Submission

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

May 2024

Disability Advocacy Victoria (DAV) and Victorian Rural Advocacy Network (VicRAN) are pleased to contribute a joint submission to *The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No.1) Bill 2024* (The Bill) on behalf of the Victorian Disability Advocacy Sector, which includes Disabled Persons Organisations.

DAV and VicRAN are encouraged to see the commitment to co-design with people with disability to make sure that their voices are heard in the design of rules and regulations that is going to take place over the next period. We hope that the Federal and State governments continue to ensure this commitment remains embedded in this process throughout the next five years while this transition takes place.

We acknowledge that the Bill is intended to be an enabling legislation which aims to set up the framework for future implementation of the NDIS. There are many key pieces of work that still need to be undertaken to see the full effect of how the Scheme will operate effectively in future years.

However, it is difficult to understand the full impact of the Bill and the changes that it proposes given the yet to be written Rules and other details, which have been committed to delegated legislation to be developed in co-design with people with disability. The Bill appears to propose amendments of concern which DAV, VicRAN and its members would like to highlight for consideration by the Committee.

1. Accessing the Scheme and Foundational Supports

We note that access to the Scheme (Section 21) will require a determination of whether a participant meets the Disability requirement and a yet to be developed Early Intervention requirement. We understand that the purpose of the early intervention stream is to ensure that if some people access the right support early on, they will not need to progress to become lifelong NDIS participants, and be able to access the supports they need through the mainstream system.

However, we note that State and Territory governments have not made strong commitments that they will fully fund and implement robust foundational supports in an ongoing way. We have concerns that by passing this legislation without this commitment, there will be a huge cohort of people caught in the gaps of not being able to access NDIS Supports and getting insufficient supports from the mainstream system.

We see this as the biggest risk of this legislation passing in its current form. There is an unacceptable risk that many people with disability will fall through the cracks and be left with no support at all with

no commitment or assurance of ongoing, strong foundational supports being implemented alongside this Bill.

In addition to this, many areas of the disability support ecosystem experience thin markets- particularly in rural and regional areas. If there is no clear and urgent action taken to address the workforce shortages and thin markets, it will not matter whether funding comes from the NDIS or foundational supports- there will not be enough services available, or they will require hours of travelling to access the services they need from the nearest city center. This is a workforce dilemma that needs to be resolved to make supports available and accessible.

Compounding this issue further is the way the NDIA price guide is set. It is more financially beneficial for a service provider or professional to work as a private practitioner in the NDIS system, rather than in the mainstream system. This creates further issues with thin markets in the mainstream system, further creating issues with access to services in mainstream settings. We are already seeing

the impact of massive shortages in mainstream systems for services such as Auslan Interpreting, because they are paid a higher rate to work privately in the community with NDIS clients. This has been impacting Deaf and hard of hearing people and their ability to do their jobs, participate in their education, or access public health appointments.

DAV and VicRAN recommend that commitment is sought from the State and Territory governments that strong and robust foundational supports and a solid plan to address thin markets is implemented alongside this Bill.

2. Needs Assessments and Budgets

In terms of the building of needs assessment and legislative instruments to decide budgets for participants, we have a number of concerns.

Section 32K and 32L set out that the funding amounts in a participant's budget are determined by a needs assessment, and a method of calculating a budget for those supports that will be determined by the Minister via a legislative instrument. Both the needs assessment tools and formula set by a legislative instrument to calculate a total budget for support needs, are both yet to be developed. This legislation does not appear to have any protections in place to stop Ministers- in the event of change of government- to continuously change the legislative instruments and needs assessments.

While we acknowledge it has been made clear that this will be co-designed and developed with the disability sector, medical and professional experts, we ask that the consultation is extended to people with disability, and disabled peoples organisations, rather than with service providers with expertise in disability services, to ensure genuine co-design with the people these decisions most affect. We ask that any legislative instrument designed to calculate a total budget for a participant is not totally formulaic in nature (or based on other compensation schemes) and considers a participants real life circumstances.

Under the proposed Bill, participants will still have the right to seek review of the statement of participant supports, which includes the reasonable and necessary budget. However, participants will not have a right to seek a review of some of the new processes the Bill creates, either internally by the NDIA or externally by a Tribunal. A ‘needs assessment’ would not be a ‘reviewable decision’ under section 99 of the NDIS Act and cannot be reviewed through internal or external review.

This is a concern for disability advocates and people with disability, because this doesn't provide a way for a participant to challenge an inappropriate needs assessment, which may then lead to an inadequate budget being set.

The Bill also doesn't ensure that a participant has the opportunity to see the needs assessment report before it is 'given to the CEO' (Section 32L(5))' . This is in conflict with the findings of the NDIS Review which stated that the needs assessment report should be provided to the participant before it is finalised. This needs to be added into the legislation so it is clear that participants will be provided with the needs assessment report before it is given to the CEO. While we acknowledge that the Bill provides for 'replacement assessments', it does not say when these would happen, or if the participant will be able to request one (clause 32L(7)). Instead, new NDIS 'Category A' Rules will define when the NDIA should arrange a replacement assessment (clause 32L(7)(b)).

We remain concerned that if a participant was to ask for a replacement assessment and the NDIA refused to arrange one, the participant would also have no way to review or challenge that refusal. The DSS website states that, if a participant seeks a review of a decision on a statement of participant supports, the review will be able to consider the needs assessment and whether it accurately reflects the participant's needs and circumstances. It also says that a participant will be able to request that a new needs assessment be conducted as part of the review. However the current drafting of the Bill does not reflect this process.

DAV and VicRAN recommend that if needs assessments are to be used as the basis for setting budgets, the legislation must provide clear and straightforward rights for a participant to receive the needs assessment before it is finalised to ensure it accurately reflects their needs and circumstances, and to request a new needs assessment where appropriate.

3. New Framework Plan and Definition of NDIS Supports

We support the proposed New Framework Plan where a participant can access a portion of their funding as flexible funding, with high-cost items being Stated supports. However if the default position is 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, the definition of NDIS Supports in Section 10 is a cause for concern.

By explicitly narrowing the scope, the definition puts constraints around what supports a person can engage with, and unless the language is adjusted to make this permissive, the flexibility on how to spend this component of funding will be lost. We understand that an intention of narrowing the scope is to ensure that foundational supports in the mainstream system can be activated, however there is currently no assurance that foundational supports are ready to pick up the supports participants may need and miss out on.

When discussing NDIS Supports, the Bill refers to ”*supports, or classes of supports*” throughout the document. Classes of supports are interpreted to mean that there will be tailored supports and rules around these supports that apply to certain disability types ie: a class of supports that is expected for people with Intellectual Disability, and there are associated rules in relation to this. In the development of these classes of supports, we recommend that these are co-designed with people with disability and disabled peoples organisations to ensure such development occurs with sufficient lived experience input, clarity and does not take away from the flexibility at the intent of the scheme.

The new section 32H sets out requirements relating to provision or acquisition of supports. These requirements are intended to enable the NDIS Rules to specify what evidence-based supports look like. The examples given mention things such as which evidence-based supports are appropriate for children with developmental delay, and what supports in remote First Nations communities also should look like (noting that these are intended to be co-designed with the same community). While we advocate for and support co-design in these areas, we are concerned that this section is very broad and could potentially allow the NDIA to intervene in what service provision and supports should look like and require participants to adhere to their views, further reducing true flexibility in how to use their plans.

Another consideration is that if the Bill states a highly prescriptive, narrow range of NDIS supports, rural/ regional participants in a thin market will face the prospect of being forced to disclose and beg local businesses whose services suit their needs, to enrol/register as providers, due to any other options being severely limited. There is a fear that there will be no room to tailor support to individual needs regardless of whether the funding is flexible, because how participants can use it will be so much more restricted.

4. Evidence Requirements and Consequences

DAV and VicRAN share concerns around the ability of the NDIA to revoke a participant's status as an NDIS participant if they do not submit the required evidence within set timeframes (28 days). While we acknowledge that there is a pathway to provide a rationale for this, it fails to take into account people with complex or cognitive disabilities who may struggle with understanding and accessing the scheme.

There are many complex situations that are not straightforward and would see participants struggle to meet this requirement- i.e. there are a lot of children with a second generational disability where their families have a history of trauma, substance abuse and/or family violence. Such a family would not have the capacity or means to be able to engage with the NDIS for their children, requiring the child's school or a disability advocate to try to start the process because family cannot engage directly with the NDIA in any meaningful way. There is a lack of support to enable the process to be rolled out as well as it could be.

The NDIA has developed a supported decision-making policy, however there is no mention of or consideration as to how this could be implemented and used within this new system to assist people to access the scheme in a fair way.

DAV and VicRAN would like to see supports built into this legislation, or delegated legislation, for people who require it to access the scheme.

5. Restrictions on plan management and flexible spending

We acknowledge the next version of the Bill will have further measures recommended by the fraud task force targeting fraud issues by service providers We are still waiting to understand what will change in terms of worker registration with the NDIS worker registration taskforce. We also understand that it is necessary to have protections in place for financial fraud within the scheme, and note that several amendments and changes are around processes to protect participants plans from being exploited.

However, we note that the language used in the Bill is heavily weighted on assumptions that the participants are using their plans in a fraudulent manner.

In Section 43 when talking about changes to plan management types, we acknowledge that the default is that a participant has a choice how they choose to manage their plans. However, the NDIA has strong powers in relation to being able to change the plan management type if the person is "*at risk of physical, mental or financial harm*, or *past behaviour has shown they have failed to comply with the Rules*".

DAV and VicRAN would like to raise two considerations relevant to this section. Firstly, there needs to be a clear definition of what *"physical, mental or financial harm"* means; we have concerns that this can be interpreted in different ways by different individuals, so there needs to be a detailed definition and consistent process reflecting how the NDIA decides there is a risk to a person, and how they communicate that risk before making a decision to change their plan management type. Secondly, it needs to be understood that *'failure to comply with rules in the past*' is not always the fault of the participant; compliance with current NDIS rules is difficult when there have been many genuine misinterpretations of ambiguous and vague rules, creating an unfair bias that the participant actively sought to use their plan fraudulently.

We consider that one of the elements missing from this Bill is the protection of people with disability against potentially fraudulent activities by organisations or service providers by putting protections in place to ensure that organisations do not provide multiple services to the same person that present potential conflict of interests. This kind of behaviour is far more prevalent in the community. One recommendation is to put measures in place to prevent the same provider/s from providing both plan management services and support coordination to the same client, and prevent unauthorised utilisation of funding in plans by cost-shuffling or using plan funding in unauthorised ways.

6. NDIS Quality and Safeguarding Commission

In terms of changes to the powers of the Quality and Safeguarding Commission, we support the strengthening of oversight by changes to auditing processes and delegation of powers through the Commission. However, the experience that disability advocates on the ground have had with the Commission thus far, is when a person with disability or disability advocate puts in a complaint, there is no feedback loop to understand what the outcome of the complaint was. This does not give participants confidence that their matter is heard or resolved. With this in mind, we note that in order for people with disabilities to fully activate their rights and entitlements under this scheme, they need to know how to access disability advocacy if they need it. We recommend that on access to the scheme, information is provided to the participant with the Disability Advocacy Support Hotline (DASH) contact details, as well as details of their local advocacy service with an explanation of what disability advocacy is and how this can help them in accessible formats.
DAV and VicRAN agree that the NDIS is a scheme that has changed the lives of many Australians with disability, and we support the need to get the NDIS back on track to ensure that it is sustainable well into the future for generations to come. However, we need to ensure that all consultation and co-design to get the amendments to the legislation right, is with people with disability, and disabled peoples organisations to ensure that the people who are most affected by changes are meaningfully involved from the beginning. We need to ensure that we do not remove the concepts of choice and control by giving the illusion of flexibility, but instead narrowing the scope of supports by making the definitions of supports too prescriptive, or making the processes to access the scheme too rigid and punitive. Finally, we need to ensure that we give participants a clear pathway in the legislation to review or challenge decisions if they feel those decisions are flawed. We look forward to a scheme that is genuinely codesigned with people with disability to place lived experience at the centre of the process.

We take this opportunity to provide our strong view of the importance of persons with disability being in senior positions within the NDIA, particularly the Quality & Safeguards Commission. We believe that leadership by people with disability of disability specific organisations is vital, and provides the best outcomes for the disability sector/community.

Submitted on behalf of:

Disability Advocacy Victoria

Chairperson

Victorian Rural Advocacy Network

Co-Chairperson

Co-Chairperson

About Disability Advocacy Victoria:

Disability Advocacy Victoria Inc. (DAV) - formerly known as Victorian Disability Advocacy Network (VDAN) - was established in 2003. DAV is the peak body for independent disability advocates in Victoria.

About Victorian Rural Advocacy Network:

The Victorian Rural Advocacy Network (VicRAN) is an incorporated network of six rural advocacy organisations in Victoria comprising:

- Barwon Disability Resource Council (BDRC), Geelong
- Grampians DisAbility Advocacy Association, Ararat
- Regional Disability Advocacy Service (RDAS), Wodonga
- Gippsland Disability Advocacy Inc (GDAI), Traralgon
- Colac Otway Regional Advocacy Service (CORAS), Colac
- SouthWest Advocacy Association, Warrnambool
- Rights Information Advocacy Centre (RIAC), Shepparton

These services provide advocacy across most of rural Victoria. RDAS also works across the border in NSW. Each service receives a mixture of Federal and State funding for disability advocacy.

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