



Submission to the Department of Social Services

**National Disability Insurance Scheme Amendment (Getting  
the NDIS Back on Track No. 1) Bill 2024**

*14 May 2024*

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## Who is Deafness Forum Australia?

Deafness Forum Australia is recognised by the Commonwealth Department of Health as the national consumer representative peak body for the 4 million Australians who live with hearing loss, have ear or balance disorders, people who also communicate using Australian Sign Language, and their families and supporters.

Deafness Forum's mission is to make hearing health & well-being a national priority in Australia. It is the peak body representing the views and interests of the 4 million Australians who live with hearing loss, have ear or balance disorders, people who also communicate using Australian Sign Language, and their families and supporters.

Deafness Forum represents Australia as a Foundation Member of the World Hearing Forum (part of WHO), as a member of the International Federation of Hard of Hearing People, and as an associate member of the World Federation of the Deaf.

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## Recommendations

### **Recommendation 1**

*The Bill should include an express commitment to work in codesign with people with disabilities, Disability Representative Organisations, and other key stakeholders across the development of subsequent legislative instruments.*

### **Recommendation 2**

*The new Bill should include an express commitment to ensuring that the core principles of participant choice and control are upheld.*

### **Recommendation 3**

*Section 10 should be expanded to align fully with Australia's commitments under the Convention on the Rights of Persons with Disability (the CRPD).*

### **Recommendation 4**

*Include a provision in s. 10 that includes mobility aids, devices, or assistive technology, or live assistance, or intermediaries that facilitate an individual's capacity to community to be classified as NDIS supports.*

### **Recommendation 5**

*The Bill should expressly provide that needs assessments are to be completed by a skilled and qualified Needs Assessor, either a trained allied health practitioner a social worker, or similar, with disability expertise, per the recommendation of the Independent NDIS review.<sup>i</sup> (at p 88 - final report)*

### **Recommendation 6**

*The Bill should explicitly provide that needs assessments are reviewable.*

### **Recommendation 7**

*States and territories should prioritise the development of the new rules which provide lists of NDIS approved supports to transition from using the APTOS as soon as possible, noting that the APTOS is particularly imperfect in delegating the types of supports needed by those who are Deaf/deaf or have hearing loss.*

### **Recommendation 8**

*Include an express provision that allows an NDIS participant to choose who they want to provide additional information or provide a further assessment to comply with subsections 30(2) -(8).*

### **Recommendation 9**

*The Bill should expressly restrict the circumstances in which a CEO can investigate a participant under subsections 30(2) to 30(8) and potentially remove a participant from the Scheme to ensure that these decisions are about the changing nature of the individual's disability, not the changing priorities of the NDIA.*

### **Recommendation 10**

*The stipulations around flexible budgets under s. 32H should expressly state what the purpose and intention of these provisions should be in the Bill itself.*

## Introduction

Deafness Forum Australia, as the national consumer representative body for the 4 million Australians who live with hearing loss, ear or balance disorders, people communicating using Australian Sign Language (AUSLAN), and their families and supporters, appreciates the opportunity to provide feedback on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024.

Firstly, we commend the Federal Government for its commitment to the long-term viability of the Scheme and the significant investment it has made towards securing the National Disability Insurance Scheme's ongoing economic sustainability since coming into term. Over the past decade, the NDIS has become a vital component of the Australian social support system and has greatly improved the lives of many living with disability. Deafness Forum shares the Albanese Government's vision of a financially sustainable NDIS to support future generations, and we appreciate that achieving this will require a recalibration across the function and operation of the Scheme.

Change is hard, and people with disability have fought fiercely to secure the quality of life that the NDIS accords them. Our priority across the reform process is the welfare of existing scheme participants who are Deaf/deaf or experience hearing loss, including children currently supported through Early Intervention. We are mindful that the ongoing viability of the NDIS depends on the willingness of the States, territories, and successive federal governments, operating across different economic circumstances, and with varying priorities, and we must be confident that this foundational legislation is both clear as to its intention and purpose, and that choice and control of participants is safeguarded across successive governments.

Deafness Forum Australia has consulted with people with lived experience who are current participants of the Scheme, their families, and advocacy groups in the Deaf/deaf and hearing space to scope for potential adverse consequences, noting that many practical implications of the changes won't become apparent until the subordinate legislation is available for review.

### General Observations on the new Bill

There are many critical gaps across the new Bill across proposed changes which will have significant impact on current and future participants. We understand that the intention of the Government is to address these gaps across subsequent legislative instruments, at some future point, which a) makes it difficult to understand the intention and purpose of a number of the changes that are provided in the Bill, and b) will mean that any changes that are not specified in the Bill will not need to be passed by Parliament, and will be far easier to amend or adjust in response to the changing priorities across Government.

At the same time, while we appreciate that the Minister has repeatedly stated that he is committed to working with the disability community across the creation of those legislative instruments, the standard requirements for consultation prescribed under s. 17 of the Legislation Act 2003 (Cth), which applies both to this Bill and any subordinate legislation which follows after, are not fit for purpose across consultation with the disability community.<sup>ii</sup>

As we are now less than 18 months away from a federal election, and stewardship of the NDIS reforms will undoubtedly change across the next 5 years. It will be imperative for us to need to lock in a commitment to a codesign process with the Disability community in the Bill itself, to ensure that the voices of the disability community are front and centre across the reform process.

## Needs Assessments - subclause 32L (2)

*Needs assessments must be developed in codesign with the disability community to build trust.*

In subclause 32L (2), the Bill states that a new assessment tool will be used to determine a participant's need for supports. Our only information is that the tool will be technical and that the NDIA will consult with the disability community and experts across its development. Given the commitment towards a whole-of-person, strengths-based approach, as opposed to a focus person's specific disabilities, we assume that the same tool which assesses a potential participant's eligibility for the Scheme would also be used to determine their supports, but this is not very clear either from the Bill itself or the explanatory memorandum.

There is a concern across the disability community the new assessment tool may be a rehash of the Coalition's Independent Assessment model, 'shelved' in 2020, which used an algorithm to determine a person's funding, based on a complex matrix of factors that were never publicly explained. We need to be confident that the new assessment tool still provides for individualised support planning for people with disability and allows a participant to articulate what they need to live a good life. It will be critical that the Government works across the development of the tool in genuine co-design with suitably qualified professionals, those with lived experience of disability, and their families to instil public confidence in the effectiveness of the new tool, while at the same time ensuring it provides a fair and equitable method for determining a participant's support needs, including participants with multiple disabilities and/or fluctuating, or episodic conditions.

*Assessments need to be conducted by suitably qualified professionals and be accessible.*

The Bill needs to specify that suitably qualified professionals will administer this tool, in line with the recommendations of the NDIS Independent Review and be able to administer the tool in an accessible format, including AUSLAN for those in the Deaf community.

*The assessment should be completed by a skilled and qualified Needs Assessor who is a trained allied health practitioner or social worker, or similar, with disability expertise.<sup>iii</sup>*

*The Bill needs to include a right to appeal a needs assessment.*

Currently, it is not clear whether a participant will have a specific right to challenge a needs assessment or ask for a replacement needs assessment if they are unhappy with the results.

Participants should be given an express right to challenge the needs assessment if they are not satisfied with the outcome of that assessment.

## NDIS supports criteria – section 10

*The range of supports that can be NDIS supports should be expanded to align with the Convention on the Rights of Persons with Disability (the CRPD)*

The new section 10 clarifies the types of supports that participants can access under the Scheme, introducing new criteria to be demonstrated before a certain support will be approved.

This new section is critically important since it determines the types of supports that the NDIS will fund and that a participant can access as part of their plan moving forwards.

Feedback from our members is that there is merit in providing clearer detail on what should and should not be an NDIS funded support, and that while many people are careful to use their funding across appropriate supports, they know others in the scheme who have received funding for supports and services which bare little to no apparent connection to their disability related support needs.<sup>iv</sup>

Our concern is that the new criterion sets a very low bar for the types of supports participants will be able to expect under the NDIS, despite supposedly being reflective of Australia's commitments under the UNCRPD. The NDIS, has been promoted '*as a world first approach to disability support which puts people with disability at the centre of decision-making, through the principles of reasonable and necessary supports and individual choice and control.*'<sup>v</sup> so it is concerning to us that the criteria focuses mostly on 'medical' supports, such as rehabilitation and health services, and appears to substantially constrain the types of supports that will be permitted which support the ability for people with disability to participate as citizens and active members of the community.

We are also concerned that 'reasonable and necessary' is a legal construct that can be narrowly interpreted, and the section is extremely difficult to interpret in any practical sense. Framing NDIS supports as only being those supports that are 'reasonable and necessary' could result in significant curtailing of choice and control for participants, and we don't yet know how collaborative the process of what a reasonable or necessary support for an individual will be.

Section 10 should align directly with the UNCRPD and allow NDIS supports which facilitate access to the full range of rights Australia is obligated to provide as a signatory. This would include access to freedom of expression and opinion, access to information (Art 21), justice (Art 13) education (Art 24) to work and employment (Art 27) to live independently (Art 19) and to participate in cultural life, recreation, leisure, and sport (Art 30) if the participant's disabilities prevent them from otherwise realizing these fundamental rights.

Expanding the range of supports that could be classified as NDIS supports, should not diminish the collective responsibilities of all levels of Government or lessen the need for broader social and cultural change as recommended by the Independent NDIS review.

### *The use of the Applied Principles and Tables of Support (APTOS) as an interim measure to determine NDIS supports*

We have concerns with the Applied Principles and Tables of Support (APTOS) being used as a transitional measure until the states and territories can determine the new rules which will provide lists of what will or will not be classified as an NDIS support.

The supports set out in the APTOS are extremely vague, and this has resulted in significant variations in interpretation. One representative organisation has previously claimed that the APTOS reinforces program boundaries and promotes a 'one dimensional, transactional approach of the old disability systems'.

*The APTOS have been neither reviewed nor amended as the scheme has evolved. Rather than a level playing field of program responsibilities, their existence has entrenched the historical divide between programs and ensured program interactions focus on who pays, rather than the needs of the person with disability requiring their concurrent support.*<sup>vi</sup>

We note that interpreting, which is routinely required by those in the Deaf and Deafblind community, isn't expressly provided as a NDIS responsibility in the APTOS, and it can be hit or miss as to whether a participant can access interpreting as a funded support, depending on the interpretation of the specific NDIA decision-maker. We believe states and territories should prioritise establishing the lists of eligible supports in codesign with the disability community as a matter of priority to avoid reliance on this resource.

### *Assistive technology for communication purposes should be permitted to be an NDIS support*

We also observe that s10 (a)(iii) neglects to recognise the critical role that assistive technology plays in supporting people who are Deaf/deaf or hearing impaired:

#### **10 Definition of NDIS support**

A support is an **NDIS support** for a person who is a participant or prospective participant if

(a) The support:

(i) 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; or

(ii) will facilitate personal mobility of the person in the manner and at the time of the person's choice; or

**(iii) is a mobility aid or device, or assistive technology, live assistance, or intermediaries that will facilitate personal mobility of the person.**

There is no equivalent reference to defining mobility aids, devices, assistive technology, or, live assistance as NDIS supports if they assist a person with disability to communicate with others. This is a critical oversight and must be amended.

## **Requesting information and reports - subsections 30(2) to 30(8)**

### *There is no explicit provision in the Bill that the participant can choose who they want to provide additional information or provide a further assessment.*

We appreciate that there will be circumstances in which the NDIA might need to reassess a participant to determine whether they remain eligible to remain on the Scheme. We are concerned that despite the explanatory memorandum stating that a participant will be able to choose the person from whom they obtain information and reports, this is not expressly provided across these new provisions:

#### **30. Subsection 30(2)**

Repeal the subsection, substitute:

##### *Requesting information and reports*

(2) If the CEO is considering revoking a participant's status as a participant in the National Disability Insurance Scheme under subsection (1), the CEO may make one or more requests under subsection (3) for the purposes of deciding whether or not to do so.

(3) The requests the CEO may make under this subsection are as follows:

a) that the participant, or another person, provide information that is reasonably necessary for deciding whether or not to revoke the participant's status as a participant in the National Disability Insurance Scheme;

(b) that the participant do either or both of the following:

(i) undergo an assessment and provide to the CEO the report, in the approved form, of the person who conducts the assessment;

(ii) undergo, whether or not at a particular place, a medical, psychiatric, psychological or other examination, conducted by an appropriately qualified person, and provide to the CEO the report, in the approved form, of the person who conducts the examination.



There are many reasons why an individual might want to use a practitioner of their own choice - including location, familiarity, cultural or linguistic factors or the practitioner's particular knowledge or expertise.

We do not want to see a situation, similar to what arises in other insurance schemes, where an insurer can force someone making a claim to be assessed by the insurer's own specialists. If the intention is that participants will have this right, then it needs to be expressly provided in this section to safeguard this commitment.

*The Bill should expressly restrict the circumstances in which a CEO can investigate and potentially remove a participant from the Scheme to ensure that these decisions are about the changing nature of the individual's disability, not the changing priorities of the NDIA.*

We are gravely concerned that the Bill does not specify when the CEO will be able to exercise their power to require a participant to essentially 'show cause' as to whether they are still entitled to be a participant, beyond the CEO "having reason to believe that the person may no longer be eligible". The capacity to require a participant to provide further reports or be reassessed justifies the CEO to determine that a participant is no longer eligible for the Scheme.

We are extremely concerned at where this leaves participants at such a transformational time in the Scheme and note that there is no explicit protection that would stop the CEO or their delegate from requiring whole classes of participants to be reassessed if the CEO decides to constrict the size of the NDIS and instead transition some cohorts across to foundational supports, or simply remove them from the Scheme all together irrespective of whether there are supports available to them or not.

Giving the CEO the absolute discretion to determine without reference to any statutory criteria that someone is no longer eligible for the NDIS could potentially result in individuals or classes of individuals being removed not for reasons that are around their disability, but simply to follow the changing priorities of the NDIA, for instance, budgetary constraints or certain interpretations of the Scheme's fundamental purpose and/or operation taken by a particular CEO at a particular point in time. Decisions by the CEO are not subject to parliamentary review, and the CEO has no real public accountability for their decision-making. There is the real potential, in our minds for people with disabilities to become the casualties of the 'court of public opinion' and it is therefore critically important that tight parameters are explicitly built into the Bill to ensure that these provisions cannot be used to achieve political or operational goals.

## **New plan budgets under 32H**

It's positive to see that the Government has picked up on the NDIS Independent Review's Recommendation 3 and has made efforts towards increasing the flexibility of budgets, at least for some participants.

We are somewhat confused, however, given that the Review was advocating for a trust-based approach to oversight of how participants spend their budget, to see so many requirements set across the acquisition or provision of flexible supports.

### **32H Reasonable and necessary budget—requirements relating to acquisition or provision of supports**

- (1) A participant's reasonable and necessary budget may provide that flexible funding, or funding for stated supports, will be provided under the plan for particular supports specified in the plan only if specified requirements are complied with in relation to the acquisition or provision of the supports.
- (2) Requirements specified under subsection (1) may include the following:
  - (a) a requirement that the supports be provided by a specified person or persons in a specified class;
  - (b) a requirement that a specified process be undertaken before the supports are acquired or provided;
  - (c) a requirement that specified conditions be satisfied in relation to the participant before the supports are acquired or provided;
  - (d) a requirement to comply with any requirements specified in the National Disability Insurance Scheme rules for the purposes of this paragraph.

Again, this section will be the subject of rules that are yet to be drafted, which is less than ideal. We need to know what the purpose of the power is and when it is going to be utilised because again this could undermine participant choice and control.

### **Concluding comments**

The Federal Government's dedication to attaining the long-term viability and economic sustainability of the National Disability Insurance Scheme is commendable. The significant investments made in securing the Scheme's future have been crucial in enhancing the lives of many Australians with disabilities. Over the past decade, the NDIS has become a cornerstone of the social support system in Australia, reflecting the nation's commitment to supporting its most vulnerable citizens.

Deafness Forum Australia shares the Albanese Government's vision of a financially sustainable NDIS that supports future generations. Achieving this goal necessitates carefully recalibrating the Scheme's functions and operations. We acknowledge that change is inherently challenging, especially for people with disability who have fiercely fought for the quality of life that the NDIS provides, often in the face of significant barriers. Our foremost priority throughout this reform process is the welfare of current Scheme participants who are Deaf/deaf or experience hearing loss, including children supported through Early Intervention programs.

The viability of the NDIS hinges on the cooperation of states, territories, and successive federal governments, each operating under different economic conditions and priorities. The foundational legislation must remain clear in its intention and purpose while safeguarding participants' choice and control across successive governments.

Deafness Forum Australia has extensively consulted with individuals who have lived experiences, their families, and advocacy groups within the Deaf/deaf and hearing communities. This consultation aims to identify potential adverse consequences of the proposed changes, noting that many practical implications will only become apparent when the subordinate legislation is available for review.

Our observations on the new Bill highlight critical gaps that could significantly impact current and future participants. While we understand that the Government intends to address these gaps through subsequent legislative instruments, the Bill's lack of clarity makes it difficult to discern the full intention and purpose of some changes. Moreover, the ease with which changes can be made without parliamentary approval raises concerns about the stability and predictability of the Scheme's provisions.

As we approach a federal election, committing to a co-design process within the Bill is imperative. This ensures that the voices of the disability community remain central throughout the reform process.

While the proposed reforms aim to enhance the NDIS's sustainability, it is vital that the implementation process remains transparent, inclusive, and firmly rooted in the principles of co-design. This approach will ensure that the NDIS continues to meet the needs of its participants' needs and demonstrates commitment to these principles, which are crucial for the success of any reform.

## References

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- <sup>i</sup> NDIS Review, *Working together to deliver the NDIS Independent Review into the National Disability Insurance Scheme*, Final Review, 2023 < [working-together-ndis-review-final-report.pdf \(ndisreview.gov.au\)](#)> accessed 13 May 2024 at p. 88.
- <sup>ii</sup> See here the comments of Dr. Darren O'Donovan, *Changes to the NDIS Act Explained with Expert Lawyers - Reasonable & Necessary with Dr George*, Summer Foundation podcast, 9 April 2024 <<https://www.youtube.com/watch?v=Ygxfw0YNeVk>> accessed 13 May 2024.
- <sup>iii</sup> NDIS review, op cit., p. 88.
- <sup>iv</sup> Comment from community member and NDIS participant with hearing loss, DFA online social media consultation (Facebook) from 9 May 2024.
- <sup>v</sup> National Disability Insurance Scheme, *What principles do we follow to create your plan?* Webpage, last updated 30 October 2023 <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/what-principles-do-we-follow-create-your-plan#:~:text=The%20NDIS%20was%20set%20up,to%20a%20participant's%20support%20needs> accessed 13 May 2024.
- <sup>vi</sup> Young People in Nursing Homes National Alliance, quoted in <https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf>, op cit, p. 75.