



# Disability Rights Advocacy Service Inc

Safeguarding and promoting the rights and  
interests of people with disability, their families

## SUBMISSION TO THE COMMUNITY AFFAIRS LEGISLATION COMMITTEE: INQUIRY INTO THE NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE NDIS BACK ON TRACK BILL NO. 1) BILL 2024 MAY 2024

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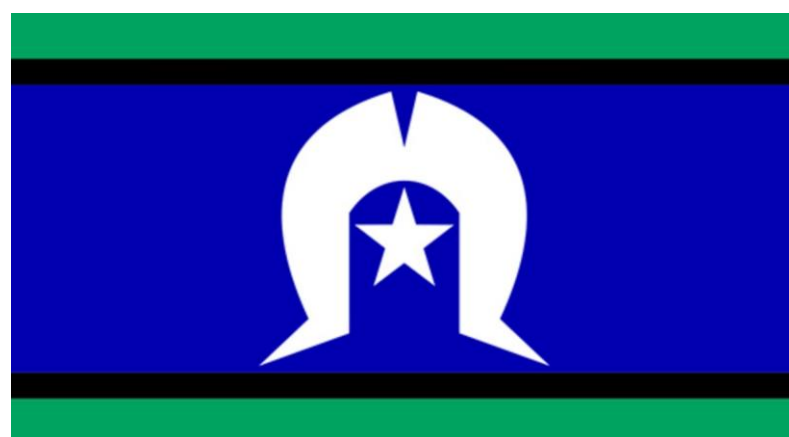




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### Acknowledgement of Country



The Disability Rights Advocacy Service Inc acknowledges that this submission was completed on Kaurna Land. We pay our respects to Elders past, present and emerging. We recognise the continuing relationship with the lands and seas and connection to culture.

Kaurna Miyurna yaiya yarta-mathanya Wama Tarntanyaku, parnaku yailtya, parnaku tapa puru purruna. Kaurna Miyurna ithu yailtya purruna, yarta kuma puru martinthi, puru warri-apinthi, puru tangka martulayinthi.

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## Background

Disability Rights Advocacy Service (DRAS) is a community organisation that is run by our members and our Board, which is made up of people with a disability. DRAS is part of a national network of disability advocacy organisations funded by the Australian Government Department of Social Services to provide individual advocacy and NDIS appeals support, individual capacity-building and systemic advocacy for persons with disability.

## What we do

Our advocates listen to people with a disability and learn from them, so that we can work alongside them to promote and defend their human rights. It means helping people with disability to get a fair go. It means helping people with a disability to enjoy all the things they are entitled to – all the things a person who doesn't have a disability can access.

## Our locations

Disability Rights Advocacy Service has three office locations in South Australia:

- Our Brooklyn Park office represents people who reside within greater metropolitan Adelaide, Mount Barker, Adelaide Hills and Murray Bridge.
- Based in Mount Gambier, our South-East service assists people throughout the South-East and Coorong region.
- People living within the Riverland region can access our Riverland office, which is based in the township of Berri.

## Our Mission

Safeguarding and promoting the rights and interests of people with a disability, their families and carers. We do this through our four governing principles:

1. People with disabilities have the same rights as other members of the Australian community.
2. People with a disability should be able to maintain and develop their culture without prejudice or disadvantage and should be encouraged to understand and embrace other cultures.
3. People with a disability should be able to receive services necessary to enable them to achieve their maximum potential as members of the community.
4. People with a disability are entitled to participate in decisions that affect their lives and to receive services in a manner that results in the least restriction of their rights and opportunities.

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## NEEDS ASSESSMENTS

1. We acknowledge that the NDIS review recommended changes to how NDIS support needs are assessed and how NDIS Plans are built.<sup>1</sup>
2. The 'Getting the NDIS Back on Track' Bill ('the Bill') section 32L outlines that the CEO must arrange for an assessment for a participant's need for supports to be undertaken as soon as practicable.<sup>2</sup>
3. The assessment will be undertaken by using an 'assessment tool', which is yet to be developed. This makes it difficult for Disability Representative Organisations to comment on the potential benefits or drawbacks of the proposed legislation, given the 'assessment tool' that will form the basis of producing a 'needs assessment report' is to be developed at a later date.
4. We note that it is pivotal that the disability community is included in meaningful co-design and consultation for the development of delegated legislation or instruments related to the 'needs assessment tool'.
5. Section 32L(3) of the Bill outlines that the assessment must assess the NDIS participants need for supports only related to the impairments that meet the eligibility criteria for gaining access to the NDIS.<sup>3</sup> This seems to narrow and contradict the NDIS Review, which recommended that a persons' disability be looked at holistically.<sup>4</sup> It also seems to be at odds with decisions made at the Administrative Appeals Tribunal which considered that the NDIA should be case managing a persons disabilities in a holistic way under their NDIS Plan.<sup>5</sup>
6. Section 32L(5) outlines that a report of the assessment must be prepared and given to the CEO as soon as practicable after the assessment is completed.<sup>6</sup> The Bill does not outline the process of how the 'needs assessment' will take place, such as who will be conducting the needs assessment (and their qualifications), how they will conduct the assessment, and opportunities for the NDIS participant to take part in the assessment. These details are to be developed through Rules and Instruments.
7. We note that the person with disability should have a meaningful opportunity to engage in the needs assessment process, that is completed at their pace, with the ability to set aside the time, and involve support people of their choosing.
8. We note our concerns that there is no equivalent provision in the Bill outlining that the needs assessment report be provided as soon as practicable to the NDIS participant. We believe that this should be included explicitly in the legislation. People with disability should have a right to access what has been written about them, particularly when the needs assessment report will determine the funding they will have access to in order to meet their needs.

<sup>1</sup> [Recommendations and actions | NDIS Review](#) recommendation 3

<sup>2</sup> National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Bill 2024 section 32L

<sup>3</sup> Ibid

<sup>4</sup> [Recommendations and actions | NDIS Review](#) recommendation 3

<sup>5</sup> *McLaughlin and NDIA* [2021] AATA 496 at [46], [61]; *HRZI and NDIA* [2023] AATA 481 at [154]; *YBLR and NDIA* [2023] AATA 1472 at [129], [132]; *Spires and NDIA* [2023] AATA 1230 at [23], [26]

<sup>6</sup> Note 2

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9. We also note that NDIS participants should be given the opportunity to provide input and feedback to a needs assessment report *before* the report is finalised.
10. We understand that section 32L(7) provides the option for a 'replacement assessment'.<sup>7</sup> While this inclusion is a potential safeguard, we note that there should be ample opportunity for NDIS participants to feel confident that their needs assessment report will be an accurate depiction of their current and ongoing needs.

### HOW BUDGETS ARE CREATED

11. We acknowledge that the terminology of reasonable and necessary supports will no longer be used and will instead be replaced with 'reasonable and necessary budgets' where NDIS Plans will be packaged into 'funding periods'.
12. The reforms are proposed to provide a larger pool of 'flexible funding' while also allowing for 'stated supports' in a more consistent way under section 32H(1).<sup>8</sup> Stated supports could be for supports such as Assistive Technology, Home Modifications and Supported Independent Living.
13. The Bill provides that under section 32K(2) that the Minister may, by legislative instrument, determine methods for working out total funding amounts for a reasonable and necessary budget.<sup>9</sup>
14. Again it is important that the Government provide the opportunity for co-design and consultation with the disability community for the legislative instrument and method that will be used to implement this legislation.
15. In practice, regardless of whether an NDIS participant has a 'flexible budget', participants will still be required to budget within the funding period of their NDIS Plan. We understand from taking part in Town Hall sessions with the Department of Social Services that the government's intention is to prevent over-spending in participants plans. It is unclear how having access to a pool of 'flexible funding' will be a change from line-by-line planning in practice. Participants and their NDIS supports will still be required to budget within the constraints of their NDIS plan funding period.
16. At this stage there is no indication that NDIS participants will be able to view and comment on a 'draft budget' before it becomes available in its final form as a Statement of Participant Supports.
17. A key part of the input from the disability community into the NDIS Review was that NDIS participants should be given greater opportunity to provide input into their NDIS Plan before it is finalised.
18. We recommend that a process be included either in legislation or delegated legislation for meaningful engagement with NDIS participants before their NDIS Plan is finalised. This will also ensure that lengthy internal or external reviews processes can be avoided.

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<sup>7</sup> Ibid

<sup>8</sup> Ibid section 32H(1)

<sup>9</sup> Ibid section 32K(2)

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### NDIS SUPPORTS

19. Section 10 of the Bill provides a new definition of 'NDIS supports'. As part of this section there are eight categories of supports that the NDIS would fund based on selected elements of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>10</sup>
20. Advocates and legal experts have queried why some elements of the UNCRPD have been included in section 10 but not others. For example, access to employment has not been included in section 10, despite funding for Supported Employment being included as a key NDIS support in current NDIS Plans.<sup>11</sup>
21. We understand that the Bill is the overarching legislative framework for allowing for supports that are 'in' and 'out' of being funded by the NDIS, with a more specific legislative instrument to come later.
22. While we support the concept of having clearer guidelines for NDIS participants about what the NDIS will or will not fund, we note that there should be safeguards for NDIS participants for inadvertently or accidentally mispending funds on what is defined as a non-NDIS support.
23. The NDIS Review recommended that there should be more emphasis placed on education and support for NDIS participants in managing their NDIS Plans, rather than a focus on punitive compliance measures. For example, the NDIS review recommended that the NDIA should adopt a trust-based approach to oversight of how participants spend their budget, with an emphasis on providing guidance and support.<sup>12</sup> We note that the Bill, or delegated legislation to be proposed, should include safeguards for NDIS participants for minor non-compliance or mishaps.
24. Furthermore, advocates and legal experts have raised concerns about section 124 being used as an interim measure until NDIS rules are made for the purposes of section 10(b). For example, they have raised concerns that the Applied Principles and Tables of Support (APTOS) referred to under section 124(2) was never designed to be applied as legislation, in that APTOS was developed as a discretionary guide. The Public Interest Advocacy Centre (PIAC) has noted that the APTOS principles are not fit for purpose and should not be used as an interim measure and that instead the Commonwealth, State and Territory Governments should develop Rules before changes are made to supports the NDIS will fund.<sup>13</sup>

### NDIS POWERS AND APPEALS

25. The Bill introduces powers for the NDIA to request any information reasonably necessary to determine whether an NDIS participant meets the early intervention or disability criteria. The circumstances for when the CEO would do this are to be prescribed within rules to be developed.<sup>14</sup>

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<sup>10</sup> Ibid section 10

<sup>11</sup> [PIAC-Explainer-NDIS-Bill\\_April-2024.pdf](#) page 4

<sup>12</sup> [Recommendations and actions | NDIS Review](#) recommendation 3

<sup>13</sup> [PIAC-Explainer-NDIS-Bill\\_April-2024.pdf](#) page 5

<sup>14</sup> Note 2 section 30A

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26. Section 30A(5) notes that the NDIA will have the power to request the participant do an assessment and provide a report within 90 days. If the NDIS participant does not do so within 90 days the NDIA can revoke their status as an NDIS participant.<sup>15</sup>
27. We are concerned that there are limited protections for NDIS participants who are not able to respond within the 90-day period. There should be support from the NDIA to help participants understand why the information is being requested and to work with both the participant and their support networks to assist them in gathering the evidence required.
28. The Bill does not outline who will be responsible for organising or paying for the information or reports referred to under section 30A(5). We believe that the NDIA should be responsible for doing so considering it is at the NDIA's request. This would assist in minimising NDIS participants having their status revoked due to not meeting the requirements for providing information and reports.
29. The Bill also does not provide a process for having the NDIA's decision reviewed, if the NDIA decides to revoke the status of an NDIS participant.

### ACCESS

30. The Federal Government and the Department of Social Services representatives have discussed that the NDIA Access criteria should be based on the impact of disability and the functional impairment rather than medical diagnosis. The NDIS review recommended that the NDIA should introduce a new Access Request and Supporting Evidence Form and accompanying guidance to make the process of applying for NDIS Access more transparent and simple.<sup>16</sup>
31. The Bill does not seem to address in detail the specific changes that will be made to the disability access criteria. Under the current disability requirements, if the medical evidence demonstrates that a person's impairment substantially reduces their functional capacity in certain domains, then they can become an NDIS participant (along with other considerations).<sup>17</sup>
32. While there are 'List A' conditions that may mean that a person with disability is more like to get access to the NDIS, in practice the NDIA still currently assesses a person's Access Request based on their medical treatment history and functional capacity.
33. At this stage it is unclear what (if any) changes are being made to the NDIS Access Rules and how they will be implemented in practice.

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<sup>15</sup> Ibid

<sup>16</sup> [Recommendations and actions | NDIS Review](#) recommendation 3

<sup>17</sup> [Do you meet the disability requirements? | NDIS](#)

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