

Submission to the Community Affairs Legislation Committee Inquiry in the 'Getting the NDIS Back on Track No. 1 Bill



Acknowledgements

SWAN acknowledges the traditional owners of the land on which this submission was produced, the Wardandi Noongar people. We acknowledge the deep spiritual connection to this land and extend our respects to community members and Elders past and present.

About SWAN

The South West Autism Network (SWAN) is grateful to Community Affairs Legislation Committee for making available this opportunity to provide feedback on the ‘Getting the NDIS Back on Track’ No. 1 Bill.

SWAN is a not for profit, charitable organisation supporting autistic individuals and their families living in the south west region of Western Australia for the past 15 years. We are a Disabled Persons and Families Organisation (DPFO) who are currently delivering two Commonwealth funded Information Linkages and Capacity Building (ILC) projects. We have almost 2000 registered members, with hundreds more people with disability and their families accessing free support from SWAN. All staff, volunteers and Board members either have a disability, or are the family member of someone with disability.

Our primary role in the community is to provide information, peer support, advocacy, and connection to mainstream and disability services. We build the capacity of people with disability and their families to navigate Government and non-government systems in order to meet their needs and participate in their local communities. We support people seeking diagnosis, post-diagnosis, and across the lifespan, and provide autistic safe space group programs for autistic children, teens and young adults through our AutStars and YES Program, in addition to delivering Youth Mental Health First Aid training to the wider community.



Contents

Acknowledgements.....	2
About SWAN	2
Executive Summary	4
Commitment to Co-design Must be Legislated.....	5
Eligibility and Access Changes	5
Funding Budgets Determined by Needs Assessment	6
Reasonable and Necessary Budget and NDIS Supports	8
Changes to NDIS Plan Budgets	9
Use of APTOS as Interim Measure for Deciding NDIS Supports	11
Inadequate Reference to the UNCRPD.....	12
Greater NDIA Powers With Limited Protections	12
Increased Powers to Change Plan Management Type.....	12
Information Collection Powers	13
Increased Measures for Quality and Safeguarding.....	14
Appealing and Reviewing NDIS Decisions and Processes	14
Extensive Reliance on Delegated Legislation	15
Recommendations	17
Contact Details.....	19

Executive Summary

The South West Autism Network (SWAN) are grateful to the Community Affairs Legislation Committee for the opportunity to provide feedback on the 'Getting the NDIS Back on Track' No. 1 Bill.

Commitment to Codesign Must be Legislated: SWAN emphasises the need for a legislated commitment to codesign with people with disabilities and their representative organisations. The current bill's lack of codesign and absence of an exposure draft has led to uncertainty and distrust within the disability community. The inclusion of diverse voices, particularly those from regional, rural, and remote areas, is crucial.

Eligibility and Access Changes: The proposed changes in Sections 24 and 25 disadvantage individuals with psychosocial disabilities by presuming early intervention can manage these conditions. This assumption undermines the recognition of psychosocial disabilities as permanent and risks exacerbating trauma for those applying for NDIS access.

Funding Budgets Determined by Needs Assessment: Section 32(L) introduces a 'needs assessment' to determine funding, raising concerns about its implementation and the expertise of assessors. The bill lacks detail on codesigning the assessment tools and methods, which risks inadequate support for individuals with complex needs.

Reasonable and Necessary Budget and NDIS Supports: The bill proposes replacing 'Reasonable and Necessary Supports' with a 'Reasonable and Necessary Budget' and a list of 'NDIS Supports.' This change could limit participant autonomy and access to crucial supports, reducing the flexibility to address individual needs.

Changes to NDIS Plan Budgets: The new framework introduces 'funding periods' and spending requirements that could restrict access to necessary supports, particularly for those with complex, multiple and/or episodic disability. There are concerns about the lack of ability for participants to review and correct needs assessments before submission to the NDIA.

Use of APTOS as Interim Measure for Deciding NDIS Supports: The bill's reliance on the Applied Principles and Tables of Support (APTOS) is problematic, as APTOS was not designed for this purpose and may conflict with other parts of the legislation.

Inadequate Reference to the UNCRPD: SWAN is concerned about the selective interpretation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in the bill. The exclusion of essential elements, such as the right to work, limits the rights and supports provided to people with disabilities.

Limited Protections and Greater NDIA Powers: The bill grants the NDIA increased powers to change plan management types and collect information, which could lead to significant negative consequences for participants without sufficient protections.

SWAN provides detailed recommendations from page 17 to address these issues, including legislating a commitment to codesign, amending sections to protect the rights of people with disabilities, ensuring qualified assessors, and improving transparency and participant involvement in the needs assessment and budget-setting processes. We urge the Committee to consider these recommendations to ensure that the NDIS reforms are inclusive, transparent, and aligned with the needs and rights of people with disabilities.

Commitment to Co-design Must be Legislated

The disability community has been promised by the Australian Government that new tools and processes for the National Disability Insurance Scheme (NDIS), including early intervention pathways and other rules for upcoming plans, will be co-designed with people with disabilities and their representative organisations. However, these proposed changes have resulted in significant uncertainty, distrust, and very real fear for people with disability and their families regarding the proposed changes. It is essential that the commitment to meaningful codesign with people with disabilities is enshrined in this bill and any future legislative amendments to the NDIS. The disability community has voiced concerns about the lack of codesign in drafting this bill and the absence of an exposure draft for sector feedback.

People with disabilities are the people who are most impacted by legislative amendments to the NDIS, so it is vital people with disabilities take the lead in designing and implementing any changes to the NDIS. Importantly, the codesign process must prioritise the inclusion of people with disabilities from diverse backgrounds. This includes ensuring the voices of individuals living in regional, rural and remote areas (especially people from geographically isolated regions), First Nations people, those from Culturally and Linguistically Diverse (CaLD) backgrounds, members of the LGBTQIA+ community, people with psychosocial disability, children and young people are prioritised. These groups will be most impacted by the proposed changes, and their voices must be prioritised in codesigning any changes.

SWAN also have significant concerns over the short timeframe of this Inquiry, and the lack of an exposure draft being provided to the disability community for feedback prior to the bill being read in Parliament. Individuals with disabilities, their families, and representative organisations require more time and resources to fully understand, discuss, and respond to the proposed changes.

Eligibility and Access Changes

In SWAN's opinion, the proposed changes in Sections 24 and 25 of the bill disadvantage individuals with psychosocial disabilities by presuming that most psychosocial disabilities can be managed through early intervention. This assumption undermines the recognition of psychosocial disabilities as permanent and risks exacerbating the distress and trauma experienced by those applying for access to the scheme. SWAN supports the position of the [Australian Psychosocial Disability Collective](#) that psychosocial disability is a legitimate disability deserving equal rights under the NDIS Act:

“At a wider level, yet-to-be-established “foundational supports,” run at state and territory levels by block-funded large NGOs promoting the notion of “recovery-based” support services, have the potential to further limit access to the NDIS for people with genuine and substantial needs that will be unable to be met under these service models.

It is also feared that some people with psychosocial disability could be forced off the NDIS altogether. The foundational supports are said to be a means to address burgeoning needs outside the NDIS system, and whilst the Minister has stated that present participants would keep their NDIS plans, we are concerned this is only in

the immediate term, and that current psychosocial participants will find themselves targeted yet again in a year or two.

We are alarmed that psychosocial disability is being subjected to discrimination and downgrading in the NDIS system. This is an incursion on our human rights under the United Nations conventions on the rights of people with disabilities (UNCRPD), of equal rights to live and participate in the community. We maintain that psychosocial disability is a very real and permanent disability for the purposes of the present NDIS eligibility criteria and deserves equal rights under the NDIS.”

Currently, psychosocial disability is recognised as a permanent disability under NDIS eligibility criteria, which is not effectively or appropriately addressed by existing mainstream services. The type of support typically funded by the NDIS is not available through traditional mental health services; of which many participants find to be retraumatising, authoritarian, judgmental, stigmatising, and systemically oppressive due to their predominant focus on pharmacological intervention.

We note that the bill requires the National Disability Insurance Agency (NDIA) to provide participants with a clear statement of the basis on which their NDIS Access was granted - whether by meeting disability requirements, early intervention requirements, or both. The bill also expands and clarifies the methods and criteria used in decision-making concerning these requirements. However, there is significant concern that the needs assessment process may not adequately capture the ‘whole of person’ support needs, particularly for those with multiple or complex disabilities, as recommended in the [final report](#) of the NDIS Review (Action 3.4).

Funding Budgets Determined by Needs Assessment

As noted in Section 32(L) of the NDIS bill, individuals with disabilities who meet the eligibility criteria will be subjected to a ‘needs assessment’ to determine the level of funding for their NDIS plan. The needs assessment and the process for calculating the funding budget will be determined by the Minister and are described in the Explanatory Memorandum as ‘highly technical’. There have been assurances made that the needs assessment and associated budget calculation tool(s) will be developed with input from the disability community and experts; however, SWAN are deeply concerned that there is no confirmation in the NDIS bill that codesign will actually occur.

With such limited information provided, SWAN have serious concerns about how the needs assessment will be operationalised, and the potential limitations of the ‘highly technical’ assessment tool(s). There is further concern that the needs assessment will only consider impairments meeting the new eligibility requirements, which is inconsistent with the ‘whole of person’ approach recommended by the NDIS Review report. This approach risks preventing individuals with complex and/or multiple disabilities from accessing all reasonable and necessary supports that they may require, putting their safety and wellbeing at risk.

Additionally, the bill does not specify who will conduct the needs assessments or the level of expertise required by individuals conducting these assessments. The NDIS Review report recommended that needs assessments be carried out by allied health professionals or social workers with expertise in disabilities. It is understood that the final decision on who

conducts the needs assessment, the assessment tools used, and how participant budgets are calculated will be made by the Minister (subclause 32L(8)(b)); however the lack of detail in the bill regarding these aspects raises very serious concerns. There is significant risk that needs assessments may not fully comprehend or accurately reflect the participants' support needs, history, circumstances, choices or rights. Assessors must be suitably qualified, knowledgeable, and experienced in the participant's disability type(s).

The NDIS Review report also clearly recommended that participants be provided with a draft of the needs assessment to verify accuracy and make corrections before it is submitted to the NDIA. However, the bill contradicts this recommendation, stating that '*a report of the assessment must be prepared and given to the CEO as soon as practicable after the assessment is completed.*'

Although the bill allows for 'replacement needs assessments,' there is a significant flaw in that it does not specify when or how a replacement assessment would be available to participants, or whether participants can request one (clause 32L(7)). In line with human rights, there should be clear provisions in the legislation allowing participants the legal right to appeal a poor quality needs assessment and/or request a replacement needs assessment, rather than delegating this authority to Category A Rules (clause 32L(7)(b)).

The Department of Social Services (DSS) suggests on their [Q&A webpage](#) that if a participant applies for a review of the NDIA's decision on the 'Statement of Supports,' the review would consider the needs assessment. DSS also suggests that a participant could request a new needs assessment as part of the decision review. However, the bill's wording does not confirm this process. It is vital that, participants must have the right to appeal individual aspects of the process (such as the needs assessment) without being forced to seek a review of the entire statement of supports, potentially risking the loss of other reasonable and necessary supports.

We understand that after the needs assessment is conducted, a 'method', as decided by the Minister (subclause 32L(8)(b)), will be applied to calculate a 'reasonable and necessary budget' for each participant, which could be used for flexible funding and/or specific supports (clause 32E). The Explanatory Memorandum states:

"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."

Rather than the flexible budgets recommended by the NDIS Review final report, this wording raises significant concerns that NDIS participants may receive only stated supports in their NDIS plans.

SWAN are highly concerned that the legislation to introduce these changes has been proposed before the needs assessment tools and budget calculation methods have been determined. Despite assurances being given that co-design will occur, SWAN note that nothing in the bill which guarantees co-design of the assessment tools and budget calculation methods will indeed happen.

Disability is diverse, and it is common for individuals to have more than one disability. There must be a flexible approach to the needs assessment process and the tools chosen. A one-size-fits-all approach will not be effective or appropriate for every individual, so it is crucial that the needs assessments be holistic. Assessors must be flexible and responsive to the

participant's needs, adjusting the assessment process and tools as necessary. Extensive research, testing, and codesign are essential to ensure that the assessment tools are reliable, accurate, and accessible for people with various communication, sensory, cognitive, cultural, language, and literacy needs. The needs assessment must be designed to accommodate the access needs of individuals with disabilities, children and young people, including those with complex communication needs and low literacy levels, First Nations and people from Culturally and Linguistically Diverse backgrounds.

The needs assessment must give due consideration to the participants' informal and formal supports, decision-making capacity, and geographic location. In calculating the budget, factors such as communication and geographic barriers must be considered. A funding budget for participant living in a metropolitan area with ready access to service providers will not work for a participant living in a regional town with no local service providers. Particularly if mandatory provider registration / enrolment is introduced, the travel costs of providers to support people with disabilities in areas of thin or no markets must be factored into budget calculations, as evidenced in the case study below:

Jamie (name changed to protect privacy) lives in small town 62km away from the nearest therapy provider. The nearest registered therapy provider is located 122km away. His NDIS plan is charged \$703.97 for one hour of therapy by a NDIS registered provider instead of \$193.99 per hour if there was a locally based therapist he could use. Jamie's NDIS plan does not include funding for the therapist's travel costs, so he receives only one hour of therapy instead of the 3.63 hours of therapy he would receive if he lived in the same town as the provider. Jamie's family have been trying to move closer to providers in order to increase his access to services since 2021, but have been unable to secure accommodation due to the housing crisis.

Reasonable and Necessary Budget and NDIS Supports

The NDIS bill proposes significant changes to the structure of the NDIS by replacing 'Reasonable and Necessary Supports' with a 'Reasonable and Necessary Budget' and a defined list of 'NDIS Supports'. The Government plans to develop lists of permitted (items and services participants may claim from their NDIS funding) and prohibited supports (items that cannot be claimed). SWAN are deeply concerned about the impact of these proposed changes on NDIS participants:

- **Impact on Autonomy, Choice, and Control:** By shifting to a predefined budget model and specified supports, it is anticipated that participant choice and control over their support plans will be significantly reduced. The flexibility to adapt supports based on changing needs or preferences would be constricted, affecting the ability to address unique and evolving participant requirements effectively.
- **Restriction on Types of Supports:** The move towards defined NDIS supports restricts the variety of supports available to participants. This change could limit access to broader supports previously covered under the more appropriate "reasonable and necessary supports" criteria, which were tailored to individual needs and often more cost-effective.
- **Reduction in Support Quality:** The new framework is likely to lead to a standardised approach that prioritises budget constraints over the quality of support.

This risks participants receiving supports that are listed as permitted rather than those that are truly beneficial or suited to their specific individual needs and circumstances.

The disability community campaigned for an individualised, person-centred NDIS. What constitutes a reasonable and necessary support for one person may not be the same for another, and the NDIS must continue to fund reasonable and necessary, individualised supports. The narrow definition of 'NDIS Supports' is overly restrictive and risks undermining the core principles of individual choice and control and thus the human rights of people with disability.

The Explanatory Memorandum provides examples such as white goods, holidays, and cosmetics as items that would be prohibited. However, there are some innovative supports such as acrylic nails which are vital for people with some neurological conditions in enabling them to be able to type (and be gainfully employed). According to the proposed legislation, such supports would be classified as cosmetics and thus banned. Assistive technology, including some white goods, can be essential, low-cost supports for people with disabilities, which dramatically improve independence and reduce the cost of supports. For example, funding accessible whitegoods like a robot vacuum is significantly cheaper than funding a support worker to prepare meals or vacuum daily. Technology evolves over time, and with this evolution, brings new assistive devices that can considerably enhance the independence of people with disabilities at a lower cost than other supports. A defined list of NDIS Supports would prevent participants from accessing these new technologies as they become available.

Whilst we agree that NDIS should not fund holidays, NDIS participants have the same right as other Australians to take holidays and often require funded supports while on holiday. This support needs to continue to be available. Moreover, Short Term Accommodation (respite) must remain an option, providing opportunities for young people with disabilities to practice independence and build skills to eventually move out of the family home and live independently.

Changes to NDIS Plan Budgets

Following the needs assessment to identify a participant's NDIS support requirements, a specific 'method' will be used to calculate a 'reasonable and necessary budget.' This 'reasonable and necessary budget' will then define the amounts for flexible funding, where participants would choose and manage the supports they need, covering funding for NDIS supports that do not fall under 'stated supports'. The other type of funding described is 'stated supports', which would be allocated for specific high-cost items and can only be used for designated supports. Yet to be determined 'Category A' NDIS Rules will define these stated supports, which may include expensive items like assistive technology, home modifications, and supported independent living (clause 32E).

Furthermore, there are very significant constraints proposed in the bill and explanatory memorandum which will impact the 'flexibility' of the flexible budget, including:

- **Specified Funding Periods:** The new framework plan will introduce 'funding periods,' that result in a participant's total funding being distributed in shorter claiming periods across the overall length of the plan (as outlined in subclauses 32F(2) and 32G(3)). This structure is designed to address 'intraplan inflation' – where funding is

exhausted before the plan's duration ends and needs additional topping up. SWAN commonly see 'intra-plan inflation' occurring due to insufficient funding in the original plan, especially in participants' first plans. We are aware that PACE has been built with the capability to turn on one-month funding periods. Disability is not static, and many participants have complex, episodic, and/or degenerative disabilities that require flexibility to spend more funding during periods of higher support needs and less during periods of lower support needs. There is a high risk that restricting participants to short funding periods will increase the risk of gaps in supports, violence, abuse, and neglect. Funding periods should be annualised, except in instances where the participant chooses a shorter funding period as their preference.

- **Spending Requirements:** The bill says that certain conditions must be met before funds can be accessed or used. These might include requirements such as obtaining services from specified providers or fulfilling specific procedural criteria before the funds can be used. This dramatically limits funding flexibility, particularly affecting people in regional, rural, and remote Australia where markets are thin to non-existent. True flexibility of funding is crucial for all NDIS participants; for geographically isolated participants it can mean the difference between accessing support or being entirely unable to access any support as noted in our previous [submission](#) to the Joint Standing Committee Inquiry into the NDIS participant experience in rural, regional and remote Australia.
- **Support Type Restrictions:** While the flexible funding aims to provide participants with some choice and control over their supports, there will be limits imposed on what types of supports can be funded. These are defined by what will be categorised as 'NDIS supports' under the new rules - potentially excluding very reasonable and necessary supports, and preventing innovation. There is an extremely high risk of people with disabilities experiencing gaps in vital supports due to narrowly defined NDIS supports.
- **Monitoring and Approval:** Whilst we recognise that flexible funding may require more rigorous monitoring and approval processes to make sure that funds are spent in line with the rules and requirements, this risks creating additional bureaucratic barriers to accessing supports. Rather than streamlining NDIS processes and the accessing of supports, there is potential of further complicating an already overly complicated system.

These restrictions significantly limit the recommended flexibility of the budget, impacting how participants can manage and use their funds to meet their needs effectively within the new NDIS plan structure.

The 'method' for calculating the new framework plan budgets will be decided by the Minister (referenced in subclause 32K(2)). How effective these changes will be will largely depend on the decisions made by the Minister. For these large-scale reforms to lead to fairer and more equitable plans, it is extremely important that the Government engages in authentic codesign with the disability community to design, test and perfect the assessment and budget-setting process.

Participants (or their nominees) must receive a draft copy of the needs assessment report to review and ensure accuracy before it is submitted to the NDIA. They must also receive a draft copy of the budget to review before it is finalised. This will significantly reduce the

high volume of requests for internal and external reviews of decisions currently occurring due to poor decision-making by NDIS representatives and the demand for high-cost reports to justify all requested supports.

The NDIS bill emphasises that participants must spend in accordance with their budget. In order to achieve this outcome, both the needs assessment and budget must be accurate and appropriate. Ensuring that participants and/or nominees are afforded the opportunity to review and correct the needs assessment, and review the budget prior to these processes being finalised is a crucial factor in safeguarding participants. The [Tune Report](#), the NDIS Review final report, and extensive systemic advocacy have all repeatedly recommended the necessity of providing draft assessments and plans to participants before they are finalised.

In developing the method for determining participant budgets, codesign and transparency are of utmost importance. Diverse voices must be prioritised in the co-design and testing of all tools and calculation methods to ensure full consideration is given to:

- People with all disability types, including individuals with multiple, complex, and/or degenerative disabilities.
- People with disabilities living in regional, rural, and remote areas, prioritising those in areas of geographic isolation and thin markets - especially in consideration of the NDIS Review's highly controversial recommendation of mandatory provider registration or enrolment and its associated impact on participants in regional and remote communities.
- Aboriginal and Torres Strait Islander people.
- Culturally and Linguistically Diverse people.
- LGBTQIA+ people.
- Children and young people and their families.

Both the needs assessments and the method to calculate budgets must be fully and extensively tested with all of the above cohorts before implementation. This process must not be rushed. It is difficult to predict what intensive supports participants may need at different life transitions, with different informal or formal supports, different geographic situations and different availability and access to supports. The system for determining budgets must be suitably flexible to adapt to unexpected life events, such as the loss of informal supports, changing support needs, unexpected hospitalisation, or the need for new assistive technology, home modifications, or equipment repairs.

Use of APTOS as Interim Measure for Deciding NDIS Supports

Under the new Part 3 (2) and (3) of the bill, the [Applied Principles and Tables of Support \(APTOS\)](#) are to be used as an interim measure to decide what qualifies as an 'NDIS Support' until new NDIS rules are developed to create the lists of permitted and prohibited supports. It is important to recognise that APTOS was never designed for this purpose. Developed in 2015, APTOS was developed to be broad policy guidelines for State Governments and the NDIA to determine responsibility for different supports. They were never meant to be a fundamental part of legislation and, in some cases, contradict other parts of this bill. For example, the draft bill states that rehabilitation falls under the responsibility of NDIS, whereas APTOS assigns this obligation to state-based Health Departments. This discrepancy poses a significant risk, as both NDIS and State/Territory Governments might assume the other is responsible, leaving participants without the necessary supports.

The existing NDIS principles for Reasonable and Necessary supports must continue to be applied for determining what qualifies as an NDIS support under subclauses 10(b) and 10(c).

Inadequate Reference to the UNCRPD

While we welcome the inclusion of reference to [United Nations Convention on the Rights of Persons with Disabilities \(UNCRPD\)](#) in the NDIS bill, SWAN are deeply concerned that the UNCRPD has been selectively interpreted and applied. The bill refers to limited elements of the UNCRPD to define 'NDIS supports', but fails to incorporate the entirety of rights and principles laid out in the convention. This selective reference narrows the scope of supports available under the NDIS, limiting the rights and supports provided to persons with disabilities, contrary to the intentions of the UNCRPD.

The reference to the UNCRPD in the bill omits important aspects such as the rights to work and employment, which are vital for the social and economic inclusion of people with disability. By excluding these essential elements, the bill may restrict individuals' access to supports that enable full participation in society, thus contradicting the wider objectives of the UNCRPD.

All elements of the UNCRPD should be included in the bill, to ensure that economic participation and employment are included in the same way that physical mobility and community inclusion are outlined. We also note that the bill should include [Article 19](#) of the convention, which affords the same right to choose where and whom people with disability live with – a right automatically afforded to non-disabled Australians.

Further, any rules or guidelines related to the definition of 'NDIS supports' should involve wide-ranging consultation and codesign with people with disability to ensure that the legislative framework is allied with the holistic intent of the UNCRPD. This will increase the likelihood that the NDIS truly supports the full inclusion and participation of all people with disabilities in our communities, as expected by Australia's international responsibilities under the UNCRPD.

Greater NDIA Powers With Limited Protections

Increased Powers to Change Plan Management Type

The NDIS Bill establishes new subsections 43(2A), (2B), (2C), and (2D), which outline situations where the CEO may deny a participant's request for funding to be Plan Managed or Self-Managed under new framework plans. Scenarios allowing the CEO to make such decisions include:

- Potential physical, mental, or financial harm to the participant if the decision isn't made.
- Non-compliance with section 46, which deals with the acquittal of NDIS amounts, regarding current or any previous plans.
- Any circumstances specified by yet to be developed Category A NDIS rules.

SWAN are extremely concerned about the scope of the power granted to the CEO to overrule a participant's plan management choice, with insufficient limits and protections for participants. Altering a participant's plan to Agency (NDIA) Managed seriously impacts their

autonomy, choice, and control, with adverse repercussions on their access to supports. In areas with minimal or no registered providers, such as regional and remote communities, the risk to participants is substantial. We emphasise the importance of amending the bill to clearly limit how this power is used and ensure there are adequate protections for participants.

The Government should amend section 43 of the bill to:

- Define the criteria for assessing potential harm to the participant and include the participant/nominee in risk assessments, with support for decision-making, family and/or carers, an advocate, and other important people in the participant's life. The criteria must include a requirement that the NDIA assess the risk of the participant being unable to access any supports or losing current supports if plan changed to Agency Managed.
- Clearly outline non-compliance with section 46 in the bill, and clarify the threshold for non-compliance that would enable the NDIA to overrule a participant's preferred plan management type.
- Make sure that NDIS rules for this section are fully codesigned with people with disability and the wider disability community. The rules must be communicated to and accessible to everyone in the disability community. The voices of regional, rural, and remote participants and nominees, who will be most impacted by inappropriate use of this power, must be prioritised in codesign.

Information Collection Powers

NDIA is granted increased authority by this bill to request information or documents from participants, with severe consequences if these requests are not met. This includes:

- **Cancellation of the Participant's Eligibility:** When reassessing a participant's eligibility for the NDIS, the NDIA can demand information or require the participant to undergo a health assessment, which might include medical, psychological, or other evaluations. If the participant does not submit the required information within 90 days, the CEO may remove them from the scheme (as specified in clauses 30 and 30A). With extensive waitlists of 6 months to 4 years for access to many mainstream services, there is a high risk of participants being removed from the NDIS and losing access to reasonable and necessary supports. The bill does not describe any constraints on this power – there are no details on how, when or for whom the NDIA may reassess a participant's eligibility, and whether the eligibility reassessment would be applied to all existing participants and/or specific cohorts of existing participants.
- **New Framework Plan Requirements:** In developing a new framework plan, the NDIA may request any information they believe to be 'reasonably necessary', or compel a participant to have a medical assessment. If the participant does not undergo the medical assessment or provide information requested within 28 days without a 'valid reason', both their current NDIS plan and any forthcoming plans will be suspended until they meet the NDIA's request (as detailed in subclause 36(3)). SWAN is deeply concerned by the brevity of the timeframe allotted to meet NDIA's requirement of medical assessments, and the lack of choice and control over who performs the assessment. There is high risk of the NDIA appointing an inappropriate medical professional without the relevant disability expertise to make the assessment (e.g., appointing a physiotherapist to assess intellectual or psychosocial disability).

These powers are far-reaching, permitting the NDIA to force participants to be assessed by a health professional of its choice, or to collect a wide range of personal information, such as notes from an allied health professional. The consequences of non-compliance are very significant, with insufficient protections for people with disability who frequently have experienced trauma.

The bill should substantially restrict these information collection powers by:

- Reducing the types of information that can be requested.
- Increasing the length of time for participants to supply the information before repercussions are imposed.
- Limiting the negative consequences for non-compliance.

Increased Measures for Quality and Safeguarding

SWAN support the proposed changes in the Bill (Schedule 2) which boost the Quality and Safeguards Commission's authority, such as imposing conditions for approval of a quality auditor and increasing regulatory actions available to the Commissioner by authorising compliance and enforcement powers to a larger number of professionals. Considerable reforms are needed, however, to address violence and abuse against people with disabilities. Unannounced site inspections of closed settings such as group homes must be introduced to proactively prevent abuse, along with improved IT systems and procedures to effectively manage complaints. These system improvements are urgently needed to enable the Commissioner to identify patterns of complaints about providers and trigger action. Importantly these changes need to make sure that the Commission monitors and deals with sharp practices (including unfair service agreements), conflicts of interest, customer capture, improve codes of conduct and their usage, and reduce the use of restrictive practices.

Appealing and Reviewing NDIS Decisions and Processes

While participants retain the right to review the 'statement of supports' (including the reasonable and necessary budget), the right to review several new procedures, either through internal NDIA processes or externally through the Administrative Appeals Tribunal is critically limited.

Concerningly, the 'needs assessment' itself is not considered a 'reviewable decision' under section 99 of the NDIS Act, which means internal or external review is not available to participants. If the bill is passed without amendment, there is significant risk of participants being unable to dispute a poor quality or inaccurate needs assessment which would likely lead to an inadequate funding budget.

Furthermore, the bill does not provide for participants to review the needs assessment report before it is forwarded to the CEO. According to Section 32L(5), the assessment report must be prepared and delivered to the CEO as soon as practicable after completion. As clearly stated in the NDIS Review final report, the needs assessment report should be given to the participant to check before being finalised. The bill must be amended to enable this crucial right to participants.

While the bill allows for 'replacement assessments,' there is no clarity on when they would occur, nor whether participants can request one themselves (referenced in clause 32L(7)). Yet to be developed NDIS 'Category A' Rules are expected to outline the circumstances under which the NDIA should organise a replacement assessment (clause 32L(7)(b)). If a

participant requests a replacement assessment and the NDIA declines, there would be no recourse to appeal or review the decision, and this must be rectified before the bill is passed. The Department of Social Services (DSS) suggests that during a review of a decision on the statement of participant supports, the needs assessment may be reconsidered to check if it accurately reflects the participant's support needs and circumstances. DSS also suggest that participants could request a new needs assessment during such a review. However, the current NDIS bill does not clearly confirm this process is available.

This to be a considerable flaw in the NDIS bill. If needs assessments are to be used for calculating budgets, participants must have the right to receive and review the needs assessment for accuracy before it is finalised, clearly stated in the legislation. The right to request a new assessment when needed should also be included in the legislation.

Extensive Reliance on Delegated Legislation

Extensive powers are given to the NDIS Minister in this bill to set up Rules and determinations without approval by Parliament being required. As proposed, 'delegated legislation' will be pivotal in implementing the NDIS reforms. Several Rules and determinations are expected to formalise current operational guidelines and policies, as recommended in the NDIS Review final report.

NDIS Rules are developed in collaboration with State and Territory Governments. The bill gives the Minister power to create new Rules that will:

- Define the types of supports the NDIS will fund (subclauses 10(b)-(c)).
- Set up decision-making processes for disability and early intervention requirements (clause 27).
- Describe which supports qualify as 'stated supports' and set prerequisites for obtaining certain supports (clause 32J).
- Clarify the situations where a participant's request to have their funding plan or self managed can be denied (subclause 43(2C)(c)).

The majority of new NDIS Rules will be classified as 'Category A', requiring unanimous agreement from all State and Territory Governments. This offers more oversight than 'Category C' Rules, which need only a majority agreement, or 'Category D' Rules, which require consultation only.

Introduced in this bill, the Minister will have the authority to make impactful 'determinations' about:

- Procedures for conducting needs assessments (subclause 32L(8)).
- Methods for calculating the amount of funding in reasonable and necessary budgets (subclause 32K(2)).

While either house of Parliament can veto these legislative instruments, they are not formally passed by Parliament and do not require agreement from State and Territory Governments. Although there are expectations for the Minister to consult properly before enacting a legislative instrument, these rules can be enforced without consultation. Given the Government's pledge to involve the disability community in developing this legislation, this commitment should be unambiguously stated in the NDIS Act.

While delegated legislation can be appropriate for administrative or technical details or to allow flexibility in areas of rapid change, using these measures raises several concerns:

- **Understanding the Full Impact is Difficult:** It is unknown how the Government will limit what is funded under the NDIS versus what will be funded by States and Territories through foundational supports, as the Rules specifying NDIS supports are not publicly available. This increases distrust and fear in the disability community, and the Government should release the draft rules for review and feedback by people with disability and their representative organisations prior to passing these amendments.
- **Appropriateness for Significant Policy Areas:** Delegated legislation may be unsuitable for some of the changes proposed by the bill. Policy areas with significant impact need greater public scrutiny than what is allowed for enacting Rules or determinations. As an example, the new section 27 permits the development of Rules about access, which is fundamental to the scheme and should be clearly detailed in the primary legislation. As the disability community do not know what is included in the delegated legislation, it is difficult to assess whether the bill strikes the right balance between the NDIS Act and delegated legislation.
- **Commitment to Codesign:** The NDIS Review report recommended that codesign be integral to all NDIS reforms. There is substantial concern in the disability community that this bill proposes major changes to the NDIS through delegated legislation without inclusion of a legislated commitment to confirming that meaningful codesign will eventuate.

By addressing these concerns, the bill can ensure that the implementation of the NDIS remains transparent, inclusive, and aligned with the needs and rights of people with disabilities.

Recommendations

1. Amend Section 4 to legislate a requirement for meaningful codesign and consultation with people with disabilities and their representative organisations in designing and implementing NDIS reforms. This must include:
 - Leadership by people with disabilities and their representative organisations.
 - Publicly available and promoted engagement plans and timelines.
 - Prioritising codesign with those most impacted by changes, including individuals living in regional, rural, and remote areas (specifically including geographically isolated people), First Nations people, Culturally and Linguistically Diverse (CaLD) communities, LGBTQIA+ individuals, and people with diverse disability types.
2. Amend Sections 24 and 25 to include comprehensive criteria that do not disadvantage people with episodic, fluctuating or 'invisible' disabilities, such as psychosocial disabilities and autism. This amendment should reflect the understanding that disability impacts can vary greatly and that recovery is not achievable or linear for everyone. There must be no changes to eligibility and access until foundational supports are established nationally and functioning fully.
3. Amend subclause 32L to require that the Needs Assessor be a qualified allied health professional or social worker with experience in conducting assessments and expertise in the participant's specific disability type(s).
4. Amend subclause 32L(5) to require that the Needs Assessor provide a draft needs assessment report to the participant for review and corrections before it is given to the CEO. As recommended in the NDIS Review final report, the Needs Assessment must take a 'whole of person' approach.
5. Amend the bill to include a requirement for the needs assessment tool(s) to be:
 - Fully codesigned with and extensively tested by people with disabilities from diverse backgrounds, families and carers, disability representative organisations, academics and health professionals, advocates, and service providers.
 - Developed using evidence from Australian and international peer-reviewed research on assessing the support needs of people with disabilities and in consideration of the impact of such assessments on them.
6. Amend sections 26 and 36 to require the NDIA to fully fund the cost of any assessments and reassessments of participants requested by the NDIA.
7. Amend Section 10 to ensure that 'Reasonable and Necessary Supports' remain the fundamental core principle of the NDIS, replacing the introduction of narrowly defined 'NDIS Supports'.
8. Remove the reference to using the 'Applied Principles and Tables of Support' (APTOS) to determine 'NDIS Supports' as an interim measure until Rules are created.
9. Remove Section 32H to ensure that a flexible budget is indeed flexible. The provisions in this section may be achieved as needed by including 'stated supports'.
10. Include in the bill the requirement that NDIA provide draft budgets to participants before they are finalised, with adequate time allowed for participants to review.

11. Introduce a new provision or amend Section 99 to ensure that 'needs assessments' are a reviewable decision.
12. Amend the relevant sections to address the extensive use of delegated legislation, such as those giving rule-making powers to the Minister (e.g., Sections 27, 32J, and 43(2C)(c)). These amendments should require more substantial public scrutiny and ensure key decisions about NDIS support and access criteria are included in the primary legislation rather than being determined solely by Ministerial rules or determinations.
13. Revise Section 43 to establish precise guidelines on when and how the NDIA can overrule a participant's preferred plan management type.
14. Amend the bill to incorporate the entire framework of the UNCRPD.
15. Improve protections for participants undergoing eligibility reassessment. There must be specific, protective criteria detailing in what circumstances eligibility may be reassessed, and limits on how often a participant's eligibility is reassessed.
16. Improve protection for participants where NDIA have been unable to contact them. This should consider reasons like fear of answering private numbers (due to scammers, lacking access to MyGov, not having a fixed address, unexpected hospitalisation or incarceration, or lacking capacity to engage with NDIS representatives).
17. As per recommendations from the Disability Royal Commission, increase quality and safeguarding measures.

Contact Details

South West Autism Network Inc

ABN: 60 399 882 817

Nick Avery
Chief Executive Officer

Phone: or
Email:
Email:
Website: www.swanautism.org.au

Busselton Office
12 Pettit Crescent
West Busselton WA 6280

Bunbury Office
35 Milligan St
Carey Park WA 6230

