

Submission

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

May 2024



**DANA** Disability Advocacy  
Network Australia

## Contents

About DANA.....	3
List of Recommendations .....	4
Introduction .....	7
Needs Assessment – Sections 32C-32L.....	9
No legislative requirement to co-design when developing rules.....	9
The needs assessment process must be person-centred and consider the whole of a person.....	10
No obligation to ensure a copy of the assessment report is provided to person on completion .....	12
No way to correct errors in needs assessment report.....	13
Ensure external material and views from a person’s chosen support team is considered in assessment and budget setting .....	15
Defining ‘NDIS Supports’ – Sections 10, 34.....	17
No obligation to co-design NDIS Support definitions .....	17
Initial principles create uncertainty - Section 10 (1)(a) .....	19
APTOS Principles are not a suitable stand-in while rules developed .....	19
Shift away from whole of person approach for current plans – section 34 (1)(aa).....	21
Expanded NDIA Powers Need Significant Limits – Sections 30, 36, 46 .....	23
Requests for information have punitive powers for non-compliance .....	23
Rules for Plan Management .....	24
Access changes should be removed from Bill – Sections 24, 25, 27 .....	26

## About DANA

DANA is the national representative body for a network of independent disability advocacy organisations throughout Australia.

### **Our Vision**

DANA's vision is of a nation that includes and values people with disabilities and respects human rights for all.

### **Our Purpose**

DANA's purpose is to strengthen, support and provide a collective voice for independent disability advocacy organisations across Australia that advocates for and with people with disability.

We achieve this by:

- promoting the role and value of independent disability advocacy
- providing a collective voice for our members
- providing communication and information sharing between disability advocacy organisations
- providing support and development for members, staff and volunteers of disability advocacy organisations
- building the evidence base to demonstrate the value of disability advocacy
- promoting the human rights, needs, value and diversity of people with disabilities

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# List of Recommendations

## Needs Assessment – Co-Design

1. Sections 32K and 32L of the Bill be amended to include a requirement that people with disability must play a leadership role in the design and implementation of reforms to the NDIS, including related legislation, subordinate legislation, and Ministerial determinations, including direct engagement with Disability Representative Organisations, the Independent Advisory Council, and a public consultation process.
2. Trials must be conducted of the proposed needs assessment and budget setting processes, with full, transparent reviews and evaluations, which are co-designed with people with disability to test the process before wide-scale implementation.
3. Ensure those instruments and frameworks are reviewed 6, 12 and 18 months after implementation, then yearly after that, with evaluation and impact statements tabled in the Australian Parliament.
4. The Joint Standing Committee on the NDIS reviews the impact of the needs assessment process and budget setting mechanism within 12 months and reports publicly. The NDIA is to make any further changes as needed to ensure fairness, equity, and essential support provision.

## Needs Assessment – General Legislative Principles

5. Include a legislative requirement that the assessment process and assessment tool (or choice of tool) is codesigned with people with disability and Disability Representative Organisations.
6. Amend subsection 32L (3) to require the assessor to conduct a whole-of-person assessment.
7. Amend section 32L (8) to require that assessors abide by a code of conduct, designed in conjunction with the community, that ensures that they act with integrity and in the interests of obtaining a clear and full picture of the person being assessed.
8. Remove subsection 32L (10) from the Bill.

## Needs Assessment – Copy Provided to Person

9. Amend section 32L (5) to require the assessor to provide a copy of the final report to the user as well as the NDIA.

## Needs Assessment – Draft and Re-Assessment Provisions

10. Amend section 32L to ensure a process for people to identify errors needing correction in any report by a needs assessor by issuing the person a draft copy of the assessment.
11. Amend section 32L to ensure that draft can be assessed (or associated nominee) for a minimum of 14 days before a finalised version is provided to the agency.

12. Amend section 32L (7) to allow participants access to a second opinion if they believe the first report does not capture their circumstances accurately. This should be able to be triggered by the person with disability, unlike the current legislation which relies on the discretion of the Agency. Requests for further assessments should have a pathway to be considered by the CEO and internally/externally reviewed.
13. Amend section 32L to clarify that assessments are undertaken at no cost to the individual.

### **Needs Assessment – External Material and Views of Support Team**

14. Amend section 32K and 32L to ensure there is scope for people to introduce reports or information from their support team as part of the needs assessment and budget setting process that will be developed with people with disability.
15. Amend section 32L (4) to ensure that the needs assessments and budget setting process have regard to a person's self-assessment, a person's support team to provide information and context to the assessor, not just information requested or that already in records.
16. Amend section 36 (2) to ensure the cost associated with any request for information is paid for by the Agency.

### **NDIS Supports Definition – Co Design**

17. Section 10 of the Bill be amended to include a requirement that people with disability must play a leadership role in the design and implementation of rules enabling or limiting the use of certain supports under the scheme.
18. A broad ban on white goods and appliances, as discussed by the Explanatory Memorandum, should not form part of the Rules.
19. Add a provision to section 10 stating that rules cannot be made prohibiting certain supports from the scheme with the intent that they be provided through state-based systems or 'Foundational Supports' unless they are practically available to people.

### **NDIS Supports Definition – Initial principles uncertain**

20. Amend section 10 (1)(a) to preserve the flexibility and breadth of the different types of disability supports that people require. Where the government seeks to implement principles about supports from the CRPD, those should be implemented in full.

### **NDIS Supports Definition – APTOS Principles not suitable**

21. That the bill is amended to remove the application of NDIS support definition in subsection 34 (f) to 'old framework' plans, remove the APTOS tables from s 124, and ensure that the new definition only applies to new framework plans in sections 32C-32L. This should also extend to the enforcement sections of the Bill in section 46.

22. Ensure that the current framework of existing plans continues until rules are developed and foundational supports are developed, established, and available to people with disability.

### **Shift away from whole of person approach in 'old framework' plans**

23. Remove section 34 (1)(aa) from the current Bill.

### **Requests for information have disproportionate penalties**

24. 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.
25. 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.
26. Amend the suspension powers in sections 30 and 36 to stress that these powers should only be used as a measure of last resort (and not as an immediate consequence of non-compliance) and require the Agency to constructively engage with the participant before they are exercised.
27. Include a provision in the participant service guarantee to ensure that decisions relating to the suspension of plans or access requiring a response to internal review requests made in relation to these provisions. If a decision is not made within this time, access to a plan should be immediately restored.
28. Direct referral to an independent disability advocate should take place if the use of these powers is considered.

### **Plan Management Rules**

29. Further detail the test in section 43 (2)(2C)(a) about what constitutes a 'physical, mental or financial harm' to the participant and stress that this power should only be used as a last resort.
30. Remove section 43 (2)(2C)(b) from the Bill.
31. Amend the bill to include section 43 (2) of the Bill as its own reviewable decision in section 99 of the Act, so that people can contest their plan-management without reviewing the rest of the plan.

### **Access Changes**

32. Remove access rule amendments in section 27 from the Bill.
33. Remove amendments to section 24 and 25 from the Bill.

## Introduction

The National Disability Insurance Scheme (NDIS) provides essential support for over 650,000 Australians and has grown substantially in recent years. But the Scheme isn't working well for everyone, and is not fair, particularly for those outside the NDIS.

In response, the Federal Government conducted the NDIS Review in 2023, which made a range of recommendations to ensure that all people with disability could access the supports they need both within and outside of the NDIS.

Additionally, the Federal Government has announced an 8% target for that growth from 2026. The details of how this will be met, given the current growth of the Scheme, are not clear. Given the announcement of the Federal Budget on the 14<sup>th</sup> of May, we understand that this Legislation will play a key part in driving a reduction of \$14.4 billion in growth over the forward estimates.

The introduction of the NDIS Act (Getting the NDIS back on track) legislative amendment is a missed opportunity to work with people with disability to co-design a holistic response to the NDIS Review recommendations and must be further amended before returning to the Parliament.

When the NDIS Review final report was released, Disability Advocacy Network Australia (DANA), alongside other disability representative organisations, stated that:

*“continued access to support for people with disability is necessary and non-negotiable. Any changes to how support is provided, either inside or outside the Scheme, must not lead to any gaps in the support we receive.”<sup>1</sup>*

We believe that this legislation, in its current form, does not meet this imperative, and will potentially both raise the costs of the NDIS, and shut people with disability out of vital support.

Additionally, our statement last December called for the extensive involvement of people with disability and our organisations in every aspect of the reform to come, through both the NDIS Review and the Disability Royal Commission final reports. We have deep concerns about the lack of consultation and involvement of people with disability in the development of this legislation. We are concerned that a similar approach will be taken to the implementation of the legislative instruments.

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<sup>1</sup> Australian Federation of Disability Organisations, Children and Young People with Disability, Disability Advocacy Network Australia, et al 'NDIS change must be led by people with disability – Joint media statement' *Disability Advocacy Network Australia* (online, 7/12/2023): <https://www.dana.org.au/ndis-review-joint-media-statement/>

There are large swathes of this Bill that are deeply consequential to how the NDIS will operate and the rights of the people that use it. However, we have no way to assess the full impact of these amendments because they are predicated on subsequent rules that will drive implementation and the policy consequences. The Australian Government and the NDIA have spoken about how these rules will be developed jointly with the community but none of those commitments are embedded in the legislation, which largely gives authority to the Minister and States alone to develop crucial new elements. The introduction of this Bill also precedes a formal response from the Government to the NDIS Review (and Disability Royal Commission).

This Bill must be revised to embed meaningful co-design into the development of primary legislation and subsequent legislative instruments. Rules proposed to be implemented through legislative instrument must instead be done through primary legislation, particularly as they relate to the introduction of the needs assessment and changes to access to the Scheme.

While there are some changes that are positive, such as the move towards more flexible funding packages, this Bill also proposes expanded powers for the NDIA that are deeply alarming to the advocacy organisations that support many people to navigate the scheme, such as:

- Broad information request powers with disproportionate penalties for non-compliance.
- The introduction of APTOS principles as a stopgap for the definition of NDIS supports.
- Strictly attaching supports to impairments undermines the 'whole of person' approach and leaves the potential for gaps in supports for people with disability while Foundational Supports are being designed and implemented.

This submission should be read in conjunction with the joint submission of DROs (Disability Representative Organisations). Quotes included in this submission are taken from a survey of advocates by DANA, except where otherwise noted.

This Bill requires significant amendments before it is returned to Parliament.



## Needs Assessment – Sections 32C-32L

### No legislative requirement to co-design when developing rules

The most prominent changes in the Bill come through a mechanism to implement ‘new framework’ plans that significantly change the planning process for people with disability. As part of these ‘new framework plans’, the Bill proposes to implement a new ‘needs assessment’ that will be undertaken for each plan review period<sup>2</sup> that will be used to determine a ‘reasonable and necessary’ budget.<sup>3</sup> The exact mechanics of these assessments and how those assessments will be translated into funding packages is intended to be detailed in Ministerial determinations that have yet to be drafted, developed or trialled.

DANA supports a new approach to needs assessment that will create a fairer, more consistent approach and ensures that people have access to the supports they need. It is critical, however, that the development of the approach to needs assessment and determination of budget is carefully designed in collaboration with people with disability, and appropriately trialled.

The Bill requires significant revisions to require engagement with people with disability. Without this change, the disability community will be left with no assurance that they will be involved in the design of the assessment process that will be used to determine the level of support they will receive. This is an unacceptable position, and this concern must be addressed urgently.

The traditional hierarchy of legislation should mean that the most important and definitional parts of a Bill should exist in primary legislation. This is the case in the current NDIS Act, where key provisions such as the reasonable and necessary support criteria exist in the Act and are supplemented by rules giving further definition and structure to the component parts of the provision.

The rules in this section are not ‘Category A’ rules which require the unanimous consent of the states and territories to implement. These new provisions relating to needs assessments only require a determination of the Minister in line with some principles of the Act and financial sustainability.<sup>4</sup>

The prospect of trying to raise disallowance motions against these determinations are of only limited comfort and are not a suitable check on a future Minister’s ability to create determinations, particularly when the current legislation places no power in the hands of people with disability to give shape to these rules. This has been a key concern of advocates when discussing the legislation:

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<sup>2</sup> National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (Cth) (‘Back on Track Bill’), cl 36, s 32L.

<sup>3</sup> Back on Track Bill, cl 36, s 32K.

<sup>4</sup> Back on Track Bill, cl 36, s 32L (10)(b).

*From what I can see, the community is really unclear about the changes and what they will mean in practice, including advocates and legal experts! I think the community is concerned that the Government has chosen to put out legislation that they've drafted without any co-design in putting the legislation together.*

A legislative requirement to develop these rules with people with disability is crucial to ensure this system will be fit for purpose and will not re-introduce the significant concerns felt by the community in response to the Independent Assessment proposals from several years ago. A lack of draft rules before the committee significantly limits the ability to understand the impact of the Bill.

### **Recommendations:**

1. Sections 32K and 32L of the Bill be amended to include a requirement that people with disability must play a leadership role in the design and implementation of reforms to the NDIS, including related legislation, subordinate legislation, and Ministerial determinations, including direct engagement with Disability Representative Organisations, the Independent Advisory Council, and a public consultation process.
2. Trials must be conducted of the proposed needs assessment and budget setting processes, with full, transparent reviews and evaluations, which are co-designed with people with disability to test the process before wide-scale implementation.
3. Ensure those instruments and frameworks are reviewed 6, 12 and 18 months after implementation, then yearly after that, with evaluation and impact statements tabled in the Australian Parliament.
4. The Joint Standing Committee on the NDIS reviews the impact of the needs assessment process and budget setting mechanism within 12 months and reports publicly. The NDIA is to make any further changes as needed to ensure fairness, equity, and essential support provision.

### **The needs assessment process must be person-centred and consider the whole of a person.**

The NDIS Review made a range of recommendations about the new approach to needs assessment and budget setting. There is a need for Government to work with people with disability and Disability Representative Organisations to develop an approach that accurately captures the support needs and life circumstances of the person.

This work will need to include consideration of a range of factors including who conducts the assessment, what tools and information are included in the assessment, and how this information is used to inform the development of the budget. The details of this approach have not yet been designed by government, and importantly the process by which government will engage with people with disability and Disability Representative Organisations.

It is critical that the assessment process is developed carefully and that the co-designed approach is embedded in the legislation. People with disability who come to advocacy organisations experience significant issues when similar assessments are commissioned by the Agency and completed by someone who is unaware of the complexity of their situation. In response to the Bill, advocates commented that:

*There are no protections in the Bill to specify who would perform the needs assessment, and what their qualifications would be. There is high risk of a poor-quality needs assessment being performed by existing, unqualified NDIS representatives, and the TSP [Typical Support Package] or similar process being used to determine budget amounts. There are insufficient review rights as well, and lack of info around how a secondary needs assessment would or would not be approved.*

*Again, [there is] not enough detail to be able to critically examine any merits if there are any. In 2021, participants of the scheme demanded that any independent assessments would be co designed and robustly evaluated. This should be the case with the Needs Assessment proposed. What we do know from our experience with NDIS Appeals, is the NDIA already determines a person's capacity with their reliance on so called expert teams (Technical Advisory Team and Home and Living) who have, in our experience, made some decisions which are detrimental to participant's wellbeing and in direct opposition to expert opinion.*

Some evidence from assessments commissioned at the AAT have previously been rebuked or dismissed by Tribunal members as irrelevant or of only limited value.<sup>5</sup>

If the assessment process and budget setting approach is not well designed, there are serious implications. People with disability may not be able to access supports for their basic needs. The AAT will be overwhelmed with cases. The onus must be on the Government to work with the community and design an assessment and budget setting process that does not replicate the same concerns identified in the previously proposed Independent Assessments.

Assessors need to be suitably trained, trauma-informed and experienced to properly analyse the impacts of various disabilities and provide insight as to what supports are likely to be effective. There needs to be deep engagement and co-design with the appropriate representative groups for different types of disabilities on how to undertake these assessments in a considerate, flexible, and appropriate way.

It is critical that the co-design of the assessment process (including who does the assessment and what tools they use) must be embedded in the legislation. In addition, a

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<sup>5</sup> Ray and NDIA [2020] AATA 3452, [148].

guiding code of conduct for these assessments co-designed with the community, may also offer a helpful structure to make sure that people's rights are protected while they are conducted. We note, however, that this may be delegated in further legislation in the Minister's general power to dictate the requirements of the assessment but could be broken out as its own area of determination for the minister in 32L (8). This is, of course, subject to the above requirements that people with disability are integrated into this process. The Bill's version of 32L (3) requires the assessment to consider only the impairments for which a person has been granted access to the scheme. This proposed approach is problematic and not feasible. A person's support needs are often a result of the interaction of their disability with a range of other factors including other conditions they may have and their informal supports as well as other intersectional factors. It is an impossible task to ask an assessor to determine whether a particular support need stems from a particular disability.

DANA believes that a comprehensive whole of person approach would be more appropriate, with funding decisions to be made relating to the ways in which people with disability require support rather than more technical arguments around which functional impairments flow from any particular disability. This would be much more in line with the NDIS Review's efforts to do away with the Primary/Secondary disability focus that has appeared in the Scheme thus far and focus on providing practical support to people. Similar concerns on this difficulty are also discussed below in relation to section 34 (aa) in 'old framework' plans.

Section 32L (10)(b) of the Bill asks the person conducting the assessment to consider the financial sustainability of the schemes. This is not an appropriate place to house that consideration. Assessors should be focused on providing a clear and accurate picture of a person's support needs and not be required to balance big-picture concerns about the sustainability of the scheme. This could undermine the accuracy of the package ultimately provided to the person.

### **Recommendations:**

5. Include a legislative requirement that the assessment process and assessment tool (or choice of tool) is codesigned with people with disability and Disability Representative Organisations.
6. Amend subsection 32L (3) to require the assessor to conduct a whole-of-person assessment.
7. Amend section 32L (8) to require that assessors abide by a code of conduct, designed in conjunction with the community, that ensures that they act with integrity and in the interests of obtaining a clear and full picture of the person being assessed.
8. Remove subsection 32L (10) from the Bill.

### **No obligation to ensure a copy of the assessment report is provided to person on completion**

The current Bill only requires that the assessment report be provided to the NDIA when it is completed.<sup>6</sup>

Advocates are concerned that there is no equivalent obligation on behalf of the assessor to provide a copy of their report to the person with disability after their assessment has been completed. This is crucial to ensuring that this process is being done transparently, and that people have the information needed to consider their review rights.

The Bill should be amended to ensure that a copy of the report is also provided to the person assessed once finalised, in addition to the below recommendations around draft assessment reports.

**Recommendation:**

9. Amend section 32L (5) to require the assessor to provide a copy of the final report to the user as well as the NDIA.

**No way to correct errors in needs assessment report**

The legislation does not provide for a mechanism for people to correct any errors that occur in the assessment process.

Additionally, the way that 32L describes the assessment process is 'one and done'. There are no provisions to amend or correct errors or incorporate additional evidence that is not available in the first instance when an assessor starts to work with someone. While it may be open for the NDIA to incorporate additional information when determining a plan, this is not guaranteed and is of particular concern given the move to budgets determined by this assessment processes.

The main remedy that the Bill seems to envision is a replacement assessment.<sup>7</sup> This is likely to be useful in some circumstances, but the effectiveness of the provision are again going to be determined by rules that are not yet part of this proposal.<sup>8</sup> If this provision is intended to be available to people who seek a second opinion, this would better address concerns around errors that find their way into these reports. If this section is only intended to be used at the Agency's discretion that will not adequately protect people with disability. In either case, this approach is problematic as it would require another time-intensive assessment when it may be the case that only part of the assessment needs to be refined or some additional information needs to be considered.

Advocates can easily see how this would go wrong and do not want people stuck in a secondary review process to contest their entire plan just to fix an error. The impact this would have has emphasised by DANA Members:

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<sup>6</sup> Back on Track Bill, cl 36, 32L (5).

<sup>7</sup> Back on Track Bill, cl 36, 32L (7)(a).

<sup>8</sup> Back on Track Bill, cl 36, 32L (7)(b).

*“It also seems that the Assessor will have a lot of power to make decisions, and that there won't necessarily be an opportunity for the NDIS participant to receive the outcome of the needs assessment, or to have a back and forth or meaningful conversation about their needs, which is the main issue with the way that the Agency currently develops NDIS Plans.”*

*“This one is really concerning to me based on the info sessions. We know nothing about the tool and method, and I am worried about the number of mistakes this tool will produce and what the appeal rights are. There is not enough information about "classes" of participants and how this will look.”*

We recommend that the legislation be amended to ensure that a draft copy of the assessment is provided to the person being assessed, and they have adequate time to review and flag any areas that they believe are inaccurate. Without a way to address these issues early in the process, the Agency will likely see an even higher level of internal and external review to address these issues. .<sup>9</sup>

The current Bill also has a mechanism for replacement assessments in section 32L (7), but only when the CEO is satisfied that one is necessary. This section would be improved by providing a right for a person to request a second assessment if they are dissatisfied with the initial assessment. This would be preferable to a formal review mechanism, in our view, by shortening the time taken to prepare plans in circumstances where someone is unhappy with an assessment.

Though it appears to be the intention of the policy, the legislation must clearly state that these assessments will be undertaken at no cost to the individual.

**Recommendations:**

10. Amend section 32L to ensure a process for people to identify errors needing correction in any report by a needs assessor by issuing the person a draft copy of the assessment.
11. Amend section 32L to ensure that draft can be assessed (or associated nominee) for a minimum of 14 days before a finalised version is provided to the agency.
12. Amend section 32L (7) to allow participants access to a second opinion if they believe the first report does not capture their circumstances accurately. This should be able to be triggered by the person with disability, unlike the current legislation which relies on the discretion of the Agency. Requests for further assessments

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<sup>9</sup> NDIS Review, *Working Together to deliver the NDIS: Supporting Analysis*, (Final Report) <<https://www.ndisreview.gov.au/sites/default/files/resource/download/NDIS-Review-Supporting-Analysis.pdf>> 251.

should have a pathway to be considered by the CEO and internally/externally reviewed.

13. Amend section 32L to clarify that assessments are undertaken at no cost to the individual.

### **Ensure external material and views from a person's chosen support team is considered in assessment and budget setting**

Assessment of need will likely include the use of a standardised assessment tools. However, for the assessment to be accurate, it must also include contextual information about the person's current supports, informal supports, and other situational factors. It is critical that the assessment process includes the ability to incorporate additional external material including reports from health professionals, input from families, as well as self-assessments done by the person with a disability. This additional material must be utilised to inform the budget setting process, for it to lead to an accurate outcome.

Further work needs to be done to ensure that the budget setting process takes into account both information from the assessment tool but also this additional external information. It is critical that the approach is not simply an algorithm that uses the assessment tool without considering the contextual information. This budget setting approach must be very carefully designed and tested with people with disability to ensure that the settings lead to an accurate budget that provides the level of support people require.

Advocates have raised concerns about how the assessment will be used to determine funding levels:

*"I'm concerned that this will turn out to be a process of number crunching like the DSP application. [It] could be their new catch phrase, same content for assessment as previously suggested with a new brand name. However, the NDIA currently do this for AAT clients, which inevitably turn out to support the original assessments provided by the client's own practitioners."*

In one case before the AAT, a Tribunal member (admittedly in the context of an assessment used for Access) stressed the need for a broad context of information to understand a person's circumstances, stating:

*The Tribunal considers the observations made by Ms Barry are more reliable than those made by (the independent assessor), as Ms Barry has seen [The Applicant] on approximately 50 to 60 occasions, including out of the comfort and familiarity of her home environment, whereas (the Independent Assessor) had only seen [the Applicant] once for a period of three hours in her home environment.<sup>10</sup>*

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<sup>10</sup> Ray and NDIA, [78].



Due to the lack of specifics at this stage, it is hard to respond to examine the impact of any new budget setting approach. However, the legislation must be amended to ensure that a holistic approach is taken to needs assessment and budget setting.

**Recommendations:**

14. Amend section 32K and 32L to ensure there is scope for people to introduce reports or information from their support team as part of the needs assessment and budget setting process that will be developed with people with disability.
15. Amend section 32L (4) to ensure that the needs assessments and budget setting process have regard to a person's self-assessment, a person's support team to provide information and context to the assessor, not just information requested or that already in records.
16. Amend section 36 (2) to ensure the cost associated with any request for information is paid for by the Agency.



## Defining ‘NDIS Supports’ – Sections 10, 34

### No obligation to co-design NDIS Support definitions

The new Bill proposes to more tightly regulate the type of supports a person more tightly can access with NDIS funding. DANA is concerned that this approach moves the NDIS towards lists of supports that are not permissible. This is primarily achieved through the operation of section 10, which has a three-part test to determine whether a support is a NDIS support. The first part requires that the bill align with definitions drawn from the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Supports can then formally be ruled in or out of the definition through legislative Rules agreed between the Federal Government and the States and Territories.

People with disability do not have a legislated role in this crucial process, which is deeply concerning. These concerns are similar to the ones raised previously, and we recommend similar amendments to the Bill which will involve people with disability in the development of rules.

In the limited information that is provided to us in the explanatory memorandum, ‘white-goods’ are provided as an example of items that are likely to be ruled out through the operation of this new definition.<sup>11</sup> We are concerned that this definition may capture items that are clearly disability-related support needs but are caught in an unnecessarily broad category of support. This wholesale exclusion may be in response to media and community misunderstanding about the requirement for certain items that arise from a disability.

AAT cases, such as the recent matter of *MKKX and National Disability Insurance Agency*, demonstrates the complexity and nuance well.<sup>12</sup> The member in that case found that an air conditioner was a reasonable and necessary support for a person who experienced significant temperature dysregulation as the result of Ehlers-Danlos Syndrome. Providing this support, it was found, would allow a significantly greater amount of social and community participation through the management of their symptoms.<sup>13</sup> It’s possible that a too broadly construed rule under section 10 (1)(c) to address ‘whitegoods’ in response to these concerns would exclude what is a highly significant and valuable support like the one detailed in that case. The ongoing development of technology are likely to provide tools, assistive technology and appliances that could have tremendously positive effects on the lives of people with disability and too-broad definitions of prohibited supports may capture those developments.

Unilaterally banning certain classes of items carries a large risk of unintended consequences and should only be introduced in very limited circumstances and in a highly targeted fashion. This is crucial to preserving choice and control:

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<sup>11</sup> Explanatory Memorandum, Back on Track Bill, 4.

<sup>12</sup> [2024] AATA 805 (19 April 2024).

<sup>13</sup> *MKKX and NDIA*, [80].

*It is concerning that the Rules would be able to 'rule out' providing supports that have previously been found by the AAT or Federal Court to satisfy the threshold of 'reasonable and necessary in some cases. - This is likely to result in more confusion rather than less for participants, particularly those who would no longer be able to access supports which they currently receive as 'reasonable and necessary supports' if Rules are created that explicitly exclude currently funded supports. The overall impact of this change would be promoting more uncertainty rather than less as to how participants will be able to continue accessing the supports which they currently rely on.*

Controlling supports in this way may also direct people to using more expensive supports, like a support worker instead of a cheaper piece of technology that is a once-off payment. For example, someone on the NDIS isn't able to clean or vacuum their floor as the result of a physical disability. For them, purchasing a robot vacuum cleaner could extend the time between needing to hire someone to support them with the cleaning and means that they can be more independent. A smaller upfront cost here would likely save substantially more over the longer-term, but such a device would likely be caught up in a broad definition of 'white good' flagged by the explanatory memorandum. This section could end up costing the scheme more over the longer-term.

Future rules in this section that attempt to regulate the distinction between 'NDIS Supports' and 'Foundational Supports' need to be conscious of the practical experience of people asked to access supports in this way. People should not be ruled out from accessing supports through the NDIS if state-based responses are still being implemented, developed, or are not available to them in a local area. The NDIS Review noted the significant development and investment this will require, noting that these changes could be expected to take 5 years<sup>14</sup> and will be front-of-mind for people in rural and remote areas and those living in areas with very low service provision. This is crucial to ensuring that no one is left behind by these changes, as flagged by Disability Representative Organisations in the introduction of this submission. This is also discussed in relation to the APTOS principles used as a stand-in further below.

### **Recommendations:**

17. Section 10 of the Bill be amended to include a requirement that people with disability must play a leadership role in the design and implementation of rules enabling or limiting the use of certain supports under the scheme.
18. A broad ban on white goods and appliances, as discussed by the Explanatory Memorandum, should not form part of the Rules.
19. Add a provision to section 10 stating that rules cannot be made prohibiting certain supports from the scheme with the intent that they be provided through state-based systems or 'Foundational Supports' unless they are practically available to people.

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<sup>14</sup> NDIS Review, 'Foundational Disability Supports for Every Australian with a Disability' <<https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis/part-one-unified-system-support-people-disability-0>>.

## Initial principles create uncertainty - Section 10 (1)(a)

The first part of the new definition in section 10 (1)(a) looks to implement a range of criteria drawn from the United Nations Convention on the Rights of Persons with Disabilities ('CRPD'). In the explanatory memorandum it is stated that these criteria are included to ensure that the Federal Government has constitutional authority to provide these funds to users of the scheme.

In initial discussions around the bill, the Public Interest Advocacy Centre and others have noted how this section is selective with its implementation of the CRPD principles.<sup>15</sup> The definition in section 10 does not include, for example, any reference to work and employment despite that being a clear focus of the CRPD.<sup>16</sup> Services or supports that help support a person's participation in the community must also now (at the same time) prevent isolation or segregation.<sup>17</sup> Full implementation of the treaty is not achieved in this process, and the application of these principles in isolation does not help to clarify the state of what will be or won't be funded by the NDIS.

There is also the significant potential for confusion around the inclusion of 'health services'<sup>18</sup> and 'rehabilitation'<sup>19</sup> considering the development of Foundational Supports and the ongoing relationship between the NDIS and services funded by state health bodies. These new categories will likely narrow the availability of many needed supports and this section should be revised to incorporate the full scope of supports that people with disability use.

### **Recommendation:**

20. Amend section 10 (1)(a) to preserve the flexibility and breadth of the different types of disability supports that people require. Where the government seeks to implement principles about supports from the CRPD, those should be implemented in full.

## APTOS Principles are not a suitable stand-in while rules developed

While most of the Bill is dedicated to establishing a new framework for plans, there are a couple of concerning amendments relating to the current framework under section 34 of the Act.

The new NDIS supports definition would also be implemented through the replacement of subsection (f) with a requirement that all supports that form part of a plan are NDIS Supports under the definition in section 10. Further development of the rules is required, as flagged above, but in the meantime the Bill proposes to rely on the 'Applied Principles and Tables of

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<sup>15</sup> Public Interest Advocacy Centre, Explainer: Getting the NDIS Back on Track Bill No. 1 (18 April 2024) <<https://piac.asn.au/2024/04/18/explainer-getting-the-ndis-back-on-track-bill/>>, 4.

<sup>16</sup> PIAC, Explainer, 5.

<sup>17</sup> Ibid.

<sup>18</sup> Back on Track Bill, cl 14, s 10 (1)(iv).

<sup>19</sup> Back on Track Bill, cl 14, s 10 (1)(v).

Support' (APTOS) agreement reached between the Federal Government and States in 2015.<sup>20</sup>

The APTOS principles were a regular policy discussion point in early years of the NDIS and were occasionally utilised by the Agency in arguing cases before the AAT. The Agency would regularly argue that particular supports were the responsibility of the State and Territories under s 34 (1)(f) to limited effect, so it is concerning that those principles could now form an integral part of NDIS supports. In a case before the AAT then Deputy President Rayment stated that the principles operate as a “high level, general, statement about what the health principles are responsible for and make no allowances for gaps in the system.”<sup>21</sup> The decision in *Burchell* stressed need for there to be a practical assessment of the circumstances and the availability of supports available to the participant.<sup>22</sup> Other submissions before this committee will also likely note the existence and implications of other material to shape the Federal/State divide, such as the *Supports for Participants Rules*.

This view, while disputed in other decisions made by the Tribunal, is preferable as it offers a check on assertions made by the NDIA and earlier policy positions that do not reflect the current landscape that is being experienced by participants. It also encourages planners and the Agency to support people to find practical solutions and avoids people with disability falling between systems when services will not be available.

Embedding a vague and regularly disputed list of what services are appropriately delivered by what level of government inserts high-level disputes about federation splits into everyone's NDIS plan. It will lead to people with disability not being able to access the supports they need. The approach outlined in the legislation would be a convoluted approach to resolving matters, re-litigate case law developed at the AAT and do little to clarify what a person can expect from their NDIS Plan. This approach would lead to people with disability being unable to access the supports they require.

#### **Recommendations:**

21. That the bill is amended to remove the application of NDIS support definition in subsection 34 (f) to 'old framework' plans, remove the APTOS tables from s 124, and ensure that the new definition only applies to new framework plans in sections 32C-32L. This should also extend to the enforcement sections of the Bill in section 46.
22. Ensure that the current framework of existing plans continues until rules are developed and foundational supports are developed, established, and available to people with disability.

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<sup>20</sup> Back on Track Bill, part 3, s 124 (2)(b).

<sup>21</sup> *Burchell and NDIA* [2019] AATA 1256 (4 June 2019), [52].

<sup>22</sup> *Ibid.*

## Shift away from whole of person approach for current plans – section 34 (1)(aa)

The Minister in his second reading speech said that this Bill would shift the scheme to a whole of person approach and would do away with primary and secondary disabilities.<sup>23</sup> However the Bill, in its current form, would implement a provision that limits the supports the person receives as strictly for the impairment for which they were given access to the NDIS. This is problematic as many people with disability have a number of co-occurring disabilities. Some of these disabilities may be identified after the point of access.

The introduction of section 34 (aa) states that supports can only be funded in connection with an impairment that meets the disability or early intervention requirements. This issue regarding attribution has been a complex part of the scheme for some time but the implementation in this bill is unduly restrictive.

This section may mean that people may be continually expected to argue access requests each time a particular support is requested. For example, many people applied for the NDIS on a diagnosis that gave them the best chance of meeting access requirements, rather than go down the often expensive and unnecessary steps to establish a case for other impairments that may also substantially affect them. Their access application may also have taken place some years ago, and their circumstances and the impact of their disability may be substantially different.

Every time that there is a possibility that a support might relate to another impairment than the one listed it would be open for the Agency to ask the person to go through the administratively burdensome process of proving access for further conditions just to establish a support is reasonable and necessary.

There is also no clear legal mechanism for further impairments to be lodged or noted against the section 24 or 25 criteria once a person is on the Scheme to mitigate this. Both sections refer exclusively to access matters that are settled for a person once they meet the criteria. The only practical way for a legal re-assessment of eligibility criteria to take place is through the revocation procedures in section 30. There are some improvements in the current Bill which would require more detailed explanations for the reasons why they were granted access to the scheme in new framework plans,<sup>24</sup> but this does not extend to plans under the current framework.

Without a clear way for people to add or amend the impairments for which they were entitled to access the scheme, there is a very significant risk that the amendments to section 34 will mean people need to establish that additional impairments meet access criteria each time

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<sup>23</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2024, 24 (Bill Shorten, Minister for the NDIS).

<sup>24</sup> Back on Track Bill, cl 36, s 32D (2)(c).

they make requests for funding in their plan. Similarly to the earlier discussion around the introduction of APTOS principles, this is likely to have a significant impact on already stretched review systems, users already having to engage in complicated planning processes and advocacy supports:

*The proposed s 34(1)(aa) conflicts with the NDIS review's "whole-person" approach and the scheme's principles and objectives. This section will allow more people to fall between the gap that exist between NDIS and other services - health, education, employment, etc.*

*The demand for services will absolutely increase. The NDIS Bill proposals seem to make the NDIS boat even smaller when there are no other lifeboats (foundational supports) available. Proposing this Bill at a time when everyone is digesting the DRC and the NDIS reports, including the government, is far from ideal and the community hasn't had the time to fully understand the proposed changes.*

The legal process of attaching certain conditions to certain supports is difficult and complex to implement. It is unlikely an assessor will be able or willing to try to split up support needs based on what condition is driving that need. In its current form the proposed approach is likely to leave people without crucial supports provided by the NDIS. It also increases the administrative burden placed on people using the NDIS and privileges those people who have the legal nous or support to navigate these very complex systems.

Additionally, because the new NDIS Supports definition appears at least in part be used to regulate what supports are funded by the NDIS and what supports will be funded by States as Foundational Supports, there is a real and critical risk that introducing this provision to current plans will leave people without support while those programs are being developed.

Until a clearer picture of the Government's intention in this space is developed, this provision should be removed from the Bill.

**Recommendation:**

23. Remove section 34 (1)(aa) from the current Bill.

# Expanded NDIA Powers Need Significant Limits – Sections 30, 36, 46

## Requests for information have punitive powers for non-compliance

The Bill introduces powers for the NDIA to request information about people's access status<sup>25</sup> or about the supports that they need to be funded in a plan.<sup>26</sup> In the event a person doesn't provide that information within a timeframe, the NDIA has the power to suspend a person's status as a participant<sup>27</sup> or the development of their plan.<sup>28</sup> These are disproportionate and deeply concerning aspects of the current Bill.

In the first instance, the powers to suspend access status or suspend access to a person's current plan should be a measure of absolute last resort and with significant safeguards in place.

The 28-day period for plan-related requests<sup>29</sup> is too short a time to provide or source the information needed to develop a NDIS plan. A minimum of 90 days, which is a timeframe used elsewhere for information requests in the current Act,<sup>30</sup> would be more appropriate, with appropriate scope to approve extensions if people are experiencing difficulties or delays responding to information.

While it may be that the shorter timeframe is intended to reflect the fact that people's plans are regularly reviewed while on the scheme, the shift to longer-term plans under the review should mean that there is more time to get these plans right. The 90-day period more accurately reflects the significance of the decision being made.

Active efforts should also be made by the Agency to reach out to the applicant directly, instead of providing such notices through email, the MyGov portal, or physical mail alone. There is a range of ways in which people interact with the Agency, and many will not have access to emails or other digital technologies that the Agency may rely on to notify people of these actions. Given the significant consequences for non-compliance, there should also be active efforts to connect people with support services such as advocacy or legal aid:

*Many participants may [be] significantly be disadvantaged by being unable to comply e.g. They are homeless, detained, hospitalized, unsupported or unwell. Additionally, if the information is from a third party (e.g. The participant's OT) the timeframe in which the participant complies may be*

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<sup>25</sup> Back on Track Bill, cl 30, s 30 (2)

<sup>26</sup> Back on Track Bill, cl 51, section 36 (3)

<sup>27</sup> Back on Track Bill, cl 30, s 30 (5)

<sup>28</sup> Back on Track Bill, cl 36, s 36 (3)(c)

<sup>29</sup> Back on Track Bill, cl 36, s 36 (3)(a)

<sup>30</sup> NDIS Act, section 26.



*entirely outside their control It is also unclear if the NDIA will provide any support (including financial support) to participants to assist them to respond to this request and meet their obligations for the Act.*

Additionally, because there is an immediate statutory power in the current form of the Bill to take away support, there needs to be an enforceable review timetable to contest these decisions. Should a review not be completed within a short timeframe (7 days), access should be restored to the participant. This is preferred over the current 'deemed decision' approach, where a decision is upheld on the expiry of a review period, because of the significant consequences that could occur when you remove support.

Without changes to these provisions within the legislation, there is a significant risk that participants who are already disadvantaged could lose access to their NDIS funding, simply by failing to be able to respond to requests within 28 days. Similarly, participants whose contact information has changed and therefore do not receive the request for information may be similarly disadvantaged. Additional safeguards are also needed for participants with complex support needs and those who may be experiencing homeless.

#### **Recommendations:**

24. 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.
25. 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.
26. Amend the suspension powers in sections 30 and 36 to stress that these powers should only be used as a measure of last resort (and not as an immediate consequence of non-compliance) and require the Agency to constructively engage with the participant before they are exercised.
27. Include a provision in the participant service guarantee to ensure that decisions relating to the suspension of plans or access requiring a response to internal review requests made in relation to these provisions. If a decision is not made within this time, access to a plan should be immediately restored.
28. Direct referral to an independent disability advocate should take place if the use of these powers is considered.

### **Rules for Plan Management**

The new law also expands the powers the NDIA has to regulate the type of plan managements used in people's plans. Under section 43, the Agency can dictate the particular plan management method used in a person's plan if they are satisfied that there is likelihood of physical, mental, or physical harm to the participant or the participant has not complied with acquittal provisions in section 46.



This section appears to codify an emerging practice from the Agency at the Administrative Appeals Tribunal. When reaching an agreement with the Agency where a person has had to continue using plan funds at a rate to maintain a safe level of supports (and a plan extension or renewal has to be triggered to maintain continuity of supports) the Agency will typically make NDIA-management of their plan funds a condition of any offer to resolve. This regularly fails to consider the reasons why a person had to continue to spend at a certain level (often for safety and support continuity) following a sharp reduction in plans.

A simple mechanism to deny flexibility for past 'breaches', as exists in section 43 (2)(2c)(b) (referring to section 46), doesn't allow for consideration of the particular circumstances as to why a person may have had to spend in the manner that they did, or if a person was acting in good faith but made a mistake. Placing these decisions in a more detailed framework about what risks materially exist as opposed to punishment for prior acts would be vastly more effective and less disruptive to users. There should be a focus on education, capacity building, support for decision making, and independent advocacy support to help address errors that have taken place in the past, not just a method to take away control. The criteria in section 46 are also not sufficiently detailed to indicate when a breach has taken place in the past.

Pending the outcome of the Registration Task Force and subsequent Government policy, this section could also have an impact on choice and control for these users. For the time being, people who are placed onto NDIA-managed plans are unable to use unregistered providers. Expanded powers for the Agency to place people on NDIA-managed plans will have a significant negative impact on choice and control.

The Government should also consider separating out these decisions made in relation to plan management as their own reviewable decision under section 99 and 100 of the Act. Because internal and external reviews to challenge these decisions require a person's entire plan to be appealed, other parts such as the amount of a person's funding can also come up for debate. Making plan-management decisions their own reviewable decision would help to improve efficiency of reviews and prevent an entire plan from being contested at review.

**Recommendations:**

29. Further detail the test in section 43 (2)(2C)(a) about what constitutes a 'physical, mental or financial harm' to the participant and stress that this power should only be used as a last resort.
30. Remove section 43 (2)(2C)(b) from the Bill.
31. Amend the bill to include section 43 (2) of the Bill as its own reviewable decision in section 99 of the Act, so that people can contest their plan-management without reviewing the rest of the plan.

## Access changes should be removed from Bill – Sections 24, 25, 27

The Bill also introduces broader rule-making powers relating to access decisions in section 27. It is not clear, however, the intent or utility of these additional provisions beyond the Bill's preference for delegating further substantive work to Rules and Ministerial determinations. Where the current section under the Act allows for rules to be made in relation to the permanence criteria, functional capacity criteria and the mechanics of early intervention supports<sup>31</sup> the new Bill proposes a wider array of powers to replace the current section, allowing rules to be made in relation to methods and criteria for all areas of the assessment.

The Explanatory Memorandum explains that these amendments will be used to implement changes to the early intervention pathway recommended by the NDIS Review.<sup>32</sup>

We note that there are other areas of the NDIS Review that relate to access that have not been implemented as part of this Bill. While it is not clear whether the Government intends to implement those changes (as the community does not yet have a formal response to the NDIS review itself) those changes should be done in primary legislation and subject to the full review of Parliament. It is not clear why broader powers are required beyond those already included in the current Act.

At this stage we cannot support further changes to eligibility criteria through delegated legislation - such changes should be in primary legislation and clearly communicated. This pause on the changes to access should also extend to the inclusion of 'NDIS Supports' as part of the access criteria in sections 24 and 25. These amendments would have the effect of requiring anyone seeking access to the NDIS to demonstrate that they require supports that would meet the new definition of NDIS Supports in section 10, discussed above. Given the substantial concerns around the new definition (and the operation of APTOS principles in the interim) the implementation of this changes could leave people stranded between systems as they fight for different levels of government to provide them support.

As an example, these changes to access could have the effect of preventing people with a psychosocial disability from accessing the scheme. The Australian Psychosocial Disability Collective has stressed how the operation of these changes could force more people to rely on mental health treatment services that only provide a small slice of the "breadth and depth of needed supports provided under the NDIS."<sup>33</sup>

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<sup>31</sup> *National Disability Insurance Scheme Act 2013* (Cth), s 27.

<sup>32</sup> Explanatory Memorandum, Back on Track Bill, 7.

<sup>33</sup> Australian Psychosocial Disability Collective, 'APDC Statement Regarding the NDIS Review and NDIS Bill Amendments 2024' <<https://www.apdcollective.net/apdc-statement-psychosocial-disability>>.

We believe that these should not form part of the assessment criteria for access until they have been appropriately codified and designed with people with disability.

**Recommendations:**

32. Remove access rule amendments in section 27 from the Bill.
33. Remove amendments to section 24 and 25 from the Bill.