



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

Inclusion tree submission



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We commit to reconciliation and acknowledge Aboriginal and Torres Strait Islander peoples', their histories, cultures and communities. We acknowledge the lands of Australia were never ceded and we respect the Aboriginal and Torres Strait Islander peoples as the traditional custodians of the land



NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT

(GETTING THE NDIS BACK ON TRACK NO. 1) BILL 2024 – Inclusion Tree Submission

Our organisation Inclusion Tree and our supporters welcome the opportunity to provide a submission in response to the Proposed National Disability Insurance Scheme (NDIS) Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill).

Who we are and who we support

Inclusion Tree provides human-centred support services, in most all States and Territories of Australia. Our services are individually tailored, strengths-focused, trauma-informed, and inspired by leading edge practices and social innovations.

We enjoy compassionately inquiring together to co-create solutions that make a difference to the people experiencing disability and mental health.

We know that investing in our people and acknowledging their gifts is what makes our business grow. We are committed to nurturing the personal and professional development of all our staff through an intentional culture of growth and learning, based on 'We-Flow' principles and practices.

We do this through providing Support Coordination, Capacity building and allied health services to NDIS participants. We support 560 participants of which 63% manage their own supports through independent workers and 'service for one' models.

We actively participate in industry working groups, events, roadshows, as well as policy and consultation sessions, advocating tirelessly for the rights of individuals to maintain control of their lives.

Our position relating to the proposed amendments

The Government proposed changes to the Legislation, which were released on 27th March 2024. The National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill), being the first legislative response to the NDIS Review Recommendations published on 7th December 2023.

The Bill proposes the most significant changes to the NDIS since it started more than a decade ago. The explanatory memorandum accompanying the Bill gives little reference to the research evidence of the Disability Royal Commission, which is concerning if the revised NDIS is to be an evidence informed scheme.

It proposes that the Minister will create a range of legislative instruments that will determine the method for calculating budgets and how needs assessments are conducted. This gives significant power to the Minister to focus on controlling the cost of supports, increasing the probability that Participants will be denied the supports they need or will be allocated those supports in a form that exposes them to greater risk.



The Government has not released drafts of these Rules or determinations so we do not know what they will include. Much of the practical impact on participants will turn on the content of these Rules and determinations, so it will be essential that they are developed in close consultation and are truly co-designed with people with disability.

The way we talk about people is important, therefore the way the Bill is framed it can be supportive of people or have unintended negative consequences. We need to consider the assumptions underlying the Bill and whether these assumptions favour a positive view of participants to live contributing valued lives within our communities.

People with disability have the right to belong in our communities and not be treated separately or differently than any other person in the wider community.

The explanatory memorandum for the proposed Bill amendments outlined 6 key points. We have used these points to guide our responses, of which we have listed below;

Item 1: A clear statement to Participants

We welcome the introduction of a clear statement that informs participants about the met criteria and their eligibility for either gaining approval or being denied entry into the NDIS.

This statement will provide clarity and understanding for all involved in the process. This clarity, explaining the reasons and criteria of which entry to the NDIS was granted, or the reasons for rejection, is seen as a crucial step towards fostering fairness and inclusivity. We believe that it not only enhances the participants' understanding of the process and supports they should expect to receive, but also contributes to their confidence and trust in the NDIS.

Our participants are often unclear around which supports will be provided by the NDIS, and the support they should obtain from the health system or other services. Providing clarity around which supports the NDIS will provide will remove ambiguity and the likelihood of 'buck passing' between the systems.

Items 2 & 3: New framework plans, reasonable and necessary budgets, and needs assessments

The NDIS Review proposed significant changes to the planning process and funding allocation for participants. Specifically, it suggested adopting a 'needs assessment' approach to determine a 'reasonable and necessary' budget, at a 'whole of person' level, considering the holistic needs of the individual rather than itemising each support separately.

We acknowledge the importance of clarity and integrity in how decisions concerning various factors in a person's NDIS plan interrelate. In particular a person's disability, their needs, requested supports, as well as the calculation of funding for approved supports and total funding amounts.

Provided that the fundamental and inherent values of the NDIS are preserved, we support a revised budget framework that addresses these factors. Primarily retaining Choice and Control of the person with disability in identifying what they need, what they consider reasonable and necessary to live the life they



choose reflective of others in the community and their own aspirations, determine what supports they need, and decide how they wish to use and receive these supports.

New framework plans and needs assessments

The Bill introduces 'new framework plans', which will be developed in a very different way to current NDIS plans. The NDIA will no longer determine whether each support a participant seeks funding for is reasonable and necessary. Instead, it will develop a more flexible budget for each participant, based on a 'needs assessment' designed to determine what supports a person needs.

The needs assessment informs the NDIS Support budget allocation, while assessment is open to review, the resulting determined budget would not be reviewable. This means the Bill does not provide a way for a participant to view the documentation before a determination is made, or challenge an inappropriate budget allocation. If the minister rejects the request for a revised needs assessment, then the participant has no recourse. This is unbalanced, the participant should see the documentation at every stage of the process.

The proposed 'Needs assessment' is limited to impairments. We are concerned this will fail to achieve a 'whole of person' approach by imposing artificial distinctions in the way a person with multiple and interrelated disabilities accesses supports. This position has been rejected by the Administrative Appeals Tribunal. This position does not take into account participants individual aspirations for a good life.

The idea of working to a minimum acceptable standard, is not geared to enrich people lives. Setting the framework and basis for a progressive way to improve and enrich someone's life must be paramount. The community needs to be involved to co-design what a needs assessments looks like, and what method will be used to determine a budget.

It is proposed that the needs assessment tools and process will be created by a legislative instrument. The federal parliament is central to this process. The Minister will develop the assessment tool and process to allocate a support budget. The Minister must remain accountable to the Senate for all legislative instruments with the supportive information prior to implementation.

When the Minister tables instruments, he should also table all of the information and work that the community has committed to doing to fuel the requested change. The Minister should also include the sources and contributions made throughout the development process. This transparent approach should be mandated to ensure that the disability community is engaged and has the ability to influence at each stage of the development process, and each iteration moving forward. We have to legislate co-design into the making of those legislative instruments.

Legislation must provide clear and straightforward rights for a participant to approve their needs assessment before it is finalised to ensure accuracy of their needs, aspirations and circumstances are captured, and they must have the right to request a new assessment when appropriate. It will be vital for Government to genuinely co-design the proposed assessment and budget-setting processes with the disability community.



The proposed mechanisms for preparing a needs assessment and calculating the funding to be allocated are exclusively managed and controlled by the NDIA. This is very similar to the Independent Assessments proposed by the previous Government and rejected by the Australian people after concerns were raised by the Every Australian Counts Campaign in 2021. The needs assessment must take into consideration peoples aspirations not just be deficits focussed.

Reasonable and Necessary budgets and supports

A related issue that requires close attention are the adjustments to the principles of Reasonable and Necessary support in Section 34. The inclusion of the 'NDIS Support' criteria in the Section has made the application and intent of the original Reasonable and Necessary criteria redundant and replaced it with a checklist of acceptable and unacceptable supports.

We must retain and enable supported decision making. Supports for decision-making empower people to navigate various aspects of their lives. We continue to support the availability of comprehensive decision-making assistance for people with disability, facilitating the expression of their preferences, aspirations, and life goals is an important component of retaining dignity and agency of their own lives.

A fundamental principle of the NDIS is the provision of Reasonable and Necessary budgets and supports. This term is frequently referenced in the Bill, the explanatory memorandum, within the community, and by the NDIA. It currently assures participants that they can maintain their Choice and Control over the supports they receive. However, there is a proposed amendment to replace the descriptor 'Reasonable and Necessary' with the term 'Supports'. This term is considerably more vague, allowing for subjective interpretations and the potential introduction of standardised 'checklist' based supports. This change is profoundly misleading and appears to be a subtle maneuver by the government to mislead the community.

Item 4: New definition of 'NDIS Supports'

The legislation will link the definition of 'NDIS supports' to participant rights under the Convention on the Rights of Persons with Disabilities (CRPD).

The explanatory memorandum says "*The NDIS amendments will 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.*" We strongly recommend a revised definition of 'NDIS supports' to be as expansive and adaptable as possible, ensuring it accommodates the diverse needs and circumstances of people with disability.

Section 34(1) of the NDIS Act currently uses a series of legal tests to define the Reasonable and Necessary supports the NDIS will fund, including that a support be 'value for money', 'effective and beneficial', and 'most appropriately funded or provided through the NDIS' (instead of another government program or community source). The Review heard these concepts are technical, complex and discretionary, contributing to inconsistent and inequitable funding decisions and disputes between participants and the NDIA.

The Bill abolishes existing legal tests and replaces them with a single definition of NDIS supports which have not yet been designed and will likely exclude some supports that are currently crucial to participants.



As mentioned above in section 2 & 3, there is a proposed amendment to replace the descriptor 'Reasonable and Necessary' with the term 'Supports'. This term is considerably more vague, and leave it open to interpretation from the Government of the day. We cannot introduce this ambiguity, when we are seeking more clarity and to retain all aspects of Reasonable and Necessary support.

While this is the first-time parts of the UN convention has been incorporated into NDIS legislation, upon close inspection of the Definition of Supports compared to the Articles contained within the UNCRPD it shows that it is far from satisfactory. It is more reasonable to say that some of the wording contained in some of the Articles associated with the Convention have been selectively edited and, in doing so, distort the intent of the Article as a guide.

The words and/or themes included in the description of NDIS Support Section 10 Items (a) I to (a) vii are drawn from these Articles:

- Article 19 - Living independently and being included in the community
- Article 20 - Personal mobility
- Article 25 - Health
- Article 26 - Habilitation and rehabilitation

While the words included in the description of a NDIS Support form part of the explanation of each Article of the UNCRPD they are drawn from, they do not include the entire explanation. Critical information that clarifies the intent of the Article is omitted. This selective cropping of the content changes the meaning being conveyed by the Articles to such an extent that the meaning is distorted and corrupted and does not accurately or faithfully represent the intent of the Articles of the UNCRPD.

The purpose of drafting the UNCRPD was never meant for it to be used as an instrument to limit State support and funding options for people with disabilities. It is intended as a mechanism to open-up and expand the rights of people with disabilities. Using these carefully selected excerpts from the Articles has the expressed intent of limiting and constraining support opportunities not expanding them.

If Article 19 were being observed in the Legislation, a proposal for a participant to be required to move into a forced co-tenancy would be prohibited. If these Amendments go through, challenging this decision, with the restricted definition of a NDIS Support, would be made significantly more difficult. Indeed, because of the way the amendments are drafted, there is nothing to stop a definition of a "Class Participant" being someone "requiring 24/7 support" being made and the definition of a "Class Supports" for this group being set at "1:3 shared support".

The NDIS Review recommendation on 1:3 support for people requiring 24/7 uses a rationale that living alone is not a community norm. The most recent 2021 census data finding- there are 9,275,217 households in Australia most 6,542,648 of which are "family households". Of the "Non-family households" 86.75% are one person households; only 2.5% of "Non-family households" are 3 person households; and only 9.28% of "Non-family households" are two people households. Therefore, living alone is in fact a community norm for non-family households



We also highlight that there are other sections of the Convention that should also be considered as reasonable and necessary supports but have not. For example, the CRPD recognises the right to work and employment, however section 10 does not appear to include supports that would specifically facilitate a participant's economic participation. This is yet another example of how the UNCRPD contents has been used selectively to promote a limited and narrow understanding of what constitutes a NDIS Support.

NDIS rules:

The Bill frequently refers to NDIS Rules and instruments that are yet to be developed.

It is incredibly difficult to provide feedback on various crucial sections that delineate provisions within the yet-to-be-developed NDIS Rules, or other forthcoming instruments without the rules and parameters being clearly defined. It is imperative that the formulation of these Rules and essential instruments undergo a process of genuine co-design with people with disabilities from the outset, rather than mere consultation on the final draft.

Several provisions within the Bill outline several changes regarding how people with disabilities and their supporters interact with the NDIA during the formulation of their plans, and subsequent budget allocation for support.

However, achieving fairer and more consistent decisions regarding budget allocation must not hinge on standardised checklists of disabilities and supports, participant 'classes' or 'one size fits all' service models. Instead, it relies on NDIS decision-makers possessing adequate skills and clear, consistent guidelines for decision-making, considering various factors and their impact on the participant as a whole, not from a standard deficit based, disability=deficit=remediation approach.

The primary emphasis should be on enhancing the capabilities of NDIS staff and delegates to improve decision-making and processes, rather than placing the burden on participants to navigate the NDIS system.

The development of foundational supports is an essential pre-requisite to the design of these Rules, there are and will continue to be challenges between state and federal governments about the funding of these supports.

The rules will specify what is in and out of the NDIS. The rules could dramatically reduce what the NDIS will fund. It is important they are not too prescriptive, leaving gaps and no way for participants to get crucial supports to sustain life.

Until Rules are written the NDIS will use the APTOS (Applied Principles and Tables of Support) to decide what will be funded. These principles were developed in 2015 as a broad policy guidance for governments. They were never intended to be inserted into legislation, are unclear and difficult to apply. This would make it even more difficult for the State & Territory Governments to decide on who is responsible for providing a type of support, leaving participants unable to receive the crucial support they need. APTOS is not fit for purpose, therefore should not be included in the Amendment Bill.



If the definition of NDIS Supports and the new Rules are too narrow, this approach will reduce choice and control for participants, and their ability to receive NDIS funding in a way that supports their individual needs.

The Government should release the draft Rules for consideration by people with disability, their supporters, services providers and the community prior to finalisation and implementation.

With the wide ranging powers given to the Minister to define who can access the scheme and control what will be funded, the unworkable definition of 'NDIS Supports', and the power of the undefined 'Needs Assessment' and 'Budget Calculation' instruments to manipulate the budget outcome, we ask is this really about plan flexibility or is this simply a smokescreen to cover a substantive agenda to reduce scheme costs by controlling who can enter the scheme and lowering plan values and the subsequent supports?

Item 5: Measures to protect participants

When implementing numerous changes across the NDIS, it is imperative to be explicitly and actively vigilant regarding any unintended adverse consequences for participants resulting from unforeseen impacts among and between the various amendment actions.

Maintaining flexibility in the use of NDIS funding is crucial to empower participants to customise supports that best suit their needs. Employing a one-size-fits-all approach risks failing to address the unique requirements of individuals. People possess expertise in their own lives, and what may work for one person may not necessarily be effective for another within the same participant group or 'class'. Imposing excessive limitations on the services NDIS participants can access, under the pretext of 'protecting participants', is unjust and overly paternalistic.

Restrictions on plan management

The NDIS Review said there should be a trust-based approach in how participants spend their budget. It also said that the focus should be on providing participants with guidance and support, with controls over a participant's budget only used as a 'last resort', such as when a person has chosen not to comply, or extreme risks of non-compliance have been identified

The 'last resort' power to control participants allocated budgets seems broader than is appropriate, as it would allow a single accidental instance of non-compliance to result in restrictions and controls to change the management of a participants NDIS plan back to agency managed. Thus impacting the participant's agency and choice and control. It would be better to implement a risk matrix which allows for inconsequential errors to be met with communication, training and upskilling to improve the participants capacity, rather than the paternalistic approach of removing the ability to make their own decisions.

This action MUST only be taken in extreme circumstances where there is evidence that physical or financial harm has, or is likely, to occur. This should be made very clear on the legislation and NDIS Rules.



There is no further information on what other circumstances could be included in the Rules. We have grave concerns that this could restrict participants' choice and control over what supports they get and who provides them, so will require close scrutiny.

6. Improved Quality and Safeguards

We support the CEO's expanded authority to prevent individuals and providers who are subject to banning orders from being employed or engaged within the sector. These amendments are expected to result in increased scrutiny of individuals and providers under banning orders.

Delegation of powers

We anticipate that granting the CEO the authority to delegate certain powers will enhance the NDIS Quality and Safeguards Commission's ability to address compliance and enforcement matters. This is a positive step forward, provided that repercussions for wrongdoing can be swiftly executed and made public to ensure the safety and protection of people with disabilities

Other comments:

In addition to the points above, we have some further comments regarding other key points in the proposed amendments;

Information gathering powers

The Bill proposes giving the NDIA new powers to request information or documents from a participant, and to impose harsh consequences where the participant does not provide this information.

As described in the Explanatory memorandum "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."

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. If the information is not received within 90 days, the CEO can revoke the participant's status, excluding them from the Scheme's support (clauses 30 and 30A).

In preparing a new framework plan, the NDIA can request any "information that is reasonably necessary" for this purpose, including asking a person to undergo a medical assessment. If the person does not comply within 28 days without a good reason, both their existing NDIS plan and the upcoming new NDIS plan will be suspended until they comply with the request (sub clause 36(3)).

These powers are very broad, giving the NDIA the ability to make a person speak to or be examined by a health professional chosen by the NDIA; or to ask for a range of personal information, such as treating notes from the person's psychologist. The consequences of not complying are also potentially severe for participants.



These information-gathering powers should be far more limited, stricter constraints on the type of information that can be requested, and restrictions on the negative consequences of failing to comply, and for what reasons imposed penalties may apply

There are different acceptable standards held of the NDIA vs what's expected from a participant.

The amendments allow the CEO or delegates to request more information and/or reports, these must be obtained and submitted within 28-90 days depending on circumstances of the request, with a review decision to be handed down within 14 days. There are instances when the requested information may not be reasonably obtainable in the given timeframe. There are already extensive waitlists to see specialists, also specialist reports are currently not funded under NDIS or Medicare which at times make the requested documentation difficult to obtain for some participants.

This is further exacerbated for participants in rural and remote areas, complying with these timeframes maybe unrealistic when access to providers is so limited.

This is wildly unbalanced considering the current lead times for the NDIA to respond to requests made by participant's ranges anywhere from 6 weeks to 8 months for a response, sometimes even longer. For example: Plan review information and supporting reports must be submitted 90 days prior to a plan expiry date. The NDIA usually do not respond within this time, and if the plan expires it 'auto rolls over' irrespective of whether the participants needs have changed. There is usually more than \$10k worth of reports and time invested to prepare this information, and in most cases it is never reviewed and the plan duplicates for another 12 months.

This contingency is frequently used by the NDIA which is a copout for the participant, it commands unnecessary effort and cost by the participants' supporters to collect this information which essentially all gone to waste, taking precious funds away from direct support , to funding reports that will not be used or reviewed. It is then up to the participant and supports to decide whether they will just accept this, or request another review and RISK their funding being reduced.

In the instances of mid-plan review requests, a change of circumstances request is automatically declined if the NDIA themselves does not review and respond within 21 days. It is again up to the participant to challenge this decision, which again puts the request at the start of the same conveyor belt for consideration.

We understand that there needs to be a mechanism for the NDIA to request information, though there is also an inherent issue with the NDIA themselves not meeting their own guidelines, this must be fixed BEFORE the responsibility is pushed to the participants, to only repeat the processes mentioned above.

Corrections to the NDIS Amendment Bill Explanatory Memorandum

After reviewing the NDIS Amendment Bill and associated documents, we identified several typographical and formatting errors in the NDIS Amendment Bill Explanatory Memorandum.



As a result, the Department of Social Services (DSS) uploaded a corrected version of the Explanatory Memorandum to its website on May 14, 2024. However, DSS also announced that the correction would be tabled in Parliament on the same day, leaving insufficient time for stakeholders to review the updated document before the submission deadline of May 17.

Ensuring the integrity of the submission process hinges on providing accurate documents for public scrutiny, including the crucial Explanatory Memorandum. To uphold transparency, accountability, and fairness, we strongly recommend postponing the submission deadline to allow stakeholders adequate time to review the corrected version

Please help us to protect Choice and Control in the NDIS. This bill is not fit for purpose and has the potential to cause great harm to people with disabilities. A revised model must be developed that it genuinely co-designed with people with disabilities, their advocates and supporters.

Additional information from the people we support

We canvassed our networks of people with disabilities and advocacy groups on their definition of Choice and Control and Co-design, these are their responses;

Choice and Control means:

- Choosing where I buy my services from and not being restricted just because I am disabled
- Choosing who helps me to implement my NDIS plan – not being directed to Government controlled services like LACs.
- Being the decision maker to choose how I want to live my life, who my friends are and how I set up services to support my needs.
- Choosing my professional health practitioners to conduct functional or capability assessments – not being directed to Government controlled or contracted services.
- Controlling and deciding who enters my home to support me, just like any Australian
- Deciding where and who I live with just like any Australian.
- Having consumer rights to terminate poor services just like any Australian.
- Choosing how I control and manage my NDIS be that Self-managed, Plan-managed, or NDIA managed.
- Having dignity of risk to try new things and learn from my mistakes, just like any Australian.

Co-design means:

- Designing legislation, policy and operational frameworks in a collaborative manner with people with a disability, carers and providers before decisions are made. Not just consultation with a select few behind closed doors and/or after the decisions are made.
- Transparently working through issues in details not gas lighting or selling people to us on outcomes that are against their interests.
- Working to unite the entire disability community, including people with a disability, careers, guardians, nominees, advocates, providers, and the NDIA. Not trying to divide us and encouraging us to fight or point fingers at each other.



- Not having pre-conceived outcomes or solutions to resolve issues and working with the entire community to develop solutions that meet the needs of people with a disability.
- Recognising our dignity of risk. People with a disability must not be wrapped up in cotton wool and support settings that are designed to 'protect us' or 'keep us safe' but which limit our rights, choice and self-determination.
- Working with us to design safeguarding measures that develop and leverage natural safeguarding by family, friends, and informal supports.
- Adopting in full the United Nations CRPD not just cherry picking the sections that work best for Government priorities.
- We advocate for people with disabilities, families and carers to maintain the current levels of choice and control working within a reasonable and necessary framework that incorporates the full CRPD. People have a right to an inclusive life within our communities and to have opportunities to develop valued roles as full Australian Citizens with the same human rights that are afforded to all Australian Citizens.
- We have significant concerns that this Bill only further segregates the disability community from the rest of our society.

We are concerned that the changes that the government are proposing, will drastically impact the quality of support and options available to people. People know what's best for them, so please allow them to retain their dignity, choice, and control over their own lives and the support they receive.

Thank you for providing us with an opportunity to share our insights and concerns regarding the proposed changes.

Should further discussion be possible, we eagerly welcome the opportunity to continue our engagement and contribute to the ongoing refinement of policies and legislation that uphold the rights and well-being of people with disability.

Kind regards,

The Inclusion Tree team

