

The Hopkins Centre
Research for Rehabilitation and Resilience

 **Griffith** UNIVERSITY
Queensland, Australia
Law Futures Centre

**Submission to the Community Affairs Legislation Committee Inquiry on the
National Disability Insurance Scheme Amendment
(Getting the NDIS Back on Track No. 1) Bill 2024**

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ARC Discovery Project (ARCDP2001100742) *Adjudicating Rights for a Sustainable National Disability Insurance Scheme*

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About Us

The Law Futures Centre was established in 2015 to produce outstanding scholarship that anticipates, innovates and meets pressing emerging challenges for law and legal institutions in Australia and internationally. Bringing together researchers from law, environmental sciences, international relations, business, health, criminology and humanities, Law Futures Centre members are committed to outstanding collaborative research that harnesses law as a key melioristic tool for shaping a better, more just future.

The Hopkins Centre, established in 2017 and co-located at Griffith University and Metro South Hospital and Health Service, is Queensland's premier research agency examining rehabilitation and resilience for people with disability. With over 200 research affiliates, including both academics and clinicians, The Hopkins Centre's approach to research involves a distinctive coupling of the voice of lived experience with systems and policy analysis. The Hopkins Centre's work transcends traditional disciplinary boundaries to investigate how to drive improved outcomes for people with severe disability through translating research into effective policies and practice.

As academics and researchers from these two Griffith University centres, in drafting this submission we have drawn upon both our individual expertise and our work on a current research project, *Adjudicating Rights for a Sustainable NDIS (2020-2023)*, which is funded by an Australian Research Council (ARC) Discovery Project (ARCDP2001100742) grant. The project is described more fully at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

Summary of Our Submission on the NDIS Back on Track Bill

Our submission to this inquiry concerning the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* ('NDIS Back on Track Bill') focusses primarily on issues related to the determination of supports including reasonable and necessary supports in the NDIS.

We submit that any changes to how the NDIS is implemented and administered should be consistent with the principles of administrative justice, enhance the rights of people with disability and be consistent with the Convention on the Rights of Persons with Disability (CRPD). We also outline below aspects from our submissions to the NDIS Review, which remain relevant to our assessment of the NDIS Back on Track Bill.

In summary, our further specific responses to the NDIS Back on Track Bill are:

1. The proposed s 10, based on concepts in the CRPD, will likely make the concept of supports *more* complex and difficult for participants to interpret. The introduction of s 10 does not resolve the issues which have arisen in relation to the current s 34 definition of reasonable and necessary supports and will likely introduce different areas of legal difficulty and complexity.
2. We support the co-design of rules which make as clear as possible which supports will be funded by the NDIS and which are excluded from funding. However, we also believe that for certain supports there may be a case for rules with a rebuttable presumption.
3. The addition of the new s 34(1)(aa) may not be sufficiently clear and could be read as potentially limiting reasonable and necessary supports to 'primary' disabilities only, which

would restrict funded supports. We note that much may depend on the content and outcomes of the new assessment tool which is to be co-designed.

4. The current requirements of reasonable and necessary supports in s 34, coupled with an additional and different definition and requirement of s 10 'NDIS Support', will likely increase the challenges for decision-makers, participants and the AAT in determining whether a support could be considered reasonable and necessary.
5. A range of difficult and important legal issues in s 34 appear to remain unresolved in the NDIS Back on Track Bill. These include the role of financial sustainability in determining supports pursuant to s 34, and whether there is a discretion for the CEO in s 33 to refuse to fund reasonable and necessary supports which nevertheless satisfy s 34.
6. Transparency will be critical in the development of a reasonable and necessary budget. All algorithms, assumptions, calculations, benchmarks and models must be transparent and understandable to the participant. Without this, it will become extremely difficult for a participant to exercise review and appeal rights on the basis that their reasonable and necessary budget is not sufficient for their needs.
7. The proposed s 32L should be rewritten to include explicit requirements that: a participant has grounds to request a reassessment; the participant will receive a copy of the needs assessment report (existing or replacement) prior to decisions on a budget; and a participant has the right to review the needs assessment report.
8. Embedding alternative trauma informed models of review and appeal into the NDIS Back on Track Bill is an area of reform that has not been considered in the proposed amendments, but in our view is a critical area for urgent reform.

Overview of our Research

Our submission is based on our current research data (including qualitative interview data) relating to NDIS reasonable and necessary support decisions, content analysis of Administrative Appeals Tribunal (AAT) appeals concerning reasonable and necessary supports, as well as broader project engagement with NDIS stakeholders, NDIS participants including those who have sought review of supports at the AAT, review of public submissions to many previous government inquiries relating to the NDIS, and on our submissions to the recent NDIS Review. Further details, policy briefs, previous submissions we have made, and our submissions to the NDIS Review in relation to our research are available at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

In summary, the findings of our research in relation to determination of supports in the NDIS include a critical need for improved clarity and transparency of how decision-makers determine reasonable and necessary supports and interpret and apply s 34 NDIS Act criteria for determining support budgets. This is necessary to ensure a rights-based approach and one which fulfils the requirements of administrative justice.

Key findings of our research include:

- ❖ Applying the current legislative processes about determination of reasonable and necessary supports can support very individualised funding for particular participants based on fact determinations. However, it can also involve highly discretionary decision-making where decision makers seek to balance incommensurable values such as choice and control, goals and aspirations, value for money and financial sustainability, and research evidence base vs lived experience of benefit. These are tensions built into the NDIS legislative scheme from its fruition which complicate the operationalisation of decision-making.
- ❖ The interview analysis from our on-going research emphasises a lack of transparency about what supports will be funded under the NDIS, and the complexity of the current approach to determining reasonable and necessary supports as an impediment to administrative justice.
- ❖ Our analysis of AAT cases also suggests there is a category of cases where participants have an expectation that certain kinds of supports will be funded as part of fulfilling the participant's goals and aspirations, even though those supports are ostensibly not within the legislative or policy framework of the scheme. This is not surprising given the excessive complexity of the legislative and policy framework which makes it difficult for participants to navigate, particularly where they lack advocacy or legal advice.
- ❖ Our analysis also reveals that there are cases which proceed to the AAT about very low cost supports/items, sometimes considered ordinary or everyday expenses, where the legal and other costs of the determination far exceed the claimed support cost.
- ❖ The current process of determining reasonable and necessary supports, both within the NDIA and in internal and external review is often experienced as traumatic for participants. In interviews, NDIS Participants and Nominees have overwhelmingly and consistently reported that the processes involved in undergoing an internal s 100 review and external s 103 AAT appeal is stressful, frustrating and traumatic, with significant negative physical, emotional, mental and financial impacts. In many instances, previous experiences of trauma and disempowerment at review and appeal is resulting in NDIS Participants and their Nominees choosing not to dispute unsatisfactory funding decisions. This is a severe indictment on processes that are supposed to provide administrative justice, hold NDIA decision-making accountable, and achieve the appropriate support entitlement for NDIS Participants.
- ❖ The basis for most decision-making about exactly what supports are considered reasonable and necessary is non-transparent to participants - for example settlement decisions about supports are not made public and reasons for internal NDIA decisions can be quite general referring to legislative criteria rather than evidence provided. This can lead to marked discrepancies and a lack of consistency both within individual cases and across the Scheme. For example, we are aware of multiple decided AAT cases where funding for lifts has been found not reasonable and necessary, while other cases refer to lifts being agreed to by the NDIA as reasonable and necessary supports at settlement prior to hearing.
- ❖ We are also concerned about a range of unresolved legal issues which have arisen in interpretation of s 34 which have the result that participants could not know in advance of an AAT legal hearing whether a support they seek would be reasonable and necessary. For example: a) if the NDIA has a general discretion to refuse funding on unknown grounds under s 33 or s 35 NDIS Act, even where a support would meet the requirements of s 34; b) if the NDIA can argue that a support should not be funded on general scheme sustainability grounds

even if it meets the requirements of s 34, where a participant has no opportunity or ability to know in advance the general scheme costs of providing a support to all participants; c) if the NDIA can argue that as well as each individual support being reasonable and necessary under s 34, the whole package of supports must also be reasonable and necessary based on benchmarks unknown to participants etc; (d) whether a support must relate to only a 'primary' disability or impairment.

Summary of Our Previous Submissions including to the NDIS Review

This submission builds on our current research project and submissions we have made to numerous Government inquiries over the last several years. This submission particularly builds upon our previous submissions to the NDIS Review.¹ We maintain and reiterate the views we expressed in those submissions as they are applicable to the new NDIS Back on Track Bill.

Our **submissions to the NDIS Review**, based on our research, that are particularly **relevant to our assessment of the NDIS Back on Track Bill** in relation to the determination of supports include:

- It should be clear to participants what kinds of supports the Government has determined will be funded under the NDIS and what kinds of supports will not be funded. There should be more detailed information in the NDIS legislation (for example, in schedules to the NDIS Act or Rules) about the specific kinds of support which will be funded in the NDIS via a total support package or will not be funded.
- Determining the prioritisation of supports and those that should be included in and excluded from the NDIS as a matter of policy at this time of sustainability challenges, should involve a process of co-design with stakeholders, people with disability, professional expert input on research evidence and should consider both the immediate costs and long-term benefits of funding particular supports.
- Assessment tools, funding models and support calculations used to determine support packages in the NDIS and by the NDIA must be transparent. Any tools and models used in determining participant needs, particular supports or support budgets should be based on research evidence. It should be clear if there are certain funding models/maximum hours which will be adopted in the calculation of particular supports or support packages/budgets (for example, models of care or early intervention models for autism).
- The determination of whether a particular category of supports should be accounted for in a reasonable and necessary package/budget for an individual participant, should not be contingent on questions of whether that kind of support would be financially sustainable across the entire scheme for the cohort of similar participants. It should be the responsibility of the NDIA/Government to determine and make clear a prioritisation strategy, as a matter of policy. This should include what categories of supports the NDIS can fund after considering both costs and benefits of that kind of support. If a particular kind of support is not considered to be one which the NDIS can sustainably provide, the support should be excluded from being funded in the scheme overall through the legislation. For example, as mentioned above there should be a schedule of specific supports which will not be funded in the NDIS in the NDIS Act or Rules.

¹ Available at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

- There may be supports the NDIA/Government determines will, as a matter of policy, only be provided for in funding packages/budgets in individual cases in exceptional circumstances. Any presumption against funding certain supports in the NDIS should not come as a surprise to a participant. Supports should again be expressly dealt with in the legislation/rules for example by rebuttable presumptions against funding, where a participant would need to show they met exceptional circumstances for funding to be included in calculating a package. Supports in this category could include provisions of private vehicles, lifts, assistance dogs in certain categories of disability, single person housing, alternative therapy, sexual services, etc (these are all matters which are being repeatedly considered in the AAT).
- It is clear to us from our research, that there has been a drift of requests for support funding to the NDIS, for supports which would have been traditionally funded by States and Territories, or by other mechanisms of Government. There are a number of AAT cases which deal with the support 'gap' left by the inadequate provision of supports which should have been funded or provided outside the NDIS (eg in a State health service) but were not. In addition, there are a range of AAT cases where participants are seeking supports which in essence relate to poverty rather than disability where the key question is inadequate social welfare for people with disability particularly given the current costs of living crisis. There could be a clearer, more specific, schedule of supports in the NDIS legislation/rules which will be funded under other systems (eg State and Territory health and education systems, other Commonwealth government systems) and not by the NDIS. This again should be a prioritisation strategy determined as a matter of policy by government and intergovernmental agreement and not through individual AAT appeals (where this issue has often arisen for decision). The determination of government interfaces in supply of supports and services should not be matters which are set in the determination of individual cases in the AAT at the cost of individual participants.
- There are a range of AAT cases which concern low value supports or items which may be considered 'everyday items' or 'normal expenses' and thus potentially technically excluded from the NDIS. The legal and other costs of litigating whether these items are reasonable and necessary has far exceeded the cost of the support/item. In some cases, the everyday item/support would have been far cheaper than a comparative item/support which would have met the legal reasonable and necessary test. We suggest that there should be consideration given to the inclusion of a small capped financial allowance in reasonable and necessary support packages which could be spent on 'ordinary' everyday items and expenses (without the need for receipts) where the participant considers this would respond to their disability related needs (eg social participation, psycho-social needs). This reflects a discussion in the original Productivity Commission Report.² It promotes participant choice within bounded financial limits, more inclusion in mainstream society and may result in scheme costs savings.
- The Government and the NDIA must ensure that current processes of decision making are re-designed and any new processes to determine individualised fundings supports are designed to ensure they are disability- and trauma-informed to limit the negative physical, emotional and mental impacts being experienced. At a minimum, NDIA decision-makers and representatives (including legal professionals) must be trained in disability- and trauma-informed communication and uphold Model Litigant Obligations.

² Productivity Commission, *Disability Care and Support* (Inquiry Report, 31 July 2011) vol 1, 2.
<https://www.pc.gov.au/inquiries/completed/disability-support/report>

Detailed Submissions on NDIS Back on Track Bill

NDIS Supports (Clause 14)

The NDIS Back on Track Bill introduces a new concept of ‘NDIS Support’ (s 10 NDIS Act) for which funding can be included in a ‘reasonable and necessary budget’. This concept is relevant not only for ‘new framework’ plans but also for ‘old framework’ plans. The new definition is lengthy and complex. S 10 (a)(i)-(viii) is deliberately based on the CRPD. It introduces requirements not previously utilised to determine supports in the NDIS. Some of these are broad and would cover supports not currently fully covered or intended to be covered in the NDIS - for example sickness benefits, health and rehabilitation services (which would include those currently provided by State and Territory health systems), and personal mobility services (which might include public transport). In other areas, the requirements for a ‘support’ are narrower than currently covered in the NDIS - for example s 10(a)(iii) appears to refer only to assistive technology used for mobility purposes and not for other purposes.

While we note that this mirroring of the CRPD in Clause 14 is intended as part of anchoring the NDIS legislation to constitutional power, we do not believe this is necessary so long as (like the current NDIS Act) it is clear more broadly that the legislation is within constitutional power. We support amendments to the Act that enhance the rights of people with disability and are consistent with the Convention on the Rights of Persons with Disability (CRPD). **However, the transplantation of the CRPD concepts directly into the NDIS legislation (including supports which may not be fully covered or at all covered by the NDIS) makes the concept of supports more complex and difficult for participants to interpret. This does not resolve the issues which have arisen in relation to the current s 34 definition of reasonable and necessary supports and instead will likely introduce further but different areas of legal difficulty and complexity.** It would likely introduce the need for both NDIA review and external appeal decision-makers to refer to CRPD jurisprudence to interpret s 10(a). The definition of general categories or types of supports notionally included in the concept of NDIS Supports should be simplified and made clearer.³

In addition, as well as meeting the requirements of s 10(a), it will be necessary to show that a possible “NDIS Support” is included as a support that is appropriate to fund or provide as declared in the NDIS Rules (10(b)) *and* which is not a support that is stipulated as not one to be provided or funded by the NDIS (s 10(c)). **It is important to note however that the manner in which the proposed definition is drafted suggests that even if a support was included and not excluded by the Rules as a funded support, it cannot satisfy the definition of a NDIS Support if it does not also satisfy s 10 (a).**

We note that it is intended that there be a process of negotiation by the Commonwealth, States and Territories and co-design with the disability community as to the content of these Rules, which we support. The success of utilising the NDIS Rules as proposed in increasing certainty, transparency and reducing complexity for decision-makers and participants will of course ultimately depend on the content of the rules themselves. As we noted above in relation to our recommendations to the NDIS Review, **we support rules which make as specific as possible which supports will be funded by the NDIS and which are excluded from funding.** This includes increased specificity about which supports are NDIS funded and which will be State/Territory funded (eg as foundational supports). This increases transparency for participants and will likely reduce AAT appeals where the AAT must currently seek to boundary set in the absence of clear statutory guidance. As we have previously submitted, we believe **for certain supports there may be a case for rules with a rebuttable presumption where in**

³ For example, see the Productivity Commission Report, *ibid*.

exceptional circumstances a participant may make an argument the supports should be provided (e.g. single SDA, assistance animals, lifts, household appliances etc).

Reasonable and Necessary Supports & Budgets

S 34 NDIS Act amendments (Clauses 46 & 47)

For 'old framework' plans during the transition period (proposed to be up to 5 years), the NDIS Back on Track Bill maintains the existing s 34 criteria to fund a reasonable and necessary support, but adds two additional requirements.

The first, (s 34(1)(aa)), is 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)'. Our understanding of the findings of the NDIS Review⁴ and of the Government response⁵ was that there was an intention to resolve the issue which has repetitively arisen in AAT appeals (with differing results) as to whether supports could only be funded for so-called 'primary' disability or could include funding for 'secondary' disability. We had understood that this distinction would be removed with supports determined on a holistic assessment of function and need. **In our view, the addition of the new s 34(1)(aa) may not be sufficiently clear and could be read as potentially limiting reasonable and necessary supports to 'primary' disabilities only, which would restrict funded supports.** We note that much may depend on the content and outcomes of the new assessment tool which is to be developed and the needs assessment report that results.

The second proposed amendment is to replace the current s 34(1)f) with a new requirement that '(f) the support is an NDIS support for the participant.' It is intended that this definition will remain operational during the significant transition period for up to five years for some participants. The complexity of the new definition of 'NDIS Support' was discussed above. As our research has made clear the current meaning and interpretation of s 34 is already discretionary, complex, lacks transparency, and lacks clarity as to what supports are included. **The addition to the current requirements of reasonable and necessary supports in s 34, of an additional and different (and to some extent overlapping) definition and requirement of 'NDIS Supports', can only increase the current problems we have found in our research. It will likely increase the problems for both decision-makers, participants and the AAT in determining whether a support could be considered reasonable and necessary. We consider this a very significant backward step.**

It is unclear to us **why there has not simply been a transition to a requirement in s 34 for funding that something be a 'NDIS Support', with a removal of all other criteria**, rather than keeping most existing requirements and adding the requirement for the support to also be a 'NDIS Support'. **Or alternatively, that the current s34 criteria are left until at least the rules supporting the meaning of 'NDIS Support' are developed and implemented.**

We also note that, unless there are further changes to the legislation or issues which are resolved in yet to be drafted new rules, **a range of difficult and important legal issues in s 34 appear to remain**

⁴ NDIS Review: Working together to deliver the NDIS, 7 December 2023, available at <https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis>

⁵ 2nd Reading Speech, [ParlInfo - BILLS : National Disability Insurance Scheme Amendment \(Getting the NDIS Back on Track No. 1\) Bill 2024 : Second Reading \(aph.gov.au\)](#)

unresolved in the NDIS Back on Track Bill. These include the role of financial sustainability in determining supports pursuant to s 34, and whether there is a discretion for the CEO in s 33 to refuse to fund reasonable and necessary supports which nevertheless satisfy s 34.

Capping of total reasonable and necessary funding amount (Clause 39)

It appears that the addition of s 33 (2A) allows the capping of both the total amount of reasonable and necessary supports as well as a capping of funding of certain components of support. **This may mean that funding for a support deemed reasonable and necessary in s 34, may nevertheless be reduced.** The legislation specifies in the proposed s 33 (2D) and (2E) that the matters relating to calculating total funding of reasonable and necessary supports or of components may be determined by the Minister by legislative instrument. **This provision may introduce both reduced funding for participants and lack of transparency about how capping will occur. It would also be inconsistent with current judicial authority which suggests supports found reasonable and necessary under s 34 are required to be fully funded.**⁶

Unclear Role of Goals and Aspirations

We note that both s 33 and s 34 retain reference to a role for participants goals and aspirations, and new framework plans also refer to a role for participants goals and aspirations (eg Clause 36, s 32D (6)). **It is however unclear to us how, given the proposed changes discussed above including to 'NDIS Support' and to 'Reasonable and Necessary Supports', and also to the nature of new framework plans discussed below (s 32E-H), how the participants goals and aspirations can play any real or significant role in determining their supports or budgets.** This is particularly the case in new framework plans.

Reviews and Appeals: New Framework Plans and Improved Review and Appeal Provisions

New Framework Plans

We note that 'new framework plans' (s 32C-32L) provide for a reasonable and necessary budget⁷ (which may include flexible funding as well as funding restricted to stated supports s 32E-H) rather than statements of a list of specific allocated support with line funding. This will be informed by a needs assessment with the budget to be calculated according to methods to be determined by the Minister by legislative instrument (s 32K). We understand that both the form of the needs assessment, needs report and the method of converting this to a budget is subject to a process of co-design, which we support. The Minister must however also have regard to financial sustainability (s 32K (3)). We consider that **it will be critically important that it is transparent to a participant how the needs assessment identified supports; what kinds of support were assumed in costing the budget; and critically, how that was converted to a budget. This must include any assumptions used in calculating the budget including capping of hours/support models/benchmarks used etc.** If algorithms are used these should be made transparent. **Without this, it will become extremely difficult for a participant to exercise appeal rights on the basis that their reasonable and necessary budget is not sufficient for their needs.**

⁶ *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132.

⁷ General supports may also be specified- s 32D.

Further to the conduct of a needs assessment, we note that s32L (7) grants the CEO discretion to request a reassessment (Clause 36) (with rules to be developed that determine what factors may trigger a reassessment). However, **there are no provisions for a participant to request a reassessment, nor is there an explicit requirement at s 32L (5) for the participant to receive a copy of the needs assessment report (existing or replacement). This should be amended.** We strongly support the statement by the Public Interest Advocacy Centre (PIAC) that “if needs assessments are to be used as the basis for setting budgets, legislation must provide clear and straightforward rights for a participant to receive the needs assessment before it is finalised to ensure it accurately reflects their needs and circumstances, and to request a new needs assessment where appropriate”⁸. We again agree with PIAC that it is critical that participants have the right to review a needs assessment report. **Given the centrality of a needs assessment report in the subsequent process to determine a reasonable and necessary budget, the right to review must be made explicit in the legislation.**

General Review and Appeal

We note that despite extensive evidence, including our own research⁹, of difficulties with the current review and appeal models in the NDIS and trauma suffered by participants who seek review and appeal, **there are currently no reforms in relation to embedding alternative trauma informed models of review and appeal into the new NDIS Back on Track Bill. We consider this a missed opportunity,** although we recognise this may be deferred pending the enactment of the new Administrative Review Tribunal (ART).

Our research and engagement with a broad array of NDIS stakeholders including NDIS participants who have been applicants in the AAT suggests that any review/appeal body or mechanisms concerning NDIS decisions should include the following design principles:

- ✚ recognise the unique and beneficial nature of the NDIS as embedded in the objects and principles of the NDIS legislation.
- ✚ enhance the rights of people with disability and accord with the CRPD.
- ✚ co-design with NDIS participants.
- ✚ a collaborative, non-adversarial and non-traumatic process which engages participants directly in the resolution process.
- ✚ funded advocacy and legal support for *all* NDIS participants/applicants.
- ✚ direct involvement by NDIA decision-makers in resolution of appeals.
- ✚ active facilitation of the gathering of all evidence necessary to make the best decision.
- ✚ transparency about how and why decisions are made.
- ✚ timely decision-making.
- ✚ decisions consistent with the legislative framework.
- ✚ consistency with the principles of administrative justice.

We stand willing to provide further information that would assist.

⁸ PIAC, Explainer: Getting the NDIS Back on Track No. 1 Bill https://piac.asn.au/wp-content/uploads/2024/04/PIAC-Explainer-NDIS-Bill_April-2024.pdf

⁹ See for example our submission to inquiries into Administrative Review Tribunal Bill 2023 at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

Kind regards,

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