



Queensland Alliance for Mental Health

# Getting the NDIS Back on Track Bill

May 2024

## Who is QAMH?

The Queensland Alliance for Mental Health (QAMH) is the peak body for the Community Mental Health and Wellbeing Sector and people with experiences of psychosocial disability in Queensland. We represent more than 100 organisations and stakeholders involved in the delivery of community mental health and wellbeing services across the state. Our role is to reform, promote and drive community mental health and wellbeing service delivery for all Queenslanders, through our influence and collaboration with our members and strategic partners. We provide information about services, work to build community awareness, education and training to influence attitudes and remove barriers to inclusion and advise government on issues affecting people with experiences of psychosocial challenges. At a national level, we have a formal collaboration with Community Mental Health Australia and provide input and advice to the work of Mental Health Australia and the National Mental Health Commission where appropriate. Locally, we work alongside our members, government, the Queensland Mental Health Commission and other stakeholders to add value to the sector and act as a strong advocate on issues that impact their operations in Queensland communities.

## QAMH contact details

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### Acknowledgement of Country

QAMH acknowledges the Traditional Custodians of the land on which we live, learn, and work and recognises their continuing connection to land, waters and community. We pay our respects to them and their cultures; and to Elders past, present and emerging.

### Recognition of Lived Experience

QAMH recognises that the Community Mental Health and Wellbeing Sector exists because of people with Lived Experience of mental distress, their families, carers and support people. We acknowledge the expertise and the courage of people with Lived Experience, and we commit to work with and alongside people with Lived Experience in all we do.

## Background

The introduction of the National Disability Insurance Scheme (NDIS) has radically changed the landscape for people living with psychosocial disability, providers of psychosocial supports and the Community Mental Health and Wellbeing sector at large. In some cases, these changes have been positive, with significant progress made in improving the Scheme's response to people with psychosocial disability via the development of the NDIS Psychosocial Disability Recovery-Orientated Framework and the introduction of the Psychosocial Recovery Coach support items. For those able to access the Scheme, it also fosters individual choice and the potential for powerful transformative impacts by enabling access to services and supports to effectively participate in society.

However, as QAMH have long advocated, the practical implementation and full benefit of these initiatives has been hampered by the Scheme's failure to recognise and accommodate the unique nature of providing support for people with psychosocial disability. It has also created vast inequities and a lack of support for people earlier in illness due to large gaps in psychosocial supports outside the NDIS largely caused by lack of clear responsibilities between the states and territories and the Commonwealth. Critically, the extent of these gaps, and Governments' response to these, are still being assessed.

QAMH welcomes the opportunity to provide a submission to the Community Affairs Legislation Committee on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill). The Bill proposes the most significant changes to the NDIS since it started more than a decade ago. This includes how participants access the Scheme and how their support needs will be assessed and funded. For example, the Bill introduces needs assessments and budget-setting and tightens the kinds of supports the NDIS will fund. These changes will impact significant numbers of Australians who are considered among the most vulnerable. As of March 2024, there were a total of 63,469 NDIS participants with psychosocial disability listed as their primary disability across Australia<sup>1</sup>. The proposed Bill will also impact those who currently access NDIS support for psychosocial disability as a *secondary disability*. These numbers are also substantial, with the same data showing that a further 37,567 people had psychosocial disability included on their NDIS plan as a secondary disability making a total of 101,036 Australians who access NDIS supports for severe, chronic and complex psychosocial disability.

The NDIS Review provided an immense opportunity to thoughtfully design a fair and effective ecosystem of disability support that benefits all Australians. Without careful attention to detail

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<sup>1</sup> National Disability Insurance Scheme. (2024) Participant datasets.  
<https://dataresearch.ndis.gov.au/datasets/participant-datasets>

however, there is a very large risk that we could end up with a system that is more complex, more confusing, and that provides less support, and less choice for our most vulnerable, rather than more.

It is critical that we get these changes right.

QAMH are concerned that these changes will unfairly disadvantage people with psychosocial disability. They are also being implemented without a clear and fully established system of foundational psychosocial supports that is designed or intended to meet the needs of people with severe, complex, and chronic psychosocial disability needs. Without broad and adequate access to the right support at the right time, not only will people with psychosocial disability be potentially worse off, but unpaid carers – including children – will again be left to fill the gap, perpetuating, and reinforcing the current issues of mental ill health facing our communities.

## Overview of proposed changes

Due to the extent and complexity of the proposed legislation, QAMH note that throughout this submission, we draw heavily on the advice provided by the Public Interest Advocacy Centre (PIAC) in their [explainer](#) for this Bill.

Overall, the Bill aims to:

- tighten criteria for the NDIS and what is considered an “NDIS support”
- enable early intervention pathways for people living with psychosocial disability and children under 9 years old [previously 7 for children] by establishing that participants may enter the Scheme under ‘disability requirements’ (s.24), ‘early intervention requirements’ (s.25) or both (it’s not clear what these different pathways will look like yet – the NDIA has stated that this will be co-designed with the disability community)
- change how NDIS participant funds are set and how they can be spent
- remove the distinction between primary and secondary disabilities
- strengthen the NDIS Quality and Safeguards Commission.

The Bill also establishes that new participants will enter the Scheme via these options and existing participants will be subject to compulsory eligibility reassessments, under the strengthened criteria. If a participant fails to provide the requested information, their eligibility can be revoked.

The reforms are being introduced on a priority basis and this Bill is the first to be tabled. There have been calls for greater consultation with the disability community and improvements to the process by which significant changes such as these are developed and rolled out. As PIAC note, there are significant concerns with both the powers that the Bill extends to the Minister, including the ability to

make future changes without parliamentary approval, and the lack of oversight and consultation involved in the process overall:

*The Minister will also make a range of legislative instruments ('determinations') that will determine the method for calculating budgets and how needs assessments are conducted. This gives the Minister significant power with limited oversight by Parliament.*

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

For this reason, QAMH recommends that when the Minister introduces the Bill to parliament, the consultation process is tabled at the same time to ensure transparency of co-design with the disability community. QAMH also highlight that this Bill extends an unreasonable amount of power to the Minister to make ongoing changes to law without due public scrutiny that should be a concern for all Australians. This must be addressed prior to the Bill being introduced.

Specific changes and their impact on people with psychosocial disability are explored below.

## Limiting access to the NDIS and "NDIS supports"

The Bill abolishes the existing *Reasonable and Necessary* tests under Section 34(1) of the NDIS Act for new framework plans and replaces them with a single definition of 'NDIS supports' in clause 10 of the Bill. This definition is very important, as it establishes what the NDIS will provide funding for under both the Early Intervention pathway and regular pathway i.e. whether NDIS supports are appropriate for a person or cohort, and once eligible, what participants can spend their funds on. Section 10 states that a support is an NDIS support for a person who is a participant or prospective participant if:

(a) the support:

- (i) is necessary to support the person to live and be included in the community, and to prevent isolation or segregation of the person from the community; or
- (ii) will facilitate personal mobility of the person in the manner and at the time of the person's choice; or
- (iii) is a mobility aid or device, or assistive technology, live assistance or intermediaries that will facilitate personal mobility of the person; or
- (iv) 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; or
- (v) is a habilitation or rehabilitation service; or

- (vi) is a service that will assist the person to access a support covered by subparagraph (iv) or (v); or
- (vii) will minimise the prospects of the person acquiring a further impairment or prevent the person from acquiring a further impairment; or
- (viii) is provided by way of sickness benefits; and

(b) the support is declared by National Disability Insurance Scheme rules made for the purposes of this paragraph to be a support that is appropriately funded or provided through the National Disability Insurance Scheme:

- (i) for participants or prospective participants generally; or
- (ii) for a class of participants or prospective participants that includes the person; and

(c) the support is not a support declared by National Disability Insurance Scheme rules made for the purposes of this paragraph to be a support that is not appropriately funded or provided through the National Disability Insurance Scheme:

- (i) for participants or prospective participants generally; or
- (ii) for a class of participants or prospective participants that includes the person.

### **Our concerns:**

QAMH has the following concerns regarding Section 10 of the Bill and the proposed definition of NDIS supports:

- The current categories are too restrictive, and – as noted by PIAC - have been drafted in a way that could have unintended legal consequences. In particular, the categories are likely to be difficult for people with psychosocial disability to meet. For example, subclause 10(a)(i) covers the category of support most likely to be applicable to people with psychosocial disability. However, this clause may be excessively complex as it requires that a support must be both ‘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’. This significantly limits the range of supports that a person may otherwise decide they need to support their social or economic participation. It is also no clearer than previous Reasonable and Necessary criteria as to how this could be met and evidenced. Similarly, subclause 10(a)(iv) refers to health services that a person ‘needs because of the person’s impairment or because of the interaction of the person’s impairment with various barriers.’ The requirement of ‘need’ may significantly restrict the range of health services that a person can access, including those that would provide a significant benefit to a person.

- In combination with eligibility reassessments, these changes will potentially impact large numbers of people with psychosocial disability currently accessing NDIS supports who are not being considered in current gap analysis planning process – this is an unknown quantum of people adding to the already significant gap in service provision outside the NDIS.
- It is not clear how these new criteria will be assessed and expected to be met i.e. what evidence people with psychosocial disability will be expected to provide to demonstrate this – people with psychosocial disability already have difficulty meeting evidence requirements.
- Clarity is needed regarding what NDIS will deliver and what foundational supports will deliver, as well as the interface between state and federal support. The Bill clarifies that to be funded by the NDIS, a support will also need to comply with new NDIS Rules (which will be ‘Category A’ Rules to be negotiated with State and Territory Governments – see below). These Rules will specify both what is ‘in’ (subclause 10(b)) and ‘out’ (subclause 10(c)) of the NDIS. Like PIAC, QAMH highlight that the development of foundational supports is an **essential** pre-requisite to the design of these Rules. These Rules could dramatically reduce what people with psychosocial disability are eligible for via the NDIS, so it will be particularly important they are not too prescriptive and do not attempt to be exhaustive, to avoid widening existing gaps in support further.
- Additionally, the Bill says that until these Rules are written the NDIS will use the Applied Principles and Tables of Support (‘APTOS’) to decide what will be funded by the NDIS and what will be left for State and Territory Governments to provide (subclause 71B(2)). However to improve the current situation, it is essential that agreement is reached with the states and territories on these responsibilities and the APTOS are not currently agreed. The definition of what is in NDIS support needs to be as permissive as possible to keep support services flexible as well as to avoid entrenching large gaps in service provision.
- While QAMH acknowledge it is unclear what foundational psychosocial supports will look like, these may also not be adequately funded or designed to support severe and chronic complex needs, which has been expected to remain the remit of the NDIS. Whether it is the intention or not, there is a risk that new criteria and eligibility will be able to be applied so restrictively that they will lock people with psychosocial disability with severe and complex support needs out of the NDIS completely. Concerningly, there is potential for the changes to more severely impact those who are most likely to benefit from NDIS than those who have less severe needs (see next section).
- The eight categories of supports are selective as to what elements in the United Nations Convention on the Rights of Persons with Disabilities (‘CRPD’) are included. For example, supports that would specifically facilitate a participant’s economic participation do not appear to be covered: Arafmi have identified in their report *At what cost? The experiences of unpaid*

*mental health carers 2023-2024*<sup>2</sup> that many mental health carers express concerns about long term, sustainable arrangements for the people they support, particularly once they are no longer able to provide support themselves. Economic participation for those who are able to do so is an important element of sustainable community participation.

## Increased information-gathering powers and impact on vulnerable participants

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

- If the NDIA is considering revoking a participant's status, it can request information or make a participant undergo a health assessment (which could include medical, psychological or other assessments). If the information is not received within 90 days, the CEO can revoke the participant's status, excluding them from the Scheme's support (clauses 30 and 30A).
- In preparing a new framework plan, the NDIA can request any 'information that is reasonably necessary' for this purpose, or ask a person to undergo a medical assessment. If the person does not comply within 28 days without a good reason, both their existing NDIS plan and upcoming new NDIS plan will be suspended until they comply with the request (subclause 36(3)).

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

### Our concerns:

QAMH has the following concerns regarding the information gathering powers enabled under this Bill:

- People with psychosocial disability may have difficulty meeting eligibility reassessments due to factors beyond their control (e.g. long wait list for services) as well as the functional impacts of their disability and current level of acuity due to illness. They are also more likely to have

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<sup>2</sup> Arafmi. (Unpublished). *At what cost? The experiences of unpaid mental health carers 2023-2024* (to be published in June 2024).



experienced a history of trauma within the medical system, making them less willing or able to engage with further reassessment that may be experienced as retraumatising.

- It is crucial to note that eligibility reassessments are likely to disproportionately impact people experiencing severe and complex psychosocial disability. Those who would benefit most from NDIS support are at the highest risk of being removed from the scheme due to the challenges they face in meeting reassessment requirements. This unintended consequence undermines the very purpose of the NDIS and must be addressed. Furthermore, the appeals process for such cases is currently unclear.
- The need to respond to information requests within short periods of time: there are significant challenges for people with psychosocial disability and their carers to access psychiatrists for assessments, both in terms of cost and time frames. This is an even more significant issue for people in regional/rural/remote areas. This could cause major barriers for people with psychosocial disabilities in accessing the NDIS.
- Eligibility reassessments in general will unduly impact people living in rural / remote communities where it is hard and/or costly to access allied health and clinical support (e.g. involves long-distance travel).
- There is a cost burden attached to getting assessments completed which will impact people with psychosocial disability and vulnerable circumstances disproportionately as they are more likely to also experience financial hardship.
- People with psychosocial disability are less likely to have strong informal support networks or have networks that are already strained. If supports are suddenly removed for people without a suitable alternative, the burden of care will fall further upon Australia's mental health carers who are already struggling, further contributing to Australia's mental health crisis. Of course, this is assuming that the person has a carer in the first place: where strong informal networks do not exist, there is potential for people to fall through the gaps and experience worse life outcomes, with further strain on acute and social service systems.
- The process of undertaking a reassessment is unnecessarily punitive and likely to exacerbate and create widespread system trauma for those who are already vulnerable. Similar examples can be found in the systemic failure of Robodebt in which vulnerable people were unfairly targeted and experienced devastating consequences as a result.
- As noted below, we are also concerned that needs assessments and reassessments may be conducted by health professionals who are not experienced in mental health presentations or do not understand the participant's history and needs. Mental health challenges are episodic and not always evident to those making assessments, and therefore assessments may not be indicative of true long term support needs. The right to appeal incorrect assessments must be incorporated into this legislation to ensure basic rights for people with psychosocial disability.

- Where people are unable to comply with information requests and are removed from the NDIS, it is critical that they are supported with the transition process to seek supports outside the NDIS that they require. QAMH note that this process is likely to be retraumatising for people who have built relationships with their current providers.

## Needs assessments and use of plan funding

The Bill introduces 'new framework plans'. For people with psychosocial disability who are (or remain) eligible for NDIS supports, the Bill proposes changes that will affect how plan funding is determined and able to be used. Specifically, it recommends using a 'needs assessment' conducted by a person of the NDIA's specification to determine a 'reasonable and necessary' budget, built at the 'whole-of-person' level, rather than line-by-line for each support.

In what appears to be a departure from what was recommended by the NDIS review, only impairments that meet the disability or early intervention requirements (subclause 32L(3)) will be eligible for support. As noted by PIAC, this approach appears to codify a position taken by the NDIA, which has been rejected by the Administrative Appeals Tribunal.

In response to 'intraplan inflation' – where funding in a plan is spent before the expiry of the plan and needs to be topped up - the proposed 'new framework plan' will also specify 'funding periods' so a participant's total funding is released in stages over the 'maximum period' of the plan (subclauses 32F(2) and 32G(3)).

### Our concerns:

QAMH has the following concerns regarding the planning process and funding of NDIS plans for people with psychosocial disability:

- The Bill does not make it clear who will conduct the needs assessment. The NDIS Review indicated it should be an allied health practitioner or social worker with disability expertise, who would be employed or contracted by the NDIA. It seems this will also be determined by the Minister (subclause 32L(8)(b)). In the case of psychosocial disability, it will be particularly important the Minister's determination ensures needs assessments are conducted by health professionals who have a mental health accreditation or a demonstrated deep understanding of the complexity of psychosocial disability. They must also understand the participant's history and needs, as mental health challenges are episodic and not always evident to those making assessments.
- People with multiple disabilities will be unable to access support for impairments considered ineligible. With the new criteria and rules making it less likely for psychosocial disability to meet the disability or Early Intervention criteria, participants and providers may encounter

situations where a person has dual physical and psychosocial disability, however is **only** able to access general disability supports for physical disability via their NDIS plan, rather than support workers who also have mental health training and who work for organisations that are properly set up to respond to participants with severe mental illness. This will put many participants and providers in risky service delivery situations, or worse, result in situations where NDIS participants are unable to receive support for their listed disability because their needs are too complex for general providers.

- The proposal to release plan funding in predetermined “funding periods” is unsuitable for people with episodic needs such as psychosocial disability. People with psychosocial disability are likely to experience fluctuating needs that require more flexibility in how / when funding is able to be used, not less. In combination with the lack of clarity regarding reviews process, QAMH is concerned that people with psychosocial disability may find themselves in circumstances where they are not able to access the support that they need. Community Managed Organisations are often restricted via funding contracts, and people with NDIS plans expected to access support via the NDIS. This may result in situations where people with psychosocial disability are potentially unable to access either NDIS or foundational psychosocial supports.

## Reviews process

Under the Bill’s proposals, participants will still have the right to seek review of the statement of participant supports, which includes the reasonable and necessary budget. However, participants will not have a right to seek a review of some of the new processes the Bill creates, either internally by the NDIA or externally by a Tribunal.

Critically, a ‘needs assessment’ would not be a ‘reviewable decision’ under section 99 of the NDIS Act and cannot be reviewed through internal or external review. This means the Bill does not provide a way for a participant to challenge an inappropriate needs assessment – and therefore to prevent an inadequate budget being set based on that needs assessment. The Bill also does not currently ensure a participant has the opportunity to see the needs assessment report before it is ‘given to the CEO’, a measure that contradicts the NDIS Review recommendations which explicitly said the needs assessment report should be provided to the participant before it is finalised.

## QAMH recommendations

- It is imperative that a strong, diverse system of foundational psychosocial supports be co-designed and comprehensively resourced to meet:
  - the existing gap in psychosocial supports for people currently not accessing NDIS support); **and**

- the support needs of any individuals who may become ineligible for the NDIS due to the proposed changes.

Implementing changes to the NDIS without first establishing a robust foundational support system will put people with psychosocial disabilities at risk of falling through the cracks and not receiving the support they need. The Australian Government must prioritise the development and funding of these foundational supports in collaboration with the psychosocial disability community before proceeding with any amendments to the NDIS.

- The information-gathering powers enabled by the Bill should be far more limited, with greater limits on the type of information that can be requested, and restrictions on the negative consequences of failing to comply. A permissive and trauma-sensitive framework should be developed to avoid negative repercussions on participants with psychosocial disability, or any person with disability.
- QAMH does not support the Bill in its current form. However if the proposed changes are adopted, it is critical that measures be put in place to support people with psychosocial disability and their carers to safely transition to new arrangements in a supported manner over a suitable timeframe.
- Commitment to thorough consultation prior to and during changes of this scale and impact is essential. Co-design is meant to be at the heart of reforms to the NDIS as recommended by the NDIS Review and promised to the disability community by Government. QAMH recommends that when the Minister introduces the Bill to parliament, the consultation process is tabled at the same time to ensure transparency of co-design with the disability community. Co-design should include participants and their carers.
- Close review of the extent of the powers in Section 10 is required to ensure that these powers are not overly complex or restrictive and that there are strong measures in place to ensure that decisions can be appealed quickly and easily when needed.
- Commitment to closely monitor implementation of changes and impacts on most vulnerable cohorts is essential – these are transformative changes to the system, with high potential for unintended impacts. Nonetheless QAMH reiterate that getting the changes right in the first place should be the focus as - once legislative change is made – it is much harder to wind back or adjust legislative instruments and address negative impacts.
- Review the suggested timeframes within which reassessments need to be conducted.
- The right to appeal should be available at all stages, including Needs Assessments. Appeals processes must be co-designed with people with psychosocial disabilities and their carers to ensure they are accessible, responsive to their needs, and easy to navigate. Moreover, the

appeals process must be timely, ensuring that people with psychosocial disabilities can access the support they need without undue delay.

- Due consideration should be given to enabling participants to be provided with and respond to the Needs Assessment report before it is given to the CEO.
- Timeframe for implementation of changes for psychosocial cohort needs to be carefully considered. The Commonwealth is suggesting this process of applying the changes be staged by disability cohort; given the magnitude of the change, lack of existing foundational psychosocial supports and vulnerability of psychosocial disability cohort, it is imperative that changes for psychosocial disability be implemented as late as possible in the process, including the introduction of “new framework plans” for existing participants.
- This is highly complex reform, and the disability community is experiencing a large amount of change fatigue as people struggle with what this means for them: the changes need to be supported with good communication and significant support for participants, carers and other support providers within the system.

QAMH also support the following PIAC recommendations in entirety:

- It is difficult to understand the full impact of the Bill and the changes it proposes. For example, the power to make Rules specifying the supports the NDIS will fund means the public does not know how the Government will limit what is funded under the NDIS and what will be funded by States and Territories through foundational supports. The Government should release the draft Rules for consideration.
- Delegated legislation may not be appropriate for all aspects of the changes made under the Bill. On significant matters of policy there should be greater public scrutiny than is required to make law via rules or determinations. For example, the proposed new section 27 provides for a rule-making power about access which is fundamental to the Scheme and should be included in the primary legislation. We can’t determine whether the Bill strikes the right balance between what is included in the NDIS Act and in delegated legislation without knowing the content of the delegated legislation.

Thank you for the opportunity to contribute to this consultation process. We look forward to continuing to work with the Australian Government to better the lives of people living with psychosocial disability. Please do not hesitate to contact QAMH should you require any further information.