

Chapter 2

Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Bills

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024²

Purpose	The bill seeks to make various amendments to the <i>National Disability Insurance Scheme Act 2013</i> , including to introduce a new definition of 'NDIS supports'; expand National Disability Insurance Scheme rules relating to access requirements; empower the CEO to request information and reports relating to the participant; provide for new framework plans; and allow for the imposition of conditions on approval of quality auditors
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives, 27 March 2024
Rights	Adequate standard of living; children's rights; health; privacy; rights of persons with disability; social security; work

2.3 The committee requested a response from the minister in relation to the bill in [Report 4 of 2024](#).³

Definition of NDIS support

2.4 The bill seeks to introduce a new definition of 'NDIS support'.⁴ A support will be an NDIS support if:

¹ See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

² This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Report 5 of 2024*; [2024] AUPJCHR 35.

³ Parliamentary Joint Committee on Human Rights, [Report 4 of 2024](#) (15 May 2024), pp. 24–46.

⁴ Schedule 1, item 14.

- the support meets one or more exhaustive criteria, such as the support will facilitate personal mobility of the person, is a health service that the person needs because of the person's impairment, or is a rehabilitation service;⁵ and
- the support is declared by the National Disability Insurance Scheme (NDIS) rules to be a support that is appropriately funded or provided through the NDIS; and
- the support is not a support declared by the NDIS rules to be a support that is *not* appropriately funded or provided through the NDIS.

2.5 Currently, the NDIS will fund 'reasonable and necessary supports' for participants provided the Chief Executive Officer (CEO) is satisfied of specified matters in relation to the funding of each support.⁶ These matters are set out in section 34 of the *National Disability Insurance Scheme Act 2013* (the Act). This bill seeks to amend section 34 of the Act to insert additional matters that the CEO must be satisfied of in relation to the funding of reasonable and necessary supports. These additional matters are that 'the support is necessary to address needs of the participant arising from an impairment in relation to which the participant meets the disability requirements (see section 24) or the early intervention requirements (see section 25)' and 'the support is an NDIS support for the participant' (as per the new definition that the bill seeks to introduce).⁷

2.6 Additionally, the bill would amend the provision requiring a participant to spend an NDIS amount in accordance with their plan to also require that the participant spend money only on NDIS supports.⁸

Summary of initial assessment

Preliminary international human rights legal advice

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

2.7 By defining NDIS supports and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. In doing so, the measure may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living and health. Insofar as the NDIS may be considered a form of social security in that it provides a benefit to people with disability to ensure disability supports and services are accessible and affordable, the

⁵ These criteria are set out in Schedule 1, item 14, new subsection 10(a).

⁶ *National Disability Insurance Scheme Act 2013* (NDIS Act), sections 33 and 34.

⁷ Schedule 1, items 46 and 47, new paragraphs 34(1)(aa) and (f).

⁸ Schedule 1, item 75.

measure would also engage and may limit the right to social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

2.8 The Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disability are guaranteed all human rights without discrimination, including those rights set out in other human rights treaties. Of particular relevance to this measure are the rights to live independently and be included in the community, the right to personal mobility and the right to habilitation and rehabilitation.⁹ These rights require States parties to take effective measures to facilitate full enjoyment of these rights, including by:

- ensuring that people with disability have ‘access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community’;¹⁰
- ensuring that people with disability have access to ‘quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost’;¹¹
- ‘facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost’; and
- enabling people with disability to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life through organising, strengthening and extending comprehensive habilitation and rehabilitation services and programmes.¹²

2.9 The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.¹³ The CRPD elaborates on the content of this right for people with disability, providing that States parties should take appropriate steps to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs and, for those living in poverty, access to assistance from the State with disability-related expenses.¹⁴ The right to health is the right to enjoy the highest attainable standard of physical and mental health and includes the right to access adequate health care as well as to live in conditions that

⁹ Convention on the Rights of Persons with Disabilities, articles 19, 20 and 26.

¹⁰ Convention on the Rights of Persons with Disabilities, article 19(b).

¹¹ Convention on the Rights of Persons with Disabilities, article 20(b).

¹² Convention on the Rights of Persons with Disabilities, article 20(a).

¹³ International Covenant on Economic, Social and Cultural Rights, article 11.

¹⁴ Convention on the Rights of Persons with Disabilities, article 28.

promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).¹⁵ With respect to people with disability, the CRPD reaffirms that this right is to be guaranteed without discrimination and obliges States parties to provide ‘those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons’.¹⁶ The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty.¹⁷ This right plays an important role in realising many other economic, social and cultural rights, including the other rights engaged by this measure.

2.10 Children have special rights under human rights law taking into account their particular vulnerabilities.¹⁸ Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, including all rights set out above, without discrimination on any grounds.¹⁹

2.11 Under international human rights law, Australia has obligations to progressively realise social and economic rights, which includes aspects of the rights of persons with disabilities (such as the right to access individualised, assessed support services and service facilities) as well as the rights to an adequate standard of living and health, using the maximum of resources available.²⁰ Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.²¹ A retrogressive measure is a type of limitation on an economic or social right.²² If this measure had the effect of reducing the availability of supports for people with disability, it may constitute a retrogressive measure.

2.12 Limitations on the above rights, including retrogressive measures, may be permissible provided that they address a legitimate objective, are effective to achieve

¹⁵ International Covenant on Economic, Social and Cultural Rights, article 12(1). See also UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4].

¹⁶ Convention on the Rights of Persons with Disabilities, article 25.

¹⁷ International Covenant on Economic, Social and Cultural Rights, article 9.

¹⁸ Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

¹⁹ UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

²⁰ See, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [39]–[41].

²¹ See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]–[45].

²² See, for example, UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [38(f)], [44].

(that is, rationally connected to) that objective and are a proportionate means to achieve that objective. In this context, the Committee on the on the Rights of Persons with Disabilities has stated that ‘the State is obliged to demonstrate that such [retrogressive] measures are temporary, necessary and non-discriminatory and that they respect its core obligations’.²³

Committee's initial view

2.13 The committee noted that by introducing a definition of NDIS support and allowing NDIS rules to potentially narrow the scope of that definition, the measure may have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants. To the extent that this results in an adverse impact on participants’ independence and quality of life, the measure would engage and may limit the rights of persons with disability as well as the rights to an adequate standard of living, health, social security and, to the extent that the measure applies to children, the rights of the child. The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia regarding the compatibility of this measure with these rights.

2.14 The full initial analysis is set out in [Report 4 of 2024](#).

Minister's response²⁴

2.15 The minister advised:

(a) of those items listed in the explanatory memorandum as not qualifying as NDIS supports, including holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods, which items, if any, are currently funded through the NDIS

Funding provided under the National Disability Insurance Scheme (NDIS) may only be used for supports that are constitutionally supportable and appropriately funded by the NDIS. In order to be capable of being funded under the NDIS, the support or services must be needed by a participant as a result of their disability. Currently those supports must be 'reasonable and necessary' and meet the criteria under section 34 of the *National Disability Insurance Scheme Act 2013* (the Act).

²³ UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

²⁴ The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The minister also provided information in relation to measures that the committee did not seek further information. The response is available in full, including in relation to these other measures, on the committee's [webpage](#).

The items listed in the explanatory memorandum are items that are not intended to be funded by the NDIS. However there have been instances where NDIS funds have been used to purchase items or supports that are not appropriately funded under the NDIS such as those listed in the explanatory memorandum. While in some instances this has been a purposeful misuse of NDIS funding, for the most part it arises as a result of a misunderstanding of what is appropriately funded by the NDIS.

It is clear that things such as holidays and online gambling are not appropriately funded by the NDIS. However, there are situations where it is less clear for a participant. For example, standard household appliances and whitegoods are not appropriately funded by the NDIS as they are everyday items and do not relate to a person's disability. However, if a person has a need for a particular appliance as a result of their disability and they otherwise would not require that appliance, then it may be an NDIS support for that person. For example, for a person with dysphasia who experiences difficulty swallowing, a doctor may recommend a soft food diet for which a blender may be purchased using NDIS funding.

Funding provided under the NDIS is not income support or a social security payment that can be used to purchase any item or service a person could spend their own money on. It is specifically and directly intended to obtain supports that a participant needs as a result of their disability to allow them to realise their full potential for physical, social, emotional and intellectual development, as well as participate in and contribute to social and economic life.

This new definition of NDIS supports will provide clarity and certainty for people with disability when selecting their supports but it does not change the types of supports that have always been appropriate to purchase with NDIS funding. The overarching test will remain whether a person has a need for the support as a result of their disability, and whether the support is most appropriately funded by the NDIS.

(b) if a support that is currently funded through the NDIS does not meet the new definition of NDIS support (for example the item is declared by NDIS rules to be a support that is not appropriately funded through the NDIS), will that support be taken away from an existing participant or no longer funded

Any item that has already been purchased or provided to a participant will not be taken away from a participant. However, if a participant is using funds to obtain supports that should not be provided by the NDIS (and are therefore not NDIS supports), they will no longer be able to use NDIS funding to continue to obtain those supports.

It is important to note this is not about denying people with disability supports they have a genuine need for as a result of their disability. It is about ensuring that Commonwealth expenditure has a constitutional basis and that NDIS funding is used for the purpose for which it is intended. For

example, NDIS funding should not be used for pharmaceuticals and medication funded through the health system or the pharmaceutical benefits scheme.

This is not a retrogressive measure. Any supports that a person may no longer have access to under the NDIS will be supports that should never have been purchased using NDIS funding. Clarifying the existing boundaries of the NDIS is a legitimate objective in implementing this definition.

(c) whether there is flexibility to take into account a participant's individual support needs in assessing whether a support meets the definition of an NDIS support

The definition of NDIS support is necessarily individualised. What is an NDIS support for one person, may not be an NDIS support for another. The test is whether a person has a need for the support as a result of their disability. For example, a participant who does not experience impacts on their mobility as a result of their disability will not require mobility aids.

There will be items that will never be an NDIS support for any participant, such as online gambling however in general, the approach is entirely needs based and therefore specific to each individual participant.

(d) why is it necessary to enable the definition of NDIS support to be narrowed by way of NDIS rules (as per subsections 10(b) and (c))

As the Committee has identified, the new definition of NDIS support serves two purposes:

- It makes clear the constitutional basis for the new budget setting framework recommended by the *Independent Review into the National Disability Insurance Scheme* (NDIS Review), and helps to clarify and identify the constitutional basis of the NDIS as a whole.
- It assists participants and the disability community to understand what is (and always has been) capable of being funded by the NDIS having regard to intergovernmental agreements and constitutional considerations.

The constitutional boundaries of what the NDIS may fund are far broader than those that are appropriately funded by the NDIS. Other Commonwealth and State and Territory systems and programs, such as Medicare and the State and Territory health systems are responsible for funding a range of supports for people with disability that could be constitutionally supported. It is necessary for these kinds of supports to be excluded from what may be funded by the NDIS.

The NDIS Act currently limits available supports to those that are reasonable and necessary for the particular participant. This limitation means the responsibility of identifying constitutionally valid supports, and supports that are appropriately funded by the NDIS, lies with the National Disability Insurance Agency (NDIA).

Once the new budget-based planning framework commences, participants will no longer receive funding in relation to specific reasonable and necessary supports. Instead, participants will receive a flexible budget (along with a limited number of identified supports that will be stated in their plan). Without rules clarifying what may be NDIS supports, the onus would be on a participant to identify whether supports are lawfully (constitutionally valid) or appropriately funded by the NDIS.

Requiring the Minister to make NDIS rules specifying what is an NDIS support puts the onus of identifying what can be funded by the NDIS in law, rather than the participant. The rules will make it much clearer for participants about what supports can, and cannot, be purchased using funding under their plan. This will also assist participants to understand what supports may more appropriately be funded and provided through other service systems so they are able to access those supports through alternative means and use their funding for appropriate disability supports.

Concluding comments

International human rights legal advice

2.16 It is noted that following the committee's preliminary analysis, a number of amendments to the bill were agreed to, including in relation to this measure.²⁵ The following concluding comments first deal with the minister's response in relation to the bill as it was originally introduced and then consider the amendments that are relevant to this measure, particularly the substituted definition of NDIS support.

2.17 As noted in the preliminary analysis, the measure pursues the legitimate objective of providing greater clarity as to what supports are to be funded by the NDIS and the measure appears to be rationally connected to that objective. The key question is whether the measure is proportionate. A relevant consideration in this regard is the breadth of the measure and whether there is sufficient flexibility to treat different cases differently. While the first criterion of the definition of NDIS support was drafted in relatively broad terms and thus may have covered a wide range of supports, the measure would have also enabled the NDIS rules to narrow the scope of supports that would be funded by the NDIS.²⁶ For example, the explanatory memorandum states that 'things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports'.²⁷ As to whether these items are currently being funded by the NDIS and if so, whether they would be consequently taken away from an existing participant if they were to no longer meet the new definition of NDIS support, the minister advised that some of these items have been funded by the NDIS

²⁵ The committee's preliminary analysis in [Report 4 of 2024](#) was tabled on 15 May 2024 and 29 Government and 1 Crossbench amendments to the bill were agreed to on 5 June 2024.

²⁶ Schedule 1, item 14, new subsections 10(b) and (c). See explanatory memorandum, p. 3.

²⁷ Explanatory memorandum, p. 4.

– most often as a result of a misunderstanding of what is appropriately funded by the NDIS. However, the minister stated that these items are not intended to be funded by the NDIS. The minister elaborated that while standard household appliances and whitegoods are generally not appropriately funded by the NDIS, there may be some situations where a person has a need for a particular appliance as a result of their disability. For example, a person with dysphasia who experienced difficulty swallowing and is recommended a soft food diet may use NDIS funding to purchase a blender. The minister emphasised that the new NDIS definition would provide clarity and certainty regarding available supports but it would not change the types of supports that have always been appropriate to purchase with NDIS funding. The minister clarified that if an item has already been purchased or provided to a participant through the NDIS, the measure would not result in that item being taken away. However, if a participant is using NDIS funds to obtain supports that should not have been provided by the NDIS and would not meet the new definition of NDIS supports, the participant would not be able to continue using NDIS funding to obtain those supports. The minister stated that the measure is not retrogressive as any supports that a person may no longer have access to under the NDIS would be supports that should never have been purchased using NDIS funding.

2.18 As to whether there is sufficient flexibility to take into account a participant's individual support needs in assessing whether a support should be provided, the minister stated that the definition of NDIS support is necessarily individualised, and the test is whether a person has a need for the support as a result of their disability. The minister stated that there will be some items that will never be an NDIS support for any participant, however generally the approach is entirely needs based and therefore specific to each individual participant.

2.19 As noted above, while the first criterion of the definition would have afforded some flexibility to take into account the needs of individual participants, such as whether the support is necessary to support the person to live and be included in the community, it is not clear that the other criteria of the definition would be similarly flexible (that is, that the support is declared to be a support that is or is not appropriately funded by the NDIS). While the minister's response acknowledged that in some situations a participant may need a standard household appliance as a result of their disability and may therefore use NDIS funding to purchase the appliance, if household appliances were declared by the NDIS rules to be supports that are not appropriately funded through the NDIS, it does not appear that an item such as a blender would be funded by the NDIS as it would fail to meet the new definition of NDIS support. In this way, the measure, as originally introduced, does not appear to contain sufficient flexibility to take into account the individual circumstances and support needs of participants.

2.20 Further, this lack of flexibility appears to be inconsistent with the approach recommended by the NDIS Review. As noted in the preliminary analysis, the NDIS Review recommended redefining the concept of reasonable and necessary supports

as ‘the total amount of funding determined to meet the support needs of a participant’. This ‘whole-of-person reasonable and necessary budget should be based primarily on a participant’s supports needs and intensity’ and ‘should be sufficient to cover the amount and type of support needed to enable the participant to participate in an inclusive life’.²⁸ The NDIS Review recommended that the amount and type of supports be determined through a structured needs assessment, undertaken by a Needs Assessor (who would be a representative of the National Disability Insurance Agency (NDIA)).²⁹ The total cost of supports recommended by the Needs Assessor would then be translated into a budget that could be used flexibly by the participant to meet their needs.³⁰ Having regard to the NDIS Review’s emphasis on focusing on the whole person, their circumstances and their support needs, it is not clear how introducing a more prescriptive definition of NDIS supports without sufficient flexibility to take into account a participant’s individual support needs—the result potentially being a reduction in the supports available for people with disability—is consistent with the NDIS Review’s recommendations.

2.21 Another relevant factor in assessing proportionality is whether any less rights restrictive alternatives could achieve the same stated objective. As to the necessity of allowing NDIS rules to further narrow the definition of NDIS support, the minister advised that once the new budget-based planning framework commences, participants will receive a flexible budget and the NDIS rules will help participants understand what supports can and cannot be purchased using funding under their plan. The minister stated that requiring the minister to make NDIS rules specifying what is an NDIS support puts the onus of identifying what can be funded by the NDIS in law, rather than on the participant. Without the NDIS rules clarifying what may be NDIS supports, the onus would be on a participant to identify whether supports are lawfully or appropriately funded by the NDIS. While it is important that the measure does not result in participants shouldering the burden of identifying what supports may be lawfully funded through the NDIS, this justification does not address whether any less rights restrictive alternatives could achieve the same stated objective. For instance, the NDIS Review’s ‘whole-of-person reasonable and necessary budget’ approach may be less likely to disproportionately limit the rights of participants.

Subsequent amendments to the measure

2.22 On 5 June 2024, government amendments to this measure were agreed to in the House of Representatives. In particular, section 10 of the bill was omitted and

²⁸ NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.3, p. 92.

²⁹ NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.3, p. 92 and action 3.4, p. 93.

³⁰ NDIS Review, *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme*, [Final Report](#) (2023) Recommendation 3, action 3.4, p. 93.

substituted with a revised definition of NDIS support. This revised definition provides that a support is an NDIS support if it is declared as such by the NDIS rules.³¹ Before making these NDIS rules, the minister must be satisfied that the support is appropriately funded or provided through the NDIS.³² Additionally, the declaration of the support in NDIS rules must implement Australia's obligations under the CRPD or any other international agreement and/or enable the provision of sickness benefits.³³ Further, the revised definition provides that NDIS rules may declare that a support is not an NDIS support and before making such rules, the minister must be satisfied that the support is not appropriately funded or provided through the NDIS.³⁴ The supplementary explanatory memorandum states that the revised definition responds to concerns about a lack of clarity in the drafting of the original provision, which would have required participants to undertake a complex analysis of whether a support may be considered an NDIS support for them.³⁵ The supplementary explanatory memorandum states that the revised definition is more accessible.

2.23 The concerns outlined above with respect to insufficient flexibility remain applicable to the revised definition. This is because the revised definition removes the first criterion of the original definition, which appeared to provide some flexibility to consider the individual circumstances and support needs of participants. The revised definition effectively leaves all the details of what is and what is not an NDIS support to future NDIS rules.³⁶ It is not clear whether these future NDIS rules would contain exceptions or afford the NDIA the discretion to consider the individual needs and circumstances of participants. For example, if a support is not declared to be an NDIS support or is declared to be a support that is not an NDIS support, it is not clear whether a participant may nevertheless use NDIS funding to obtain that support if it was otherwise demonstrated that they needed that support as a result of their disability. It also remains unclear that this approach is necessarily the least rights restrictive.

2.24 In conclusion, while the measure pursues a legitimate objective and would be rationally connected to that objective, it does not appear to contain sufficient flexibility to ensure that any limitation on rights is proportionate in each case. For those participants who may lose access to supports, the potential interference with

³¹ Government amendment sheet SK113, item (5), substituted subsection 10(1).

³² Government amendment sheet SK113, item (5), substituted subsection 10(2).

³³ Government amendment sheet SK113, item (5), substituted subsection 10(3).

³⁴ Government amendment sheet SK113, item (5), substituted subsections 10(4) and (5).

³⁵ Supplementary explanatory memorandum relating to sheet SK113, p. 3.

³⁶ It is noted that the Senate Standing Committee on the Scrutiny of Bills regularly raises concerns if significant matters (such as this) are left to delegated legislation, see the committee's Guidelines on scrutiny principle (iv): [Inappropriate delegation of legislative powers](#).

rights may be significant. However, as much will depend on how the NDIS rules are drafted, it is not possible to finally conclude on the permissibility of such limitations.

Committee view

2.25 The committee thanks the minister for this response. The committee considers that to the extent the measure would have the effect of reducing the type of supports that will be funded by the NDIS and thus available for participants, it would engage and limit the rights of persons with disability as well as the rights to an adequate standard of living, health and social security. Additionally, to the extent that the measure applies to children, the rights of the child would be engaged and possibly limited.

2.26 The committee considers that the measure pursues the legitimate objective of providing greater clarity as to what supports are to be funded by the NDIS and notes that the NDIS Review identified this as an area in need of reform. As to proportionality, the committee notes the minister's advice that those participants who have already purchased or been provided with an item through the NDIS will not have that support taken away. The committee considers this would assist with the proportionality of the measure with respect to those participants.

2.27 However, the committee notes that if a participant is using funds to obtain supports that would not be classified as NDIS supports (as per the new definition), they will no longer be able to use NDIS funding to continue to obtain those supports. In such cases, the committee considers the potential interference with rights to be more significant. The committee considers that, depending on how the NDIS rules are drafted, there is a risk that the measure may not be sufficiently flexible to ensure that any limitation on rights is proportionate in each case. This concern applies to both the measure as it was originally introduced and the revised version.

2.28 The committee notes that as part of its usual scrutiny process, it will scrutinise any future NDIS rules and related legislative instruments for their compatibility with human rights.

Suggested action

2.29 The committee considers the proportionality of this measure may be assisted were future NDIS rules made for the purposes of proposed section 10 to contain sufficient flexibility such that where a support is either not declared to be an NDIS support or is declared to not be an NDIS support, the NDIA may nevertheless exercise discretion to approve the provision of that support through the NDIS if the participant has demonstrated a need for the support as a result of their disability.

2.30 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.31 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Requests for information

2.32 The bill seeks to expand the circumstances in which the CEO of the NDIA may request information and reports from a participant, including for the purposes of:

- deciding whether or not to revoke the participant's status as a participant in the NDIS;³⁷
- deciding whether or not the participant meets the early intervention requirements or disability requirements;³⁸
- undertaking an assessment for a participant;³⁹
- preparing a statement of participant supports for a participant,⁴⁰ and
- deciding whether to approve a statement of participant supports for a participant.⁴¹

2.33 Under the current Act, the CEO may only request information and reports for the purposes of preparing a statement of participant supports, or deciding whether to approve a statement of participant supports.⁴²

2.34 As to what information may be requested, the CEO may request that the participant, or another person, provide information that is reasonably necessary for the purpose of making the particular decision, such as deciding whether the participant meets the access requirements, or whether their status should be revoked. The CEO may also request that the participant undergo an assessment and/or undergo, whether or not at a particular place, a medical, psychiatric, psychological or other examination conducted by an appropriately qualified person and provide the report of that assessment or examination to the CEO in the approved form.⁴³ The requested information must be returned to the CEO within 90 days, or a longer period if specified. Once the information is received, the CEO may request more information or make the relevant decision. The consequence for not complying with a request for information will depend on the context in which the information is requested. For example, in the context of a revocation or assessment decision, the CEO may revoke a participant's status without receiving the information unless the CEO is satisfied that it was reasonable for the person to not have complied with the request.⁴⁴ If the CEO requests information for the purposes of undertaking an assessment or preparing or

³⁷ Schedule 1, item 30 and item 31, new paragraph 30A(1)(c).

³⁸ Schedule 1, item 31, new section 30A.

³⁹ Schedule 1, item 52.

⁴⁰ Schedule 1, item 52.

⁴¹ Schedule 1, item 52.

⁴² NDIS Act, subsection 36(1).

⁴³ See e.g. Schedule 1, item 20, subsection 30(3).

⁴⁴ Schedule 1, item 30, subsections 30(5) and (6) and item 31, subsection 30A(7).

approving a statement of participant supports and that information is not received within the specified timeframe, the CEO must suspend the preparation of the new framework plan unless the CEO is satisfied that it was reasonable for the person to not have complied with the request, in which case a further request may be made.⁴⁵

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.35 By allowing the CEO to request that a participant undergo an assessment or examination and provide personal information, including sensitive medical information, to the CEO, the measures would engage and may limit the right to privacy.⁴⁶ The right to privacy prohibits arbitrary or unlawful interference with a person's privacy.⁴⁷ It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. The right to privacy also includes the right to personal autonomy and physical and psychological integrity.⁴⁸ The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

Committee's initial view

2.36 The committee noted that allowing the CEO to request information and reports from a participant, including sensitive medical information, engages and may limit the right to privacy. The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia to assess the compatibility of this measure with this right.

2.37 The full initial analysis is set out in [Report 4 of 2024](#)

⁴⁵ Schedule 1, item 54, paragraph 36(3)(b).

⁴⁶ If, as a consequence of the request for and provision of information, a participant's status was revoked, this may affect other rights of the participant. As a result, the measure may also indirectly limit the rights of people with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the participant was a child). As this measure does not directly relate to those provisions in the NDIS Act that allow for revocation, this entry does not address these more indirect human rights implications.

⁴⁷ International Covenant on Civil and Political Rights, article 17; Convention on the Rights of Persons with Disabilities, article 22; and Convention on the Rights of the Child, article 16.

⁴⁸ See generally UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4], and *MG v Germany*, UN Human Rights Committee Communication No. 1428/06 (2008) [10.1].

Minister's response⁴⁹

2.38 The minister advised:

(a) what circumstances would trigger the CEO considering whether to revoke a participant's status under section 30 of the Act

Subsection 30(1) of the Act will not be changed in any way by the Bill. It currently allows the CEO to revoke a participant's status if the CEO is satisfied they do not meet the residence requirements or either the disability requirements or the early intervention requirements.

A decision to revoke a participant's status under existing section 30 is discretionary and can only be used when the CEO has evidence a participant no longer meets the residence requirements and either the disability requirements or the early intervention requirements.

The CEO will consider revoking the participant's status under this provision only if there is evidence before the CEO that reasonably suggests the person no longer meets the eligibility criteria. For example, if a participant provides updated medical evidence as part of a plan reassessment which suggests they no longer meet the disability or early intervention requirements, the CEO may consider further whether this is the case and if so, the participant's status may be revoked.

Similarly, if the CEO receives information suggesting a participant has relocated overseas, the CEO would seek information to determine whether or not that is the case, and therefore whether or not the participant continues to meet the residence requirements.

(b) what circumstances are likely to be prescribed for the purposes of proposed section 30A

The intent of proposed section 30A is primarily to operationalise the new early intervention pathway once it is ready to be implemented. NDIS rules made under section 30A are likely to prescribe matters such as the age of a participant, particularly where a child has entered the NDIS due to developmental delay, and the length of time that a participant has been in the Scheme. This will allow for a consideration of whether early intervention supports are working for a participant and identify whether those supports are no longer required, or whether a participant would benefit from receiving different kinds of supports or services under the NDIS and/or other service systems such as universal education.

(c) how likely or frequently would the CEO make a request for information and reports from a participant and why does the bill not provide any limit on how often the CEO could make such requests of participants

⁴⁹ The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The response is available in full on the committee's [webpage](#).

Requests for information under proposed section 30A can only happen at times prescribed in NDIS rules. The CEO will not be able to make requests under section 30A in any other circumstances. Participants and their families and carers will know and be able to anticipate when the CEO will make a request for information under section 30A because it will be prescribed in NDIS rules.

With respect to section 30, the CEO will request information if there is already reasonable evidence that suggests the participant does not meet one of the relevant criteria. There will not be recurring requests unless a participant fails, without reasonable excuse, to comply with earlier requests for information.

It is critical the CEO has the ability to request information in this circumstance, as it will ensure decisions about ongoing access to the Scheme are based on current information and ensure the participant is able to access the most appropriate support to meet their needs. It also gives the participant an opportunity to respond to any potentially adverse information that may have been provided to the NDIA. The information requested must be reasonably necessary for the purpose of considering whether the participant continues to meet the relevant criteria or not. Once that has been established, there may be no need for the CEO to request further information unless there is sufficient information for the CEO to make a decision that the participant no longer meets the access requirements at the time. It is important to note that this would not preclude a person from making any future access requests. There is no limitation on the number of times a person can apply for access to the NDIS.

(d) what types of places could the CEO specify in requesting that a participant undergo an examination (under proposed subparagraph 30(3)(b)(ii))

The type of location is likely to depend on the kind of examination that is being undertaken. For example, a medical examination may be most appropriately undertaken at the premises of a medical practitioner who has appropriate equipment to conduct the examination. Alternatively, if the examination focuses on a person's ability to undertake self-care activities, it may be more appropriate for the examination to occur in the person's home or other place that they spend time in on a day-to-day basis.

Proposed subparagraph 30(3)(b)(ii) is consistent with subparagraph 26(1)(b)(ii), which allows the CEO to request that a prospective participant undergo certain examinations by an appropriately qualified person, whether or not at a particular place.

(e) if the CEO specified a place, whether a participant could choose an appropriately qualified person to undertake an examination even if that person was not able to perform the examination at the place specified

If the qualified person was not able to undertake an examination at the place specified, the NDIA would work with the person to enable a suitable alternative location that would allow the examination to occur.

Concluding comments

International human rights legal advice

2.39 As noted in the preliminary analysis, the measure pursues the legitimate objectives of improving the quality and consistency of NDIA decisions and ensuring decisions are based on current information and appears to be rationally connected to those objectives. The key question is whether the measure is proportionate to achieving those objectives. In this regard further information was sought as to the circumstances in which the CEO would consider whether to revoke or reassess a participant's status (and consequently make a request for information for the purposes of making that decision). The minister advised that the decision to revoke a participant's status is discretionary and can only be made when the CEO has evidence that a participant no longer meets the eligibility criteria. For example, if a participant provides updated medical evidence as part of a plan reassessment that suggests they no longer meet the disability or early intervention requirements, the CEO may consider further whether this is the case and if so, the participant's status may be revoked.

2.40 In relation to reassessment decisions, the circumstances in which the CEO must reassess a participant's status are to be prescribed by NDIS rules. The minister advised that the NDIS rules are likely to prescribe matters such as the age of a participant, particularly where a child has entered the NDIS due to a developmental delay, and the length of time that a participant has been in the NDIS. The minister stated that the reassessment decision will allow for a consideration of whether early intervention supports are working for a participant and identify whether those supports are no longer required, or whether a participant would benefit from receiving different kinds of supports or services under the NDIS and/or other services systems. As to how likely or frequently the CEO would make a request for information, the minister advised that requests with respect to reassessment decisions can only happen at times prescribed in the NDIS rules. With respect to revocation decisions, the minister advised that requests for information will only be made if the CEO already has reasonable evidence that suggests the participant does not meet the eligibility criteria. The minister stated that there would not be recurring requests for information, unless a participant fails, without reasonable excuse, to comply with earlier requests for information. The minister noted that if a participant's status was revoked, they would not be precluded from making another access request as there is no limitation on the number of times a person can apply for access to the NDIS.

2.41 Additionally, subsequent amendments to this measure were agreed to in the House of Representatives that may assist with proportionality. In particular, the amendments provide that the CEO must not request that a participant undergo an

assessment or examination unless they are satisfied that the report of the assessment or examination would provide information that they cannot otherwise reasonably obtain.⁵⁰ The supplementary explanatory memorandum states that:

These amendments will impose a further limitation in that the CEO can only make such requests if there is no other reasonable alternative way of obtaining the information. This limitation will require the CEO to have regard to other reasonable alternatives before making the request for an assessment or examination, for example, whether the participant or another person can provide further information.

These limitations together provide a safeguard to ensure that participants will only be asked to undertake assessments and examinations where it is absolutely necessary for the CEO to make a decision about their ongoing access to the NDIS.⁵¹

2.42 Based on the information provided by the minister, as well as the additional safeguard inserted in the bill by the amendments, it appears that the circumstances in which information may be requested, and thus a participant's right to privacy may be limited, are sufficiently circumscribed. While there is no limit in the bill as to how often the CEO could exercise the power to request information, the requirement that the CEO must only make such requests where they are satisfied that the information cannot be reasonably obtained in an alternative way would appear to go some way to mitigate the risk that a participant would have to repeatedly provide personal information and prove their disability.

2.43 A further consideration with respect to proportionality is the extent to which a participant would be able to exercise control over the assessment process. The minister advised that the types of places that the CEO could specify in relation to an examination would depend on the type of examination. For example, if it was a medical examination, it would be most appropriate for the examination to take place at the premises of a medical practitioner who has appropriate equipment. The minister advised that if the qualified person who the participant chose to undertake the examination was not able to do so at the place specified, the NDIA would work with the person to enable the examination to occur at a suitable alternative location. If this were to occur in practice, this would assist with proportionality and may ensure that a participant's sense of autonomy and control is not lost in the process. However, it is noted that discretionary safeguards are not as stringent as the protection of statutory processes as there is no requirement to follow them.

2.44 These additional safeguards, as well as those provisions that provide some flexibility with respect to the timeframes for compliance with a request for information and safeguard against the CEO making a decision before the participant is able to

⁵⁰ Government amendment sheet PA110, items (2) and (4).

⁵¹ Supplementary explanatory memorandum relating to sheet PA110, pp. 2–3.

comply (if the non-compliance is reasonable),⁵² would appear to be sufficient to ensure that the limitation on privacy is likely to be proportionate.

Committee view

2.45 The committee notes that allowing the CEO to request information and reports from a participant, including sensitive medical information, engages and may limit the right to privacy. The committee considers that the measure pursues the legitimate objectives of improving the quality and consistency of NDIA decisions and ensuring decisions are based on current information and appears to be rationally connected to those objectives.

2.46 Based on the information provided by the minister, the committee considers that the circumstances in which the right to privacy is likely to be limited are sufficiently circumscribed. The committee considers that the measure is accompanied by sufficient safeguards to ensure that the limitation on the right to privacy is proportionate.

Suggested action

2.47 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.48 The committee considers that its concerns have therefore been addressed, and makes no further comment in relation to this measure.

Working out total funding amounts for NDIS participants

2.49 By way of background, the bill seeks to introduce new framework plans, which must include a participant's statement of goals and aspirations and a statement of participant supports.⁵³ The statement of participant supports must, among other things, specify the participant's reasonable and necessary budget.⁵⁴ The reasonable and necessary budget would provide for flexible funding (that is, an amount that may be flexibly spent on NDIS supports) and/or funding for a particular stated support or a particular class of stated supports (that is, an amount that must be spent on specific high-cost items such as assistive technology).⁵⁵ Whether a participant is entitled to flexible funding and/or funding for stated supports would be based on the needs assessment report for the plan (which would be prepared following an assessment of

⁵² See Schedule 1, item 30, new subsection 30(6) and item 31, new subsection 30A(7) and explanatory memorandum, p. 9.

⁵³ Schedule 1, item 6 and item 36, new subsection 32A(1) and 32D(1).

⁵⁴ Schedule 1, item 9 and item 36, paragraph 32D(2)(a).

⁵⁵ Schedule 1, item 36, new sections 32E–32G.

the participant's needs for supports in respect of the impairments for which they gained access to the NDIS).⁵⁶

2.50 Proposed section 32K would specify how the total funding amount for flexible funding and/or funding for a stated support in a participant's plan must be worked out. In particular, it would require that the total funding amount be worked out by applying the information in the needs assessment report and would allow the minister to determine, by legislative instrument, methods for working out a total funding amount.⁵⁷ In making any such determination, the minister must have regard to certain principles, including that people with disability should be supported to receive reasonable and necessary supports, and the need to ensure the financial sustainability of the NDIS.⁵⁸ Likewise, the minister must have regard to these same matters in making any determinations with respect to assessments of participants' need for supports, such as the assessment tools that must be used or certain requirements for undertaking assessments.⁵⁹ It is noted that the financial sustainability of the NDIS is not currently a specific matter that must be taken into account when assessing a participant's need for supports or approving funding. Rather, the concept must be considered more generally in giving effect to the objects of the Act.⁶⁰

Summary of initial assessment

Preliminary international human rights legal advice

Rights of persons with disability; rights to an adequate standard of living, health and social security; and rights of the child

2.51 By requiring that the minister have regard to the financial sustainability of the NDIS in determining (by way of legislative instrument) matters relating to working out total funding amounts and assessing participants' need for supports, there appears to be a risk that the measures may result in fewer supports being approved and funded for participants. If this were the case, the measures may have an adverse impact on participants' independence and quality of life, and so would engage and may limit the rights of persons with disability, and rights to an adequate standard of living, health and social security. In addition, as the measures would apply to children and it is not clear that the best interests of the child would be a primary consideration in working out the total funding amount or determining matters relating to assessments, the measures would engage and may limit the rights of the child.

⁵⁶ Schedule 1, item 6 defines 'needs assessment report' as 'the report of an assessment undertaken in accordance with section 32L for the purposes of the plan'.

⁵⁷ Schedule 1, item 36, new subsections 32K(1) and (2).

⁵⁸ Schedule 1, item 36, new subsection 32K(3). The principles referred to are those set out in subsections 4(5) and (11) of the NDIS Act.

⁵⁹ Schedule 1, item 36, subsections 32L(8) and (10).

⁶⁰ NDIS Act, section 3.

2.52 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. If the measures did have the effect of reducing the total funding amounts and supports available for people with disability, they could be considered retrogressive – a type of limitation.

Committee's initial view

2.53 The committee noted that the measures require the minister to have regard to the financial sustainability of the NDIS in determining matters relating to working out total funding amounts and assessing participants' need for supports. To the extent that this results in fewer supports being approved and funded for participants and has an adverse impact on participants' independence and quality of life, the measures would engage and may limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children). The committee sought the advice of the Minister for the National Disability Insurance Scheme of Australia in relation to the compatibility of the measure with these rights.

2.54 The full initial analysis is set out in [Report 4 of 2024](#).

Minister's response⁶¹

2.55 The minister advised:

The method for working out a total amount for a participant's reasonable and necessary budget is to be worked out in accordance with a method determined by the Minister through a legislative instrument (see proposed new section 32K). In making this determination, the Minister must have regard to the following:

- the principle that people with disability should be supported to receive reasonable and necessary supports, including early intervention supports
- the principle that reasonable and necessary supports for people with disability should:
 - support people with disability to pursue their goals and maximise their independence
 - support people with disability to live independently and to be included in the community as fully participating citizens
 - develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment
- the need to ensure the financial sustainability of the NDIS.

⁶¹ The minister's response to the committee's inquiries was received on 30 May 2024. This is an extract of the response. The response is available in full on the committee's [webpage](#).

The Committee has asked for further information about the compatibility of the requirement to have regard to the financial sustainability of the NDIS with the above rights. In particular, the Committee has asked for advice on the following:

(a) what is the objective of the measures and how does this objective address a pressing and substantial social or public concern

The need to ensure the financial sustainability of the NDIS is fundamental to giving effect to the Objects of the Act (see paragraph 3(3)(b) of the Act). The requirement is also consistent with subsection 209(3) which requires the Minister to have regard to the objects and principles of the Act as well as the need to ensure the financial sustainability of the NDIS when making all NDIS rules, which are the primary form of legislative instrument under the Act.

The NDIS Review supported the proposition that 'a right that cannot be sustained is a right denied' (see page 30 of the NDIS Review Final Report). A critical objective must be that the NDIS is sustainable in the long term so that it can continue to meet the needs of people with disability into the future. There has been substantial social and public concern about the future of the NDIS, including its long-term sustainability and the projected growth of the Scheme. The Bill addresses these concerns by including new measures that will return the NDIS to its original intention and ensure it continues to be available to support Australians with permanent and significant disability for their lifetimes.

It is, therefore, appropriate to have regard to the need to ensure financial sustainability of the NDIS in determining the method for calculating a participant's reasonable and necessary budget under the new planning framework and supporting participants to manage their budget. It is important to note this is only one consideration the Minister is required to make in the context of the determination.

(b) how much weight is to be given to each matter (namely, the principles set out in section 4 of the Act and the financial sustainability of the NDIS) and whether guidance will be prepared to assist the minister in this regard

The Bill does not prescribe the weight to be given to each of the matters mentioned in proposed subsection 32K(3). While it is a matter for the Minister to determine what weight should be given to each consideration, generally equal weight should be given to each.

Specific guidance will not be prepared to assist the Minister in determining how much weight is given to each matter prescribed in proposed subsection 32K(3). It will be a matter for the Minister to consider each matter having regard to appropriate advice and information including consultation and co-design with the disability community.

It is important to note that section 17 of the *Legislation Act 2003* requires a rule-maker to undertake appropriate consultation before making legislative instruments. In particular, subsection 17(2) of the *Legislation Act* provides that in undertaking appropriate consultation, a rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons having expertise in relevant fields and the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

This process will provide opportunities for affected parties to provide input to the Minister which may guide the Minister's consideration of each relevant matter. Details of consultation undertaken in the preparation of a legislative instrument must also be included in the explanatory statement.

(c) whether there is flexibility for the minister to have regard to other matters, such as the best interests of the child

While the Minister is required to have regard to the matters prescribed in subsection 32K(3) when making the determination, there are no limits in relation to any other matters the Minister may choose to have regard to.

As noted above, the Minister will also be required to undertake appropriate consultation before making the instrument, and should have regard to any relevant matters brought up through that process.

(d) whether the measures could result in a participant 's total funding amount being reduced and consequently having supports taken away from them

Under the current planning framework, participants do not receive a 'total funding amount'. They receive a plan that identifies reasonable and necessary supports for them. This may be done with reference to an amount of funding, in practical terms, but the central concept in a plan under the current framework is the provision of specific reasonable and necessary supports rather than an overall funding amount.

The new planning framework will rely on a comprehensive assessment of a participant's needs in order to work out a participant's reasonable and necessary budget. This will be established as an amount of funding a participant can use to purchase the range of supports they need to meet their disability needs. This is a different approach to planning that, for the most part, no longer identifies what reasonable and necessary supports are for the participant. The plan that results from this new process is not comparable with a plan developed under the existing framework.

The key area of reform, consistent with the NDIS Review is that the new planning framework will provide more flexibility so participants can identify supports that best meet their disability support needs. This will not take supports away from participants, but rather give them more autonomy and choice and control about how they select their supports.

(e) what, if any, safeguards accompany the measures to ensure that the NDIS continues to provide sufficient supports to people with disability such that the minimum core obligations with respect to key economic and social rights, including the rights to social security, health and an adequate standard of living, are satisfied

It is important to note that the NDIS is not, and has never been intended to be, a form of social security. The purpose of social security is to provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. The UN Committee on Economic Social and Cultural Rights has stated that social security, through its redistributive character, plays an important role in poverty reduction and alleviation.

The redistributive (and means tested) nature of social security is not consistent with the scope of the NDIS, which provides support to all people with a permanent and substantial disability, or to those who may benefit from early intervention support.

The structure of the Bill ensures that all participants will have access to the supports they require as a result of their disability, in line with Australia's obligations under the CRPD. This is, and always has been, the intention of the NDIS and that will not change under the new framework.

By providing participants with a reasonable and necessary budget that is directly linked to a comprehensive assessment of their needs, the new planning framework will provide participants with sufficient funding for their disability-related needs. This link between funding provided and an assessment of overall needs is an important safeguard for ensuring participants have sufficient funding to access appropriate disability supports.

The Bill also includes a number of safeguards to ensure that participants will have access to supports over a sustained period of time. For example, the Bill introduces the concept of a 'funding period' which essentially releases funding under the participant's plan in set intervals. This ensures that a participant will continue to have access to sufficient funding for disability-related supports throughout their entire plan period.

Additionally, by including requirements to consider the financial sustainability of the Scheme in certain decisions, the Bill safeguards the future of the NDIS ensuring it will be available to provide sufficient supports to people with disability into the future.

(f) what, if any, safeguards are there to ensure the measures are not retrogressive

The Bill introduces a new approach to planning which is more participant-focused and flexible, consistent with recommendations of the NDIS review. Providing participants with a reasonable and necessary budget, including a

flexible budget that can be used to purchase a range of supports chosen by the participant, is an important safeguard against retrogression. Many of the measures in the Bill are focused on moving back to the intention of the NDIS and provide participants with choice and control in the context of a fairer and more consistent approach to decision-making around access and planning for the benefit of people who need access to early intervention or disability supports.

Additionally, the new planning framework will rely on a needs assessment which will be the subject of extensive consultation, technical expertise and deep engagement with the disability community. This will ensure needs assessments are fit-for-purpose and support continuous improvement in planning experiences for all participants in the Scheme.

Concluding comments

International human rights legal advice

2.56 As to the objective being pursued by the measures, the minister advised that ensuring the financial sustainability of the NDIS is fundamental to giving effect to the objectives of the Act. The minister stated that the NDIS must be sustainable in the long term so that it can continue to meet the needs of people with disability into the future. The objective of ensuring the financial sustainability of the NDIS, while important from a policy perspective, may not in itself be sufficient to constitute a legitimate objective for the purposes of international human rights law. There appears to be a risk that the measures could result in the total funding amounts for participants being reduced and consequently fewer supports being provided and, in such cases, would constitute a retrogressive measure. The United Nations (UN) Committee on the Rights of Persons with Disabilities has emphasised that when a State seeks to introduce retrogressive measures, for example in response to an economic or financial crisis, it is 'obliged to demonstrate that such measures are temporary, necessary and non-discriminatory and that they respect its core obligations'.⁶² After acknowledging the importance of disability allowances provided by the State as a way of supporting people with disability and facilitating their full inclusion in the community, the UN Committee cautioned:

States parties must not add to the hardship faced by persons with disabilities by reducing their income in times of economic or financial crisis or through austerity measures that are inconsistent with human rights

⁶² UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [43]. See more generally UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

standards [namely, the minimum core elements of economic and social rights].⁶³

2.57 The minister's response indicates that the measures would not be temporary. As to its necessity, the minister stated that there has been substantial social and public concern about the future of the NDIS, including its long-term sustainability, and the projected growth of the NDIS. The minister stated that the measures in the bill, including these ones, address these concerns by returning the NDIS to its original intention and ensuring it continues to be available to support Australians with permanent and significant disability for their lifetimes. Given the relatively high threshold under international human rights law that must be met in order to justify retrogressive measures, particularly where such measures relate to austerity or ensuring financial sustainability, it is not clear, based on the information provided, that this threshold has been met with respect to these measures. It is therefore not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

2.58 In assessing proportionality, it is relevant to consider how the measures are likely to operate in practice, including the likely weight to be given to each matter identified in the legislation when determining funding. The minister advised the bill does not prescribe the weight to be given to each matter and there will not be specific guidance prepared to assist the minister in this regard. The minister stated that it will be a matter for the minister to determine what weight should be given to each consideration, although generally equal weight should be given to each matter. The minister noted that in making NDIS rules relating to these measures there will be opportunities for consultation with affected parties and this consultation will guide the minister's consideration of each relevant matter. Further, the minister stated that there are no limits in relation to other matters the minister may choose to have regard to, including for example the best interests of the child.

2.59 Without legislative or other guidance to assist the minister in exercising their discretion, there appears to be a risk that greater weight may be given to ensuring the financial sustainability of the NDIS, which could result in fewer supports being assessed as necessary and the total funding amounts being reduced. Where children are involved, while the minister may consider other matters such as the best interests of the child, they are not required to do so by law. As international human rights law requires the best interests of the child to be a *primary* consideration, it follows that the financial sustainability of the NDIS must be a secondary consideration – which is not how the provisions are currently drafted. Indeed, the minister advised that generally equal weight would be given to relevant matters, so even if the minister chose to consider the best interests of the child, it is unlikely that that consideration

⁶³ UN Committee on the Rights of Persons with Disabilities, *General comment No. 5 (2017) on living independently and being included in the community* (2017) [62].

would be given the primacy that it requires under international law. As noted by the UN Committee on the Rights of the Child:

...the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.⁶⁴

2.60 As to whether there are any safeguards to mitigate the risk that the measures may be retrogressive in practice, the minister advised that providing participants with a reasonable and necessary budget, including a flexible budget that can be used to purchase a range of supports chosen by the participant, is an important safeguard against retrogression. If, however, an existing participant was unable to purchase the equivalent level of supports using their new reasonable and necessary budget, it is not clear how the new planning framework itself would operate as a safeguard against retrogression. As to safeguards accompanying the measures to ensure that the minimum core obligations with respect to economic and social rights are met, the minister advised that the new reasonable and necessary budget, which is directly linked to a comprehensive assessment of a participant's needs, will provide participants with sufficient funding for their disability-related needs. The minister stated that other measures, such as the release of funding under the participant's plan in set intervals over a period of time, as well as the requirement to consider the financial sustainability of the NDIS, will ensure that participants will continue to have access to sufficient funding for disability-related supports throughout their entire plan period and into the future.

2.61 Based on the information provided, while the minimum core obligations are likely to be met, there appears to remain a risk that the measures may be retrogressive, depending on how it operates in practice, and it is not clear that there are sufficient safeguards to ensure that the resulting limitations on rights would be proportionate in each case. Further, as there is no requirement to consider the best interests of the child, the measures are unlikely to be compatible with this right.

Committee view

2.62 The committee thanks the minister for this response. To the extent that the measures result in fewer supports being approved and funded for participants and consequently if this had an adverse impact on participants' independence and quality of life, the committee considers the measures would limit the rights of persons with disability, the rights to an adequate standard of living, health and social security as well as the rights of the child (if the measures applied to children).

⁶⁴ UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

2.63 While ensuring the financial sustainability of the NDIS is an important policy aim, given the high threshold that must be met to justify retrogressive measures under international human rights law, the committee considers that it is not clear whether this stated objective would, in itself, be considered legitimate for the purposes of international law. The committee considers that there remains a risk that the measures may be retrogressive in practice, as without any legislative or other guidance, there is a risk that the financial sustainability of the NDIS may be given greater weight than other matters, such as the needs of participants, and there do not appear to be sufficient safeguards accompanying the measures to mitigate this risk. The committee therefore considers that it has not been demonstrated that the proposed limitations on rights would be proportionate in all cases.

2.64 Further, the committee notes that the best interests of the child are not required to be considered. Noting the requirement under international human rights law that, where children are involved, the best interests of the child be a primary consideration, which means that it may not be considered on the same level as all other considerations, the committee considers that the measures do not appear to be compatible with this right.

Suggested action

2.65 The committee considers the proportionality of the measures may be assisted were:

- (d) guidance prepared, in consultation with, and co-designed by, people with disability, to assist the minister in considering and giving appropriate weight to the various matters in proposed subsection 32K(3); and
- (e) the best interests of the child included as a primary matter that the minister must have regard to in making a determination under proposed subsection 32K(2).

2.66 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.67 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Legislative instruments

Social Security (Remote Engagement Program Payment) Determination 2023⁶⁵

FRL No.	F2023L01003
Purpose	This legislative instrument determines the arrangement that is the remote engagement program; the part of that program that is a remote engagement placement; and the rate of payment of a remote engagement program payment
Portfolio	Employment and Workplace Relations
Authorising legislation	<i>Social Security Act 1991</i>
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and Senate on 31 July 2023)
Rights	Adequate standard of living; equality and non-discrimination; just and favourable conditions of work; social security; work

2.68 The committee initially considered, and requested further information in relation to, this legislative instrument in [Report 10 of 2023](#), and published its concluded advice to Parliament in [Report 12 of 2023](#).⁶⁶ The committee did not make a further request for the provision of a response from the minister but did make a series of recommendations to assist with the proportionality of the measure.

Remote engagement program

2.69 This instrument determines arrangements between the Commonwealth and Paupiyala Tjarutja Aboriginal Corporation and the Commonwealth and Ngaanyatjarra Council Aboriginal Corporation, respectively, as the remote engagement program. It also determines the part of that program that is the remote engagement placement and the rate of the remote engagement program (REP) payment (that is, \$190 per fortnight). The remote engagement program is intended to replace the Community Development Program.

2.70 To the extent the measure provides opportunities for job seekers to develop employment skills and facilitates the payment of a supplementary social security

⁶⁵ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Remote Engagement Program Payment) Determination 2023, *Report 5 of 2024*; [2024] AUPJCHR 36.

⁶⁶ Parliamentary Joint Committee on Human Rights, [Report 10 of 2023](#) (13 September 2023), pp. 5–18; Parliamentary Joint Committee on Human Rights, [Report 12 of 2023](#) (15 May 2023), pp. 83–104.

payment, the committee considered that it promotes the rights to work, social security, an adequate standard of living and equality and non-discrimination. However, the committee also considered that these rights may be limited. For example, if work performed as part of the remote engagement program placement was characterised as a form of employment for the purposes of international human rights law, the measure may engage and limit the right to just and favourable conditions of work, noting that the rate of payment is insufficient to amount to fair remuneration. The measure may also engage and limit the rights to social security and an adequate standard of living if the remote engagement program placement is ended and the payment removed on unreasonable grounds.

2.71 The committee considered that the measure pursues a legitimate objective and noted that as the program is still in its trial phase and had not been subject to evaluation, it was not possible to conclude on its likely effectiveness to achieve the stated objective. The committee considered that the measure was accompanied by some important safeguards but remained concerned that a placement may be ended in circumstances that may not always be reasonable. Were this to happen, there would be a risk that the payment may be removed on unreasonable grounds and thus constitute a retrogressive measure that risks impermissibly limiting the rights to social security and an adequate standard of living. The committee also considered, however, that were the supplementary payment to be removed only in circumstances that are reasonable, subject to due process, and provided for in law, the measure would likely be compatible with these rights.

2.72 The committee was also concerned that if the placement were to constitute a form of employment for the purposes of international human rights law, the rate of pay for a minimum 15 hours per week (being \$6.33 per hour) is insufficient to amount to fair and equal remuneration. While the committee noted that the remote engagement program payment is in addition to the participant's other social security entitlements, were the participant to be paid the minimum wage for the hours worked as part of the program, they would receive a higher fortnightly income amount than that offered by the program. As such, if the placement were to constitute a form of employment for the purposes of international human rights law, the committee considered that the measure may not, in all circumstances, constitute a proportionate limitation on the right to just and favourable conditions of work. The committee further considered that if the measure impermissibly limited the above rights, it would also likely constitute unlawful discrimination, particularly with respect to Aboriginal and Torres Strait Islander peoples, as it is not clear that the differential treatment would be based on reasonable and objective criteria.

2.73 The committee considered that the proportionality of the measure may be assisted by:

- amending the *Social Security Act 1991* to remove the maximum rate of pay for the remote engagement program payment, thereby allowing the rate of pay to be greater than \$190 and determined through genuine co-design;
- circumscribing with greater clarity the grounds on which a REP Placement may be ended, including the circumstances in which a REP host may cancel a placement; and
- specifying the duration of the REP Placement in legislation, noting that the longer the placement the more likely it would be considered to be a form of employment.

2.74 The committee finally recommended that the statement of compatibility be updated to reflect the information provided by the minister in *Report 12 of 2023*.

Minister's response⁶⁷

2.75 The minister advised:

I thank the Committee again for their consideration of the Instrument, and for the opportunity to respond in full to the Committee's initial views in October 2023.

I note advice from the Committee Secretariat that the Committee does not require a response to the Report, and that the Instrument is now a concluded matter for the Committee.

As noted in my previous response, the Government has committed to replace the Community Development Program (CDP) with a new program with real jobs, proper wages and decent conditions developed in partnership with First Nations people. The Remote Engagement Program (REP) is a trial that has helped inform the design of the new program.

As at 29 February 2024, there has been very limited uptake of the REP Trial, there are currently no trial participants and no participant has become eligible for a REP payment. The REP Trial and availability of the REP payment will not be extended beyond 30 June 2024.

The Government remains committed to supporting community and real job opportunities for people in remote Australia, including in the Ngaanyatjarra Lands. These employment opportunities will aim to ensure just and favourable conditions of work, in line with the Committee's recommendations.

On 13 February 2024, the Government announced a \$707 million investment in a new Remote Jobs and Economic Development Program that will help close the gap in employment outcomes by creating 3,000 jobs in remote Australia.

⁶⁷ The minister's correspondence was received on 16 May 2024. This is an extract of the response. The response is available in full on the committee's [website](#).

I have asked the National Indigenous Australians Agency to take consideration of the Committee's findings in designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia, which together will replace the CDP.

Committee view

2.76 The committee thanks the Minister for Indigenous Australians for this response. The committee welcomes the minister's request that the National Indigenous Australians Agency consider the committee's findings when designing a new Remote Jobs and Economic Development Program and a new employment service for remote Australia, which would replace the Community Development Program.

Mr Josh Burns MP

Chair