



BILLS DIGEST

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

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Key points

- The [National Disability Insurance Scheme Amendment \(Getting the NDIS Back on Track No. 1\) Bill 2024](#) is the first in a proposed series of Bills that amend the [National Disability Insurance Scheme Act 2013](#) in response to the findings and recommendations of the [Independent Review into the National Disability Insurance Scheme](#).
- Concerns have been raised in relation to aspects of the National Disability Insurance Scheme (NDIS), including in relation to financial sustainability, fraud and eligibility criteria.
- The Government has [advised](#) that the NDIS Financial Sustainability Framework agreed by National Cabinet in April 2023 will provide an annual growth target in the total costs of the NDIS of 8 per cent by 1 July 2026, with further moderation of growth as the Scheme matures.
- The Bill:
 - provides new definitions of disability supports, to clarify the scope of valid supports appropriately funded under the NDIS
 - provides for a new assessment process for gaining entry into the NDIS by way of the two eligibility streams of the NDIS—early intervention and disability requirements, or both
 - sets out the manner in which an existing NDIS participant will transition from an old plan to a new plan.
- The Senate Community Affairs Legislation Committee is conducting an inquiry into the Bill and is due to report by 20 June 2024.
- At the time of writing, the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills had not reported on the Bill.

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House: House of Representatives

Portfolio: National Disability Insurance Scheme

Commencement: On the 28th day after Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

All hyperlinks in this Bills Digest are correct as at May 2024.

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Purpose of the Bill

The purpose of the [National Disability Insurance Scheme Amendment \(Getting the NDIS Back on Track No. 1\) Bill 2024](#) (the Bill) is to amend the [National Disability Insurance Scheme Act 2013](#) (the *NDIS Act*) to:

- provide new definitions of disability supports, serving to narrow the scope of valid supports appropriately funded under the National Disability Insurance Scheme (NDIS) and
- provide for a new assessment process for gaining entry into the NDIS via the two eligibility streams of the NDIS—early intervention or disability requirements, or both.

This Bill comprises two Schedules. Schedule 1 has 3 Parts:

- Part 1 clarifies what counts as NDIS supports, new processes for needs assessment, and a shift from ‘reasonable and necessary supports’ to ‘reasonable and necessary budgets’
- Part 2 is a consequential amendment to the [Legislation \(Exemptions and Other Matters\) Regulation 2015](#), exempting the rules and other legislative instruments under the *NDIS Act* from sunsetting
- Part 3 sets out transitional arrangements.

Schedule 2 has 2 Parts. Part 1 makes amendments to quality and safeguarding, including provisions for approvals for quality auditors, and expanding powers for authorising infringement notices to Executive Level 2 (EL2) officers (previously requiring Senior Executive Service (SES) approval).

Background

The [NDIS was designed](#) to replace an ad hoc system of state-based disability care and services to ensure fairness across Australia for people with significant and permanent disability. A decade into its implementation, the NDIS has many outstanding issues and challenges. Government ministers and stakeholders have raised concerns that the Scheme is [financially unsustainable](#), that [fraudulent providers](#) are claiming funds without providing proper care, and that there has been a [large increase in the number of children](#) in the Scheme.

On 18 October 2022, Minister for the NDIS Bill Shorten [launched](#) an [independent review into the design, operations and sustainability of the NDIS](#) (NDIS review). The NDIS review engaged with over [2,000 people through consultations](#) and received [over 2,500 submissions](#). The NDIS review report, [Working together to deliver the NDIS](#), made [26 recommendations](#).

According to the [Explanatory Memorandum](#), the Bill is the first in a series of legislative changes the Government will make in response to the recommendations of the NDIS review (p. 2).

NDIS review recommendations

The [Explanatory Memorandum](#) states that the amendments in the Bill give effect to [NDIS review report](#) Recommendation 3 and interconnected elements in Recommendations 5, 6, and 7 (p. 3). The amendments also support the partial implementation of Recommendation 17 (p. 3). The recommendations are as follows:

Recommendation 3: Provide a fairer and more consistent participant pathway

Recommendation 5: Provide better support for people with disability to make decisions about their lives

Recommendation 6: Create a continuum of support for children under the age of 9 and their families

Recommendation 7: Introduce a new approach to NDIS supports for psychosocial disability, focused on personal recovery, and develop mental health reforms to better support people with severe mental illness

Recommendation 17: Develop and deliver a risk-proportionate model for the visibility and regulation of all providers and workers, and strengthen the regulatory response to long-standing and emerging quality and safeguards issues.

The [NDIS review's report](#) listed detailed actions to implement each of those recommendations (pp. 4–16).

The Bill addresses the various recommendations through different provisions, broadly outlined as:

- clarifying definitions of NDIS supports
- making a change to the idea of reasonable and necessary funding for supports in the NDIS and
- through clarity on the early intervention stream for the NDIS.

The proposed amendments will mean some changes in the way money is allocated and spent by individuals in the NDIS, and clarification over whether someone will receive NDIS funding until the age of 65 or receive NDIS funding for some years of early intervention into their disability only.

Current NDIS arrangements

This section describes current NDIS arrangements that are relevant to the Bill.

Plans built from reasonable and necessary supports

Disability supports under the NDIS are funded via individual budgets known as plans.¹ Currently, NDIS plans are built from sets of disability funding categories defined as '[reasonable and necessary' supports](#)'. The criteria used by the National Disability Insurance Agency (NDIA) for determining reasonable and necessary supports are set out in section 34 of the *NDIS Act*.

Additional criteria and considerations are set out in the [National Disability Insurance Scheme \(Supports for Participants\) Rules 2013](#) (NDIS rules).

The [NDIS review report](#) recommended shifting from individual support items to a whole-of-person approach to plans ([Recommendation 3, Action 3.3](#)). The Bill includes provisions to implement this recommendation, comprising a shift from building plans based on individual support items—such as seeing an occupational therapist, having a support worker, or buying a prosthetic—to reasonable and necessary budgets with flexibility in how funds are spent within the budget.

Eligibility criteria for the NDIS

Access to the NDIS is based on, amongst other things, the [disability requirements](#)² or the [early intervention](#) requirements.³ A NDIS participant may be eligible for both early intervention and permanent disability supports concurrently. NDIS participants who enter the NDIS scheme on the basis of the early intervention criteria may eventually finish their early intervention funding period and be assessed as eligible based on the permanent disability category or be assessed as no longer eligible for NDIS funding.

Brief description of key issues in the NDIS

This section details some key issues in the NDIS as they relate to the Bill.

Cost of the scheme

A key concern regarding the NDIS is the total cost to the federal government, the [estimated expenditure being \\$41.9 billion](#) in 2023–24. Prime Minister Anthony Albanese has [stated](#) that NDIS

1. [National Disability Insurance Scheme Act 2013](#) (*NDIS Act*), Chapter 3, Part 2.

2. *NDIS Act*, subparagraph 21(1)(c)(i); section 24.

3. *NDIS Act*, subparagraph 21(1)(c)(ii); section 25.

funding is ‘unsustainable’, with the federal government [calling on state and territory governments to contribute more](#) to the costs of the Scheme. While this Bill does not address federal, state and territory funding arrangements, it is designed to clarify costs of the Scheme overall and some provisions can be viewed as cost saving measures (see ‘Key issues and provisions’ section).

Fraud

Related to concerns about the cost of the Scheme overall is the issue of [fraudulent providers](#) who overcharge NDIS participants, particularly those in supported independent living facilities where providers may have access to a large proportion of a person’s NDIS plan budget. There are also issues of [overcharging](#) by some disability service providers who charge NDIS participants more than non-NDIS participants for the same service. There have also been high-profile reporting of NDIS funds being misused, such as a provider accused of [pressuring NDIS participants](#) to use their funds for cruises.

Eligibility criteria

There has also been criticism of the NDIS eligibility criteria—in particular, of inconsistencies such as the presence of ‘access lists’ ([List A](#) and [List B](#)) that streamline the process for people with certain conditions but not others, along with [burdensome paperwork](#) required for eligibility determination. An [example often described](#) is a person with a permanent spinal cord injury that has to prove their condition and needs to the NDIS each year. Related to costs are concerns that there has been [a large increase in numbers of children](#) entering the Scheme, potentially contributing to high scheme costs now and in later decades.

Policies aimed to address these NDIS issues

Tackling costs

In order to restrain NDIS cost growth, the Albanese Government committed to [an 8% growth target under](#) the NDIS Financial Sustainability Framework in 2023. Questions were posed about the Financial Sustainability Framework during [Senate estimates hearings in May 2023](#). Responses to those questions indicated that details of how capping the growth of the NDIS at 8% would be achieved were not yet finalised (pp. 69–73). The Government has claimed public interest immunity over documents relating to the Framework, in response to [Senate orders for the production of any related documents](#) (no. 253). Deputy Leader of the Government in the Senate, Don Farrell, [stated in October 2023](#):

... disclosure would prejudice relations between the Commonwealth and the states and territories. Disclosure would harm the Commonwealth's ongoing relations with the states and territories on this and other matters.

Currently, no further information on the Framework is available, but the 8% growth target is set to be in place by [July 2026](#).

Addressing fraud and overcharging

The [Fraud Fusion Taskforce](#) set up by Minister Shorten is a coordinated approach across 16 government agencies to quickly detect, resolve and prevent NDIS fraud. Minister Shorten has stated that the Fraud Fusion Taskforce investigated [\\$1 billion in NDIS payments](#) in its first year. In April 2024, Minister Shorten stated that [100 cases of NDIS fraud](#) had gone to court.

There is also a [new taskforce](#) for unfair ‘wedding tax’ prices, whereby some NDIS providers charge NDIS participants more than non-participants for same service.

Increasing NDIA capabilities

The [2023–24 Budget contained measures](#) aimed at increasing the capacity of the NDIA. These included \$732.9 million over 4 years to improve the effectiveness and sustainability of the NDIS to ‘uplift capability, capacity and systems to better support participants’:

Capability: \$429.5 million investment in the NDIA’s workforce capability and systems resulting in better consistency and equity in decision-making for access and planning decisions for NDIS participants

Better planning: \$73.4 million to better support participants to manage their plan within budget, including assistance from the NDIA during the year and holding plan managers, support coordinators and providers to account

Flexibility: \$63.8 million to take a lifetime approach to ensure plans are more transparent and flexible for life events

Independent living: \$56.4 million to strengthen supported independent living decisions, including by introducing a home and living panel with highly trained staff to improve consistency across decisions and updating guidelines for planners to improve participants’ ability to live independently

Evidence-based supports: \$29.3 million to support the quality and effectiveness of services provided to participants, through improving oversight of services and increasing take up of evidence-based supports

Blended payment trial: \$24.6 million to work with participants and providers to trial blended payment models, to increase incentives for providers to innovate service delivery and improve outcomes

First Nations and remote communities: \$7.6 million to pilot approaches to partner with communities to improve access to supports in remote and First Nations communities

Fraud: \$48.3 million to crack down on fraud and non-compliant payments in the Scheme and to develop a business case for new IT platforms and systems to detect and prevent fraud and non-compliant payments.

The [Budget papers stated](#) that these measures would support improved administration of the scheme to ‘reduce additional growth in Scheme expenses by \$15.3 billion’ over 4 years from 2023–24 (p. 198).

Committee consideration

Senate Community Affairs Legislation Committee

The Bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 20 June 2024. Details of the inquiry are at the [inquiry webpage](#). At the time of writing this Bills Digest no written submissions from stakeholders had been published.

Senate Standing Committee for the Scrutiny of Bills

At the time of writing, the Senate Standing Committee for the Scrutiny of Bills was yet to comment on the Bill.

Policy position of non-government parties/independents

Australian Greens

While the Australian Greens do not appear to have responded publicly to the Bill at the time of writing, Senator Steele-John has [previously spoken out](#) against NDIS cost cutting measures in the 2023 Budget:

Let's be really clear, the Greens want to see an increase in funding for the NDIS. Right now, too many disabled people are not able to get the support they need to live a good life.

Labor's announcement to have a target for spending growth is sounding a lot like a cap on the NDIS. The notion of a cap is a broken promise from the Albanese government and is causing tremendous concern in the disability community.

If the federal government caps funding to the scheme at 8% growth, this announcement will see over \$50 Billion less allocated to the NDIS over the decade. De-funding the NDIS by this amount is completely unacceptable.

Coalition

Michael Sukkar, the Shadow Minister for the NDIS, and Senator Hollie Hughes, the Shadow Assistant Minister for the NDIS, released a [joint media statement](#) on the Bill, stating:

The new legislation has left many questions unanswered with key measures in the Bill failing to be finalised ahead of its release.

This Bill, although participant-focused, fails to address provider fraud and price gouging which are two major issues contributing to cost blowout within the Scheme.

If the legislation passes, it will take 12–18 months for the measures to become operational, putting further uncertainty on participants, families, carers and providers.

The Coalition is calling on the Government to outline how the measures in this Bill will achieve the projected savings and contribute to the overall sustainability of the NDIS, while addressing the diverse needs of NDIS participants.

Position of major interest groups

[People with Disability Australia](#), a lead advocacy body, released a [media statement on the Bill](#) calling for genuine co-design of legislative changes to enact the recommendations of the NDIS review:

No one is more interested in the NDIS being sustainable and viable than people with disability. Our lives depend on it. People with disability and NDIS participants are worried about what these changes will mean for their lives and the supports we rely on to fully participate in the community...

Getting the legislation and the implementation of reforms right will rely on genuine co-design with people with disability and their representative organisations, which Minister Shorten today stated will take place over 18 months.

Co-design isn't having conversations behind closed doors. It's drafting workable legislation with people with disability. Today's promise of co-design must be delivered. That means the refinement of this legislation must happen out in the open with people with disability leading the way and the plans for how it's implemented.

Sam Bennett and Hannah Orban of the Grattan Institute [note](#) the need to balance unsustainable costs in the NDIS with the need for consistency and better quality services for people with disability:

Make no mistake – this Bill is about containing costs. And for good reason.

The spiralling cost growth of the NDIS – the National Disability Insurance Scheme – threatens its very existence. Doing nothing will only quicken its demise; moderating how much the NDIS grows year on year is essential to keeping this remarkable scheme going well into the future.

NDIS 2.0 will be better than Mark 1. It could finally banish the existential threat of uncontained cost growth, introduce consistency in the amount of funding each person gets and what they can spend it on, and ensure that only the people that need it will stay on the scheme for life.

Who can join the scheme, how long they can stay in it, and what they can spend their funding on could all be different as soon as June, if the Bill is passed.

Financial implications

The [Explanatory Memorandum](#) states that the changes in the Bill are ‘expected to contribute to decisions made by National Cabinet to moderate cost growth of the NDIS in the medium to long-term and meet the 8% sustainability target by 1 July 2026’ (p. 3).

The limited available information on the NDIS Financial Sustainability Framework and the financial impact of the Bill makes it difficult for the Parliament to assess the impact of the proposed amendments on NDIS participants and the overall costs of the Scheme.

The [2024-25 Budget Papers state that](#) the NDIS Actuary projected that without further action, NDIS payments would increase by \$14.4 billion over four years from 2024–25. The Government advises that ‘NDIS reforms being undertaken by the Government are expected to moderate this additional growth to that projected at the 2023–24 MYEFO, and ensure the NDIS remains on track to achieve the NDIS Sustainability Framework agreed by National Cabinet from 1 July 2026’ (BP2, p. 173). This Bill forms part of these NDIS reforms.

Statement of Compatibility with Human Rights

As required under Part 3 of the [Human Rights \(Parliamentary Scrutiny\) Act 2011](#) (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. The Statement of Compatibility with Human Rights can be found at page 60 of the [Explanatory Memorandum](#) to the Bill.

Parliamentary Joint Committee on Human Rights

In its [report of 17 April 2024](#), the Parliamentary Joint Committee on Human Rights stated that it had deferred consideration of the Bill (p. 5).

Key issues and provisions

Regulation of eligibility pathways

Clarity around early intervention and permanent disability streams

The NDIS has two entry points to the Scheme, one via [permanent disability](#)⁴ and the other via [early intervention](#) needs.⁵ An NDIS participant:

- may be part of both the early intervention and permanent disability streams from the start
- may transition from early intervention to permanent disability stream at a later date based on assessment or
- may be limited to the early intervention stream only.

It is [already the case](#) that NDIS participants in the early intervention stream are not guaranteed conversion to the permanent disability stream after their early intervention timeline. NDIS

4. NDIS Act, section 24

5. NDIS Act, section 25.

participants may exit the Scheme after their early intervention timeline, and the Bill provides further clarity on this.

Item 18 in Schedule 1 to the Bill repeals and replaces subsection 21(2) to require the CEO of the NDIA, when considering whether a person meets the access criteria for the NDIS to separately consider and decide whether the person meets the disability requirements and the early intervention requirements. In addition, the Bill mandates that participants are to be explicitly informed whether they satisfy the criteria for permanent disability, early intervention, or both sets of requirements at the time of entry into the Scheme: **proposed subsection 28(2)** (inserted by **item 26**).

The delineation of whether a participant is in the early intervention stream, the permanent disability stream, or both may be a measure to control costs, and to ensure that children do not remain as NDIS participants for their whole life if they no longer need early intervention supports. The capacity to cease NDIS supports due to the end of early intervention already exists. The Bill is seeking to refine and ensure that participants are clearly notified of their eligibility status from the start.

Clearer powers to end participation in the NDIS

Existing section 30 of the *NDIS Act* allows the CEO of the NDIA to revoke a person's status as a participant in the NDIS.

Item 30 in Schedule 1 to the Bill inserts **proposed subsections 30(2)–(8)** so that the NDIA CEO can require a participant to provide information or undergo an assessment if they are considering revoking a person's status as a participant. The results of the assessment will determine whether the CEO decides that the participant is no longer eligible for the NDIS.

According to the [Explanatory Memorandum](#) to the Bill (p. 9):

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

Item 31 inserts **proposed section 30A** into the *NDIS Act* to require the CEO of the NDIA to decide, in circumstances to be prescribed by the NDIS rules, whether or not an existing participant meets the **early intervention requirements** and, if not, whether the participant meets the **disability requirements**. If the CEO decides that the participant does not meet either of these requirements, the CEO must revoke the participant's status as a NDIS participant. Importantly, the criteria that the CEO must apply and the matters to which the CEO must or must not have regard are to be set out in the NDIS rules. According to the [Explanatory Memorandum](#) to the Bill (p 10):

Currently, when people enter the Scheme through the early intervention pathway, the Agency cannot check if the supports are working, are still necessary, or if the participant is still in need of early intervention. NDIS rules may prescribe circumstances in which the CEO must check-in with a participant in the early intervention pathway.

This provides a pathway to an assessment that early intervention has been successful, and the person no longer requires support from the NDIS.

New definition of NDIS supports

Currently, section 33 of the *NDIS Act* sets out the matters that must be included in a participant's plan—in particular, the general supports (if any) that will be provided and the reasonable and necessary supports (if any) that will be funded under the NDIS.

The Bill makes no changes to the definition of the term **general supports**.⁶ However, the Bill inserts a new definition of **NDIS support** and qualifies the meaning of the term reasonable and necessary.

Item 6 of Schedule 1 to the Bill inserts a reference to the term **NDIS support** in the definitions in section 9 of the *NDIS Act*.

Item 14 inserts **proposed section 10** to define that term. According to **proposed paragraph 10(a)** an **NDIS support**:

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

A support listed above is only an **NDIS support** if **both** of the following conditions are satisfied:

- it is declared by the NDIS rules to be a support that is appropriately funded or provided through the NDIS for participants generally or for a class of participants: **proposed paragraph 10(b)** and
- the support is not one that has been declared under the NDIS rules as being a support that is not suitable to be funded through the NDIS: **proposed paragraph 10(c)**.

This amendment aims to define and limit the permissible uses of NDIS funds and is intended to prevent the allocation of funds for non-NDIS-approved expenses such as rent, perfume, online gambling, and whitegoods ([Explanatory Memorandum](#), p. 4).

Proposed paragraph 10(a) is focused on defining supports in terms of services, aids and devices that a person *needs* as a result of their impairment. The [Explanatory Memorandum](#) states that this approach 'is consistent with recommendations of the NDIS review around taking a needs-based approach to planning and budget setting' (p. 3).

Importantly **item 75** repeals and replaces subsection 46(1) of the *NDIS Act* so that a participant who receives a NDIS amount, or a person who receives a NDIS amount on behalf of a participant, may only spend the money on **NDIS supports**.

6. *NDIS Act*, subsection 13(2) defines the term **general supports** as a service provided by the Agency to a person or an activity engaged in by the Agency in relation to a person that is in the nature of a coordination, strategic or referral service or activity, including a locally provided coordination, strategic or referral service or activity.

Key issue: use of legislative instruments

The new definition is one component of the Bill’s proposed change from NDIS plans based on a participant’s ‘reasonable and necessary supports’ to plans consisting of ‘reasonable and necessary budgets’ that can then be allocated to NDIS supports (as defined in the legislation and rules).

It is unclear which supports will be set out or excluded in the NDIS rules as the Government has not developed or drafted proposals. Minister Shorten stated in his [second reading speech](#): ‘These rules, together with all legislative instruments provided for in the bill, will be developed with all states and territories following genuine consultation with the disability community’ (p. 22).

The proposed NDIS rules will likely distinguish between supports that should be funded by the NDIS and those to [be more appropriately funded by the health or education system](#). However, this distinction may present practical challenges, especially for supports associated with disabilities stemming from medical conditions, where it can be complex to ascertain whether the support should be financed by the health system or the NDIS.

Reasonable and necessary budgets

The term [reasonable and necessary](#) has been a [key term](#) in the design of the NDIS, as it is one of the criteria by which the NDIA decides the support that a participant may be funded to receive.

Item 9 in Schedule 1 to the Bill inserts a reference to the term ***reasonable and necessary budget*** into the list of definitions in section 9 of the *NDIS Act*.

Item 36 inserts **proposed Subdivision B—Content of new framework plans** into Division 2 of Part 2 of Chapter 3 of the *NDIS Act*. Within new Subdivision B is **proposed section 32D** which sets out the matters that must be included in a participant’s plan—including, but not limited to, the participant’s reasonable and necessary budget: **proposed paragraph 32D(2)(a)**; the plan’s maximum period of effect: **proposed paragraph 32D(2)(d)** and the management of funding for supports under the plan: **proposed paragraph 32D(2)(f)**.

Reasonable and necessary budgets will be developed in line with the conditions set out in **proposed sections 32E to 32K** of the *NDIS Act* (inserted by **item 36**). Specifically, the sections operate to establish the concept of a budget made up of flexible funding and/or **stated supports** which are supports declared by the NDIS rules for participants or for a class of participants: **proposed subsection 32E(4)**.

Flexible funding

If the participant needs at least some supports that are NDIS supports—but not stated supports—the reasonable and necessary budget must provide that **flexible funding** up to a total funding amount will be provided to the participant for those supports. That funding may be spent on any NDIS supports: **proposed subsections 32E(2) and (3)** unless the CEO restricts the spending to specified NDIS supports: **proposed subsections 32F(6) and 32F(7)**.

Proposed section 32F provides that flexible funding is to be allocated within a participant’s plan to a specified period (called a **funding period**) of not more than 12 months. If a participant does not spend their flexible funding in that period it will be possible to add the amount of the underspend to the amount for the next funding period: **proposed subsection 32F(5)**.

Stated supports

If a participant’s assessment report indicates that they need a particular support or class of supports that is both an NDIS support and a stated support then the funding provided to the participant may be spent only on those stated supports provided that they are also NDIS supports: **proposed subsection 32E(3)**.

In that case, the reasonable and necessary budget must provide funding for each stated support: **proposed subsection 32G(2)**. As with flexible funding, funding for stated supports is allocated for funding periods of no more than 12 months and any unused funds may be rolled over to the following period: **proposed subsections 32G(3)–(5)**.

The effect of the amendments is that ‘reasonable and necessary’ will refer to a participant’s plan as a whole rather than individual support items within a plan such as daily living care, therapy-based care and so on. This is in line with the [blueprint of NDIS reforms](#) set out in the [NDIS review report](#):

NDIS budgets should be set at a whole-of-person level, rather than built line by line for each support need. This was always the intention of the scheme. Budget setting should focus first and foremost on support needs and intensity, which should be determined through the previous stage (p. 40).

This approach aligns with action [3.4 of the NDIS review recommendations](#), and establishes funding on an aggregated level that addresses the overall needs of the person rather than on a per-item basis.

Assessing supports

Proposed section 32L requires the CEO to arrange an assessment of a participant’s need as soon as practicable after preparation of a plan commences and that the assessment must be undertaken using the assessment tool. A report of the assessment must be prepared and given to the CEO as soon as practicable after the assessment is completed: **proposed subsection 32L(5)**.⁷ The Bill does not require a copy of the assessment report to be given to the participant.

Importantly, **proposed subsection 32L(8)** empowers the Minister to make legislative instruments to determine the assessment tools and other requirements for undertaking assessments, as well as the information or other requirements to be contained in the report. As yet, those legislative instruments have not been made. As set out above, Minister Shorten has [advised](#) that ‘all legislative instruments provided for in the bill, will be developed with all states and territories following genuine consultation with the disability community’ (p. 22).

How a reasonable and necessary budget is calculated

Proposed section 32K provides for the NDIS Minister to determine in a legislative instrument the methods for working out a person’s reasonable and necessary budget for both flexible funding and stated supports.

Under **proposed subsection 32K(3)** the Minister must, in making such a determination, have regard to the guiding principles set out in subsections 4(5) and 4(11) of the *NDIS Act* as well as the ‘need to ensure the financial sustainability’ of the NDIS. Financial sustainability is not defined in the *NDIS Act* and takes its ordinary meaning. The principle at subsection 4(5) is: ‘People with disability should be supported to receive reasonable and necessary supports, including early intervention supports’. The principle at subsection 4(11) states:

Reasonable and necessary supports for people with disability should:

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

7. Note that there appears to be a drafting error in proposed subsection 32L(4), as ‘must’ should be the first word in paragraph (a), rather than being included in the initial wording of the subsection that introduces paragraphs (a) and (b), (given that paragraph (b) begins with ‘may’).

- (c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

In addition, **proposed subsection 32K(4)** provides for the Minister's determination on methods for calculating budgets to take into account compensation amounts—whether lump sum or periodic—and amounts paid for personal injury that are funded under a scheme of insurance.

As with the other legislative instruments provided for in the Bill, no details have been provided in regard to the proposed methods for calculating reasonable and necessary budgets. These methods will be key in determining the level of support available to NDIS participants and the impact of the proposed amendments on the scheme as a whole.

The new framework may contribute to more effective cost management within the NDIS, as overall plan budgets may be able to be constrained based on disability type. The changes may lower the likelihood of the Administrative Appeals Tribunal reversing a decision made by the NDIA when it is contended that a specific support item qualifies as reasonable and necessary. The amendments in the Bill will mean that approved NDIS supports are explicitly defined in the NDIS rules (see **proposed section 10**, discussed above).

Transition from an old plan to a new plan

The Bill proposes that NDIS participants have reasonable and necessary budgets, and they will be able to spend flexibly within that budget. There are also measures for transitioning from current plan arrangements to the new plan arrangements. To facilitate this transition, participant plans will either be a ***new framework plan*** or an ***old framework plan: proposed section 32A***.

The [Explanatory Memorandum](#) states that 'all participants will eventually transition to a new framework plan. The transition to ***new framework plans*** will be gradual and occur by class of participants.' (p. 12).

In the context of gradual transition **item 35** inserts **proposed subsections 32(3) and (4)** into the *NDIS Act* to introduce the legislative basis for making subsequent plans. Existing subsection 32(1) provides that if a person becomes a participant, the CEO must facilitate the preparation of the participant's plan. The amendment at **item 33** of the Bill provides that these will be referred to as initial plans.

In the meantime, **proposed Subdivision C—Content of old framework plans** of Division 2 of Part 2 of Chapter 3 of the *NDIS Act* (inserted by **item 36** in Schedule 1 to the Bill) will update certain elements of old framework plans. Specifically, **item 39** in Schedule 1 to the Bill inserts **proposed subsections 33(2A)-(2F)** to introduce the concepts of ***total funding amounts*** and ***funding component amounts***.

The ***total funding amount*** is the funding that will be provided under the participant's plan for all reasonable and necessary supports funded under the plan (**proposed paragraph 33(2A)(a)**). If the participant's plan includes funding for a reasonable and necessary support (or class of such supports) that is of a kind determined by the Minister in a legislative instrument under **proposed paragraph 33(2E)(c)**, the funding for each such support or class of supports is a ***funding component amount (proposed paragraph 33(2A)(b))***.

Proposed subsection 33(2B) provides that where a statement of participant supports specifies that funding will be provided for reasonable and necessary supports during funding periods the statement:

- **may** specify funding periods for the reasonable and necessary supports generally, or for a specified reasonable and necessary support, or class of supports
- **must** specify when each funding period starts and ends and

- **must** specify, for each funding period:
 - the proportion of the total funding amount that will be provided during each funding period for reasonable and necessary supports generally
 - if the funding period is for a particular support or class of supports and there is no funding component amount—the proportion of the total funding amount that will be provided under the plan during the funding period for the support or class of supports or
 - if the funding period is for a particular support or class of supports and there is a funding component amount—the proportion of the funding component amount that will be provided under the plan during the funding period for the support or class of supports.

The funding period must be not more than 12 months: **proposed subsection 33(2C)**. Consistent with other provisions in the Bill, **proposed subsection 33(2E)** is a broad power for the Minister to make legislative instruments that may determine matters including, but not limited to:

- the circumstances in which a statement of participant supports must specify the total funding amount, funding component amounts and funding periods
- how to work out a total funding amount for reasonable and necessary supports
- how to work out a funding component amount for a support
- how to work out when the first funding period starts.

Other provisions

Spending flexible funding

Items 62–67 of Schedule 1 to the Bill amend section 43, which currently allows a participant to request that their plan is managed wholly or partly by themselves, a plan manager or the NDIA. Currently the CEO must comply with that request, except in specified circumstances: subsection 43(2). **Proposed subsection 43(2C)** lists the situations in which the CEO may decide not to comply with a request in relation to a new framework plan.

Items 68–73 amend section 44 of the *NDIS Act*, which currently describes the circumstances in which a person must not manage funding. This is the case where, for instance, the CEO is satisfied that the participant’s management of the funding for supports would present an unreasonable risk to the participant. **Item 73** inserts **proposed subsection 44(4)** to allow for the making of NDIS rules to prescribe the circumstances which would be taken to present such unreasonable risk.

When an amount will not be paid

Item 74 of Schedule 1 to the Bill inserts **proposed subsections 45(4) and (5)** into the *NDIS Act*.

Proposed subsection 45(4) operates so that the NDIA must not pay a NDIS amount to any person if the payment would result in:

- for a new framework plan—the total amount of flexible funding provided under the plan or for a funding period under the plan exceeding the total funding amount specified in the plan, or for that funding period
- for an old framework plan—the total funding amount specified in the plan or for a funding period under the plan being exceeded.

Concluding comments

The Bill proposes a change in the use of reasonable and necessary, [described by the Grattan Institute’s Sam Bennett and Hannah Orban](#) as a ‘a sleight of hand with a foundational concept’.

Whether that is the case or not, the Bill introduces a range of measures which will better link spending of NDIS monies with the supports specified in a participant’s plan. Further, the Bill inserts clearer provisions to bring participation in the NDIS to an end.

The *NDIS Act* already has extensive provisions for the making of NDIS rules. The Bill inserts additional rule making powers. In the absence of draft rules, it is difficult to predict whether the Government, with the help of the measures in the Bill, will be able to achieve its aim to limit the growth of the NDIS to 8% per annum.

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