

National Disability Services Submission:

# Getting the NDIS Back on Track Bill 2024



## About National Disability Services

National Disability Services (NDS) is Australia's peak body for disability service organisations, representing more than 1000 service providers. Collectively, NDS members operate several thousand services for Australians with all types of disability. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Commonwealth governments. We have a diverse and vibrant membership, comprised of small, medium and larger service providers, employing 100,000 staff to provide support to half a million of people with disability. NDS is committed to improving the disability service system to ensure it better supports people with disability, their families and carers, and contributes to building a more inclusive community.

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## 1.0 Scope of submission

National Disability Services (NDS) welcomes the opportunity to make a submission to the Community Affairs Legislation Committee regarding the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No.1) Bill 2024 (the Bill).

The Senate referred the provisions of the Bill to the Committee for inquiry and report by 20 June 2024. This submission provides NDS's views, specifically in relation to the proposed changes within the Bill.

NDS is broadly supportive of the recommendations made by the independent panel leading the NDIS Review. The panel has seized the opportunity to consider fundamental changes to the way in which the NDIS operates. Its recommendations go to the heart of some long-standing issues, such as simplifying access and improving planning, improving supports for those who are not NDIS participants, redesigning the experience for children, young people and their families, improving the ways in which markets are working, and supporting scheme sustainability.

The NDIS Review recommended (action 21.2) that key policy parameters be elevated to legislation and Rules to ensure transparent governance of the NDIS. This recommendation highlights the importance of codifying key elements of the scheme's operations, such as sustainability and reasonable and necessary supports, in legislation and Rules. The implementation detail included reviewing existing operational guidance and identifying and prioritising opportunities to strengthen the NDIS Act and associated Rules from 1 January 2024. By 2025, the Department of Social Services is to commence the process of implementing the identified amendments. This approach is aimed at ensuring that the NDIS was governed by a robust and clear framework, benefiting all those involved. Once amendments are made, the Department of Social Services is to translate the NDIS Act 2013 into alternate formats, including Easy English, within 12 months.

NDS understands that a package of legislative reforms, beyond those being considered by the Committee, will be required to implement the NDIS Review recommendations.

## 2.0 NDIS Review: Improve participant pathways

The NDIS Review envisioned a participant pathway that would deliver a fairer and more consistent approach to accessing, funding and implementing disability supports. It proposed a package of reforms to significantly improve the participant pathway, including changes to the way people applied for access to the scheme, how information was gathered from participants to assess need, and how individual budgets were set. It also recommended more support for participants to create a plan for spending once their budgets had been set.

The recommendations emphasised the need for increased investment in getting the budget right for each participant and suggested that the new participant pathway should feature a more structured way to gather information about the participant, their circumstances and their support needs. The new process would feature a consistent needs-based assessment process to set budgets at a whole-of-person level, based primarily on support needs and intensity, rather than functional impairments.

The new approach to information-gathering to inform budgets would require a support needs assessment. The assessment should be completed by a skilled and qualified Needs Assessor who is a trained allied health practitioner or social worker, or similar, with disability expertise.

The Needs Assessor was recommended to be the decision-maker and determine the amount and type of support needed, with a detailed record of the assessment automatically available.

Gathering information about participants and their circumstances in a consistent manner and assessing their support needs in a more structured way should help ensure budgets are set more accurately and consistently. When coupled with greater flexibility in how funding can be used, this new process should also mean participants would require fewer reviews. Assessments were also expected to become more forward-looking, particularly for participants with a progressive condition.

In addition, the NDIS Review emphasised the need for more support for people with disability to understand how they might use their funding. It proposed separating the determination of the budget from developing a plan of action to use the funding. The future system was suggested to take a trust-based approach in how participants could use their budget, making it easy for them to comply with Rules. Compliance would be encouraged through guidance and support, with more hands-on interventions used where there are serious risks or a history of issues.

The report highlighted that reforming the participant pathway is a long-term vision that will require significant collaboration with people with disability and the sector. Some immediate actions are necessary to begin improving people's experience and outcomes.

The amendments in the Bill are concentrated on enabling these recommendations to be implemented.

## 3.0 Recommendations

**Recommendation 1:** To enhance the National Disability Insurance Scheme (NDIS), the Bill should strengthen co-design principles by actively involving people with disability in the design of the system. This approach should include the development of clear definitions and specific implementation guidelines to ensure effective and inclusive participation.

Given the importance of meaningful inclusion of people with disability in the NDIS, the Bill should strengthen provisions for co-design. Currently, the NDIS Act 2013 includes a provision (General principles guiding actions under this Act, 9A) stating that people with disability are central to the NDIS and should be included in a co-design capacity. However, to ensure clarity and effectiveness, this provision should be further developed to include a comprehensive definition of co-design and specify how, when and where it should be applied.

The Bill should define co-design as a collaborative process that involves people with disability as equal partners in the design, development and implementation of NDIS services. This definition should also outline the intent of co-design, emphasising its role in ensuring that NDIS services are tailored to meet the diverse needs and preferences of people with disability.

To operationalise this principle, the legislation should specify the use of co-design principles in the development of legislative instruments and operational guidelines related to the NDIS.

It should outline a clear process for engaging people with disability in co-design activities, including the timing and methods of consultation.

**Recommendation 2:** Government should release draft Rules and determinations for public consideration regarding the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No.1) Bill 2024.

The Bill requires that Rules and other legislative instrument be developed to operationalise many key amendments. These Rules and determinations will be pivotal in shaping how the NDIS operates, including the allocation of funding responsibilities between the Commonwealth, states and territories. The absence of these drafts has created uncertainty about their content. Given that the practical implications for participants and providers depend heavily on these Rules and determinations, it is essential that they are developed in close consultation with people with disability and the sector.

For example, the government's power to make Rules specifying the supports the NDIS will fund is a critical aspect of the Bill. However, without the draft Rules being released, the public remains unaware of how these Rules will define what is funded under the NDIS, what will be funded by states and territories through foundational supports and what is a mainstream service obligation. This lack of clarity makes it challenging for stakeholders, particularly people with disability, to understand how the NDIS will operate and how their needs will be met.

It is essential that draft Rules are developed in close consultation with people with disability and the sector and are released for public consideration before being enacted.

Furthermore, delegated legislation may not be appropriate for all aspects of the changes made under the Bill. Significant matters of policy, such as access provisions, should be included in the primary legislation to ensure greater parliamentary scrutiny and transparency in critical NDIS policy.

More specifically, this recommendation should be applied promptly to the draft Rules that specify what supports should be funded under the NDIS. This will provide much-needed clarity and transparency regarding the division of funding responsibilities between the Commonwealth and the states and territories through foundational supports.

**Recommendation 3:** The Australian Government should prioritise the implementation of NDIS Review recommendations on foundational supports, including the formalisation of these recommendations through a Foundational Supports Statement of Intent.

Changes proposed to definitions of NDIS supports in the Bill attempt to address concerns raised around the use of "reasonable and necessary" to determine what supports the NDIS will fund. The Bill grants the Government the power to specify the supports funded under the NDIS through Rules. However if these Rules assume that foundational supports will be able to be accessed by people with disability outside the NDIS before these are available, there is a risk that some people with disability will be left without the supports that they need. The development of foundational supports is crucial before defining these Rules.

The NDIS Review addressed issues with the current ecosystem of supports as their first set of recommendations. It called for:

- Develop Foundational Supports Statement of Intent: NDS recommend that National Cabinet agree to jointly design, fund and commission an expanded and coherent set of

foundational disability supports outside individualised NDIS budgets. This agreement should be formalised in a Foundational Supports Statement of Intent, which defines foundational supports through general and targeted streams of activity, including the new Navigator function as recommended by the NDIS Review. The Statement should represent a commitment from all governments to all people with disability that foundational supports will be developed and funded as a critical part of an effective and sustainable disability ecosystem.

- **Develop Foundational Supports Strategy:** This strategy should articulate the vision, desired outcomes and in-principal investment priorities for foundational supports. It should define the vision for foundational supports, outline key outcomes expected, agree in-principle to increased investment, and detail how all governments will work together to ensure foundational supports meet current and emerging needs of people with disability.

NDS strongly recommends that the Australian Government prioritises the implementation of the NDIS Review recommendations concerning foundational supports.

NDS understands that developing a comprehensive set of co-designed, tried and evaluated foundational supports will take time. However, NDS urges the Department of Social Services, in collaboration with state and territory governments, to commit to a Statement of Intent and expedite a comprehensive Foundational Supports Strategy, as recommended by the NDIS Review.

**Recommendation 4:** National Cabinet must promptly agree and publish an implementation roadmap for the proposed reform agenda ensuring a smooth and strategic transition over a five-year period.

To ensure the effective and sustainable implementation of the Bill, it is recommended that National Cabinet agrees and publishes an implementation roadmap. This roadmap should outline the strategic sequencing of reforms over a five-year transition period, addressing critical dependencies, managing risks and minimising disruptions for participants, providers, and workers. Legislative changes, including those proposed in the Bill, should be considered within the broader context of these reforms, highlighting the importance of coordinated and cohesive legislative action to support the NDIS's long-term success.

The roadmap should be developed in consultation with all stakeholders, including people with disability, their families, carers, disability representative organisations, workers and disability service providers. It should prioritise inclusion and genuine engagement of these stakeholders in the implementation process.

To ensure smooth transitions and minimise disruptions, it is crucial to communicate changes clearly, well in advance and allow ample time for providers to adjust their systems. Significant changes should ideally be tested before full implementation.

This is important because NDIS reform is unique and complex, making it hard to compare with other systems. While change is inevitable and necessary for improvement, it can be taxing. According to our [State of the Disability Sector survey](#), 74 per cent of respondents felt their leadership spent too much time dealing with NDIS changes, and 72 per cent of respondents stated their staff are exhausted by ongoing changes in the NDIS. This data describes the demands of NDIS changes diverting the focus of providers from their core responsibilities. It is crucial because it indicates potential strains on leadership and staff, impacting the overall

effectiveness and sustainability of disability services.

To enhance the NDIA's implementation, performance, governance, administration, expenditure, capability and culture, changes must be carefully planned, considering potential implications and allowing for innovation through a learning-by-doing approach. Effective communication will be key to success.

This recommendation is in line with the NDIS Review's emphasis on the importance of careful sequencing and consultation for successful implementation. An implementation roadmap will provide clarity and direction, ensuring a smooth transition for existing participants and laying the foundation for a more equitable and sustainable disability support ecosystem.

## 4.0 Key considerations for government

The changes to the NDIS legislation aim to clarify existing laws for better delivery, address key recommendations from the 2023 NDIS Review, and focus more on individuals. These reforms are gradual and include developing foundational supports. They also aim to improve participant experiences, ensure funding reaches the intended recipients, and align with the NDIS's growth target for long-term sustainability.

The Bill introduces a range of significant changes that will require thorough examination.

Schedule One of the Bill includes provisions for:

- defining NDIS supports
- establishing a reassessment process for participant status
- facilitating the transition of participants to a new framework plan
- introducing new framework plans with flexible budgets and specified supports
- ensuring old framework plans include total funding amounts
- updating circumstances under which the Agency manages funds
- specifying that participants must spend money only on NDIS supports as outlined in their plan
- exempting NDIS Rules from sunset provisions.

Schedule Two of the Bill includes provisions for:

- imposing conditions on the approval of quality auditors, particularly regarding the employment of individuals with banning orders
- expanding delegation powers related to compliance and enforcement.

NDS broadly supports the NDIS Review recommendations and recognises the need for legislative changes. However, there are concerns about the impact of Schedule One on participants' pathways, particularly, without access to the draft rules, its transparency. NDS agrees with the provisions outlined in Schedule Two. Details should ensure that audits are performed by appropriate people and that auditing enterprises are owned and operated in ways that are consistent with the intent of this Schedule.

These reforms aim to clarify existing laws, improve participant experiences and ensure funding reaches the intended recipients. This aligns with the NDIS's growth target for long-term sustainability. However, it is vital that government consider potential negative impacts of these changes.



## Enhancing clarity and scope of NDIS supports

To enhance the clarity and scope of NDIS supports, several key considerations must be considered by the government when making amendments to the Bill.

### Access

- The Bill requires the NDIA to specify whether a person enters the NDIS under the disability impairment, the early intervention criteria or both. These criteria will also have a role in determining supports.
- The Bill enables the NDIA CEO to request information to determine whether a participant continues to meet the access criteria.
- Category A Rules will be developed to specify how these criteria will be applied and the sorts of circumstances that the CEO needs to consider in making this decision.
- The disability community considers decisions regarding the eligibility of individuals for the NDIS to be of utmost importance. It is crucial that the criteria used for these decisions are transparent, fair and developed through consultation with the sector.

### Defining NDIS supports

- The Bill should include a new definition of “NDIS supports” to provide clarity on what supports will be funded by the NDIS and what will not.
- This definition should not be too prescriptive to avoid leaving gaps in coverage.
- It is crucial that the new definition ensures that supports are necessary for a person’s inclusion in the community, facilitate personal mobility or prevent further impairment.

### Foundational supports

- The Rules should focus on defining which supports are the responsibility of the Commonwealth Government through the NDIS and which are the responsibility of state and territory governments (that is, “foundational supports”).
- Development of foundational supports is crucial and should precede the design of new Rules.
- These rules should not be overly prescriptive to allow for flexibility and responsiveness to individual needs.

### Applied Principles and Tables of Support (APTOS)

NDS has raised concerns about the practical application of APTOS. While the NDIS was intended to work alongside universal services available to everyone, the [Applied Principles and Tables of Support](#) outline the responsibilities of these systems. These systems are obligated to consider the holistic needs of individuals, including people with disability. For instance, the education system must customise learning approaches for each student, including addressing accessibility needs for students with disability. Despite efforts to clarify these responsibilities through revised [Operational Guidelines](#) and [Would we Fund It?](#) guides, people with disability, NDIS participants, and providers often find themselves in funding disputes without clear resolution.

- The Bill includes APTOS provisions that should be used as an interim measure until new rules are established under the Bill.
- Concerns have been raised about the practical applications of APTOS, particularly regarding its broad interpretation and grey areas.

- It is recommended that the inclusion of APTOS within the Bill be delayed until a comprehensive plan for foundational supports outside of the NDIS is developed.
- This delay will allow for a more coherent and integrated approach to determining what supports are 'in' and 'out' of the NDIS.

## Ensuring fair and inclusive needs assessments

The Bill proposes the use of assessments to evaluate participants' support needs. The assessments will be conducted using tools determined by the Minister and are intended to be highly technical, requiring consultation with the disability community and experts. However, concerns exist regarding the potential limitations of these assessments, particularly in capturing the needs of individuals with multiple and interrelated disability.

### Avoiding replication of independent assessments

The Bill's provisions for needs assessments must avoid replicating the issues with previous proposals for independent assessments. These assessments were criticised for their standardised, one-size-fits-all approach, which may not adequately capture the complexities of individuals' needs. There were also concerns about assessors lacking specialised skills for diverse disability and a lack of cultural competence, particularly for individuals from diverse backgrounds.

### Clarification of assessment process

The Bill should provide clarity on the circumstances under which a replacement needs assessment can be ordered by the NDIA. The Bill should clarify the recourse available to participants if they disagree with the outcome of the needs assessment. Participants should have a transparent and accessible process for challenging assessments that do not accurately reflect their needs and circumstances.

### Transparent and inclusive process

To ensure fairness and inclusivity, the government should prioritise genuine co-design with the disability community in developing the needs assessment process. This will help create an assessment process that is fair, inclusive and responsive to the diverse needs of NDIS participants.

### Access to needs assessment report

Ensuring participants have access to their needs assessment report before it is finalised and given to the CEO is essential. This access promotes transparency, enabling participants to verify the accuracy of their assessment. It empowers them to identify any discrepancies or omissions that could impact the level of support they receive. This practice builds trust between participants and the NDIA, demonstrating a fair and accountable assessment process. Additionally, it allows participants to provide feedback and request reassessment if necessary, ensuring the process remains person-centred, transparent and accountable.

### Whole-person approach

The needs assessment process should adopt a whole-of-person approach, ensuring that assessments consider all aspects of an individual's life and support needs. This approach is essential for individuals with multiple and interrelated disabilities, since it avoids imposing

artificial distinctions that may limit access to necessary supports.

### **Consultation and development of legislative instruments**

The process and method for calculating participants' flexible funding and funding for stated supports should be specified in the NDIS rules. These instruments should be developed in consultation with people with disability, the disability community, health professionals and all states and territories.

The introduction of needs assessments under the Bill presents an opportunity to improve the NDIS by ensuring that assessments are accurate, fair and respectful of participants' diverse needs and circumstances. However, careful consideration and consultation with the disability community are crucial to avoid replicating past issues and ensure that the needs assessment process is inclusive and effective.

## **Enhancing participant protection and administrative clarity**

### **Reasonable and necessary budget requirements**

- The Bill allows for specifying funding conditions, such as who can provide supports, process requirements and participant conditions.
- These conditions could affect the accessibility and choice of supports, particularly in early intervention and First Nations community reforms.
- The breadth of circumstances allowing for restrictions should be narrowed to prevent unintended consequences and undue limitations on participant choice.

### **Intra-plan inflation**

- Intra-plan inflation refers to the increase in costs of goods and services within a participant's NDIS plan over time.
- It can impact participants by reducing the purchasing power of their allocated budgets, potentially leading to unmet needs and inadequate support.
- There is a risk of market failures and providers may face challenges in support continuity if they are unable to adjust their pricing to account for inflation.
- Intra-plan inflation can also occur where a participant requires more support than originally allowed for in their budget. This can be due to changing circumstances, increased support needs or poor planning processes and decisions.
- Lack of mechanisms to address intra-plan inflation could result in participants being unable to access necessary supports and providers struggling to deliver services effectively.
- The legislation should include provisions to account for intra-plan inflation, such as periodic reviews and adjustments to budgets, to ensure they remain sufficient for participants' needs.

### **Ministerial Rules and determinations**

- The Bill grants the Minister power to make Rules and determinations without parliamentary approval.
- These delegated legislations are crucial for implementing the proposed reforms and should reflect genuine consultation with the disability community.
- Clear guidelines are needed to ensure transparency and accountability in the development of these rules.

## NDIA powers

- The NDIA would have more authority over plan management to prevent exploitation or misuse of funds.
- New powers include requesting information or documents and imposing consequences for non-compliance, which could significantly impact participants' access to supports.
- There should be limitations on the type of information requested and the severity of consequences for non-compliance to protect participants' rights.
- Changes to the CEO's power to vary a participant's plan need clearer limits to ensure it is used appropriately.

In summary, the proposed amendments to the NDIS legislation contain important provisions regarding restrictions, powers, and budget requirements that have significant implications for participants. It is crucial for the government to carefully consider these aspects to ensure that they do not unduly restrict participant choice or autonomy. Transparent and accountable processes, along with genuine consultation with the disability community, are essential to safeguard the rights and interests of NDIS participants.

## 5.0 Conclusion

Achieving the reform agenda will require significant adjustments across all aspects of service delivery. Effective implementation will rely on careful deliberation, collaboration and co-design. The NDIS Review recommended a governance structure to oversee the implementation of the reform agenda. Government has signalled its intent to establish a mechanism such as the NDIS Evidence Advisory Committee, NDIS Review Implementation Advisory Committee and NDIS Review Implementation Working Group.

It is crucial for providers to have a seat at the table, alongside other stakeholders, as these committees work to ensure that changes can be safely and practically implemented. All stakeholders must work together to ensure the delivery of high-quality, equitable, and sustainable supports that offer choice, control and independence to people with disability. The views of people with disability, their representative groups, providers and government must all be considered in the next phase of implementing reforms.

The disability services sector is prepared and eager to adopt recommendations that improve the quality and safety of services. A skilled, capable, diverse and sustainable provider landscape is a desirable outcome for participants. However, it is important to consider how the timing of reforms aligns with the sector's capacity to respond.

NDS is dedicated to collaborating with the government and the disability sector to ensure that Australians with disability have access to safe, quality and culturally appropriate services.

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