hughes

Senator Maria Kovacic

Dissenting Report - Australian Greens

I look at this legislation and can see some of the small changes are going to make it easier for somebody to be removed from the NDIS, and easier for really significant cutbacks to their allocation, to their dollars—and the government wants to rush this through.¹

- 1.1 The Australian Greens are deeply grateful for the advocacy, submissions, time and expertise contributed to this inquiry by disabled people, their family members and representative organisations. We also wish to extend this gratitude to the many academics, legal experts, professional peak bodies, care workers and advocates who did the same.
- 1.2 The work undertaken by witnesses and via submissions to the inquiry was remarkable and provided the committee with invaluable information. The Australian Greens acknowledge that providing this evidence to the committee was a daunting experience for many, requiring significant preparation, vulnerability and emotional labour.
- 1.3 We recognise that the introduction of this bill and commencement of this inquiry took many by surprise and came at a time of exhaustion due to the massive workload created by The Royal Commission into violence, abuse, exploitation and neglect and the NDIS Review.
- 1.4 Rarely has a committee inquiry considered a piece of legislation of such significance to disabled people, their families and communities. This inquiry presented the opportunity for the committee to support disabled people, their families and the community to engage deeply with a bill that will have profound implications for their lives and future.
- 1.5 The committee also had the opportunity to thoroughly test the assumptions upon which the bill is based and rigorously examine the motivations that drove its creation. We had the opportunity to thoroughly assess the capacity and ability of key entities, like the states and territories, to deliver additional disability supports. We had the opportunity to rigorously scrutinise the harms that this bill could subject disabled people to and the ways it could make their lives, and the lives of their families, more difficult.
- 1.6 It is with genuine alarm that the Australian Greens express the view that the inquiry was prevented from fully seizing these opportunities by the decision of government committee members to oppose an extension of the inquiry. Because of this decision not to extend the inquiry, the Australian Greens were not able to fully scrutinise all aspects of this Bill, including the amendments that were

¹ Susan Hart, parent of a participant.

passed by the House of Representatives only two weeks before the reporting date.

- 1.7 Furthermore, the draft committee report was circulated very close to the deadline of the meeting to adopt it, leaving only 45 working minutes for Western Australian senators to read and review the report.
- 1.8 This report cites the witness statements and submissions of many of the organisations and individuals that took the time and effort to participate in this inquiry, but unfortunately there are many more powerful and insightful contributions that were not able to be included because of this time pressure. To all the contributors who have not been mentioned throughout this report, please know that your contributions have been noted and greatly appreciated by the Australian Greens.
- 1.9 Finally we wish to also acknowledge the incredible work done by the committee Secretariat to enable the committee to hold the few hearings that were agreed to and to process the evidence provided to us.

Context surrounding the introduction of this Bill

- 1.10 The Australian Government and Minister for the NDIS failed to provide a formal response to the NDIS Independent Review or the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability (the DRC) before this bill was introduced to Parliament on 27th March, 2024. At the time of the tabling of this report no such responses have been delivered and the date of their delivery is unknown.
- 1.11 As a result, neither the community nor the Parliament are aware of the Government's position on the NDIS Review's 26 recommendations and 139 actions, or the 222 recommendations of the DRC at the time of this bill being tabled.
- 1.12 The Government's decision to introduce this bill before these vital responses have been provided was surprising, particularly given the Explanatory Memorandum of the bill frames the bill as a response to the recommendations of the NDIS review.
- 1.13 The Government's decision to attempt to have the Parliament pass this bill in the absence of these responses has denied the community and Members of Parliament the opportunity to consider the legislation in the full context of the changes that the Government wants to make to Australian disability law.
- 1.14 This absence of any response to the DRC and NDIS Review looks like a mild oversight when compared with the Government's continued refusal to release key documents regarding the NDIS Financial Sustainability Framework. Despite departmental officials confirming that this bill will give effect to the 8 per cent "growth" target, the Government has consistently refused to make this

Framework available to the public since the issue was raised in Senate Estimates over 6 months ago.

- 1.15 Combined with the government's failure to research, model, or in any way inquire into the positive economic impact of the NDIS or the number of participants that will be removed from the NDIS due to this legislation, the community and Parliament are now being required to support a bill without access to the basic contextual information that underpins the Government's reforms.
- 1.16 It was revealed during Senate Estimates that the Government spent \$620,000 on a two year contract for a speechwriter in addition to \$400,000 spent with RedBridge Group to conduct focus groups and message testing to identify how to best frame the changes proposed in the NDIS Bill. This messaging advises on how to elicit a level of 'qualified tolerance' from the community for reforms that would inevitably mean funding cuts to the scheme. From the reports commissioned by RedBridge Group:

When we presented rorts, fraud, and unreasonable pricing as posing an existential threat to the NDIS, we were able to create an environment in which respondents were amenable to reforms designed to counter these things.²

After presenting respondents with the above proof points that provide vital, believable context of reforms designed to benefit participants, we were able to elicit a degree of qualified tolerance for reforms. Respondents do not like these reforms but they may be willing to tolerate them where there are/is:

- Carve-outs for exceptional circumstances (i.e. we're not forcing everyone into the same box, and the most in need are still fully supported);
- Initial goodwill generated by the measures to humanise the Scheme and to protect participants (and the Scheme) from exploitation. Conversely, there is a strong resistance to any discussion of costs alone as a driver of reforms; and
- Alternative or 'offsetting' benefits in place. For example, in relation to the threshold for developmental delays, there is more (but not outright) acceptance once respondents had been treated with the idea of investing in mainstream supports for children (through schools/kinders/etc) to enable earlier intervention and improve the safety net. In relation to the Supported Independent Living (SIL) changes, these become more acceptable when couched in benefits around reducing social isolation and ensuring people don't fall through the cracks. Conversely, proposing to 'grandfather' changes to SIL did not work as a way of 'offsetting' the impacts.³

² <https://dataresearch.ndis.gov.au/media/3966/download?attachment> pg 1.

³ <https://dataresearch.ndis.gov.au/media/3966/download?attachment> pg 4-5.

- 1.17 It is increasingly clear that the public is now watching the results of that polling play out in real time. The Government focuses on “rorts”, “cheats”, and the most absurd and unusual examples of NDIS usage, all of which can be traced back to the RedBridge reports.
- 1.18 Just like the previous government proactively dropped stories on so-called “dole bludgers” to undermine the calls for a Royal Commission into Robodebt, is the view of the Australian Greens that this government is undermining the NDIS in the same way.
- 1.19 Moreover, stories of fraud have been raised during Senate Estimates⁴ without the Agency providing the qualifying data or proof around allegations of participants or providers using participant’s NDIS funding for things that are not disability-related.
- 1.20 The committee has heard evidence that the bill does not address the causes of fraud, raising questions about how serious those allegations are, and how committed the Government actually is to stopping unscrupulous claims:

The Bill also fundamentally misses the mark in addressing current issues in the Scheme, such as fraud and quality and safeguarding issues... these amendments... do not deter providers from engaging in fraud during the registration process or during the provision of services. States and territories are concerned that these provisions do not go far enough to address the serious known issues of provider fraud and misconduct.⁵
- 1.21 Further, the Explanatory Memorandum only mentions the word ‘fraud’ once, contradicting the messaging that this Bill is intended to address fraud within the NDIS.
- 1.22 During the inquiry hearing on 14 June, the committee heard that there is a significant gap in the legislation relating to the protection of participants who report fraud:

I have a client right now who has witnessed really extreme human rights abuse to an NDIS participant as part of the NDIS scheme who can't safely and lawfully blow the whistle. How is that an effective system? Given the objects of this bill, how can this bill not take steps to improve the ability of people to speak up under this scheme? If the objects of this bill are to safeguard participants and to address fraud and integrity issues, then a failure to improve protections for people who will speak up is a critical hole.⁶
- 1.23 This was further echoed by Villamanta Disability Rights Legal Service:

⁴ https://www.apf.gov.au/Parliamentary_Business/Senate_Estimates/ca pdf from page 94, evidence provided from Mr John Dardo.

⁵ Council for the Australian Federation (on behalf of all Australian States and Territories), Submission 46.

⁶ Human Rights Law Centre.

A participant is actually disincentivised from reporting fraud because they may well then be asked to repay a debt on the fraud for something they never received.⁷

- 1.24 Rather than centring NDIS discussion solely around fraud, the Australian Greens believe that the Government should acknowledge the positive economic benefits of the NDIS to the broader Australian community, and the positive effects the scheme has had on disabled people's lives.
- 1.25 Per Capita's 2021 research⁸ outlined that for every dollar the Government puts into the scheme, a conservative estimate of 2.25 dollars are returned to the broader economy. Furthermore, Per Capita estimated that for every \$1 billion dollars diverted away from the scheme, the impacts could see a loss of around 10,000 jobs. If these legislative reforms pass, we will see \$14.4 billion in cuts to the scheme. According to the research by Per Capita, this could see 144,000 jobs lost.
- 1.26 The NDIS contributes significantly to the Australian economy, and the passing of this legislation would put that at risk.

Creation Of The Bill: Secretive Process, Rushed Inquiry

- 1.27 The Bill proposes to make the most significant changes to the scheme, since its inception 10 years ago. Such significant changes should have been subject to thorough and transparent consultation with the disability community to build consensus around legislative change and ensure community support. However, the committee heard evidence that groups and individuals who were invited to participate in consultations were legally gagged by non-disclosure agreements⁹ and not a single public consultation was held prior to the Bill's introduction.¹⁰
- 1.28 In addition to this, the government made the active decision not to circulate a legislative exposure draft¹¹ denying the community the opportunity to provide feedback on the bill prior to introduction. Not providing an exposure draft, along with requiring stakeholders who were consulted about the Bill to sign

⁷ Villamanta Disability Rights Legal Service.

⁸ https://percapita.org.au/our_work/false-economy-the-economic-benefits-of-the-ndis-and-the-consequences-of-government-cost-cutting/#:~:text=A%20conservative%20estimate%20of%20the,2021%20is%20around%20%2452.4%20billion.

⁹ <https://www.theguardian.com/australia-news/2024/mar/26/government-ndis-review-overhaul-criticism-greens-labor-ndas.>

¹⁰ <https://www.dss.gov.au/the-ndis-amendment-bill-questions-and-answers#11.>

¹¹

https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/28203/toc_pdf/Community%20Affairs%20Legislation%20Committee%202024%2006%2014.pdf;fileType=application%2Fpdf#search=%22committees/commsen/28203/0000%22 pg 37.

non-disclosure agreements demonstrates a lack of respect for transparent policy creation processes, and a failure to meet the basic standards of parliamentary integrity.

- 1.29 Given the magnitude of changes proposed in this Bill, the community should have had more opportunities for open consultation and co-design of the legislation, to ensure its rigour and effectiveness. More time is also needed by the Parliament to appropriately scrutinise the legislation, and to hear from the community about how it would affect them.
- 1.30 Substantial amendments proposed by the Government were also published during the final hour of what was then intended to be the final hearing. Pressure from non-Government committee members and the disability community resulted in an additional half day hearing, but an extension was not granted to properly consider the impacts of these amendments.
- 1.31 These decisions paint a picture of a Government that knew their Bill contained significant measures that would cause grave concern for disabled people and decided to push the bill through as fast as possible with the least possible scrutiny.
- 1.32 The disability community, stakeholders and legal professionals reported to the committee their grave concerns for the consequences of this Bill during the course of this inquiry. In listening to the evidence given, reviewing the many submissions, and in also understanding that this Bill holds a budget saving commitment of \$14.4 billion dollars over the forward estimates, the Australian Greens understand why the Government chose to keep the legislation a secret for as long as possible and why the Bill is being rushed through so quickly.

Changes through the bill are projected to moderate scheme growth by \$14.4 billion over the forward estimates from 2024-25 and offset further projected increases in scheme costs.¹²

This is about reduction of support for people with disability to the tune of over \$4.4 billion.¹³

- 1.33 The Australian Greens hold concerns that the States and Territories have requested the Government slow down the passage of the Bill, and that their appearance at the hearings was noticeably missing.

The swiftness with which the Commonwealth is pursuing changes to constrain the NDIS... risks a fragmented and disconnected service system... We are deeply concerned that this way of going about the reform – including through this Bill – will lead to worse outcomes for more Australians with disability and their families.¹⁴

¹² Robyn Shannon, Deputy Secretary, Disability and Carers Stream, Department of Social Services.

¹³ Samantha Connor, disabled person

¹⁴ Council for the Australian Federation (CAF), Submission 46.

- 1.34 Many more key witnesses also did not have the opportunity to provide their evidence during the hearings.
- 1.35 The committee heard significant evidence from participants, family members, lawyers, advocates and academics about their dire concerns regarding this bill. For a Bill of this magnitude that will have such deep impacts for many disabled people, their families, carers and the workforce in the immediate term, the rushed nature of this inquiry is simply not good enough.

Concerns expressed by community

- 1.36 The witness statements and submissions presented throughout this inquiry have highlighted grave concerns for the fundamental aspects of the NDIS: access to the scheme; choice and control; reasonable and necessary supports; and the right to appeal decisions that participants or applicants don't agree with.
- 1.37 The committee also heard concerns from participants about being subject to new assessments that have been compared with the "independent assessments" of the former Liberal Government, which were strongly rejected by the disability community.
- 1.38 Some of the key concerns raised were around:
- Reasonable and necessary supports

The bill proposes a shift from reasonable and necessary supports to a restrictive list of permitted supports, claimable from budgets based on yet-to-be-developed needs assessments. This approach risks denying necessary supports to people with complex needs and lacks the individuality and the flexibility that the NDIS promises.¹⁵
 - Revoking access

A new ground for revoking the status of a participant in the NDIS has been included in the Bill.¹⁶
 - Mandatory needs assessments

There are a lot of fears in the community at the moment, as to, for instance, the needs assessment not being consistent with the information that has already gone to the review.¹⁷
- 1.39 Of additional concern are the implications for First Nations disabled people and regional and remote communities. During the third hearing of this inquiry, the First Peoples Disability Network expressed deep reservations that requirements for producing evidence within NDIS designated time frames will disadvantage First Nations disabled people, particularly those living in regional and remote

¹⁵ Every Australian Counts.

¹⁶ Council for the Australian Federation, Submission 46.

¹⁷ Inclusion Australia.

areas. They also expressed further concerns around the cultural responsiveness of assessment tools and tailored supports are also not addressed in this bill:

this legislation contains zero indication that they understand or care about First Nations people with disability. There's not a single mention of First Nations people, Closing the Gap, Indigenous people, Aboriginal people, or the International Convention on the Elimination of All Forms of Racial Discrimination in the bill at all. First Nations people need tailored supports, culturally responsive diagnostic tools and thriving, adequately funded community controlled organisations. Without these basic assurances, we have no reason to trust that the minister is going to give the appropriate attention to these needs when making rules was about what is and isn't an NDIS support.¹⁸

1.40 It is evident that the lack of consultation with regional disabled people has led to further negative consequences for them in this Bill.

There's no understanding in these recommendations of the geographic distances that we have here and the impact they have on how we can access supports.... The way this bill is written, and the narrowing of supports to 'specified NDIS supports' is really risky.¹⁹

Inadequacy of Foundational Supports

Intrepidus Law rejects the bill as drafted, questions the haste with which it has been delivered and presses for attention and pressure to be applied to the states to first establish much-needed foundational supports as the priority in addressing scheme sustainability.²⁰

1.41 The Inquiry has heard from multiple witnesses and submissions of the Government's reliance on the States and Territories delivering "foundational supports" in order to fill the gaps in support that would be created by the passing of this Bill. While The Australian Greens support a more broader scope of supports being available to disabled people, the committee heard that foundational supports are currently non-existent and must first be established by the States and Territories, which the Government itself acknowledged would take at least two years just to develop a strategy.²¹

...foundational supports are critical to the support of this. It's critical that they be designed and implemented before there's any change in any other aspects of the ecosystem.²²

1.42 This Bill would immediately enable the removal of participants from the scheme, and the denial of access for many more; pushing them back to those

¹⁸ First Peoples Disability Network.

¹⁹ Every Australian Counts.

²⁰ Belinda Kochanowska, Principal Solicitor, Intrepidus Law.

²¹ <https://ministers.dss.gov.au/media-releases/13711>.

²² Inclusion Australia.

currently non-existent 'foundational supports'. Indeed, the term "foundational supports" is ambiguous. The committee heard that foundational supports have not even been defined by the Government:

It also concerns me that we're sort of having this discussion about... foundational supports, when in actual fact we still don't know what foundational supports are. A few organisations might have an idea of what they would like it to be, but at this point in time there is no definition or list...²³

To date there has been no decision as to the specific services that will be provided as Foundational Supports...²⁴

- 1.43 In enabling the stripping of supports and participants from the scheme, the Government has further failed to provide the committee or the community any data, modelling, or clarity around how many participants are calculated to have supports cut, or how many would be removed from the scheme altogether as a result of this Bill.
- 1.44 Without an understanding of the magnitude of these grave outcomes, and with there being little to no supports available outside the NDIS for at least the next few years, this Bill should not be passed.

Detailed areas of concern

- 1.45 The Australian Greens have specific concerns about the content of multiple sections of this Bill. Many of these concerns are laid out below, but it should be noted that this is not an exhaustive overview of the shortcomings of this Bill.

Removal of individualised reasonable and necessary supports

- 1.46 This Bill introduces 'NDIS Supports' to replace the concept of 'reasonable and necessary supports' that exists in the current Act. In doing so, the Bill removes one of the fundamental pillars of the NDIS.
- 1.47 The inclusion of 'reasonable and necessary supports' within the current legislation allows participants to be provided with individualised supports based on their circumstances, support needs, goals, and aspirations. Decisions regarding what is considered a 'reasonable and necessary support' are guided by clear legal tests contained within section 34. These tests include, but are not limited to, that the support will enable the participant to participate socially and economically; that the support represents value for money; and that the support is best provided by the NDIS.
- 1.48 Under this Bill, this would be changed so that supports would instead be required to be explicitly named in the NDIS Rules to be defined as an NDIS support. The decision on what to include in this list of 'NDIS supports' would

²³ Autism Awareness Australia.

²⁴ Council of the Australian Federation, Submission 46.

be made by the Minister, and is required to gain the agreement of all states and territories. Crucially, the definition of 'NDIS supports' would not be required to obtain agreement from participants that it would adequately meet their needs.

- 1.49 The change to an allowable list of 'NDIS supports' has been criticised by many submissions to this inquiry. A key concern that has been raised is that essential supports participants are currently receiving will not be available to them under the new legislation. From the submission from Every Australian Counts:

The narrow definition of 'NDIS Supports' is overly restrictive and risks undermining individual choice and control which are meant to be core pillars of the scheme.²⁵

- 1.50 Section 10 of this Bill provides the framework for determining what will be listed as an NDIS support. It states that a support may only be declared an NDIS support if it implements Australia's obligations under the Convention on the Rights of Persons with Disabilities, or if it enables the provision of sickness benefits. Multiple submissions to this inquiry noted that this definition does not require holistic implementation of Australia's CRPD obligations, as summarised by Muriel Cummins during the hearings:

We've heard a lot today about how section 10 draws on some aspects of the UNCRPD but doesn't reflect it in its entirety.²⁶

- 1.51 Further requirements on allowable supports are introduced in Section 32H, which states that a participant's budget can include requirements that must be met for certain supports to be provided. These requirements can include a specific person or group of people who provide the supports, some process that needs to be undertaken before supports are provided, or **any** other requirement as included in the NDIS Rules.
- 1.52 This is a blatant attempt to control the choices that participants make. Choice and control is one of the central pillars of the NDIS and removing it in this way makes it clear that the Government prioritises their bottom line over the wellbeing of the disability community.
- 1.53 The government should remove the concept of 'NDIS Supports' from the Bill entirely and return to 'reasonable and necessary' as the basis for providing supports to participants.

Requests for information or examination

- 1.54 Subsections 30(2) and 30A(4) allow the CEO to request information from participants in order to make a decision about revoking access or changing the participant's status (i.e. from early intervention status to disability status). According to the Explanatory Memorandum, this request could require the

²⁵ Every Australian Counts.

²⁶ Muriel Cummins, NDIS Occupational Therapy Community of Practice.

participant to undertake a medical, psychiatric, or other assessment or examination, possibly at their own expense. The participant would be required to obtain this evidence within 90 days or some other specified time period, or risk being removed from the scheme.

- 1.55 This is concerning to The Australian Greens for a number of reasons, including significant risk of traumatisation or re-traumatisation; discrimination to participants in non-metro areas where wait lists to allied health providers are much longer; and insufficient safeguards set up to limit when and why this information can be requested.

People with disability have reported finding such assessments harmful, distressing and intimidating... the AAT heard of consequences of mandatory medical assessments that included 'exacerbated anxiety and loss of confidence', 'a real risk of [the person] suffering physical injury', and 'severe depression that may even result in her taking her life if the assessment was to go ahead'.²⁷

- 1.56 The Government amendments passed in relation to this issue made some improvements, including requiring that the CEO be satisfied that the information gained is necessary and that an assessment or examination wouldn't cause harm to the participant, but this does not go far enough. The issue of who pays for the assessment is still not addressed, and there are insufficient safeguards to mitigate the long wait times for allied health providers that could result in a deadline not being met. Furthermore, the participant has no avenue to appeal the decision to request information - instead they rely on the judgement of the CEO about whether harm could be caused to them by such a request.

- 1.57 The Public Interest Advocacy Centre noted in their supplementary submission to this inquiry that these Government amendments relating to requests for information, assessment, or examination "do not go far enough in protecting participants from the overly broad operation of these powers". They also note that the amendments:

do not provide similar constraints on the equivalent, identically-worded, power for the CEO to compel medical assessments for the purpose of preparing a participant's plan (as contained in subsection 36(2)(b)(ii)).²⁸

- 1.58 This Bill should be amended, and in particular subsections 30(2) and 30A(4) should be amended, to add the right for a participant to appeal the request for information, assessment, or examination as unnecessary or harmful.

²⁷ Public Interest Advocacy Centre.

²⁸ PIAC.

Needs assessments and budget creation

1.59 The Bill introduces a new framework for creation of participant plans, which includes needs assessments. They have been described by the Government in the Explanatory Memorandum as a more holistic and sensitive way to assess the support needs of a participant, but this has been disputed by some submissions.

32L(3)... subsection greatly narrows the scope for what supports will be considered under a 'needs assessment' and may mean that only part of the person is being considered through this approach, contrary to the 'whole of person' approach that is intended through this assessment.²⁹

For a budget to be set at a whole-of-person level, a person's needs must be assessed at a whole-of-person level, otherwise this will result in an inadequate budget being set. As drafted, those provisions would adopt a view that has been rejected by the AAT, the Joint Standing Committee on the NDIS and the NDIS review.³⁰

1.60 The needs assessment report is intended to form the basis of the statement of participant supports via a 'method', though this method has not been defined at all in Bill. The statement of participant supports will then inform the creation of the budget. There have been concerns raised throughout the inquiry about consequential process components such as this method being delegated to the Rules instead of included in the main Act:

Defining features for this method should be detailed in the primary legislation. Without transparency principles outlined in the legislation, this process will not have parliamentary oversight, and we return to the issue of the method of budget-setting taking place in a 'black-box' i.e. utilising assessment scores in an unknown and potentially unproven manner.³¹

1.61 There have been significant concerns expressed about the reviewability of the budget creation process and, in particular, the needs assessment:

It would be belated and inefficient to use that process [of reviewing the statement of supports] to detect issues with the needs assessment report, which would often be immediately apparent to the participant.³²

It is of serious concern to Intrepidus Law that appeal rights are not being offered to participants with respect to proposed needs assessments. For any citizen to not have the right to appeal a government decision which so intimately impacts their life or could threaten their life is completely unacceptable... procedural fairness and appeal rights must be provided to participants of the scheme.³³

²⁹ Australian Centre for Disability Law.

³⁰ Public Interest Advocacy Centre.

³¹ OT Community of Practice.

³² PIAC.

³³ Intrepidus Law.

- 1.62 It should be noted that the Bill has been amended to add a note clarifying that needs assessments can be reviewed indirectly through a review of the statement of participant supports. However, this amendment does not address the concerns raised. This was expressed during the hearing on 14 June:

The statement of participant supports is reviewable, but that is not dependent on the assessment. The assessment—we don't know what it is, so we don't know if it works. We don't know if it's of any value or achieves any useful purpose. The only thing that could potentially be ordered is that another one is done. But one would have to assume that it's going to have the same inputs and therefore the same outputs, so it's not going to change anything. There's not even a power in there to have the participant correct fatally incorrect information; it could have the wrong name, the wrong anything. We see documents come out from the agency where the name of the person changes halfway through. We have seen materials where the wrong disability is stated. If that occurs—humans make errors; that's how we are—there is no right for the participant to request that the agency correct that and send it back to be done again. So, another assessment doesn't make much difference if you're going to get the exact same outcome.³⁴

- 1.63 Participants should be able to request that their needs assessment be reviewed on its own, rather than as a small part of a larger decision. It is essential that participants can verify that their needs assessment accurately reflects their support needs, goals, and aspirations, and this can only be achieved if the assessment report can be reviewed both formally and informally by the participant.

Plan self-management

- 1.64 According to the Explanatory Memorandum, subsection 33(5) allows the CEO to change a participant's plan from self-managed to agency managed if the participant has a history of over-spending. This is highly concerning as overspending can occur for a multitude of reasons, many of them valid, reasonable, and beyond the participant's control.
- 1.65 Furthermore, changing a participant's plan to agency managed requires supports to only be provided through registered providers. In rural and remote areas, the availability of registered providers is highly variable so this would affect the quality of supports provided and, in some cases, mean that essential supports required by a participant are not available. For First Nations and culturally or linguistically diverse participants, being limited to registered providers can also result in non-culturally safe care.

Changing a participants plan to Agency (NDIA) Managed has dramatic impact on a participant's autonomy, choice and control; with serious

³⁴ Ms Naomi Anderson, Villamanta Disability Rights Legal Service.

repercussions impacting their access to supports – particularly in areas of thin markets such as regional and remote communities.³⁵

- 1.66 The ability to self manage and engage an unregistered provider should be decided on a case-by-case basis, guided by a rigorous risk assessment and supported decision making process. For any participant to have their right to self manage removed because of factors outside of their control is fundamentally unjust.

Ministerial Powers

- 1.67 Of concern to the Australian Greens is the significant number of items in the Bill that allow the Minister to fundamentally change the substance of NDIS law through legislative instruments. These include:

- The ability to categorise participants into “classes”
- Determination of the method for calculating a plan budget
- Determination of what will be involved in a needs assessment, including assessment tools, requirements for carrying out an assessment, information that must be included in a report, and requirements that a report must meet
- Different rules for different classes of participants, if decided by the Minister
- Determination of how to work out a budget
- **Any** provision for the purpose of transition

- 1.68 Delegating the power to determine key components of the NDIS to the Minister of the day would result in a huge loss of certainty for the disability community. Legislation will be able to be changed at a whim by the executive government of the day who would have the power to rewrite the fundamental makeup of how the NDIS works. Significantly less consultation would be required, and there would far less opportunity for scrutiny by the Parliament and the community.

- 1.69 Specifically in relation to the Minister’s ability to categorise participants into “classes”, this power allows the Minister of the day to create segregationist policy and should be removed entirely from the Bill.

Classification systems determined by ‘identifiable characteristics’ are considered an outdated and archaic phenomenon when considered through an equality lens and have no place in contemporary disability policy.³⁶

- 1.70 The Greens believe that the items laid out in the above dot points should be detailed in the Bill rather than in delegated legislation, both to build trust with the disability community and to limit the amount of decision making power that is placed solely with the Minister.

³⁵ Every Australian Counts.

³⁶ OT Community of Practice.

1.71 Where delegated legislation is necessary, there should be a requirement for authentic co-design rather than just a requirement to “consider the principle” of co-design, and exposure drafts of the legislation should be provided to the public as soon as they are available.

Of serious concern is the lack of legislated commitment to codesigning the new NDIS tools and processes in close partnership with people with disabilities and their representative organizations. Comprehensive codesign, research, testing and refinement of these reforms - in close partnership with diverse disability communities - must occur before any implementation.³⁷

1.72 Furthermore, the Government should amend the Bill to add a legislative requirement for authentic co-design with organisations that represent disabled people and their families, and the wider disability community. This requirement should apply to all subsequent legislation, guidelines and policies that accompany this Bill. Additionally, legislative instruments should be subject to the consent of all organisations and individuals engaged through the co-design process.

Recommendations

1.73 It is the strong belief of the Australian Greens that this Bill should not pass in its current form, which includes the amendments passed by the House of Representatives which did not go nearly far enough. The above sections of this report detail some of the specific criticisms that have been raised during the course of this inquiry, but even with all of these criticisms addressed there would still be remaining aspects that would harm disabled people. Simply put, because of the decision by Government committee members not to extend this inquiry, there was not enough time to fully unpack the impacts of this Bill and to provide recommendations that would make it safe to pass.

Recommendation 1

1.74 That the Bill not be supported.

Recommendation 2

1.75 That the Government ensure foundational supports be comprehensively defined and implemented in states and territories.

Recommendation 3

1.76 That the Government deliver a formal response to the Disability Royal Commission and the NDIS Review.

³⁷ Every Australian Counts.

1.77 Once these actions have been undertaken, the Government can return to the conversation of amending the NDIS Act but with a commitment to true, authentic co-design with disabled people to achieve change that will meaningfully improve the lives of the many people who rely on the NDIS.

Senator Jordon Steele-John

Appendix 1

Submissions and Additional Information

- 1 Royal Australian College of General Practitioners
- 2 NDIS Occupational Therapy Community of Practice
 - 2.1 Supplementary to submission 2
- 3 Griffith University
- 4 Disability Advocacy Victoria and Victorian Rural Advocacy Network
- 5 Disability Rights Advocacy Service
- 6 Mental Health Australia
- 7 MND Australia
- 8 Spinal Cord Injuries Australia
- 9 Pathways 2 Independence Pty Ltd
- 10 Deafness Forum Australia
- 11 Osteopathy Australia
- 12 Positive Pathways Occupational Therapy Mental Health Service
- 13 SCN2A Australia
- 14 Assistive Technology Suppliers Australia
- 15 Ms Marie Johnson
 - 15.1 Supplementary to submission 15
- 16 The Royal Australian and New Zealand College of Psychiatrists
- 17 Kiind
- 18 Epilepsy ACT
- 19 Victorian Mental Illness Awareness Council
- 20 Aruma and Alliance20
- 21 Disability Advocacy Network Australia
- 22 Mr Jarrod Marrinon
 - 22.1 Supplementary to submission 22
- 23 Epilepsy Association of SA & NT Incorporated (The Epilepsy Centre)
- 24 The Australian Orthotic Prosthetic Association
- 25 Emerge Australia
- 26 Australian Association of Psychologists Inc
- 27 Blind Citizens Australia
- 28 Solace Coordination
- 29 Neurological Alliance Australia
- 30 Australian Association of Social Workers
- 31 Australian Centre for Disability Law
- 32 Multicultural Disability Advocacy Association of NSW
- 33 Queensland Council of Social Service
- 34 Epilepsy Foundation

- 35 Epilepsy Queensland
- 36 Deafblind Australia
- 37 AEIOU Foundation
- 38 Queensland Nurses and Midwives' Union
- 39 JFA Purple Orange
- 40 Queensland Independent Disability Advocacy Network
- 41 Brotherhood of St. Laurence
- 42 Department of Social Services, the National Disability Insurance Agency and the National Disability Insurance Scheme Quality and Safeguards Commission
 - 42.1 Supplementary to submission 42
- 43 Kin Disability Advocacy
- 44 Queenslanders with Disability Network
- 45 Specialist Disability Accommodation Alliance
- 46 Council for the Australian Federation
- 47 Mr Peter Gregory
- 48 Dr George Taleporos
- 49 Occupational Therapy Australia
- 50 Every Australian Counts
 - Attachment 1
- 51 Ability First Australia
- 52 Mr Tony Clark
- 53 Down Syndrome Australia
- 54 Australian Federation of Disability Organisations
- 55 Professor Helen Dickinson
- 56 Dr Darren O'Donovan
- 57 Public Interest Advocacy Centre
 - 57.1 Supplementary to submission 57
- 58 Women with Disabilities Australia, Women with Disabilities Victoria and Women With Disabilities ACT
- 59 South West Autism Network
- 60 Disability Representative Organisations (National Coordination Function)
- 61 Council for Intellectual Disability
- 62 Down Syndrome NSW
- 63 People with Disability Australia
 - 63.1 Supplementary to submission 63
- 64 The Australian Orthotic Prosthetic Association
- 65 Office of the Public Advocate South Australia
- 66 Hireup
- 67 Advocacy for Disability Access and Inclusion Inc.
- 68 National Disability Services
- 69 Queensland Alliance for Mental Health
- 70 Autism Partnership Australia

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- 71 Intellectual Disability Rights Service
 - 72 Vision Australia
 - 73 Mind Australia
 - 74 Australian Psychological Society
 - 75 Young People In Nursing Homes National Alliance
 - 75.1 Supplementary to submission 75
 - 76 Tandem
 - 77 Rare Voices Australia
 - 78 Advocacy WA
 - 79 National Aboriginal Community Controlled Health Organisation (NACCHO)
 - 80 Cat Walker and Uli Cartwright
 - 81 National Legal Aid
 - 82 Belong Network & Disability Resources Centre
 - 83 NSW Disability Advocacy Network
 - 84 Disability Advocacy NSW
 - 85 Amaze
 - 86 The Self Manager Hub
 - 87 National Mental Health Consumer Alliance
 - 88 Queensland Advocacy for Inclusion
 - 89 Genetic Epilepsy Team Australia
 - 90 Gippsland Disability Advocacy Inc.
 - 91 Staffing Options for Community Services
 - 92 Villamanta Disability Rights Legal Service
 - 93 Deaf Australia
 - 94 Aged & Community Care Providers Association
 - 95 Speech Pathology Australia
 - 96 Consumers of Mental Health WA
 - 97 Dementia Australia
 - 98 National Regional Rural Remote and Very Remote Community Legal Network (4Rs Network)
 - 99 Health Services Union
 - 100 Centre for Disability Studies
 - 101 Action on Disability within Ethnic Communities
 - 102 Disability Council NSW
 - 103 National Mental Health Consumer and Carer Forum
 - 104 Summer Foundation
 - 105 Institute For Urban Indigenous Health
 - 106 Name Withheld
 - 107 Confidential
 - 108 SupportedPlus
 - 109 Name Withheld
 - 110 Ms Talie Star
 - 111 Ms Karen Kline

- 111.1 Supplementary to submission 111
- 112 Name Withheld
- 113 Name Withheld
- 114 Name Withheld
- 115 Name Withheld
- 116 Ms Ruth Hoffman
- 117 Ms Cathy Pollaers
- 118 Name Withheld
- 119 Name Withheld
- 120 Miss Amanda Rudd
- 121 Name Withheld
- 122 Mr Geoffrey Baldwin
- 123 Name Withheld
- 124 Dr Kiran Amin
- 125 MS Australia
- 126 Uniting Communities Law Centre
- 127 Australian Psychosocial Disability Collective
- 128 Touching Base
- 129 Aged and Disability Advocacy Australia
- 130 Carers NSW
- 131 Advocacy for Inclusion (AFI)
- 132 Physical Disability Australia
- 133 Australian Rehabilitation and Assistive Technology (ARATA)
- 134 Family Advocacy
- 135 Australian Autism Alliance
- 136 Australian Lawyers Alliance (ALA)
- 137 Commissioner for Children and Young People
- 138 ICF Australia Interest Group
 - Attachment 1
 - Attachment 2
- 139 Inclusion Tree
- 140 Australian Music Therapy Association
- 141 ME/CFS Australia
- 142 Autism Aspergers Advocacy Australia (A4)
 - Attachment 1
- 143 Lite n' Easy
- 144 Ms Danielle Keymer
- 145 ME/CFS & the NDIS Facebook Group
- 146 Human Rights Law Centre
- 147 Dr Richard Madden
- 148 Ms Krystle McCluskey
- 149 Ms Zoe Mithen

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- 150 Name Withheld
151 Name Withheld
152 Name Withheld
153 First Peoples Disability Network
154 Mr Robert Heron
155 Dr Kay Wilson
156 Name Withheld
157 Name Withheld
158 Name Withheld
159 Ms Amanda Hicks
160 Mrs Leah Kateiva
161 Ms Mischelle Surawski
162 Mrs Kathleen McCartney
163 Sam Petersen
164 Name Withheld
 • 164.1 Supplementary to submission 164
165 Ms Shirley Humphris
166 Name Withheld
167 Mrs Lyn Williams
168 Mr Mark Toomey
169 Mr Bobby Noone
170 Name Withheld
171 Ms Heather Renton
172 Name Withheld
173 Dr GS Lakes
174 Name Withheld
175 Name Withheld
176 Name Withheld
177 Ms Alison Barber
178 Ms Eva Paluska
179 Name Withheld
180 Ms Carolyn Fitzgibbon
181 Mr Stevie Howson
182 Name Withheld
183 Name Withheld
 • 183.1 Supplementary to submission 183
184 Miss Rebecca Roussis
185 Ms Maria Baduy
186 Name Withheld
187 Name Withheld
188 Ms Micheline Lee
189 Name Withheld
 • 189.1 Supplementary to submission 189

- 190 Sporting Dreams Queensland
- 191 Private Congregate Care Alliance
- 192 Allied Health Professions Australia
 - Attachment 1
- 193 Name Withheld
- 194 Ngaanyatjarra Pitjantjatjara Yankunytjara Women's Council
- 195 Name Withheld
- 196 Real Life Assistants
- 197 Name Withheld
- 198 Ms Angelica Keegan
- 199 Dr Sumi Santha-Rajah
- 200 Dr Aaron Chambers
- 201 Dr Michaela Baulderstone
- 202 Queensland Disability Advisory Council (QDAC)
- 203 Ms Caroline Summerfield
- 204 Bolshy Divas
 - 204.1 Supplementary to submission 204
- 205 Allied health professionals campaign sample

Additional Information

- 1 Department of Social Services, Correction to Explanatory Memorandum, Additional information received 17 April 2024.
- 2 Department of Social Services, Exposure draft proposed amendment - Section 10 - Definition of NDIS support, Additional information received 22 May 2024.
- 3 Department of Social Services, Supplementary Explanatory Memorandum - Section 10 - Definition of NDIS support, Additional information received 22 May 2024.
- 4 Peter Gregory, What is Co-Design, Additional Information received 28 May 2024.
- 5 Department of Social Services, Replacement Explanatory Memorandum - with corrections, Additional information received 17 April 2024.
- 6 Public Interest Advocacy Centre, Response to invitation to comment, Additional information received 17 May 2024.

Answer to Question on Notice

- 1 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding intraplan inflation; received 6 June 2024.

- 2 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding National Cabinet decision regarding timing of reforms; received 6 June 2024.
- 3 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding foundational supports; received 6 June 2024.
- 4 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding NDIS review processes; received 6 June 2024.
- 5 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding consultation process for the bill; received 6 June 2024.
- 6 Answer to written question on notice by Department of Social Services regarding needs assessment process and requirements; received 6 June 2024.
- 7 Answer to written question on notice by Department of Social Services regarding review rights in relation to item 30 of the bill; received 6 June 2024.
- 8 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding co-design by the NDIA; received 13 June 2024.
- 9 Answer to question taken on notice by Department of Social Services at a public hearing on 22 May 2024 regarding changes in planning and needs assessments; received 13 June 2024.
- 10 Answer to written question on notice by Department of Social Services regarding funding of assessments and examinations when requested; received 13 June 2024.
- 11 Answer to written question on notice by Department of Social Services regarding proposed subsections 30(3) and 30(6); received 13 June 2024.
- 12 Answer to written question on notice by Department of Social Services regarding amendment to section 10 of the bill; received 13 June 2024.
- 13 Name withheld, Answer to question taken on notice at a public hearing on 21 May 2024; received 28 May 2024.
- 14 Answer to question taken on notice by Down Syndrome NSW at a public hearing on 14 June 2024; received 17 June 2024.
- 15 Answer to question taken on notice by Consumers of Mental Health WA at a public hearing on 14 June 2024; received 17 June 2024.
- 16 Answer to question taken on notice by Women with Disabilities Australia at a public hearing on 14 June 2024; received 17 June 2024.
- 17 Answer to question taken on notice by Disability Advocacy Network Australia at a public hearing on 14 June 2024; received 17 June 2024.
- 18 Answer to question taken on notice by the Australian Autism Alliance at a public hearing on 14 June 2024; received 17 June 2024.
- 19 Answer to question taken on notice by Inclusion Australia at a public hearing on 14 June 2024; received 17 June 2024.

20 Answers to questions taken on notice by the Department of Social Services at a public hearing on 14 June 2024; received 20 June 2024.

Appendix 2

Public Hearings

Tuesday, 21 May 2024

Committee Room 2S1, Parliament House
Canberra

Professor Bruce Bonyhady, Private capacity

Disability Advocacy Network Australia

- Ms El Gibbs, Acting Chief Executive Officer – via videoconference
- Mr Liam Thatcher, Advocacy and Policy Officer – via videoconference

Inclusion Australia

- Ms Maeve Kennedy, Senior Manager, Policy and Projects – via videoconference

Women With Disabilities Australia

- Ms Sophie Cusworth, Acting Chief Executive Officer – via videoconference

Women with Disabilities Victoria

- Ms Diana Piantedosi, Director of Policy, Advocacy and Community Engagement – via videoconference

First Peoples' Disability Network

- Mr Damian Griffis, Chief Executive Officer – via videoconference
- Ms Tahlia-Rose Vanissum, National Policy & Systemic Advocacy Manager – via videoconference

Ability First Australia

- Mr Andrew Rowley, Chief Executive Officer – via videoconference

Autism Awareness Australia

- Ms Nicole Rogerson, Founding Chief Executive Officer – via videoconference

Queenslanders with Disability Network

- Ms Michelle Moss, Chief Executive Officer – via videoconference

Down Syndrome Australia

- Mr Darryl Steff, Chief Executive Officer – via videoconference

Down Syndrome NSW

- Ms Emily Caska, Chief Executive Officer – via videoconference

- Ms Ellen Hester, Administration Specialist – via videoconference

Kin Disability Advocacy

- Dr Siyat Abdi, Systemic Advocacy Officer – via videoconference
- Ms Christine Grace, Advocacy Services Manager – via videoconference

Ms Samantha Connor, Private capacity

Ms Marie Johnson, Private capacity

Mr Jarrod Marrinon, Private capacity

Mr Peter Gregory, Private capacity

Mr Daniel Flynn, Private capacity

Ms Tanya Carroll, Private capacity

Multicap Group

- Ms Joanne Jessop, Chief Executive

Aruma and Alliance20

- Dr Martin Laverty, Chief Executive

Aruma

- Ms Candice Charles, Chair
- Mr James McCoy, Human Rights Advisor

NDIS Occupational Therapy Community of Practice

- Ms Muriel Cummins, Co-convenor – via videoconference
- Ms Sally Davison, Occupational Therapist – via videoconference

OT Australia

- Dr Priscilla Ennals, President – via videoconference
- Mrs Michelle Oliver, General Manager – via videoconference

Wednesday, 22 May 2024

Committee Room 2S1, Parliament House
Canberra

People With Disability Australia

- Ms Maryke Jonkers, President – via videoconference
- Ms Joanne Yates, Acting Deputy CEO – via videoconference
- Mx Giancarlo de Vera, Senior Policy Manager – via videoconference

Australian Federation of Disability Organisations

- Ms Lauren Henley, Senior Systemic Advocate – via videoconference

Every Australian Counts

- Dr George Taleporos, Independent Chair – via videoconference
- Ms Nicole (Nick) Avery, Deputy Chair – via videoconference
- Sam Peterson – via videoconference

National Coordination Function

- Ms El Gibbs, Director, Policy and Advocacy - Disability Advocacy Network Australia – via videoconference
- Ms Catherine McAlpine, Chief Executive Officer - Inclusion Australia – via videoconference
- Ms Ruth Richter, Disability Advocacy Network Australia – via videoconference

Mr Tony Clark, Private capacity

Ms Elly Desmarchelier, Private capacity

Mr Matthew Potocnik, Private capacity

Mrs Susan Hart, Private capacity

Carers and Advocates Australia

- Ms Claire-Louise McCrackan, CEO – via videoconference

Dr Darren O'Donovan, Private capacity

Professor Helen Dickinson, Private capacity

Australian Human Rights Commission

- Ms Rosemary Kayess, Disability Discrimination Commissioner – via videoconference

Midlas

- Mrs Gaelle Gouillou, Chief Executive Officer – via videoconference

Tom & Co Legal

- Mr Tom Monks, Legal Practitioner Director – via teleconference

Intrepidus Law

- Ms Belinda Kochanowska, Principal Solicitor and Founder – via videoconference

Sussex Street Community Law Service

- Dr Rita Kleinfeld-Fowell, Head of Disability Practice – via videoconference

Public Interest Advocacy Centre

- Ms Sheetal Balakrishnan, Senior Solicitor – via videoconference
- Mr Mitchell Skipsey, Senior Solicitor – via videoconference

Department of Social Services

- Ms Robyn Shannon, Deputy Secretary, Disability and Carers Stream
- James MacIsaac, Group Manager, NDIS Participants and Performance Group
- Ms Sarah Rubenstein, Principal Legal Officer, Public Law Branch – via teleconference
- Ms Julie Yeend, Branch Manager, NDIS Governance, Policy, and Legislation Branch – via teleconference

National Disability Insurance Agency

- Mr Matthew Swainson, Chief Counsel

NDIS Quality and Safeguards Commission

- Mr Matthew Phelan APM, Acting Commissioner
- Ms Alicia Chambers, Deputy Commissioner, Regulatory Policy, Insights and Review – via videoconference

Friday, 14 June 2024

Committee Room 2S3, Parliament House
Canberra

Disability Advocacy Network Australia

- Ms El Gibbs, Director, Policy and Advocacy – via videoconference

Inclusion Australia

- Ms Maeve Kennedy, Senior Manager, Policy and Projects – via videoconference
- Ms Catherine McAlpine, Chief Executive Officer – via videoconference

Women with Disabilities Australia

- Ms Sophie Cusworth, Acting Chief Executive Officer – via videoconference

Down Syndrome NSW

- Ms Emily Caska, Chief Executive Officer – via videoconference
- Ms Ellen Hester, Administration Specialist – via videoconference

Australian Autism Alliance

- Ms Jenny Karavolos, Co-Chair – via videoconference

Australian Lawyers Alliance

- Mr Tom Ballantyne, Chair, NDIS Special Interest Group – via videoconference

Villamanta Disability Rights Legal Service

- Ms Naomi Anderson, Legal Practice Manager – via videoconference

Human Rights Law Centre

- Mr Kieran Pender, Senior Lawyer – via videoconference
- Ms Madeleine Howle, Lawyer – via videoconference

Public Interest Advocacy Centre

- Ms Sheetal Balakrishnan, Senior Solicitor – via videoconference
- Mr Mitchell Skipsey, Senior Solicitor – via videoconference

Advocacy for Inclusion

- Mr Craig Wallace, Head of Policy – via videoconference

First Peoples Disability Network

- Ms Tahlia-Rose Vanissum, National Policy and Systemic Advocacy Manager – via videoconference

Consumers of Mental Health WA

- Dr Mad Magladry, Consumers of Mental Health WA – via videoconference

Department of Social Services

- Ms Amanda Lee, Acting Deputy Secretary, Disability and Carers Stream
- Mr James MacIsaac, Group Manager, NDIS Participants and Performance Group
- Ms Sarah Rubenstein, Principal Legal Officer, Public Law Branch
- Ms Bronwyn Worswick, Chief Counsel, Legal Services Group

National Disability Insurance Agency

- Mr Matthew Swainson, Acting Deputy Chief Executive Officer, Governance, Risk and Legal Group

NDIS Quality and Safeguards Commission

- Ms Alisa Chambers, Deputy Commissioner, Regulatory Policy, Insights and Review – via videoconference