

2022-2023-2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE
NDIS BACK ON TRACK NO. 1) BILL 2024**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for the National Disability Insurance Scheme, the Hon Bill Shorten MP)**

NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024

OUTLINE

The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill) amends the *National Disability Insurance Scheme Act 2013* (the Act) to do the following things:

1. Require the National Disability Insurance Agency (Agency) to provide participants with a clear statement of the basis on which they entered the National Disability Insurance Scheme (NDIS, Scheme), either by meeting the disability requirements, the early intervention requirements, or both. The Bill will also clarify and expand the NDIS rules relating to access provisions, including the methods or criteria to be applied when making decisions about the disability and early intervention criteria and the matters which must or must not be taken into account.
2. Create the new reasonable and necessary budget framework for the preparation of NDIS participants' plans. This aligns with the original intent of the NDIS to support people with permanent and significant disability as part of a larger landscape of supports outside of the NDIS. The Bill provides for 'new framework plans' to be developed in accordance with a new budget framework. Participants will receive funding based on whether they accessed the Scheme on the basis of impairments that meet the disability requirements or the early intervention requirements or both.
3. Provide for the needs assessment process and the method for calculating the total amount of the participant's flexible funding and funding for stated supports for new framework plans to be specified in legislative instruments and NDIS rules. These will be developed in consultation with people with disability, the disability community, health and allied health technical professionals, and with all States and Territories.
4. Insert a new definition of 'NDIS supports' which will provide a clear definition for all participants of the authorised supports that will be funded by the NDIS and those that will not.
5. Insert measures focused on protecting participants such as:
 - a. Allowing the CEO to specify in the statement of participant supports the total funding amount under the plan for reasonable and necessary supports together with the funding component amount under the plan for each support or class of support up to a specified amount.
 - b. Clarifying the requirement that an NDIS participant who receives an amount or amounts for NDIS supports may only spend that money in accordance with the participant's plan. This reflects the reasonable expectation that participants should spend up to the limits specified in

their plan – unless their needs significantly change and spend on supports needed as a result of their impairment.

- c. Enabling the Agency to change the plan management type as well as imposing shorter funding periods to safeguard participants where others may seek to exploit or coerce the participant to use their package in a way that is not consistent with their best interests.
6. Insert quality and safeguard amendments to enable the imposition of conditions on approved quality auditors to not employ or engage a person against whom a banning order has been made, and to enable greater delegation of the Commissioner's compliance and enforcement powers to specified positions.

Wherever the Bill inserts new and expanded NDIS rule-making powers, these rules must be made in compliance with the requirements of section 209 of the Act and the *Legislation Act 2003*.

The Bill contains two schedules:

Schedule 1 sets out the new definition of NDIS supports; clarifies the process for reassessment of participant status; provides for participants to transition to a new framework plan; provides for new framework plans that include a flexible budget and budget for stated supports; old framework plans to have total funding amount; updates to circumstances in which the Agency will manage funds; specification of the requirement that participants spend money only on NDIS supports and in accordance with their plan and; exemptions for NDIS rules from sunseting.

Schedule 2 sets out conditions on approval of quality auditors in relation to the employment of someone with a banning order against them and provides for an expansion of delegation powers with respect to compliance and enforcement powers.

BACKGROUND

The Bill is the first in a series of legislative changes the Australian Government will make in response to the 2023 Independent Review into the NDIS (the NDIS Review).

Co-chaired by Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM, the NDIS Review delivered its final report *'Working together to deliver the NDIS'* to Australian governments in December 2023.

The NDIS Review considered Australia's disability system in its entirety with a focus on improvements to deliver better outcomes for people with disability in a more responsive and cost-effective way. The NDIS Review calls on Australian governments to commit to creating a unified ecosystem that supports people with disability.

The NDIS Review engaged closely with people with disability, their families, carers, providers and workers. The NDIS Review heard from over 10,000 people and organisations and hosted 14 webinars and over 200 virtual and face-to-face

consultations including 38 regional, rural and remote engagement and 50 phone interviews. The NDIS Review also received over 4,600 online submissions from both individuals and organisations. The recommendations and actions reflect the breadth of this consultation.

National Cabinet considered the NDIS Review's final report in December 2023. National Cabinet agreed that the Commonwealth would work with state and territory governments to implement legislative and other changes to return the NDIS to its original intent of supporting people with permanent and significant disability as part of the larger landscape of supports outside of the NDIS.

The NDIS Review made 26 recommendations with 139 integrated actions which provide a blueprint to renew the promise of the NDIS and deliver a more accessible and inclusive Australia.

National Cabinet committed to introducing an initial tranche of legislation to the Commonwealth Parliament in the first half of 2024. Other recommendations that are likely to require legislative changes, including changes to NDIS rules, will be considered in the future following engagement with the disability community. Not all the NDIS Review recommendations will require legislative changes.

The amendments in this Bill give effect to NDIS Review recommendation 3 and interconnected elements in recommendations 5, 6, and 7. The amendments also support the partial implementation of recommendation 17.

The amendments enable progress of key NDIS Review recommendations to clarify the NDIS access requirements and the supports that the NDIS will provide a participant, to create a new model for determining a reasonable and necessary budget, and provide more flexibility on how the Commissioner can take regulatory actions to protect NDIS participants from abuse, harm and neglect.

Although participants with new framework plans will no longer receive 'reasonable and necessary supports', the concept of what is reasonable and necessary for participants remains at the core of the NDIS with the creation of the 'reasonable and necessary budget'.

FINANCIAL IMPACT STATEMENT

The changes in the Bill are expected to contribute to decisions made by National Cabinet to moderate cost growth of the NDIS in the medium to long-term and meet the 8 per cent sustainability target by 1 July 2026.

The immediate changes arising from the Bill can be operationalised by the Agency from early 2024-25.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024

ABBREVIATIONS AND ACRONYMS USED IN THIS EXPLANATORY MEMORANDUM

- **Act** means the *National Disability Insurance Scheme Act 2013*
- **Agency** means the National Disability Insurance Agency
- **APTOS** means the Applied Principles and Tables of Supports agreed by First Ministers in 2015
- **Bill** means the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track – No. 1) Bill 2024
- **CEO** means the Chief Executive Officer of the National Disability Insurance Agency
- **Commission** means the National Disability Insurance Scheme Quality and Safeguards Commission
- **Commissioner** means the National Disability Insurance Scheme Quality and Safeguards Commissioner
- **Legislation Act** means the *Legislation Act 2003*
- **LEOMR** means the *Legislation (Exemptions and Other Measures) Regulation 2015*
- **NDIS** means the National Disability Insurance Scheme
- **NDIS Review** means the 2023 Independent Review into the NDIS
- **NDIS rules** means rules made under section 209 of the *National Disability Insurance Scheme Act 2013*
- **Scheme** means the National Disability Insurance Scheme
- **SES** means the Senior Executive Service established under section 35 of the *Public Service Act 1999*

NOTES ON CLAUSES

Section 1 sets out how the new Act is to be cited – that is, as the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track – No. 1) Act 2024*.

Section 2 provides a table setting out the commencement of the new Act. The whole of the Act will commence on the 28th day after the Act receives the Royal Assent.

Section 3 provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule has effect according to its terms.

SCHEDULE 1 – AMENDMENTS

Summary

Schedule 1 sets out the new definition of NDIS supports; the process for reassessment of participant status; provision for participants to transition to a new framework plan; provision for new framework plans that include a flexible budget and budget for stated supports; old framework plans to have total funding amount; updates to circumstances in which the Agency will manage funds; specification of the requirement that participants spend money only on NDIS supports and in accordance with their plan; and exemptions for NDIS rules from sunseting.

Background

The NDIS Review recommended a range of changes to the participant experience to provide a fairer and more consistent pathway for participants. One of the major changes proposed by the NDIS Review was to change the basis for setting a budget to a ‘whole-of-person’ level rather than for individual support items. The Review also recommended new needs assessment processes to set budgets and a ‘trust-based approach’, with a focus on providing guidance and support to participants.

Explanation of the changes

Part 1—Amendments

Items 1 and 2 – Amendments to section 3

Section 3 sets out the objects of the Act. Current subparagraph (3)(3)(c)(i) provides that in giving effect to the objects of the Act, regard is to be had to (among other things) the broad context of disability reform provided for in the *National Disability Strategy 2010-2020* as endorsed by the then Council of Australian Governments (COAG) on 13 February 2011 (2010-2020 Strategy).

The 2010-2020 Strategy was replaced by *Australia’s Disability Strategy 2021-2031* (2021-2031 Strategy) accessible at:

(<https://www.disabilitygateway.gov.au/document/3106>).

Item 1 amends subparagraph 3(3)(c)(i) to substitute the requirement to have regard to the 2010-2020 Strategy with a requirement to have regard to disability strategies agreed to by the Commonwealth and each host jurisdiction from time to time. This amendment future-proofs the Act and ensures that regard is being had to the appropriate interjurisdictional agreement at any given time.

Item 2 adds a note informing the reader that in 2024 the relevant strategy referred to in subparagraph 3(3)(c)(i) is the 2021-2031 Strategy which is accessible at:

(<https://www.disabilitygateway.gov.au/document/3106>).

Item 3 – Section 8 (paragraph (c) of the paragraph beginning ‘The National Disability Insurance Scheme comprises’)

Section 8 provides a simplified outline of the Act. This item omits paragraph (c) of the first paragraph and replaces it with a new paragraph. The current paragraph (c) explains that the NDIS comprises of (amongst other things) individual plans under which reasonable and necessary supports are provided to people with disability.

The new paragraph (c) inserts a reference to NDIS supports (rather than reasonable and necessary supports), which reflects the creation of new framework plans that will include reasonable and necessary budgets instead of line by line reasonable and necessary supports. It also reflects the new concept of ‘NDIS supports’ (see **item 14**).

Amendments to definitions

Items 4 to 13 – Section 9

These items amend section 9 of the Act which deals with definitions.

The following are new definitions inserted into the Act to deal with amendments made by this Bill:

- flexible funding
- funding component amount
- funding period
- NDIS supports (see **item 14**)
- needs assessment report
- new framework plan
- old framework plan
- reasonable and necessary budget
- stated support
- total funding amount

The following are existing definitions that are being amended to deal with amendments made by this Bill:

- NDIS amount
- participant
- reassessment date
- statement of participant supports

Item 14 - After section 9A

This item inserts proposed new section 10 which provides a definition for NDIS support. The definition serves two purposes.

First, it provides a constitutional underpinning for the new planning framework (see **item 36**) by setting out the kinds of supports that the Commonwealth is constitutionally capable of funding. This is primarily accomplished by engaging with Australia’s obligations under the *Convention on the Rights of Persons with Disabilities* (CRPD).

The definition also relies on the relevant aspects of the social welfare power under the Constitution.

Second, proposed paragraphs (b) and (c) will allow NDIS rules to be made that narrow the scope of these constitutionally valid supports to those that are appropriately funded by the NDIS.

A support can only be an NDIS support if the support:

- is necessary to support the person to live and be included in the community, and to prevent isolation or segregation of the person from the community
- will facilitate personal mobility of the person in the manner and at the time of the person's choice
- is a mobility aid or device, or assistive technology, live assistance or intermediaries that will facilitate personal mobility of the person
- is a health service that the person needs because of the person's impairment or because of the interaction of the person's impairment with various barriers
- is a habilitation or rehabilitation service
- is a service that will assist the person to access a support covered by subparagraph (iv) or (v)
- will minimise the prospects of the person acquiring a further impairment or prevent the person from acquiring a further impairment
- is provided by way of sickness benefits.

An NDIS support will only be an NDIS support, and therefore constitutionally supported, if the participant has a need for that support as a result of their impairment. This is consistent with recommendations of the NDIS Review around taking a needs-based approach to planning and budget setting.

Proposed new paragraph 10(b) provides that a support is an NDIS support for a person who is a participant or prospective participant if the support is declared by NDIS rules to be a support that is appropriately funded or provided through the NDIS for participants or prospective participants generally, or for a class of participants or prospective participants that include the person.

Proposed new paragraph 10(c) provides that a support is not an NDIS support for a person if the support is declared by NDIS rules to be a support that is not appropriately funded or provided through the NDIS for participants or prospective participants generally, or for a class of participants or prospective participants that include the person.

NDIS rules made for the purposes of proposed new paragraphs 10(b) and 10(c) will be Category A rules requiring the unanimous agreement of all States and Territories before they can be made (see **item 115**).

As an interim measure, until new rules are made under paragraphs 10(b) and/or (c), APTOS will be incorporated to determine what is and is not an NDIS support (see **item 124**). Reliance on the APTOS is a transitional measure that will only be in place until

new NDIS rules can be made. These rules will be developed with States and Territories as a priority.

Notes at the end of the section assist the reader by pointing to the relevant heads of power in the Constitution authorising funding of NDIS supports.

This new definition assists participants by providing clear guidance on what supports they can access through the NDIS. For example, things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports.

The NDIS Review commented that the needs-based approach to budget setting will prioritise evidence-based supports that lead to a more predictable and manageable Scheme. It also commented that a stronger evidence base providing clear regulation and guidance on effective therapies and supports should provide better quality, improve outcomes, and make navigating the scheme for participants and their families easier.

Implementing and relying on this definition of NDIS supports will allow the Commonwealth, States and Territories together to ensure that the NDIS funds supports that are effective and backed by a strong evidence base.

Items 15 and 16 – Subsection 10B(1)

These items deal with notes at the end of subsection 10B(1) of the Act. These items together add a new note that notifies the reader that the sunseting regime set out in the Legislation Act does not apply to this instrument. This is a consequence of the amendments made by **item 123** which amends the LEOMR to clarify that instruments made under the Act are exempt from sunseting. This is explained further in Part 2 of Schedule 1.

Item 17 – Paragraph 19(2)(b)

Subsection 19(2) currently provides that a person may make more than one access request if they are deemed not to meet the access criteria under subsection 21(3), unless a decision has not yet been made on a review. A decision under subsection 21(3) that a person does not meet the access criteria is a reviewable decision under paragraph 99(a), and the decision will be automatically reviewed under paragraph 100(5)(b).

This item amends paragraph 19(2)(b) to clarify that a person who has had their status as a participant revoked cannot make another access request until a decision has been made on review. This provides for consistency of operation across the NDIS.

Where a person does not meet access criteria or the CEO is taken to have decided they do not meet access criteria due to a failure to do a thing by operation of subsection 21(3), or the person becomes a participant and the CEO then subsequently revokes their participation status under sections 30 or 30A, then that person may make another access request at any time, unless a review under subsection 100(5) or section 103 is underway.

Item 18 – Subsection 21(2)

Currently, the CEO makes an access decision under section 21 by being satisfied that a participant meets the age requirements, the residence requirements and either the disability requirements or early intervention requirements or both. There is no requirement for the CEO to separately decide whether a person meets the disability requirements or early intervention requirements. The amendment made by this item requires the CEO to separately consider and decide whether or not a participant meets the disability requirements, the early intervention requirements or both.

The only immediate effect of this amendment is that when new participants into the NDIS receive a written notice of their access decision, that notice will specify whether the CEO decided that the person met the disability requirements, the early intervention requirements or both (see **item 26**).

In the long term, this will enable the establishment of the separate early intervention pathway recommended by the NDIS Review. In particular, the NDIS Review recommended that the NDIS should work differently for people accessing early intervention supports than for those people receiving disability supports for lifelong disabilities.

This amendment provides the statutory foundation for the future early intervention pathway. Operationalising this pathway will require the establishment of Category A NDIS rules. Once NDIS rules are in place, the Agency can rely on the decision made at access to determine whether a participant is eligible and/or should participate in the early intervention pathway.

Example – Amena

Caterina is a representative for her child, Amena, who lives with Autism and has sensory and cognitive impairment.

Caterina may not understand what is evidence-based best practice for someone in Amena's situation. As a result some of Amena's funding is going toward supports that are not effective, preventing Amena from achieving the best outcomes.

After this amendment, Amena would be identified as a participant that would benefit from early intervention as part of her access decision and who could be streamed into a new pathway, when developed so she can get the best evidence-based supports.

The legislative amendments ensure that Amena can be streamed into a new pathway which is designed specifically to support children and their families who would benefit from early intervention to improve lifetime outcomes.

Items 19 and 20 - Paragraph 24(1)(e) and subsections 24(2) and (3)

These items amend section 24 of the Act which prescribes the 'disability requirements' by omitting the term 'support' and substituting 'NDIS supports'. This reflects the

insertion of the new concept of an NDIS support, clarifying that a person must be likely to require NDIS supports for the rest of the person's lifetime.

Item 21 - At the end of subsection 24(4)

This item inserts two new notes at the end of subsection 24(4). The first note explains that the time at which the disability requirement must be met is the time at which the decision is made. For an access request, this is the time the request is considered.

A second note alerts the reader that NDIS rules may be made under section 27 that are relevant to the consideration of the disability requirements.

Item 22 - After paragraph 25(1)(c)

This item inserts a new paragraph (d) into subsection 25(1), which deals with the criteria that must be met for a person to meet the early intervention requirements.

The NDIS Review recommended a reformed early intervention pathway to provide supports to individuals where there is good evidence the intervention is safe, cost-effective and significantly improves outcomes. The new early intervention pathway will be designed in consultation with people with disability.

Proposed new paragraph 25(1)(d) will require the CEO to be satisfied that any early intervention supports that would be likely to benefit the person would be NDIS supports for the participant.

This ensures that in considering whether early intervention supports would be beneficial to a person, the CEO may only consider supports that may be provided under the NDIS. The CEO may not consider supports that are more appropriately provided by another service system.

Item 23 - Subsection 25(3)

This item repeals subsection 25(3) as the intent of the provision is now covered by the amendments made by **item 22**.

This item also inserts two new notes after section 25 that explain that the time at which the early intervention requirement must be met is the time at which the decision is made. For an access request, this is the time the request is considered.

A second note alerts the reader that NDIS rules may be made under section 27 that are relevant to the consideration of the early intervention requirements.

Item 24 - Subsection 26(3)

Section 26 deals with requests for information that the CEO may make for the purposes of determining an access request. Subsection 26(3) provides that if requested information is not received within relevant time periods the prospective participant is taken to have withdrawn the access request unless the CEO is satisfied

that it was reasonable for the prospective participant not to have complied with the request within that period.

This item amends subsection 26(3) so that this exception also applies to information that was requested from a person other than the participant. This protects the participant from being penalised if information is not provided by another person, for example a health professional, within a certain period of time.

Item 25 - Section 27

This item repeals and substitutes section 27 which allows for NDIS rules relating to the determination of any matter for the purposes of the disability requirements and early intervention requirements. These rules will continue to be Category A rules and will require the agreement of all States and Territories.

Similar to the existing section 27, proposed new section 27 will allow NDIS rules to prescribe methods and criteria to be applied, or matters that may, must or must not be taken into account for the purposes of sections 24 and 25. The rules may also prescribe circumstances in which a matter relevant to the application of either of those sections is taken to exist or to not exist in relation to a person. This new section 27 allows for flexibility for tailored rules.

The rules made under section 27 will allow the NDIS to provide clarity about whether the person is eligible and should apply for the NDIS or whether supports should be sought outside of the Scheme. These rules will also clarify how certain criteria should be applied and provide clear guidance to participants on what to do if their circumstances change.

When it is ready to be implemented, the new early intervention pathway will primarily be operationalised through rules made under section 27.

Example – Kym

Kym applies to the NDIS based on an impairment which results in psychosocial disability.

Kym's disability is highly episodic in nature, in that its impacts on her life fluctuate from time to time.

There is currently a great deal of ambiguity about how some access criteria should be applied to Kym's circumstances.

This new power enables a rule to be made, clarifying how certain NDIS access criteria should be applied to Kym's unique circumstances.

As a result, Kym and her health professionals have a clearer idea about whether Kym is likely to be eligible to access the NDIS, what information is required to make an access request, and Kym's access decision is able to be clearly explained to her.

Item 26 - Subsection 28(2)

This amendment repeals and substitutes subsection 28(2) and now requires the CEO to give written notice to new participants that specifies whether they have become a participant under section 24 (by meeting the disability requirements) or section 25 (by early intervention requirements), or both.

The only immediate effect of this amendment is that when new participants into the NDIS receive a written notice of their access decision. That notice will specify whether the CEO decided that the person met the disability requirements, the early intervention requirements or both.

Item 27 - Paragraph 29(1)(c)

This amendment is consequential to amendments made by **items 30** and **31** that change the provisions under which a participant's status in the Scheme may be revoked.

Item 28 - Subsection 29(2)

Section 29 of the Act deals with circumstances in which a person ceases to be a participant.

Subsection 29(2) deals with the payment of NDIS amounts after a person ceases to be a participant.

Existing subsection 29(2) refers to payment of amounts in relation to reasonable and necessary supports. This reference is no longer appropriate as new framework plans will have reasonable and necessary budgets instead of reasonable and necessary supports.

The replacement subsection 29(2) provides that a person is not entitled to be paid NDIS amounts that relate to supports that are acquired or provided after the person ceases to be a participant.

The subsection does, however, allow for Category A NDIS rules to specify the circumstances where payments can still be made for supports provided or acquired before a participant ceases to be a participant, even if that payment occurs after the person ceases to be a participant.

Item 29 – Before subsection 30(1)

This item inserts a new heading into section 30 indicating that the following subsections deal with circumstances in which participant status may be revoked.

Item 30 - Subsection 30(2)

Section 30 deals with the revocation of participant status if a participant no longer meets the access criteria (including the residence requirements, the disability requirements, or the early intervention requirements). This is an existing power under the Act and is only used when it is abundantly clear that a participant no longer meets the eligibility criteria. This item provides new information gathering powers that will improve the operation of section 30, but will take account of things that make it difficult

to access and obtain requested information and assessments, for example due to delays in attending specialist appointments.

Requesting information and reports

This item repeals subsection 30(2) and inserts new subsections 30(2) to 30(8). These provisions will allow the CEO to request information from a participant or other person if the CEO is considering revoking a person's status as a participant in the NDIS.

Currently, there is no ability for the CEO to request information for the purposes of considering the revocation of a person's status as a participant. It is important for the CEO to be able to request and receive information from participants. It ensures that the CEO is making decisions based on up to date and current information about a participant. This will not result in people having to repeatedly prove their disability but will allow the CEO to determine the state of their functional capacity (which can change over time) having regard to the best available information to ensure they are receiving the most appropriate supports.

Subsections 30(3) to 30(6) provide that the CEO may make a request for information from a participant, or another person, or request the participant undergo an assessment or examination and provide a report in the approved form to the CEO. The person must provide a report of this assessment or examination in the approved form for consideration. As is the case throughout the NDIS, the participant is able to choose the person from whom they obtain information and reports, as long as that information is provided in the form requested by the CEO.

The changes specify the time period in which such information must be provided (90 days, or a longer period as prescribed) and clarify the CEO must make a determination within 14 days regarding the participant's status or make further requests for information.

Where a participant fails to comply with a request for information within the timeframe prescribed, the CEO may revoke the participant's status. The CEO must not revoke the participant's status if the CEO is satisfied that it was reasonable for the participant (or other relevant person) not to have complied with the request made by the CEO within 90 days. This may include for example, because they are hospitalised during that period or cannot obtain an appointment with a relevant medical professional within the stated period.

The intent of these changes is to provide clear timeframes for the reassessment process and allow the CEO to take into account circumstances outside the participant's control, such as a specialist not providing the required information within the timeframe.

Notice of decisions

Subsection 30(7) provides that the CEO must give the participant written notice of a revocation of participation that includes the date on which the revocation comes into effect.

Item 31 - At the end of Part 1 of Chapter 3

Circumstances in which CEO must consider participant's status

This item inserts new section 30A that sets out the CEO's ability to consider the status of certain participants. Category A NDIS rules must be made before this provision can operate. This power will operate in a similar way to existing section 30, allowing the CEO to revoke a person's status as a participant, however it will be subject to strict rules around when and how the power can be used. The associated information gathering powers will take account of things that make it difficult to access and obtain requested information and assessments, for example due to delays in attending specialist appointments.

Currently, when people enter the Scheme through the early intervention pathway, the Agency cannot check if the supports are working, are still necessary, or if the participant is still in need of early intervention. NDIS rules may prescribe circumstances in which the CEO must check-in with a participant in the early intervention pathway. If circumstances are prescribed in the rules, then the CEO must consider whether a participant meets the early intervention requirements, and if not, whether the participant meets the disability requirements. If the participant no longer meets either the early intervention or disability requirements, the CEO must revoke the person's status as a participant in the NDIS.

NDIS rules may also prescribe requirements with which the CEO must comply; criteria that the CEO is to apply; or matters to which the CEO may, must or must not have regard in making a decision about revocation.

Requesting information and reports

Section 30A allows the CEO to request information from a participant, or another person, or request the participant undergo an assessment or examination and provide a report in the approved form to the CEO. The participant may choose the person from whom they obtain the report.

Where the report is received within 90 days, or such longer period as prescribed, the CEO must make a determination within 14 days regarding the participant's status or make further requests for information.

Where a participant fails to comply with a request for information within the timeframe prescribed, the CEO must revoke the participant's status unless otherwise satisfied there are reasonable grounds to have not complied with that request.

Notice of decisions

The CEO must give written notice to a participant of the decision made about their status and whether their status as a participant has been revoked, the date at which the revocation will occur, and any information prescribed by the rules.

This provision will address issues relating to participants missing key check-ins that are designed to assess the impact of supports and that initiate modifications to plans

as required. It also ensures that decisions are being made on the best and most up to date information available.

This is particularly important for early intervention supports where benefits are expected from early investment and there is a likelihood that the supports required will change over time.

This amendment enables the Agency to check progress and update plans and funding accordingly. In some cases, this may result in an assessment that early intervention has been successful and the person no longer requires support from the NDIS.

Example – Ben and Bella

Ben (aged 11) became an NDIS participant as a young child, as did his sister Bella (aged 9), both with developmental delay. Each of their early plans saw steady use of capacity building supports, with claims made for occupational therapy and speech therapy, and plans were always within budget.

No plan reassessments for either child have been conducted since 2020 because Ben and Bella's child representative (their father Frank) has refused to engage with the Agency, including in planning.

Frank is self-managing both plans and since 2020 there has been unusual activity. Frank cannot be contacted, but when plans are extended he claims all the funds in large amounts with no detail of the support being accessed.

The Agency wants to understand if Ben and Bella still meet the early intervention criteria. There is not enough information to know if they still need the NDIS, or if the early intervention funded in their plans has made a difference.

The Agency begins the eligibility reassessment process, but Frank does not respond. There is not enough information to complete the eligibility reassessment. Under the current provisions of the Act, the Agency has to make a decision on old information from the original access requests, and no change is made to Ben and Bella's participant status or plans.

Once these amendments are enacted, the Agency can require Frank to provide the requested information to the Agency so it can make a decision based on up-to-date information. This also ensures the supports Ben and Bella receive are right for their current needs. If Frank continues to not respond, the CEO may decide to revoke Ben and Bella's access after an appropriate opportunity has been provided to provide the relevant information.

A new access request could be made for Ben and Bella, that would need to provide up to date information about their impairments and if they meet early intervention or disability requirements or both.

Item 32 - Division of Part 2 of Chapter 3 (after the heading)

This item inserts the title '*Subdivision A – facilitating preparation of participants' plans*' to assist the reader to navigate the Act.

Items 33 to 36 – Section 32

Section 32 deals with the situation in which the CEO must facilitate the preparation of a participant's plan. These items amend section 32 to deal with the addition of new framework plans.

Item 33 inserts a new heading at the beginning of section 32 to assist the reader, identifying that the first part of the section deals with '*initial plans*'.

Item 34 amends subsection 32(2) to refer to the preparation of initial plans only.

Item 35 inserts the new heading '*subsequent plans*' and adds new subsections 32(3) and (4).

Subsection 32(3) provides that the CEO must facilitate the preparation of a subsequent plan for a participant if the CEO decides to prepare a new plan as a result of the reassessment of a participant's plan or if the CEO gives the participant a notice that they are to receive a new framework plan in accordance with subsection 32B(2).

The CEO must facilitate preparation of the subsequent plan as soon as practicable, or within a timeframe prescribed by the NDIS rules.

A note at the end of this section reminds the reader that the CEO may suspend the preparation of a new framework plan if information or reports requested for the purposes of undertaking a needs assessment are not received (see **item 54**).

Item 36 – After section 32

This item provides for new framework plans.

32A Kinds of plans

This section will clarify that there will be two kinds of plans under the NDIS. These are:

- new framework plans, which are prepared in accordance with Subdivision B
- old framework plans, which are a plan prepared in accordance with Subdivision C.

32B Participants that are to have new framework plans

All participants will eventually transition to a new framework plan. The transition to new framework plans will be gradual and occur by class of participants. New section 32B provides that the Minister may determine by legislative instrument the classes of participants who are to receive new framework plans and the period within which the CEO must give a notice of the transition to each participant within that class.

This is the basis for setting a reasonable and necessary funding package at a whole-of-person level, rather than for individual support items, in line with action 3.4 of the NDIS Review.

These classes may be determined by reference to any identifiable characteristics such as age, location and types of supports that they receive. The classes of participants to be transitioned will be based on operational advice from the Agency and will be influenced by organisational capacity and learnings about how transition has progressed for prior classes.

It is envisaged that the timeframe for transition of NDIS participants from old framework plans to new framework plans will take up to 5 years. This timeframe has been identified to allow for co-design and consultation on the tools and NDIS rules that need to be in place for new framework plans and is consistent with the recommendations of the NDIS Review. It also takes into account the need for the transition of participants by identified cohorts to occur in an orderly, planned progression.

Once the Commonwealth, States and Territories have agreed the overarching transition plan for NDIS participants to move to new framework plans, these provisions allow for the Minister to determine the sequence for various of classes of participants to transition via legislative instrument. Once transition commences, it will be important that the process continues smoothly and efficiently. A legislative instrument power for the minister supports this approach by enabling timely decisions about the progression of classes in a way that can be accommodated by the Agency. and potentially amend

Subsection 32B(3) provides that Category D NDIS rules may prescribe details (if any) that must be specified within the notice.

Subdivision B—Content of new framework plans

32C Application of this subdivision

Subsection 32C(1) signals that by the end of 5 years all participants are expected to have transitioned to a new framework plan, but has a contingency if this timeframe is too short or too long. The subsection provides that subdivision B, applies to a participant if:

- a new framework plan has come into effect
- the participant has been given a notice under subsection 32B(2) that they are to transition to a new framework plan
- the CEO starts to prepare the plan after the end of 5 years following the commencement of the Bill or within in a shorter or longer period as determined by legislative instrument.

The Minister may, by legislative instrument, extend or condense the overall timeframe for transition where organisational capacity may dictate the necessity to extend timeframes to protect participants from automatically transitioning to a new framework plan without appropriate safeguards and assessment tools in place.

Under section 17 of the Legislation Act, appropriate consultation must be undertaken in relation to the proposed legislative instrument before it is made. The nature and extent of this consultation must be explained in the Explanatory Statement for each

instrument in accordance with section 15J of the Legislation Act. This means that relevant stakeholders and the States and Territories will need to be consulted on this legislative instrument and have the opportunity to make comment before it is made. The instrument will also be subject to Commonwealth parliamentary scrutiny and disallowance. The consultation process will need to occur in a timeframe that is consistent with the operational requirements for the transition.

32D – Matters that must be included in a participant’s plan

Section 32D sets out matters that must be included in a participant’s new framework plan.

Subsection 32D(1) provides that a participant’s plan must include a statement that specifies the participant’s goals, objectives and aspirations, as well as the environmental and personal context of the participant’s living. This is consistent with the participant’s statement of goals and aspirations that is included in an old framework plan (see subsection 33(1) of the Act).

Statement of participant supports

Subsection 32D(2) provides that a participant’s plan must include a statement of participant supports that is prepared with the participant and approved by the CEO. This is consistent with the requirement to have a statement of participant supports in old framework plans (see subsection 33(2) of the Act).

Where appropriate, the content of the statement of participant supports in new framework plans is consistent with the content in old framework plans. In particular, the statement of participant supports must specify the management of funding for supports under the plan and the management of other aspects of the plan, the general supports (if any) that will be provided, and the circumstances in which the CEO must reassess the plan.

In addition, the statement of participant supports for new framework plans will specify the following:

- the participant’s reasonable and necessary budget
- whichever of the following applies:
 - that the participant meets the disability requirements
 - that the participant meets the early intervention requirements
 - that the participant meets both the disability requirements and the early intervention requirements.

Recording this in a participant’s plan is important to implement the early intervention pathway once it has been established. It will ensure that participants are being assessed and receiving supports that meet their needs.

- the plan’s maximum period of effect, starting on the day the plan is approved.

How general supports may be specified in plan

Subsection 32D(3) prescribes that a participant's plan may also specifically include, or describe generally, the general supports that will be provided under the NDIS. These may be included with reference to a specified purpose or otherwise. This is consistent with old framework plans.

Time limits for approving statement of participant supports

Subsection 32D(4) sets out the timeframe in which the CEO may decide whether to approve the statement of participant supports. This must be done in accordance with NDIS rules, or if there are no such rules, as soon as reasonable practicable. These rules are Category C NDIS rules requiring the majority agreement of States and Territories, where the majority includes the Commonwealth. However, under subsection 32D(5) these timeframes do not apply if the preparation of a participant's plan is suspended under subparagraph 36(3)(b)(i) (see **item 54**).

Requirements for CEO in approve statement of participant supports

New subsection 32D(6) provides that, in deciding whether or not to approve a statement of participant supports, the CEO must:

- have regard to a participant's statement of goals and aspirations
- for any general supports, be satisfied:
 - that the supports will be, or are likely to be, effective and beneficial for the participant, having regard to current good practice, and
 - of any other matters specified in the NDIS rules
- have regard to the principle that a participant should manage their plan to the extent the participant wishes to do so
- have regard to the operation and effectiveness of any previous participant plans
- have regard to whether section 46 (dealing with the acquittal of NDIS amounts) was complied with in relation to any previous participant plan
- be satisfied of any matters specified in the NDIS rules.

Agency-managed funding – supports to be provided only by a registered NDIS provider

Subsection 32D(7) requires where funding for supports under a participant's plan is managed by the Agency, supports are to be provided by a registered NDIS provider only.

Plan may deal with additional matters

Under subsection 32D(8) a participant's plan may include any additional matters that are prescribed by the NDIS rules.

A note provides an example of a matter that may be included in a plan, specifically that the plan may include arrangements for ongoing contact with the Agency.

Statement of goals and aspirations to be recorded in writing

There is no requirement for a person to provide their statement of goals and aspirations in writing. Subsection 32D(9) provides where the person does not provide the statement of goals and aspirations in writing, the Agency must record the statement on their behalf. A record of this will be provided to the participant consistent with section 38 of the Act.

32E - Reasonable and necessary budget - entitlement to flexible funding or stated supports

Proposed new section 32E provides in subsection 32E(1) that a participant's reasonable and necessary budget is made up of flexible funding or stated supports or both.

Flexible funding

The NDIS Review recommended changing the basis for setting a budget to a whole-of-person level and allowing greater flexibility in how participants can spend their budget. The proposed new sections establish the concept of a budget made up of flexible funding and/or stated supports.

Flexible funding will be provided to or in relation to a participant up to a certain amount. This change is based on the principle that people with disability know their own support needs and are best placed to determine how to meet these needs. This means that a participant may use flexible funds to acquire a range of supports that they need as a result of their impairment/s, provided those supports are appropriately funded by the NDIS. This gives participants a much higher level of choice and control around identifying and acquiring the supports that best meet their individual needs.

Flexible funding will be provided under a plan for specified periods (known as funding periods).

New subsection 32E(2) will provide that flexible funding will be available to a participant where the needs assessment report for the plan indicates the participant requires at least some NDIS supports that are not stated supports. Flexible funding up to a specified total funding amount will be provided under the plan for those supports.

The participant may spend their flexible funding on any NDIS supports for the participant, taking into account any restrictions under subsection 32F(6) (restrictions on how flexible funding is spent) that may require that funding be spent on particular supports.

Legislative notes point the reader to other relevant provisions, including sections 32F (additional rules about flexible funding), 32K (working out total amount of flexible funding), 32H (requirements relating to the acquisition or provision of supports), 46 (dealing with the acquittal of NDIS amounts) and 182 (dealt with debts due to the Agency).

The introduction of a flexible budget implements action 3.5 of the NDIS Review, to allow greater flexibility in how participants can spend their budget, with minimal

exceptions. However, where a participant spends funding on supports that are not NDIS supports, or not in accordance with the plan, a debt may arise.

Example – Kirra

Kirra lives with multiple sclerosis and has a cognitive impairment. She gets multiple comprehensive medical reports from her neurologist ahead of her planning meeting which are shared with her planner.

Under the new planning process, Kirra meets with a needs assessor who takes time to get to know her circumstances and undertakes a structured support needs assessment. This will be a human-centric process.

The support needs assessment (which will be co-designed with the disability community) ensures Kirra's needs are assessed in a holistic and sensitive way.

Kirra's support needs assessment will not require her to repeatedly prove that she meets the disability requirements or the early intervention requirements or both. It will have a whole-of-person focus with the objective of identifying the impacts of the Kirra's disabilities.

The outcomes of the support needs assessment leads to the creation of a reasonable and necessary budget which is comprised of a flexible budget and stated supports for high-cost assistive technology (a motorised wheelchair and a text to speech communication device).

This is communicated to Kirra in an accessible format, and Kirra is assisted to implement her plan.

During her needs assessment and planning meeting, Kirra indicated to the Agency she would be using some of her flexible budget on face-to-face training so she is more job-ready. However, when she talked with her friends she realised she wanted to use her budget differently to meet her needs and purchases a symbol board, a walker and hires a support worker.

How Kirra spends her flexible budget is up to her, as she will know best how she should be supported. Kirra will be expected to manage within her budget, and have a real need for what she purchases, which must be NDIS supports related to her impairments.

Stated supports

Stated supports are provided under a reasonable and necessary budget for specific high-cost items. Category A NDIS rules will prescribe supports that are stated support for participants or classes of participants. For example, high-cost assistive technology, home modifications and supported independent living may all be stated supports.

Paragraph 32E(3)(d) provides that funding for stated supports can only be spent on that support (or class of supports) and cannot be spent for any other purpose, including

acquiring other NDIS supports. A participant's need for a stated support will be identified through the needs assessment report.

Legislative notes point the reader to other relevant provisions, including sections 32G (additional rules about stated supports), 32H (requirements relating to the acquisition or provision of supports), 46 (dealing with the acquittal of NDIS amounts) and 182 (dealing with debts due to the Agency).

32F – reasonable and necessary budget - flexible funding

This section applies if a participant's reasonable and necessary budget provides that flexible funding is to be provided under a plan.

Funding periods for flexible funding

If a participant's reasonable and necessary budget provides for flexible funding, then subsection 32F(2) sets out the plan must prescribe specific periods (funding periods) in which flexible funding will be provided under a plan, including a start and end date for each funding period and the proportion of the total flexible funding that will be provided in each period.

Subsection 32F(3) provides that a funding period must be no more than 12 months and each funding period within a plan may differ from one another. The first funding period commences on the first day of the plan and funding periods must run consecutively, with the next period commencing immediately after the preceding period ends. It is possible that a proportion for a particular funding period may be nil, for example, where a participant is undertaking an intensive program do not require funding during certain funding periods.

The needs assessment process will enable the CEO to approve multi-year plans where appropriate. Funding periods will provide participants with clear guidance on how much funding they have to spend over each period, so they can manage their flexible budget effectively.

This amendment will ensure the right balance is struck between the importance of providing participants with a flexible budget and supporting participants to spend within their budget. Setting a shorter funding period is discretionary and will add to the safeguards available where there are concerns around a participant's safety and wellbeing (for example, where there are concerns that a participant is at risk of exploitation).

This amendment will also assist in addressing sustainability pressures on the Scheme as intra-plan inflation is a key driver of Scheme costs and arises in situations where a participant is over-utilising their plan.

Rolling-over unspent funding

If the flexible funding amount for a funding period is not spent within that period, then subsection 32F(5) provides the next funding period will be increased by the excess amount that was not spent in the preceding period, that is the excess amount will 'roll

over'. This ensures that participants do not lose access to funds if they are not spent within a certain funding period. However, funding does not roll-over from the end of a plan into a new plan.

Restrictions on how flexible funding is spent

In certain circumstances, the CEO may place restrictions on the spending of some or all of the flexible funding provided for in a reasonable and necessary budget. This will only occur where the CEO is satisfied that any of the following circumstances exist:

- a participant would likely suffer physical, mental or financial harm if the flexible funding were not subject to restriction
- section 46 (dealing with the acquittal of NDIS amounts) has not been complied with in relation to any of the participant's plans
- a circumstance prescribed by new Category A NDIS rules.

As recommended by the NDIS Review, these restrictions will only be used where a participant has a history of over-spending, non-compliance with the relevant NDIS rules, or the Agency has identified risk of harm to a participant. Flexibility will be the standard approach wherever possible.

32G - Reasonable and necessary budget – stated supports

Specifying either a total funding amount or requirements for provisions or acquisition of stated supports

Subsection 32G(2) provides that if a participant's reasonable and necessary budget includes funding for stated supports, then the budget must do at least one of the following:

- provide that funding will only be provided under the plan for the support or class of supports up to a specified amount
- specify requirements under subsection 32H(1) in relation to the acquisition or provision of the support or class of supports (such as a requirement to obtain a quote or quotes).

Funding periods for stated supports

If a participant's reasonable and necessary budget provides for funding for a stated support, then subsection 32G(3) provides the plan must prescribe specific periods (funding periods) in which funding will be provided, including a start and end date for each funding period and the proportion of the total funding that will be provided in each period.

Category A NDIS rules may prescribe certain supports that are not required to have funding periods.

A funding period must be no more than 12 months and each funding period within a plan may differ from one another. The first funding period commences on the first day of the plan and funding periods must run consistently, with the next period commencing immediately after the preceding period ends.

Rolling over unspent funding

Subsection 32G(6) provides if the total funding for stated supports for a funding period is not spent within that period, then the next funding period will be increased by the excess amount that was not spent in the preceding period i.e. the excess amount will 'roll over'. This ensures that participants do not lose access to funds if they are not spent within a certain funding period. However, funding does not roll-over at the end of a plan into a new plan.

32H – Reasonable and necessary budget - requirements relating to provision or acquisition supports

New section 32H provides that the reasonable and necessary budget may specify that funding (either flexible funding or funding for a stated support) will only be provided where certain requirements are met. These requirements may include the following:

- a requirement that supports are provided by a specified person or class of persons
- a requirement that a specified process be undertaken prior to the supports being acquired or provided
- a requirement that specified conditions be satisfied in relation to the participant before the supports are acquired or provided
- a requirement to comply with any requirements specified in new Category A NDIS rules.

For example, a requirement may be that a participant obtain a certain number of quotes for home modifications or major assistive technology.

In addition, these provisions are intended to support future reforms to the NDIS, including a new early intervention pathway and alternative commissioning. For example, NDIS rules may specify what evidence-based supports are appropriate for children under nine years of age with developmental delay. The rules could also specify particular supports in a remote First Nations community that have been co-designed with that community through an alternative commissioning approach.

32J – Reasonable and necessary budget – National Disability Insurance Scheme rules

Section 32J provides a new Category A NDIS rule making power setting out requirements with which the CEO must comply, methods or criteria that the CEO is to apply and matters that the CEO may, must or must not take into account in making a decision under sections 32F, 32G or 32H about a reasonable and necessary budget.

32K – Reasonable and necessary budget - working out total funding amounts

Section 32K specifies that total funding amounts in a participant's reasonable and necessary budget must be determined by applying information contained in the needs assessment report in accordance with the method set out by a legislative instrument.

The method will only take into account supports that are NDIS supports for a particular participant and will only take into account impairments that meet the disability requirements or early intervention requirements.

The method may also take into account other factual information such as informal supports available to a participant and the area in which they live. It may also take into account additional assessment tools relevant to the particular participant, and whether there have been any lump sum compensation payments related to their support needs.

The outcome of the method will be a dollar amount for flexible funding and/or funding for stated supports. Some stated supports (such as assistive technology) will require a quote, similar to the existing process. The method will prescribe the manner in which the quotes are considered and how an amount of funding is identified for these kinds of supports.

Subsection 32K(1) provides that a needs assessment report must be used to work out the total funding amount for flexible funding and total funding amount for stated supports. This must be done by applying the information contained in a needs assessment report to the method determined under subsection 32K(2).

Subsection 32K(2) provides that the Minister may, by legislative instrument, determine methods for working out the total funding amounts above. When making such a determination, the Minister must have regard to the need to ensure financial stability of the NDIS as well as the principles set out in subsection 4(5) and (11) of the Act.

Relevantly, these objects provide that people with disability should be supported to access supports that:

- support people with a disability to pursue their goals and maximise their independence
- support people with a disability to live independently and to be included in the community as fully participating citizens
- 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.

A determination under subsection 32K(2) may relate to how to take compensation into account, including:

- lump sum compensation payments that specifically include an amount for the cost of supports; and
- lump sum compensation payments that do not specifically include an amount for the cost of supports; and
- periodic compensation payments that the CEO is satisfied include an amount for the cost of supports; and
- amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation; and

- supports in respect of personal injury that may be funded or provided under a scheme of insurance, or under a Commonwealth, State or Territory law.

Compensation is defined in the Act at subsection 11(1) as a payment (with or without admission of liability) in respect of:

- compensation or damages in respect of personal injury
- personal injury, under a scheme of insurance
- compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme
- personal injury, in settlement of a claim for damages or a claim under such an insurance scheme that is wholly or partly in respect of the cost of supports that may be provided to a participant (whether or not specifically identified as such). It does not matter whether the payment is made directly to the person who sustained the personal injury or to another person in respect of that person.

Subsection 32K(5) clarifies that the legislative instrument may determine different methods for different classes of participants or classes of stated supports. This is without limiting subsection 33(3A) of the *Acts Interpretation Act 1901* that prescribes scope of powers in relation to where an Act confers a power to make a legislative instrument.

Subsection 32K(6) provides that, despite subsection 14(2) of the Legislation Act a determination under subsection 32K(2) may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Under section 17 of the Legislation Act appropriate consultation must be undertaken in relation to the proposed legislative instrument before it is made. The nature and extent of this consultation must be explained in the Explanatory Statement for each instrument in accordance with section 15J of the Legislation Act. This means that relevant stakeholders and the States and Territories will need to be consulted on this legislative instrument and have the opportunity to make comment before it is made. The instrument will also be subject to Commonwealth parliamentary scrutiny and disallowance.

32L – Assessment of participant’s need for supports

CEO to arrange assessment of participant's needs for supports

Subsection 32L(1) provides that the CEO must arrange for an assessment of a participant’s need for supports to be undertaken as soon as practicable after the CEO commences the preparation of a plan for a participant.

What an assessment covers

Subsections 32L(2) to (4) deal with how an assessment must be undertaken.

The assessment must be undertaken using the assessment tool and in accordance with any other requirements determined under subsection 32L(8). It must assess the

participant's need for supports only in respect of impairments that meet the disability or early intervention requirements.

The needs assessment must have regard to any information or reports requested by the CEO for the purposes of the assessment and may have regard to any information held by the Agency in relation to the participant.

Needs assessment reports

Subsections 32L(5) and (6) deal with needs assessment reports. As soon as practicable after the assessment, a report of the assessment must be prepared and given to the CEO. The report must include any information and meet any requirements determined by the Minister under subsection 32L(8).

Replacement assessments

Subsection 32L(7) allows the CEO, when deciding whether or not to approve a statement of participant supports, to decide that a replacement assessment of the participant's needs should be undertaken. The CEO must be satisfied in accordance with Category A NDIS rules that the replacement assessment should be undertaken.

If the CEO decides that a replacement assessment should be undertaken, then the CEO must arrange for that assessment. The assessment must be undertaken in accordance with subsections 32L(2) to (6). The replacement assessment is taken to replace the existing assessment and the needs assessment report prepared for the replacement assessment is taken to replace the needs assessment report prepared for the existing assessment.

This means that the assessment will be undertaken again (in whole or in part) and the resulting needs assessment report will replace the existing assessment report.

Ministerial determinations relating to assessments and reports

Subsection 32L(8) allows the Minister, by legislative instrument, to determine the following:

- assessment tools to be used in undertaking needs assessments
- requirements for undertaking assessments (such as a requirement for a person undertaking the needs assessment to have certain skills or qualifications)
- information that must be included in a needs assessment report
- requirements that the needs assessment report must satisfy (including matters that must be set out in the report).

The needs assessment tool (or tools) will be highly technical and developed in consultation with the disability sector and medical and professional experts, as well as relying on international learning and best practice. These instruments will be evidence based and it is expected the instruments will need to be changed and updated in accordance with experience from their use and other updates such as medical standards and advice.

The determination may make different provision for different classes of participants.

This approach is consistent with the recommendations of the NDIS Review that the needs-based approach to budget setting will prioritise evidence-based supports that lead to a more predictable and manageable scheme.

When making the determination, the Minister must have regard to the need to ensure financial stability of the NDIS as well as the principles set out in subsection 4(5) and (11) of the Act.

Relevantly, these objects provide that people with disability should be supported to access supports that:

- support people with a disability to pursue their goals and maximise their independence
- support people with a 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.

Despite subsection 14(2) of the Legislation Act, a determination under subsection 32L(8) may make provision for, or in relation to, a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Under section 17 of the Legislation Act appropriate consultation must be undertaken in relation to the proposed legislative instrument before it is made. The nature and extent of this consultation must be explained in the Explanatory Statement for each instrument in accordance with section 15J of the Legislation Act. This means that relevant stakeholders and the States and Territories will need to be consulted on this legislative instrument and have the opportunity to make comment before it is made. The instrument will also be subject to Commonwealth parliamentary scrutiny and disallowance.

Subdivision C—Content of old framework plans

32M – Application of this Subdivision

All plans in force at the time of commencement of the Act will now be known as old framework plans. Old framework plans will continue to exist until such time when all participants have transitioned to new frameworks plans in accordance with subsection 32C(1).

From commencement, old framework plans will have funding limits which will support the Agency's ability to help participants manage their plan within the funding allocated.

Items 37, 38, 408, 41 and 43-45 – Section 33

These items insert new headings into section 33 to assist with readability.

Item 39 - After subsection 33(2)

This item allows the CEO to specify 'total funding amounts' and 'total component amounts' in old framework plans.

The decision to specify a total funding amount or a total component amount will be discretionary and will add to the tools available to the CEO to support participants to stay within their allocated funding amounts in their current plans. This amendment will also assist in addressing sustainability pressures on the Scheme as intra-plan inflation is a key driver of Scheme costs and arises in situations where a participant is over-utilising their plan without experiencing a significant change in circumstance.

Example – Jai

Jai self-manages the funding in his plan. He has had 5 plans in the last three years, with no change in his circumstances. Jai's first plan was managed within the funding allocated, but his subsequent plans saw several large claims made with no invoices provided.

Jai repeatedly exhausted all the funding in his plan well before the plan reassessment date, and then asked the Agency to complete an early plan reassessment when his funds were exhausted in order to have access to more NDIS funding.

Based on Jai's spending behaviour, the NDIA will be able to initiate a plan reassessment, and place a spending limit on Jai's plan, as well as implementing monthly releases of funds.

Jai's claiming changes, including no longer claiming large amounts of funding without invoices, and he manages his plan within the total funding amount.

Total funding amounts and funding components

New subsection 33(2A) will provide that the statement of participant supports may (and must in circumstances prescribed a determination made under subsection 33(2E)), specify the following:

- a total funding amount, being the total amount of funding that will be provided under the plan in relation to all reasonable and necessary supports funded under the plan
- a funding component amount, being the total amount of funding that will be provided in relation to a class or classes of reasonable and necessary supports, funded under a plan
- that funding will be provided under the plan in relation to reasonable and necessary supports during specified periods (each of which is a funding period).

The new subsection 33(2B) provides that where the statement of participant supports specifies that funding will be provided under the plan for reasonable and necessary supports during funding periods, then the statement must:

- specify funding periods:
 - for reasonable and necessary supports funding under the plan generally

- for a specified reasonable and necessary support or class of reasonable and necessary supports
- specify when each funding period starts and ends
- specify for each funding period:
 - the proportion of the total funding amount that will be provided under the plan during each funding period for reasonable and necessary supports generally
 - if the funding period relates to a particular support or class of supports and there is no funding component amount, the proportion of the total funding amount that will be provided under the plan during the funding period for the support or class of supports
 - if the funding period is for a particular support or class of supports for which there is a funding component amount, the proportion of the funding component amount that will be provided under the plan during the funding period for the support or class of supports.

New subsection 33(2C) deals with when a funding period starts and ends and provides that:

- a funding period must be no more than 12 months,
- the duration of a funding period may differ from the other funding periods,
- if the funding period is for reasonable and necessary supports generally:
 - the first funding period must start on a day worked out in accordance with a determination made under subsection 33(2E)
 - each other funding period for the support is continuous, that is, that each funding period commences immediately after the preceding period ends.

New subsection 33(2D) provides that the total funding amount and any funding component amount must be worked out in accordance with a determination under subsection 33(2E).

New subsection 33(2E) provides that the Minister may, by legislative instrument, determine:

- circumstances in which a statement of participant supports must specify that funding will be provided under paragraphs 33(2A)(a),(b) and (c)
- how to work out the total funding amount for reasonable and necessary supports
- kinds of supports, or classes of supports, that may have funding component amounts
- how to work out the funding component amount for a support, or class of supports
- any one or more of the following:
 - requirements with which the CEO must comply
 - methods or criteria that the CEO is to apply
 - matters that the CEO may, must, or must not take into account
 in working out a total funding amount or a funding component amount, or deciding any matter for the purposes of subsections (2B), (2C) or (2D).

New subsection 33(2F) provides that despite subsection 14(2) of the Legislation Act, a determination under subsection 33(2E) may make provision for, or in relation to, a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. For example, the determination may adopt a document such as the *NDIS Pricing Arrangements and Price Limits* as in force from time to time. This recognises the fact that pricing arrangements change from year to year to take account of inflation and developments in the market.

Under section 17 of the Legislation Act appropriate consultation must be undertaken in relation to the proposed legislative instrument before it is made. The nature and extent of this consultation must be explained in the Explanatory Statement for each instrument in accordance with section 15J of the Legislation Act. This means that relevant stakeholders and the States and Territories will need to be consulted on this legislative instrument and have the opportunity to make comment before it is made. The instrument will also be subject to Commonwealth parliamentary scrutiny and disallowance.

Item 42 - At the end of subsection 33(5)

This item inserts an additional factor that the CEO must consider when exercising the power to approve a statement of participant supports under subsection 33(2). Specifically, the CEO must have regard to whether section 46 (dealing with the acquittal of NDIS amounts) was complied with in relation to any previous plan for the participant.

This allows the CEO to change the plan management type in the statement of participant's supports in light of a participant's spending history. For example, if a participant has a history of over-spending their plan, the CEO may change the participant from self-managed to agency managed to support the participant to spend their funding more effectively.

Items 46 to 47 – Section 34

Section 34 of the Act sets out the matters that the CEO must be satisfied of when approving a statement of participant supports under an old framework plan and allows for NDIS Rules to prescribe methods or criteria to be applied or matters to which the CEO is to have regard, in deciding whether or not they are satisfied of those matters.

Item 46 inserts an additional criterion (new paragraph 34(1)(aa)), which provides that the supports must be necessary to address the needs arising from an impairment that meets the disability requirements (in accordance with section 24) or early intervention requirements (in accordance with section 25). **Item 48** makes consequential amendments to subsection 34(2) to ensure that NDIS rules can be made for the purposes of new 34(1)(aa).

This amendment clarifies that the NDIS only funds supports for impairments that meet the disability or early intervention requirements, as per the Scheme's original intent. This amendment reflects the Agency's current operational guidelines and will provide

clarity to participants and other service systems about what supports will be funded through the NDIS. It will not require participants to repeatedly prove their disability.

Item 47 repeals existing paragraph 34(1)(f) and replaces it with a requirement that any general supports provided or reasonable and necessary supports funded are NDIS supports. This simplifies the drafting of 34(1)(f) while making it clear that only supports appropriately funded by the NDIS will be included in a statement of participant supports.

Item 49 - At the end of subsection 35(4)

This item expands the rule making power in subsection 35(4) which provides for NDIS rules relating to how to take into account certain forms of compensation. New paragraph 35(4)(d) allows the NDIS rules to deal with supports for personal injury that have been funded under another law or scheme of insurance.

Items 50 to 54 - section 36

These items make changes to section 36 of the Act that deals with requests for information and reports for certain purposes.

Item 50 inserts a new subdivision title 'Subdivision D – Information and reports' to assist the reader in navigating the Division.

Item 51 replaces the heading for section 36 of the Act so that it reads '*requesting information and reports*'. This reflects the fact that section 36 no longer only deals with information and reports for the purposes of preparing and approving a participant's plan.

Item 52 inserts an additional purpose for which the CEO may make a request under subsection 36(2), specifically to undertake an assessment under section 32L. **Item 53** is a consequential amendment to the amendment made by **item 52**.

Item 54 repeals subsection 36(3) and inserts new subsections 36(3) to (5). It sets out matters related to requests for information the CEO makes for prescribed purposes and the processes surrounding them.

Subsection 36(3) deals with requests for information for the purposes of preparing a new framework plan. It provides that a request for information must specify a 28 day minimum timeframe in which to provide information and reports. If the CEO does not receive the information or reports 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 not to have complied with the request for information within the relevant timeframe.

Subsection 36(4) sets out a notification requirement if preparation of a new framework plan is suspended as a result of non-compliance with the timeframe set out under subsection 36(3). It also provides that any other old or new framework plan that is in effect for the participant is suspended pending receipt by the CEO of the requested

information or reports. Once this information is received the CEO must recommence the preparation of the new framework plan.

These provisions support the effective transition of participants to the new budget setting framework. The new needs assessment will need to be completed to inform the amount of flexible funding and/or identify the stated supports to be included in a participant's plan. These amendments ensure decisions about new framework plans are based on up-to-date and current information about a participant, thus improving the quality and consistency in decision-making by the Agency. Improved quality and consistency in decision-making is also a key requirement in ensuring the delivery of NDIS supports is evidence-based and outcomes focused.

Subsection 36(5) deals with requests for information for the purposes of preparing a statement of participant supports for a participant or deciding whether to approve a statement of participant supports for a participant. It provides that the CEO may decide whether to approve a statement of participant supports prior to receiving all the information requested under subsection 36(2). It also requires that a reasonable opportunity be provided to answer those requests, and notes that if information is received after the CEO has made a decision to approve a statement of participant supports, the plan can be varied, reassessed or replaced if necessary.

This subsection provides the CEO flexibility to make decisions to approve statements of participant supports as soon as they consider that the requisite information has been provided. This provides immediate outcomes to participants, while retaining the flexibility to adjust plans if new information becomes available.

Items 55 – 59 – When plans are in effect

Item 55 inserts subdivision heading **Subdivision E – When a plan is in effect etc.** before section 37. This assists the reader in navigating the Division of the Act.

Item 56 repeals and replaces subsection 37(3) and inserts new subsection 37(4) and is consequential to the introduction of new framework plans.

Subsection 37(3) deals with when a plan ceases to be in effect. In addition to the two circumstances identified in current subsection 37(3) (that a plan ceases to be in effect when it is replaced by a new plan or the participant ceases to be a participant), subsection 37(3) also provides that a new framework plan ceases immediately after the end of the maximum period of effect specified under new paragraph 32D(d), as new framework NDIS plans have an end date.

New subsection 37(4) clarifies when a plan is deemed to be replaced by another plan for the purposes of paragraph 37(3)(a).

Item 57 inserts new paragraph 41(1)(aa) before existing paragraph 41(1)(a). Subsection 41(1) deals with when a statement of participant supports in a participant's plan is suspended. Currently, a plan is suspended where a person is temporarily absent from Australia or where a participant does not take the required action to obtain appropriate compensation. This item adds a new circumstance, specifically that a plan

is suspended where a person fails to provide requested information or reports for the purposes of a needs assessment under new section 32L. This item is a consequential amendment to the amendment at **item 54**.

Item 58 repeals and replaces paragraph 41(2)(a). Current paragraph 41(2)(a) refers to reasonable and necessary supports, which are not provided under new framework plans. The replacement paragraph makes reference to NDIS supports which are provided under both old framework and new framework plans. It provides that a person is not entitled to be paid NDIS amounts while their statement of participant supports is suspended, where those amounts relate to supports that are acquired or provided during the period of suspension.

Item 59 adds a new subsection at the end of subsection 41. It provides that NDIS rules may specify when supports should be taken to be or not to be acquired or provided during a period of suspension for the purposes of subsection 41(2). This item is a consequential amendment to the amendment at **Item 44**.

Items 60 and 61 – Section 42

These items are consequential amendments.

Item 60 amends paragraph 42(1)(a), which deals with the purchasing of supports under a plan. The item and makes changes to language so that the provision applies to old framework plans and new framework plans.

Item 61 amends subsection 42(2), which deals with the management of funding for supports under a plan. The item inserts a reference to new paragraph 32D(2)(f) so that the provision applies to new framework plans as well as old framework plans.

Item 62 - Subsection 43(2)

This inserts a reference to subsection 43(2A) into subsection 43(2) and is consequential to **item 47**.

Item 63 – After subsection 43(2)

Section 43 deals with the choice for a participant in relation to plan management type. It allows the participant to make a plan management request that their plan is managed wholly or partly by themselves, a plan manager or the Agency. Except in certain situations set out in section 43, the CEO must comply with that request.

This item inserts new subsections 43(2A), (2B), (2C) and (2D). These subsections deal with situations in which the CEO may not comply with a participant's plan management requests in relation to new framework plans.

These new provisions provide that if the CEO is satisfied that certain circumstances exist, the CEO may decide that a particular portion of flexible funding or a particular portion of funding for stated supports is to be managed by one of the following:

- the Agency
- the participant, if the participant has made a plan management request

- a plan nominee (if the decision would be consistent with the terms of appointment of the nominee), and the participant has made a plan management request
- a registered plan management provider, if the participant has made a plan management request that nominates that provider.

The circumstances in which the CEO may make such a decision are:

- the participant would be likely to suffer physical, mental or financial harm if the CEO were not to make the decision
- section 46 (dealing with the acquittal of NDIS amounts) has not been complied with in relation to the plan or any of the participant's previous plans
- a circumstance prescribed by Category A NDIS rules.

Category A NDIS rules may make provision for determining whether a portion of the budget should be managed by another person, including but not limited to:

- requirements with which the CEO must comply
- method or criteria that the CEO is to apply
- matters the CEO may, must or must not take into account in making a decision.

This change provides the CEO with the ability to provide additional support to participants to help them manage their plan within their budget. The flexibility to allow the Agency, a plan nominee or a registered plan management provider to manage the plan ensures the participant is appropriately supported. It also provides opportunities to build plan management capacity incrementally and over time and strengthen Scheme integrity.

Example – Parker

Parker is a participant who has a physical disability. Parker's plan includes \$100,000 of self-managed funding. Parker uses the funding to pay for rent and groceries. The Agency has also observed that Parker recently purchased 10 food processors. It is not clear why Parker purchased them.

Parker has made frequent requests for plan reassessments because they have overutilised their plan.

At his plan reassessments, the Agency explained to Parker that their funding was not provided for rent, groceries or multiple food processors. Parker's local area coordinator works with them to make sure he understands how they can use their NDIS funding to best meet their support needs.

Once these amendments are enacted, the Agency will also be able to change Parker's plan management type to Agency managed to ensure that Parker is appropriately utilising their plan to provide for their disability related needs.

Item 64 - Paragraph 43(3)(d)

This item amends paragraph 43(3)(d) to add a reference to paragraph 44(1)(c). This amendment is consequential to the amendment made by **item 52**.

Item 65 - After subsection 43(4)

This item inserts new subsection 43(4A), which is an additional circumstance in which the CEO may decide not to comply with a participant's plan management request in relation to an old framework plan. Specifically, it provides that where a participant requests that their plan be managed by a registered plan management provider, the CEO does not need to comply with this request if the CEO is satisfied that section 46 (dealing with the acquittal of NDIS amounts) would not be complied with by the relevant plan manager (see **item 69**).

This amendment protects participants and allows the CEO to take steps if a registered plan management provider may take advantage of a participant by inappropriately spending NDIS amounts.

Item 66 - Paragraph 43(6)(e)

This item amends paragraph 43(6)(e) to add a reference to paragraph 44(2A)(c). This amendment is consequential to the amendment made by **item 68**.

Item 67 - Subsection 43(7)

This item repeals and replaces subsection 43(7).

Subsection 44(7) sets out a hierarchy to plan management requests, providing that certain circumstances will override a plan management request. This amendment inserts new paragraphs into subsection 44(7) to deal with plan management requests in relation to new framework plans.

New paragraph 44(7)(a) provides that the CEO does not need to give effect to a plan management request in relation to a new framework plan in the following circumstances:

- if the plan management request is for self-management – the participant is insolvent or under administration or if the CEO is satisfied that participant's management would present unreasonable risk or permit participant to manage unpermitted matters
- if the plan management request is for a plan management provider – the CEO is satisfied that the provider's management of the funding would present an unreasonable risk to a participant
- if the plan management request is for a nominee to manage the plan – the nominee is insolvent or under administration or the CEO is satisfied that the nominee's management would present an unreasonable risk to the participant.

New paragraph 44(7)(c) provides that the requirement for the CEO to give effect to a request that a plan nominee manages funding under a participant's plan does not apply if the CEO is satisfied that certain circumstances exist, including that the

participant would be likely to suffer physical, mental or financial harm or that section 46 (dealing with the acquittal of NDIS amounts) would not be complied with.

Item 68 - At the end of subsection 44(1)

This item inserts new paragraph 44(1)(c), which provides that a person must not manage funding where the CEO is satisfied that section 46 (dealing with the acquittal of NDIS amounts) would unlikely be complied with under the plan. This may apply to the whole of the plan to or a part of the plan.

Item 69 - After subsection 44(2)

This item inserts subsection 44(2AA), which relates back to paragraph 43(4A)(b) and applies to a request that a participant's plan be managed by a registered plan management provider. The effect of new subsection 44(2AA) is that the statement of participant supports must provide that the funding of supports is to be managed by the Agency if the CEO is satisfied that section 46 (dealing with the acquittal of NDIS amounts) would be unlikely to be complied with if the plan management provider were to manage the funding of supports. This may apply to the whole plan or part of the plan.

This amendment protects participants and allows the CEO to take steps if a registered plan management provider takes advantage of a participant by inappropriately spending NDIS amounts.

Item 70 - At the end of subsection 44(2A)

This item inserts new paragraph 44(2A)(c) and applies to a request that a participant's plan be managed by a plan nominee. The effect of this new paragraph is that a plan nominee may not manage the funding under a plan if the CEO is satisfied that section 46 (dealing with the acquittal of NDIS amounts) would be unlikely to be complied with. This may apply to the whole of the plan or part of the plan.

This amendment protects participants and allows the CEO to take steps if a nominee takes advantage of a participant by inappropriately spending NDIS amounts.

Items 70 to 71 – NDIS rules relating to plan management

Subsection 44(3) currently provides for NDIS rules that may prescribe criteria that the CEO is to have regard to in considering whether giving effect to certain plan management requests would pose an unreasonable risk to a participant.

Item 70 assists the reader to navigate section 44 by inserting the heading '*National Disability Insurance Scheme rules relating to unreasonable risk*' before subsection 44(3).

Item 71 amends the rule making power in section 44(3) so that NDIS rules may also prescribe matters that the CEO is not to have regard to in deciding whether giving effect to certain plan management requests would pose an unreasonable risk to a participant.

Item 73 inserts two new Category A NDIS rule making powers.

New subsection 44(4) will allow NDIS rules to prescribe circumstances in which the management of funds under a plan by a participant, a registered plan management provider or a plan nominee would be taken to present an unreasonable risk to the participant.

A new heading '*National Disability Insurance Scheme rules relating to compliance with section 46*' will be inserted before new subsection 44(5) to assist the reader to navigate the section.

New subsection 44(5) will allow Category A NDIS rules to prescribe criteria that the CEO is to apply and matters to which the CEO is, or is not, to have regard to in considering whether section 46 (dealing with the acquittal of NDIS amounts) would be unlikely to be complied with if funding for supports was managed under the plan by any of the following:

- the participant
- a registered plan management provider
- a plan nominee

The intention of subsection 44(4) rules is to provide greater clarity about when the CEO can change a participant's plan management type (for example, from self-managed to plan or agency managed). The Act currently specifies that people must not manage funding if it would 'present an unreasonable risk to the participant' but does not specify what constitutes an unreasonable risk. The new NDIS rules, to be designed in consultation with the disability community and the States and Territories, will describe what can be considered an 'unreasonable risk'.

The subsection 44(5) rules will enable the CEO to consider additional financial risk factors when making a decision about plan management type. For example, they may enable the CEO to take into account if a person has spent the funding in their plan on things which are not NDIS supports, or if they are spending more funding than is in their plan.

Item 74 - At the end of section 45

Section 45 of the Act deals with the payment of amounts under the NDIS. This item inserts subsections 45(4) to 45(6) that set out circumstances where a NDIS payment amount should not be paid under a participant's plan.

For a participant's new framework plan, the Agency is not permitted to pay an NDIS amount to a person if the payment would result in the total amount of flexible funding in a plan being exceeded (including for a funding period), or the total amount of funding for a stated support in a plan being exceeded (including for a funding period).

For a participant's old framework plan, the Agency is not permitted to pay an NDIS amount to a person if the payment would result in a total funding amount or total component amount in a participant's plan being exceeded (including in relation to a funding period).

The above does not apply in relation to the payment of an NDIS amount if the CEO is satisfied that there are exceptional circumstances (that must be prescribed in NDIS rules) justifying the making of the payment amount without varying or replacing the participant's plan.

Category D NDIS rules, requiring consultation with States and Territories, may prescribe what constitutes exceptional circumstances.

These changes enable the CEO to apply spending limits under the existing planning framework and are designed to ensure participants spend within the funding amount in their plan. The CEO will be able to top-up plans if satisfied exceptional circumstances exist, which must be specified in NDIS rules. These exemptions will ensure no participant is left without critical support.

Item 75 - Subsection 46(1)

Section 46 deals with the acquittal of NDIS amounts, including spending of those amounts and the retention of records.

This item repeals and substitutes subsection 46(1) and inserts new subsections 46(1A) and (1B), all dealing with the spending of NDIS amounts.

This item inserts new headings to assist the reader to navigate the section. The first heading explains that the following provisions deal with *'Requirement to spend money only on NDIS supports and in accordance with plan'* at the beginning of the section. The second heading explains that the remainder of the section deals with *'Requirements relating to the retention of records'*.

New subsection 46(1) provides that a participant who receives an NDIS amount, or a person who receives a NDIS amount on behalf of a participant may spend money only on NDIS supports for the participant and in accordance with the participant's plan.

The requirement to spend money only on NDIS supports for the participant means that funds may only be used to obtain supports that have a constitutional basis, are appropriately funded by the NDIS, and are needed by the participant as a result of their impairment or impairments.

The requirement to spend money in accordance with a plan means that any specifications or limitations set out in a plan must be complied with. For example, if funding periods are specified in a participant's plan, they are required to comply with those and not exceed the funding allocated to those funding periods.

The notes under subsection 46(1) assist the reader by pointing to the consequences that may arise as a result of a failure to comply with subsection 46(1). The first note reminds the reader that a failure to comply with the requirements may lead to a variation of the participant's plan, in particular in relation to the plan management type and the type and duration of funding periods for a plan. The second note points the reader to section 182 of the Act that deals with debts due to the Agency.

Subsections 46(1A) and (1B) ensure that the requirements of subsection 46(1) apply where a participant (or another person spending money on behalf of the participant) does not receive the NDIS amount directly, for example because the NDIS amount is paid directly to a provider without the participant or other person receiving that amount first.

These changes will support the NDIS Review's recommendations to provide more guidance to participants about how to spend their NDIS funding.

Item 76 - Paragraph 46B(2)(b)

This amendment omits 'reasonable and necessary supports specified in' and substitutes 'supports (other than general supports) funded under'. This reflects the fact that new framework plans do not have 'reasonable and necessary supports' but rather have supports funded under a participant's reasonable and necessary budget.

Item 77 - Subparagraph 47A(1)(a)(i)

This item amends subparagraph 47A(1)(a)(i) so both new framework plans and old framework plans can be varied.

Item 78 - After subsection 47A(1)

This item inserts new kinds of plan variations. In particular, it inserts proposed new subsections (1AA) and (1AB) that set out permitted variations for new framework plans.

Permitted variations for new framework plans

Subsection 47A(1AA) provides that the CEO may vary the following aspects of a new framework plan:

- the participant's reasonable and necessary budget
- general supports that will be provided under the plan (if applicable),
- the statement of participant supports in relation to funding for supports or other aspects of the plan
- the maximum period of effect for the plan
- circumstances in which the Agency must reassess a plan.

A legislative note reminds the reader that a statement of participant supports must give effect to a plan management request except in certain circumstances where subsection 43(2) applies, where a plan is partially or wholly managed by the Agency.

A second legislative note reminds the reader that the CEO must have regard to matters in subsection 47A(2A) when varying the statement of participant supports.

Proposed subsection (1AB) sets out certain elements of the reasonable and necessary budget that may be varied under subsection (1AA).

These are:

- in relation to the maximum period of effect specified in a plan, the following may be varied:
 - the total funding amount for flexible funding
 - the total funding amount for stated support
- the total funding amount for a stated support
- the number or duration of the funding periods for flexible funding or for stated supports
- the proportion of the total funding amount for flexible funding, or for stated supports, that will be provided under the plan during one or more funding periods
- a restriction provided under subsection 32F(6) (including restrictions on how flexible funding is spent, and the imposition or removal of a restriction)
- to change, add or remove a requirement on the provision or acquisition of supports under subsection 32H(1).

A variation of the participant's reasonable and necessary budget may occur if:

- the CEO is satisfied the person requires crisis or emergency funding as a result of a significant change their support needs
- the CEO receives information after a plan has come into effect that was made under subsection 36(2) or 50(2) in relation to the plan, and that information is the reason the plan should be varied – for example the information is a quote for a support such as an item of high-cost assistive technology or home modifications
- the CEO is satisfied that circumstances prescribed by Category A NDIS rules exist in relation to the participant.

Finally, this item also inserts a new heading '*Permitted variations—old framework plans*' to assist the reader to navigate the section.

Item 79 - Subsection 47A(1A)

This item amends subsection 47A(1A) to omit 'a participant's' (first occurring) and substitute 'an old framework'. This reflects the fact that there are now two kinds of participant plans.

Item 80 - Paragraph 47A(1A)(a)

This item amends repeals and replaces paragraph 47(1A)(a) and inserts new subparagraphs 47A(1A)(ab) to (ag). These amendments deal with variations to old framework plans and are consequential to the amendments made by **item 39**, introducing the concept of a total plan amount and a component plan amount, as well as funding periods, for old framework plans.

Specifically, the new provisions will provide that the CEO make the following kinds of variations:

- a variation to the plan's reassessment date or the circumstances in which the Agency must reassess the plan

- if a plan reassessment date is varied, the CEO may vary:
 - the total funding amount for reasonable and necessary supports
 - a funding component amount for a support
- a variation to specify any one or more of the following (if not already specified in the plan):
 - a total funding amount for the reasonable and necessary supports specified in the plan
 - a funding component amount for a reasonable and necessary support, or a class of such supports, specified in the plan
 - funding periods for funding provided under the plan for reasonable and necessary supports generally, a particular reasonable and necessary support, or a class of such supports
 - the proportion of the total funding amount or funding component amount that will be provided under the plan during each funding period
- a variation of the number or duration of the funding periods for funding provided under the plan
- a variation of the proportion of the total funding amount or of a funding component amount that will be provided under the plan during one or more funding periods
- a variation relating to the general supports (if any) that will be provided to or in relation to the participant under the plan.

Item 81 - Subsection 47A(1A) (note 1)

This amendment fixes a typographical error.

Item 82 - After subsection 47A(1A)

This item inserts a new heading ‘*Conditions not limited*’ before new subsection 47A(1B) to assist the reader in navigating the section.

New subsection 47A(1B) will provide that despite the fact that subsections 47A(1AA), (1AB) and (1A) prescribe certain circumstances in which the CEO may vary a plan, the NDIS rules are not limited by these circumstances and may prescribe conditions that limit variations under subsection 47A(1) (which provides that NDIS rules may prescribe conditions that must be satisfied for the CEO to vary a plan).

Item 83 - After subsection 47A(2)

Requirements for CEO – new framework plans

This item inserts new subsection 47A(2A) which prescribes requirements for the CEO when varying the statement of participant supports in a new framework plan. Specifically, the CEO must:

- have regard to the participant’s statement of goals and aspirations
- be satisfied in relation to any general supports to be provided of the following:
 - that the supports will be, or are likely to be, effective and beneficial for the participant, having regard to current good practice; and

- any other matters specified in the NDIS rules for the purposes paragraph 32D(6)(b)
- have regard to the principle that a participant should manage their own plan to the extent they wish to do so
- have regard to the operation and effectiveness of the plan and any previous plans of the participant
- have regard to whether the section 46 (dealing with the acquittal of NDIS amount) has been complied with in relation to the plan or previous plans for the participant
- be satisfied of any matters prescribed by Category A NDIS rules.

These requirements put parameters around the CEO's decision-making in varying a new framework plan.

Item 84 - Subsection 47A(3) (at the end of the heading)

This item inserts '*—old framework plans*' to the subtitle to clarify the matters that are being dealt with.

Item 85 - Subsection 47A(3)

This item amends subsection 47A(3) to omit 'the participant's' (first occurring) and substitute 'an old framework'. This reflects the fact that there are now two kinds of participant plans.

Item 86 - At the end of subsection 47A(3)

This item inserts paragraphs 47A(3)(g) and (h) that require the CEO to have regard to whether the participant has complied with section 46 (dealing with the acquittal of NDIS amount) in relation to the plan or any previous plans in varying an old framework plan.

Item 87 - At the end of subsection 48(1)

This item adds a note at the end of subsection 48(1), which provides that the CEO may conduct a reassessment of a participant's plan at any time.

The note points the reader to new section 49B and reminds the reader that a reassessment of an old framework plan cannot be undertaken if the participant has been given a notice under subsection 32B(2) that they are to have a new framework plan.

Items 88 and 89 – At the end of Subsection 48(3) (notes)

These items deal with legislative notes after subsection 48(3) which deals with the CEO making a decision to conduct a reassessment on the participant's request.

Item 88 omits 'Note' and substitutes 'Note 1'.

Item 89 adds Note 2, which reminds the reader that the CEO will not be able to make a decision to reassess an old framework plan at the request of a participant, if

the participant has been given a notice under subsection 32B(2) that they are to have a new framework plan.

Item 90 - Subparagraph 48(7)(b)(ii) and 49 (1)(b)(ii)

This item amends subparagraphs 48(7)(b)(ii) and 49(1)(b)(ii) to refer to section 32D (matters to be included in a new framework plan).

Item 91 - At the end of subsection 49(1)

This item adds a note which reminds the reader that the CEO will not be able to make a decision to reassess an old framework plan at the request of a participant, if the participant has been given a notice under subsection 32B(2) that they are to have a new framework plan.

Item 92 – At the end of section 49A

This item adds a note which reminds the reader that the CEO will not be able to make a decision to reassess an old framework plan at the request of a participant if the participant has been given a notice under subsection 32B(2) that they are to have a new framework plan.

Item 93 - After section 49A

This item inserts new section 49B which provides that there can be no reassessment of old framework plan if participant is to have new framework plan.

It provides that the CEO must not conduct a reassessment of an old framework plan if the participant has been given a notice that the participant is to have new framework plans under subsection 32B(2).

Items 94 Subsection 73B(1) (note)

This item amends the note at the end of section 73B(1) which reminds the reader that if funding for supports under a plan are managed by the Agency, then supports are to be provided only by a registered NDIS provider. The amendment makes it clear that this is relevant to old and new framework plans.

Item 95 Subsection 74(3)

This item omits reference to sections 74(4) and (5) and substitutes a reference to new subsections 74(3A) to (5). This is consequential to the amendments in **item 96** relating to the plan management for children.

Item 96 - After subsection 74(3)

Section 74 deals with the management of plans for children by persons with parental responsibility.

This item deals with a choice in relation to plan management type. It allows a person with parental responsibility to make a plan management request that a child's plan is

managed wholly or partly by that person, a plan manager or the Agency. Except in certain situations the CEO must comply with that request.

This item inserts new subsections 74(3A), (3B), (3C) and (3D). These subsections deal with situations in which the CEO may not comply with a person's plan management request in relation to a new framework plan for a child.

These new provisions provide that if the CEO is satisfied that certain circumstances exist, the CEO may decide that a particular portion of flexible funding or a particular portion of funding for stated supports is to be managed by one of the following:

- the Agency
- the person with parental responsibility, if the person has made a plan management request
- a registered plan management provider, if the participant has made a plan management request that nominate that provider.

The circumstances in which the CEO may make such a decision are:

- the participant would be likely to suffer physical, mental or financial harm if the CEO were not to make the decision
- section 46 (dealing with the acquittal of NDIS amounts) has not been complied with in relation to the plan or any of the participant's previous plans
- a circumstance prescribed by Category A NDIS rules.

Subsection 74(3D) excludes the requirement to give effect to a plan management request in circumstances set out in under subsection 74(4) or 74(4A).

Item 97 - Paragraph 74(4)(b)

This item amends the structure of the subsection for clarity. It also provides that if the CEO is satisfied that section 46 requirements for acquittals of NDIS amounts would be unlikely to be complied with if a particular person were to manage the funding for supports under the plan, then the statement of participant supports in the participant's plan must not specify that person as managing those funds.

Item 98 - After subsection 74(4)

This item prevents the CEO making a decision that funding be managed by a registered plan management provider to the extent that doing so would present an unreasonable risk to the participant.

Item 99 - Subsection 74(6)

This item replaces the current Category A NDIS rule-making power for the NDIS rules with a more expansive power to make rules determining any matter for the purposes of this section. The amendment identifies three topics on which the NDIS rules may make provision, but rules are not limited to them. These are requirements with which the CEO must comply, methods or criteria that the CEO is to apply, and matters that

the CEO may, must or must not take into account in making any decision under this section.

Items 100 to 102 - Subsection 99(1) (table item 3, column 2)

These items amend subsection 99(1) which sets out a table of reviewable decisions under the Act.

Item 100 adds specificity and clarity to the table of reviewable decisions and decision-makes by listing relevant subsections rather than only sections.

Item 101 inserts subsection 32D(2) as a subsection under which a decision to approve the statement of participant supports in a participant's plan is made.

Item 102 inserts an additional reviewable decision into the table. This decision is the CEO decision to suspend the preparation of a new framework plan for a participant under subparagraph 36(3)(b)(i).

Item 103 - Subparagraph 101(2)(a)(i)

Section 101 deals with the effect of later decisions before a review is completed.

This item inserts a requirement that requests for a review of decisions under 32D(2) are handled consistently with those made under subsection 33(2).

Items 104, 105, 107, 109, 110, 111, 112 and 113

These items insert legislative notes to remind readers that legislative instruments made under the Act are exempt from sunseting under the Legislation Act (see part 2 of this Schedule, amending the LEOMR). The instruments are exempt from sunseting as they form part of an intergovernmental scheme.

Item 106 – Paragraph 144(1)(c)

This item amends paragraph 144(1)(c) to omit the reference to 'provides reasonable and necessary' and substitute it with 'funds or provides'. This reflects the fact that new framework plans will not fund reasonable and necessary supports but rather fund supports through a reasonable and necessary budget.

Item 108 – Section 179

This item amends section 179 to omit the reference to 'reasonable and necessary'. This reflects the fact that new framework plans will not fund reasonable and necessary supports but rather fund supports through a reasonable and necessary budget.

Items 114 - Subsection 209(2)

This item adds clarity and specificity by replacing a reference to section 14 with a reference to subsection 14(2) of the Legislation Act.

Items 115 to 122 - Subsection 209(8)

These items insert new NDIS rule making powers into the table at subsection 209(8) to identify the category of the NDIS rule-making powers inserted by this Bill

Part 2—Consequential amendments

Legislation (Exemptions and Other Matters) Regulation 2015

Item 123 Section 12 (after table item 42AB)

This item amends section 12 of the LEOMR by inserting a new item into the table. Specifically, it provides that NDIS rules and any other instrument made under the Act are exempt from sunseting.

The Legislation Act establishes a comprehensive regime for the publication of Commonwealth Acts and instruments. Section 62 of the Legislation Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Legislation Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Legislation Act.

Part 4 of Chapter 3 of the Legislation Act provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed 10 years after they are made unless steps are taken to preserve their operation, or the instruments are exempt from sunseting. As set out in section 49 of the Legislation Act, the purpose of sunseting is to ensure that legislative instruments continue to be fit-for-purpose and are kept up to date through regular review.

Section 54 of the Legislation Act provides for instruments to which the sunseting regime in Part 4 of Chapter 3 does not apply. Instruments which are prescribed by the regulations for the purposes of paragraph 54(2)(b) of the Legislation Act are exempt from sunseting.

The LEOMR prescribes instruments that are exempt from sunseting. The LEMOR prescribes classes of legislative instruments (at section 11) and particular instruments (at section 12) that are exempt from sunseting under paragraph 54(2)(b) of the Act. In this way, the LEOMR serve as a central source of sunseting exemptions, facilitating their whole-of-government management and ensuring that accurate sunseting information can be readily provided to Australian Government agencies, the Parliament and the general public.

It is appropriate for all legislative instruments made under the Act to be exempt from sunseting as they form part of an intergovernmental scheme, as provided in the Attorney-General's Department's *Guide to managing sunseting of legislative instruments*.

The legislative instruments made under the Act operationalise the NDIS, which is an intergovernmental scheme involving the Commonwealth and all States and Territories. As a result, the instruments form an integral part of an intergovernmental scheme.

As outlined above, almost all legislative instruments made under the Act are subject to formal state or territory consultation or agreement requirements. The remainder are subject to consultation under section 17 of the Legislation Act.

This results in a situation where instruments cannot be made, amended or repealed without direct involvement of States and Territories except in the case of sunseting where the instruments will be automatically repealed by operation of a Commonwealth law. This is inconsistent with the consultation and agreement requirements for NDIS rules specifically, and with the operation of the NDIS and the Act more broadly. A sunseting exemption will ensure the same consultation and agreement requirements apply to an instrument being repealed as those that apply to the instrument being made, consistent with the intergovernmental nature of the NDIS.

Part 3—Application and transitional provisions

Item 124 - NDIS supports

This item is a transitional provision until the NDIS rules under paragraph 10(b) of this Bill are made.

Until such time, subitem 124(2) sets out that a support is an NDIS support for the purposes of the Act if:

- the support meets the requirement in proposed paragraph 10(a) of the Bill, and
- the support is in a class of supports mentioned in the *Applied Principles and Tables of Support* under the heading ‘Reasonable and necessary supports for eligible people’, and
- the person falls within the class of people for whom the table identifies that support is for.

Subitem 124(3) prescribes that a support is taken to not be an NDIS Support for the purposes of the Bill if the support is within a class of supports that are mentioned in the *Applied Principles and Tables of Support* under the heading “Other parties”.

Subitem 124(4) further sets out that a support is not an NDIS support if that support falls within the supports described under the NDIS rules made for the purposes of subsection 35(1), reasonable and necessary supports or general supports that will not be funded or provided under the NDIS.

Subitem 124(5) further prescribes that a support is not an NDIS support if that support falls within the supports described under the NDIS rules made for the purposes of subsection 35(1), reasonable and necessary supports or general supports that will not be funded or provided under the NDIS and the participant is the type of participant prescribed, or would be such participant.

The proposed subitem 124(6) clarifies that the *Applied Principles and Tables of Support* means the document titled ‘Principles to determine the responsibilities of the NDIS and other service systems’ dated 27 November 2015. This document is available on the Department’s website as existing at the time of the commencement of the Act.

Item 125 - Access requests

This item specifies that section 21 (when a person meets access criteria), section 26 (requests that the CEO may make) and section 28 (when a person becomes a participant) of the Bill apply on commencement in relation to a person who makes an access request on or after commencement.

Item 126 - Meeting the disability requirements or the early intervention requirements

This item specifies that section 24 (disability requirements), section 25 (early intervention requirements) and section 27 (NDIS rules relating to disability

requirements and early intervention requirements) of the Bill apply on commencement in relation to the following:

- a person who makes an access request on or after commencement
- any person who is a participant on or after commencement, for the purposes of determining whether the person meets the disability requirement or early intervention requirement on or after commencement. This applies to persons who become a participant before, on or after commencement.

Proposed subsection (3) prescribes that any NDIS rules made under section 27, relating to disability requirements and early intervention requirements, of the Act remain in force after commencement.

Item 127 - Status of person as a participant

This item prescribes that section 29 (when a person ceases to become a participant), section 30 (revocation of participant status) and section 30A (requirement to reconsider status of certain participants) of the Bill apply on commencement in relation to all participants after commencement, whether they became a participant before or after commencement.

Item 128 - Transition to new framework plans

This item sets out that subsections 32(3) and (4) (CEO must facilitate preparation of participant's subsequent plan), 32B(2) (CEO must give written notice that participant must have new framework plan) and 32C(1) (contents of new framework plans) of the Bill apply on commencement in relation to all participants after commencement, despite whether they became a participant before or after commencement.

Item 129 - Old framework plans—content and approval of statement of participant supports

Subsection (1) sets out that section 33 (matters that must be included in a participant's plan), section 34 (reasonable and necessary supports) and section 35 (NDIS rules for statement of participant supports) of the Bill apply on commencement in relation to a statement of participant supports included in an old framework plan for a participant if the statement is approved or varied on or after commencement.

Subsection (2) clarifies that the above subsection (1) applies whether the participant becomes a participant, and for variation, whether the plan comes into effect.

Item 130 – When a plan ceases to be in effect

This item sets out that subsection 37(3) (when a plan ceases to be in effect) of the Bill apply on commencement in relation to a participant's plan, whether the plan comes into effect before on or after commencement.

Item 131 – Suspension of plans

This item sets out that paragraph 41(2)(a) (relating to meaning of management the funding for supports under a participant's plan) of Bill apply on commencement in

relation to a suspension of a statement of participant supports in a participant's plan that starts on or after that commencement.

Item 132 – Circumstances in which persons must not manage funding

This item sets out that subsections 43(3), (4A), (5) and (6) (relating to plan management), and 44(1), (2AA), and (2A) (relating to circumstance in which a person must not manage funds), of the Bill apply on commencement in relation to a person who is a participant on or after that commencement.

This applies whether or not the person became a participant before, on or after commencement, whether or not the relevant plan management request was made before, on or after commencement. When dealing with proposed subsection 43(4A) (relating to plan management) and proposed subsection 44(2A) (circumstances in which a person must not manage funding), - this is whether the plan nominee is appointed before, on or after commencement.

Item 133 – Acquittal of NDIS amounts

This item prescribes that section 46 of the Bill applies on commencement in relation to:

- a participant who receives an NDIS amount, including because of subsection 46(1A) or
- a person who receives an NDIS amount on behalf of a participant, including because of subsection 46(1B)

This applies whether or not a participant becomes a participant before, on or after commencement.

Item 134 - Garnishee orders

This item prescribes that paragraph 46B(2)(b) of the Bill applies on commencement in relation to the making of a garnishee order on or after commencement.

Item 135 – Varying old framework plans

This item sets out that subsection 47A(1A) and (3) of the Bill apply on commencement in relation to a variation of old framework whether the plan came into effect before on or after commencement.

Item 136 – No reassessment of certain old framework plans

This item sets out that section 49B (circumstance in which the CEO must not conduct a reassessment of old framework plan) of the Bill applies on commencement in relation to an old framework plan whether that plan comes into effect before, on or after commencement.

Item 137 – Children

This item prescribes subsection 74(4) and (4A) (relating to plan management for child participants) of the Bill apply on commencement in relation to a participant:

- whether they became a participant before on or after commencement
- whether the plan came into effect before on or after commencement
- whether any relevant plan management request was made before on or after commencement

NDIS rules made for the purposes of proposed subsection 74(6) (relating to the CEO's decisions with respect to children) that were in force before commencement, continue to be in force.

Item 138 – Transitional rules

This item sets out that the Minister may prescribe a legislative instrument to make rules that deal with transitional matters (including any saving or application provisions) relating to any amendments or repeals in this Bill.

The rules may prescribe modifications to any Act or instrument as set out in this Bill for a period of 12 months after commencement.

However, the rules may not:

- create an offence or civil penalty
- provide powers of:
 - arrest or detention
 - entry, search or seizure
- impose a tax
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation of this Act
- directly amend the text of an Act.

Apart from the above conditions, the Bill does not limit the rules that may be made for the purposes of transitional matters.

SCHEDULE 2 – QUALITY AND SAFEGUARDS AMENDMENTS

Summary

Schedule 2 of the Bill enables the Commission to attach conditions to the approval of an approved quality auditor. This schedule will also strengthen the NDIS Commissioner's ability to take regulatory actions by delegating certain compliance and enforcement powers and functions.

Background

The NDIS Review identified there are currently gaps in the oversight of NDIS providers. To address this the NDIS Review recommended the Commission develop and deliver a risk proportionate model of regulation and strengthen the regulatory response to long-standing and emerging quality and safeguards issues.

On 12 February 2024, the Minister announced a new Taskforce will work with people living with disability to ensure provider and worker registrations lead to better outcomes for NDIS participants. This Taskforce will provide expert advice to Government on the best approach to overhaul the current registration system for those who deliver supports while, crucially, maintaining choice and control for participants, as recommended by the NDIS Review.

In the meantime, these amendments take immediate steps to respond to known gaps in NDIS regulation and are expected to be compatible with the future design of the Commission. These amendments will improve the Commission's ability to respond effectively to specific safeguarding and fraud concerns whilst making the most efficient use of their existing resources.

The current provisions restricting delegation of compliance and enforcement action, has proven inefficient and unnecessary. It requires SES officers to be fully briefed on relatively straightforward and low risk matters such as the issuing of compliance notices and infringement notices. Effectively only 12 SES officers are available to make compliance and enforcement decisions. While the Commission has 18 SES officers, 5 are in corporate roles and therefore do not have expertise in compliance and enforcement matters, and one is the General Counsel for whom it would be inappropriate to make compliance and enforcement decisions. Greater efficiencies can be achieved if an SES officer is not required to issue these notices but the function can be delegated to an appropriate EL2 officer with experience and expertise in the area.

Explanation of the changes

Part 1—Amendments

Item 1- Before subsection 73U(5) (after the heading)

This item inserts new subsection 73U(4A) which introduces a new power to make NDIS rules which specify conditions of the approval for a person or body to become an approved quality auditor.

Enabling NDIS rules which specify the conditions for approved quality auditor will strengthen the quality and integrity of auditing within the NDIS. For example, the proposed NDIS rule-making power could be used to impose a condition requiring an approved quality auditor not to employ or engage a person against whom a banning order has been made. Such a condition would prevent banned persons from being able to move from the NDIS provider sector of the NDIS market system to the NDIS auditing sector, and continue to engage in activities that had them banned from the provider market. The strengthening of the quality and integrity of auditing within the NDIS is consistent with the NDIS Review recommendations in relation to risk-based registration of NDIS providers.

Item 2 - After subsection 73U(5)

This item inserts subsection 73U(5A) which specifically authorises conditions that restrict the employment or engagement of a person, against whom a banning order has been made, by an approved quality auditor. The amendment also authorises conditions that require the approved quality auditor to not have, or continue to have, a person against whom a banning order has been made as member of their key personnel. It also clarifies that this does not limit conditions specified under subsections.

Such a condition would prevent banned persons from being able to move from the provider sector of the NDIS market system to the NDIS auditing sector and continuing to engage in activities that had them banned from the provider market.

Item 3 - Subsection 73U(6)

This item repeals and replaces subsection 73U(6). New subsection 73U(6) makes clear that the Commissioner cannot vary or remove existing conditions that are specified in the NDIS rules under subsection (4A).

Item 4 - After subsection 73U(9)

This item inserts subsection (9A) and an associated heading '*National Disability Insurance Scheme rules relating to approved quality auditors*'.

This subsection enables Category A NDIS rules to prescribe requirements with which the Commissioner must comply, criteria that the Commissioner is to apply, or matters to which the Commissioner may, must or must not have regard to, in deciding whether

to give, or refuse to give, an approval to a quality auditor, whether or not to make an approval that is subject to conditions, and, whether or not to vary or revoke an approval.

Item 5 - At the end of subsection 73ZN(9)

This item inserts a new requirement for the Commissioner to notify an approved quality auditor when a banning order is made against a person who is employed or otherwise engaged by the approved quality auditor.

This amendment enables an approved quality auditor to meet conditions that may be made under the new provision inserted in subsection 73U(5A) that authorises conditions to be placed upon an approved quality auditor who has engaged or employed or is continuing to engage or employ a person against whom a banning order has been made.

Item 6 - After paragraph 201A(1)(i)

This item inserts subsection 73U(4A) and (9A) (approved quality auditors) as provisions for which the Minister may, in writing, delegate to the Commissioner their power under section 209 to make National Disability Insurance Scheme rules.

Item 7 - Subsections 202B(1) and (2)

This item repeals and substitutes sections 202B(1) and (2). These amendments will allow the Commissioner to delegate certain powers and functions to specified non-SES employees. In exercising this discretion, the Commissioner must take into account whether the APS employee's position or office is sufficiently senior, or, whether the employee has the appropriate qualifications or expertise to perform the power or function when making a decision to delegate.

This will allow for scaling up of compliance and enforcement activities, reflecting the Commission's commitment to taking timely compliance and enforcement action against NDIS providers who fail to comply with the requirements of the Act.

Specifically, the item will allow the Commissioner to delegate a power or function under subsection 73ZL(2) or (3) (infringement notices) including powers under Part 5 of the Regulatory Powers Act in relation to, or incidental to, the provision of this Act, to an APS employee in the Commission who holds, or performs the duties of an Executive Level 2 or equivalent position.

This will alleviate current inefficiencies which require SES officer involvement in relatively straight forward and low risk compliance notices and infringement notices, both of which are at the lower end of compliance and enforcement action

Delegation of infringement notices and compliance notices to non-SES officers will expedite the regulatory response to safeguard participants and address service delivery concerns. It will enable notices to be issued at the same time as or shortly after attendance at premises to observe service provision. Non-SES officers are more likely to be involved in this type of monitoring of services.

Similarly, giving non-SES officers the ability to extend the time required for payment, or to withdraw an infringement notice enables prompt resolution of claims of financial hardship or any representations made regarding withdrawal.

Infringement notices are generally issued for relatively straight forward breaches of the NDIS Act where the impact on NDIS participants is at a lower level. In practice, most of the infringement notices issued are in relation to breaches of the NDIS Act for failing to meet requirements to lodge reports or documents with the Commission within specified time limits. More significant breaches of the NDIS Act are not usually dealt with by an infringement notice. Recipients of an infringement notice may choose not to pay it. If they pay, civil proceedings cannot be commenced for the alleged breach. If they do not pay, civil proceedings may be commenced.

More serious actions which remove recipients from NDIS sector, such as banning orders and civil penalties, will continue only to be able to be delegated to SES and acting SES employees.

This amendment is consistent with action 17.6 of the Review, that the Commission should be resourced to strengthen compliance activities and communications to respond to emerging and longstanding quality and safeguards issues, and market developments and innovation.

Item 8 - Subsection 209(8) (table item 4, column headed “Description”, after paragraph (k))

These items insert an NDIS rule-making power into the table at subsection 209(8) to identify the category of the NDIS rule-making powers inserted by this Part.

Part 2—Application and transitional provisions

Item 9 - Conditions of approval – approved quality auditors

This item applies to the amendment to subsection 73U(4A) (see **item 6**) in relation to the approval of a person or body to be an approved quality auditor.

Item 10 - Notification of banning orders

This item applies to the amendment to subsection 73ZN(9) (see **Item 5**), the obligations introduced by the amendment apply to banning orders made on or after the commencement of the Act.

Item 11 - Delegation of regulatory powers

This item applies to the amendment to subsection 202B(1) (see **item 7**), so that any delegations that were already in existence prior to the amendment continue to apply and are treated as being made under the new section.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT (GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024

The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill amends the *National Disability Insurance Scheme Act 2013* to do the following things:

1. Require the National Disability Insurance Agency (Agency) to provide participants with a clear statement of the basis on which they entered the National Disability Insurance Scheme (NDIS, Scheme), either by meeting the disability requirements, the early intervention requirements, or both. The Bill will also clarify and expand the NDIS rules relating to access provisions, including the methods or criteria to be applied when making decisions about the disability and early intervention criteria and the matters which must or must not be taken into account.
2. Create the new reasonable and necessary budget framework for the preparation of NDIS participants' plans. This aligns with the original intent of the NDIS to support people with permanent and significant disability as part of a larger landscape of supports outside of the NDIS. The Bill provides for 'new framework plans' to be developed in accordance with a new budget framework. Participants will receive funding based on whether they accessed the Scheme on the basis of impairments that meet the disability requirements or the early intervention requirements or both.
3. Provide for the needs assessment process and the method for calculating the total amount of the participant's flexible funding and funding for stated supports for new framework plans to be specified in legislative instruments and NDIS rules. These will be developed in consultation with people with disability, the disability community, health and allied health technical professionals, and with all States and Territories.
4. Insert a new definition of 'NDIS supports' which will provide a clear definition for all participants of the authorised supports that will be funded by the NDIS and those that will not.
5. Insert measures focused on protecting participants such as:

- a. Allowing the CEO to specify in the statement of participant supports the total funding amount under the plan for reasonable and necessary supports together with the funding component amount under the plan for each support or class of support up to a specified amount.
 - b. Clarifying the requirement that an NDIS participant who receives an amount or amounts for NDIS supports may only spend that money in accordance with the participant's plan. This reflects the reasonable expectation that participants should spend up to the limits specified in their plan – unless their needs significantly change and spend on supports needed as a result of their impairment.
 - c. Enabling the Agency to change the plan management type as well as imposing shorter funding periods to safeguard participants where others may seek to exploit or coerce the participant to use their package in a way that is not consistent with their best interests.
6. Insert quality and safeguard amendments to enable the imposition of conditions on approved quality auditors to not employ or engage a person against whom a banning order has been made, and to enable greater delegation of the Commissioner's compliance and enforcement powers to specified positions.

Human Rights Implications

The Bill engages the following rights:

- Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Rights of people with disability – Articles 4(3) and 7 of the CRPD
- Right to social security – Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 28 of the CRPD
- Right to health – Article 12(1) of the ICESCR and Article 25 of the CRPD
- Right to privacy and reputation – Article 17 of the ICCPR and Article 22 of the CRPD

The Bill seeks to protect the rights of persons with disability by ensuring the continued support for the needs of persons with disabilities, having regard to the key objectives of the National Disability Insurance Scheme (NDIS), the first of which is to give effect to Australia's obligations under the CRPD, in conjunction with other laws. Each of the relevant rights engaged by the Bill are dealt with in turn.

Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the CRPD and Articles 2, 16 and 26 of the ICCPR

Article 3 of the CRPD reflects the need for respect of the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), non-discrimination, full and effective participation and inclusion in society, the need for respect for difference and acceptance of persons with disabilities,

equality of opportunity, accessibility, gender equality and respect for the evolving capacities of children with disabilities, including their right to preserve their identities.

In addition, Article 4 of the CRDP outlines the need to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disability without discrimination of any kind on the basis of disability.

The Bill ensures the inherent dignity and individual autonomy of people with disabilities as stated in Article 3 of the CRPD, by requiring the Chief Executive Officer (CEO) of the Agency to make a specific decision about whether a prospective participant meets the disability requirements, the early intervention requirements, or both, in order to gain access to the NDIS. The Bill will also clarify and expand the NDIS rules relating to access provisions, including the methods or criteria to be applied when making decisions about the disability and early intervention criteria and the matters which must or must not be taken into account. In doing so, the Bill will ensure transparency such that participants are aware which criteria they have met as part of their access to the NDIS.

This aspect of the Bill will also facilitate the establishment of an early intervention pathway to ensure that participants receive the supports and services which are most appropriate to them. In seeking to ensure that participants continue to meet early intervention requirements if they access the NDIS on this basis, the Bill promotes the respect for difference and acceptance of persons with disabilities and the respect for the evolving capacities of children with disabilities in particular.

The Bill further engages with Articles 3 and 4 by providing legislative authority for participants to utilise their plan funding flexibly for NDIS supports. This reinforces participants' inherent dignity and individual autonomy by supporting the freedom to make one's own choices about their use of supports, in turn promoting their independence to ensure full and effective participation and inclusion in society. This is articulated in Article 3 of the CRPD in relation to promoting the full realisation of persons with disability, as per the obligations in Article 4.

The Bill provides clarification on when a person has 'substantially reduced functional capacity' and when a person's impairment is 'permanent, or likely to be permanent'. The inclusion of additional factors for consideration when deciding whether a person meets the access or early intervention requirements may limit the rights set above in certain circumstances. However, the Bill does not change the criteria for accessing the NDIS, but rather helps to clarify broad and potentially ambiguous terminology. The changes are reasonable, proportionate and necessary to ensure that participants and prospective participants have a clear understanding of what is required to gain access to the NDIS, which also respects their inherent dignity.

Article 5(2) of the CRPD seeks to prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds. Article 12 of the CRPD reaffirms that persons with disability have the right to recognition everywhere as persons before the law and shall enjoy legal capacity on an equal basis with others, with appropriate measures being

taken to provide access and support in exercising their legal capacity, including appropriate safeguards. The Article also provides that persons with disability should be given equal rights to, among other things, control their financial affairs and not be arbitrarily deprived of their property.

Similarly, Article 16 of the ICCPR states that everyone shall have the right to recognition everywhere as a person before the law, and Article 26 of the ICCPR states that all persons are equal before the law and are entitled, without any discrimination on any grounds, to the equal protection of the law, including protection from discrimination. Article 2(3) of the ICCPR seeks to ensure that any person whose rights or freedoms are violated shall have an effective remedy, and that competent authorities enforce such remedies when granted.

The Bill promotes Article 12(5) of the CRPD by recognising the equal right of people with disability to control their own financial affairs. The Bill ensures that people with disabilities are afforded higher levels of choice and control in identifying and acquiring the supports that best meet their individual needs, provided these supports are appropriately funded by the NDIS.

The Bill also provides that, in limited circumstances, the CEO can place restrictions or conditions on portions of this flexible funding, thereby setting reasonable parameters within which Article 12(5) of the CRPD is adopted. This limitation is connected with, and proportionate to, the legitimate objective of ensuring that the NDIS funds supports for which it has appropriate authority, and that such funds are properly directed towards the provision of those supports.

The Bill sets out specific circumstances in which the CEO can impose restrictions or conditions on flexible funding, including where the CEO is satisfied there is an unreasonable risk to the participant if the restriction or condition is not imposed, or where a person has previously not spent their NDIS funding in accordance with their plan. This limitation is compatible with Article 12(4) because it provides an effective safeguard to risk of the participant being subjected to financial exploitation, violence and abuse (a protection offered by Article 16 of the CRPD).

Similarly, the Bill seeks to adopt Article 12(5) in a manner compatible with Article 12(4) by providing that a statement of participant supports does not need to give effect to a plan management request if the CEO is satisfied that the participant is unlikely to utilise the funding in accordance with their plan. As stated above, this will ensure that participants are protected from the risk of being subjected to financial exploitation, violence and abuse.

The Bill also seeks to adopt Article 12(5) of the CRPD in a way which ensures that flexible funding can only be used to purchase 'NDIS supports'. It will include a definition of the types of supports which can be an 'NDIS support' but will not prescribe specific 'NDIS supports'. This restriction on the freedom to make one's own choices in Article 3 of the CRPD is proportionate and for a legitimate objective of providing transparency and clarity about supports which are and are not appropriately funded by the NDIS

and ensuring the financial stability of the NDIS for the benefit of persons with disabilities who meet the relevant access requirements.

Rights of people with disability – Articles 4(3) and 7 of the CRPD

Article 4(3) of the CRPD seeks to ensure necessary consultation with, and active involvement of, persons with disabilities in the development and implementation of legislation and policies.

The Bill is compatible with Article 4(3) through the clarification and expansion of the NDIS rules which relate to the access criteria. The new NDIS rules will be designed and implemented with extensive consultation and co-design with the disability community. In addition, the methodology for working out the amount of funding in a participant's plan will be developed and built with the disability community.

Article 7 of the CRPD requires the taking of all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. This requires that the best interests of the child are a primary consideration and that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and should be provided with disability and age-appropriate assistance to realise that right.

The Bill promotes Article 7 by giving children with disabilities and their family access to early intervention supports to meet their child's individual support needs. The requirement for the CEO to specify whether a child has met the early intervention requirements will provide clarity for children and their family as to the nature of their NDIS funding and will ensure that children are provided with support to pursue their goals and aspirations on an equal basis as children without disability.

Right to social security – Article 9 of the ICESCR and Article 28 of the CRPD

Article 9 of the ICESCR recognises the right to social security and social insurance.

In addition, Article 28 of the CRPD recognises the right of persons with disability to an adequate standard of living for themselves and their families. Article 28(2) seeks to ensure equal access by persons with disabilities to appropriate and affordable services, devices and other assistance for disability-related needs.

The Bill outlines parameters in relation to the adoption of Article 28 of the CRPD by providing that under 'new framework plans', which are plans developed in accordance with the budget requirements of the Bill, participants will receive funding in respect of impairments that meet the disability requirements or the early intervention requirements. This limitation is necessary to achieve the objective of ensuring that needs which are not the responsibility of the NDIS (for example, treatable health and mental health conditions) are dealt with through more appropriate means, such as the health system. This will also help to ensure financial sustainability of the NDIS and aligns with the original intent of the NDIS of supporting people with permanent and significant disability as part of a larger landscape of supports outside of the NDIS.

These changes are proportionate and for a legitimate objective, including to help ensure that all persons with disability who meet the requirements for accessing the NDIS are supported for as long as they continue to do so.

The Bill is compatible with the above Articles as it contains measures to remove barriers for people with disability to utilise their funding in a way which best suits them and meets their individual needs. The Bill recognises that people with disabilities know their own support needs the best and allows people with disability to flexibly use their NDIS funding to purchase disability-related needs. The changes ensure that the NDIS is placed on a more sustainable financial footing to allow participants to choose how to meet their needs.

Right to health – Article 12(1) of the ICESCR and Article 25 of the CRPD

Article 12(1) of the ICESCR seeks to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Similarly, Article 25 of the CRPD seeks to recognise that persons with disability have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. This involves the provision of health services needed by persons with disabilities specifically because of their disabilities and services designed to minimise and prevent further disabilities to be provided.

The Bill supports Article 25(1)(b) of the CRPD by establishing a clear early intervention pathway to ensure that people who meet the early intervention requirements have access to supports which mitigate the impacts of their impairments and improve their functional capacity.

The Bill is further compatible with the right to health by allowing for the establishment of NDIS rules which guide the making of access decisions relating to people with progressive conditions. This will ensure that the NDIS participants who meet the early intervention requirements continue to receive the supports that are best targeted to their needs.

The Bill also includes powers to make NDIS rules which specify the types of supports which are the responsibility of the NDIS and which are the responsibility of the health or mental health system. This aspect of the Bill will promote transparency regarding the types of supports which are appropriately funded by the NDIS. Additionally, it will ensure that persons with disabilities can seek out and obtain supports and services from the appropriate system.

Right to privacy and reputation – Article 17 of the ICCPR and Article 22 of the CRPD

Article 22 of the CRPD provides that no person with disability, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence or other types of communication, or to unlawful attacks on their honour and reputation. It also provides that the privacy of personal, health and rehabilitation information of persons with disabilities should be protected on an equal basis with others. This right contains

similar protections to those in Article 17 of the ICCPR. The right to privacy in Article 17 includes respect for informational privacy, including in respect of storing, using and sharing private information and the right to control the dissemination of private information.

For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

The Bill does limit the above Articles by allowing the disclosure of information relating to banning orders to approved quality auditors if a banning order is made against a person who is employed or engaged by the quality auditor, or is part of the quality auditor's key personnel. This limitation is connected to a legitimate objective and is proportionate to the purpose of providing safe and high quality supports and services to people with disability, protecting people with disability from exploitation, violence and abuse, as well as providing equal recognition before the law.

Conclusion

The Bill is compatible with human rights because it advances the protection of the rights of people with disability in Australia, consistent with the CRPD, ICCPR and ICESCR. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensure the long term integrity and sustainability of the NDIS, for the benefit of all persons with disability who have access to the NDIS.

**[Circulated by the authority of the
Minister for the National Disability Insurance Scheme, the Hon Bill Shorten MP]**