



Council for the Australian
Federation

**Council for the Australian Federation Submission
to the Senate Standing Committee on Community
Affairs: National Disability Insurance Scheme
Amendment (Getting the NDIS Back on Track No.
1) Bill 2024**

May 2024

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Council for the Australian Federation

This submission has been prepared on behalf of the Council for the Australian Federation (CAF), as the representative of all Australian state and territory governments.

CAF was formed to support and enhance the Australian federal system by providing an intergovernmental forum for state and territory leaders in Australia.

The objectives of CAF are to work towards a common understanding of the states’ and territories’ positions in relation to policy issues involving the Commonwealth Government; and to take a leadership role on key national policy issues, including the Federation, that are not addressed by the Commonwealth Government.

The Council of Australian Federation is currently chaired by the Premier of South Australia.

Executive Summary

States and territories share significant concerns with the provisions of the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No.1) Bill (the NDIS Bill/the Bill), and the potential impacts on people with disability. By making this Submission, CAF is seeking to shape amendments to the NDIS Bill, and to publicly articulate state and territory governments' concerns.

The Independent Review of the NDIS (the NDIS Review) envisaged a broader ecosystem of support for people with disability. The vision was a connected system including accessible and inclusive mainstream services, foundational supports and individual supports funded through the National Disability Insurance Scheme (the NDIS/the Scheme). States and territories signed up in good faith to partnering with the Commonwealth to deliver new foundational supports in line with this Review's recommendations. We must work together, and in partnership with the disability community, to build a cohesive disability ecosystem.

If done well, the work will ensure positive outcomes for people with disability, who will be able to seamlessly access the supports they need and understand the services available to them.

However, we are genuinely worried that this Bill undermines the vision of the NDIS Review. The swiftness with which the Commonwealth is pursuing changes to constrain the NDIS, without the defined and designed broader ecosystem, and the limited consultation with disability stakeholders and state and territory governments, risks a fragmented and disconnected service system that fails to address the needs of the most vulnerable members of our community. If we don't do this carefully, and in tandem with broader improvements to the disability ecosystem, people with disability will end up in our hospitals or other settings that are unsuitable for their needs. The Bill also fundamentally misses the mark in addressing current issues in the Scheme, such as fraud and quality and safeguarding issues.

Ultimately, we simply do not have the information we need to assess the impact of the changes proposed in the NDIS Bill – It is unclear who will be in or out of the scheme or the supports they will receive. We are deeply concerned that this way of going about the reform – including through this Bill – will lead to worse outcomes for more Australians with disability and their families. This is deeply concerning. We encourage the Committee to specifically consider whether there is sufficient information available and safeguards in place in this current Bill to be able to assure people with disability that they will be able to access the supports they need.

We commend the Committee and the Government's considerations of our proposals to amend and improve the Bill.

Summary of CAF's Concerns

CAF is concerned that:

1. The pace of the reform schedule is not allowing time for meaningful consultation with the disability community, or with states and territories, particularly in the absence of a formal Government response to the recommendations of the NDIS Review.
2. The amendments are complex, and will alter the operation of the NDIS before broader improvements are made to the disability ecosystem, including Foundational Supports,

creating a risk of emerging service gaps for people with disability (for example, if changes are made to limit eligibility for particular cohorts, such as children with autism, before the design and commencement of any alternate services outside the NDIS).

3. Certain transitional mechanisms, for example, the use of the Applied Principles and Tables of Support (APTOS) for defining 'NDIS Supports', are unsuitable and risk creating complexity, uncertainty, and poorer decision-making regarding NDIS participants' access to services.
4. The Bill expands the powers of the Minister for the NDIS and the National Disability Insurance Agency (NDIA) in determining the direction and operation of the NDIS, without appropriate safeguards, and diminishes the role of state and territory governments in scheme governance. For example, the use of legislative instruments enables the Minister for the NDIS (the Minister) to develop key new mechanisms for transitioning participants to new framework plans and for budget setting, without effective input from the disability community and state and territory governments.
5. The Bill misses the opportunity to strengthen the NDIS. It does not sufficiently address current failures in the *National Disability Insurance Scheme Act 2013* (NDIS Act) to combat fraud and misconduct, and improve quality and safeguarding measures for the NDIS Commission (the Commission). This should be the starting point for legislation and reform, ahead of changes to the operation of the NDIS and implementation of Foundational Supports.

CAF's recommendations

CAF makes the following recommendations, for consideration by the Inquiry. More detail on the recommendations is contained in the rest of the submission.

No.	Recommendation
1	The Commonwealth Government should undertake genuine and meaningful consultation with the disability community, service providers, and state and territory governments on the reforms outlined in the Bill, including in particular, the list of authorised and unauthorised NDIS supports and the design of new budget setting assessment tools, as well as any future tranches of legislative amendments.
2.	Schedule 1 to the NDIS Bill (Main Amendments) should commence on proclamation: <ul style="list-style-type: none">• on a date after new Category A NDIS Rules envisaged by the Bill are agreed;• only if the NDIS Bill is amended to make new legislative instruments Category A NDIS Rules, as per recommendation 8; and• on a date after the scope, design and implementation of the new Foundational Supports has been agreed between the Commonwealth and the states and territories. Schedule 2 to the NDIS Bill (Quality and Safeguards Amendments) should commence 28 days after the Act receives Royal assent, in line with the current intent of the Bill.

3	The Commonwealth should provide clear and detailed explanation of the decisions made in the drafting of proposed subsection 10(a) (definition of NDIS support) and how this will impact access to the NDIS.
4	The NDIS Bill should require NDIS Rules made pursuant to proposed sections 10(b) and (c) to be periodically reviewed and revised, to accommodate the phased implementation of complementary Foundational Supports.
5	The Applied Principles Tables of Supports (APTOS) should not be used as part of the transition mechanisms of the NDIS Bill. This would be addressed by implementing recommendations 2 and 4.
6	Subitem 138(2) of the NDIS Bill should be removed.
7	The NDIS Act should be amended to include a legislated requirement to seek agreement of all states and territories for amendments to the NDIS Act: <ul style="list-style-type: none">• that categorise any new NDIS Rule, and• that re-categorise or remove any existing NDIS Rules.
8	The power to make legislative instruments in proposed subsections 32B(1), 32C(2), 32K(2), 32L(8) and 33(2E), and the transitional rules under item 138(1) of the Bill, should be amended to instead require Category A NDIS Rules.
9	Item 123 of the Bill should be removed. No NDIS Rules or legislative instruments under the NDIS Act should be exempt from sunseting.
10	Category A NDIS Rules should be developed as a check and balance to regulate the use of the NDIA's powers provided for in proposed subsections 30(2)-(6), proposed subsections 30A(4)-(7), proposed section 32H, proposed subsection 44(1)(c) and proposed section 46. As per recommendation 2, all Category A NDIS Rules should be developed and agreed prior to commencement of these amendments.
11	The Bill should be amended to specify that any new assessment, or examination, required of participants as a result of this Bill, will be paid for by the NDIA, and will not increase costs for the individual.
12	The NDIS Bill should be amended to strengthen quality, safeguarding, fraud and compliance measures.

Reform of the NDIS is an issue for all Australian governments

States and territories are committed to ensuring a strong, fair and sustainable NDIS

This submission underscores state and territory governments' continued commitment to working collaboratively with the Commonwealth and stakeholders to reform the disability support ecosystem. More than one in six people in Australia have a disability, and each of them has a right to participate as equal members of the Australian community, with equitable opportunities to fulfil their potential. An effective disability support ecosystem is critical for achieving this objective.

States and territories contribute significantly to ensuring people with disability have the support they need. This includes through direct financial investment to the NDIS, as well as providing disability specific supports outside the NDIS, and building inclusive and accessible mainstream service systems.

The NDIS is, and must remain, a central pillar of the disability ecosystem.

Our governments are committed to working with the Commonwealth to deliver reforms to build a strong, fair, and sustainable NDIS, ensuring the Scheme is enduring and will continue to provide support to people with disability into the future.

The NDIS Review Final Report¹ and the Disability Royal Commission Final Report² have provided a vision for reform. It is now incumbent on all Governments to consider the best way forward. This is a complex area of reform, and people with disability are relying on us to get it right.

National Cabinet agreed to pursue reforms to the NDIS and the disability ecosystem, but the changes in the Bill are not in the spirit of this agreement

In December 2023, National Cabinet agreed to reform the NDIS and the disability ecosystem in Australia to ensure that all people with disability have access to the support they need.³ These reforms are intended to improve and secure the future of the NDIS, so that it can continue to provide life-changing support to Australians with a disability.

National Cabinet expressed a strong commitment to implement reform in good faith. National Cabinet agreed to work together to:

- Implement legislative and other reform to the NDIS to improve the experience of participants and restore the original intent of the Scheme to support people with permanent and significant disability, within a broader ecosystem of supports.
- Adjust state and territory NDIS contribution escalation rates, increasing from 4 per cent to be in line with actual Scheme growth, capped at 8 per cent, with the Commonwealth paying the remainder of Scheme costs growth, commencing from 1 July 2028.

¹ The NDIS Review Final Report and Supporting Analysis was released in December 2023 - <https://www.ndis.gov.au/about-us/improving-ndis/ndis-review>

² The Disability Royal Commission Final Report was released on 29 September 2023 - <https://disability.royalcommission.gov.au/publications/final-report-executive-summary-our-vision-inclusive-australia-and-recommendations>

³ See Meeting of National Cabinet – the Federation working for Australia, media release, Wednesday 6 December 2023 - <https://www.pm.gov.au/media/meeting-national-cabinet-federation-working-australia>

- Jointly design, fund, and commission Foundational Supports for people with disability, to be phased in over time.

These measures reflect the commitment of all Australian Government's to genuine and enduring reform of the disability ecosystem. The reforms must be designed and implemented holistically to ensure the future sustainability and success of the NDIS, and the effective functioning of a broader disability support ecosystem.

States and territories remain committed to delivering on all components of this agreement, including increased investment in a broad disability support ecosystem. However, the significant changes which are proposed to be made to the NDIS by the Bill are not in the spirit of the agreement between Australian governments through National Cabinet. More importantly, the changes risk worse outcomes for people with disability.

Part 1. Further consultation is needed on the proposed NDIS reforms

- The NDIS Review reaffirmed that the NDIS is a co-operative scheme between the Commonwealth, states and territories and people with disability.
- Reforms made in response to the NDIS Review recommendations should be developed collectively by the Commonwealth, state and territory governments as part of a formal response to the final report of the NDIS Review.
- Effective collaboration between the Commonwealth, states and territories, and with the disability community, is critical in the next phase of reform and will deliver better outcomes for people with disability.

Reform to the disability ecosystem is at its best when informed by meaningful consultation with people with disability, and state and territory governments

National Cabinet agreed to reforms to the NDIS and broader disability ecosystem on the premise that reforms would be informed by detailed collaboration across our governments and with the disability community. This expectation has not been met in the development of this Bill.

The NDIS is a complex service system that took a decade to conceive, develop, test and implement, with the Commonwealth, states and territories and disability community working together. Reforms in this space have significant implications for Australians with disability and organisations which provide disability services. It is vital that any changes to the Scheme are developed in genuine consultation and partnership with people with disability, their families and carers, and the disability sector, to ensure the disability service system works for people who rely on it.

The NDIS operates in a cooperative, interconnected social services system. Reforms to the NDIS may have a significant impact on mainstream services, such as hospitals, schools and community service organisations. It is also vital that state and territory governments are given the opportunity for detailed cross-portfolio consultation on reforms in this space, to avoid unintended impacts to other essential service systems and to ensure service systems work together to achieve the best outcomes for people with disability.

We are concerned that consultation with the disability community has largely occurred following the introduction of this Bill to Parliament. To the extent there was consultation on the Bill prior to introduction, we remain concerned that this was rushed, and with no transparency of the issues that were raised.

We acknowledge the immense efforts of the members of the Independent Review Panel for the NDIS Review to engage deeply with the disability community in preparing the recommendations of the Review. All governments must continue those efforts in responding to the NDIS Review and considering the best way forward for implementation.

The driving philosophy of the NDIS is that people with disability have a say in the issues that impact their lives. The NDIS Bill implements significant reforms and changes to the NDIS and warrants detailed and genuine consultation with the disability community.

CAF highlights some of the key features of the NDIS Bill:

- The support to be provided to participants in the NDIS will change, which will impact on the eligibility of future and current NDIS participants. The newly established concept of NDIS support (see proposed section 10 of the NDIS Act) and future NDIS Rules will set out the scope of these supports (called "NDIS supports"). This is discussed further below.
- New framework plans will be used for new and, eventually, existing participants in the NDIS (see proposed section 32D). These plans are part of the transition away from a focus on "reasonable and necessary supports" to a "reasonable and necessary budget" (see proposed sections 32E-32K). The new framework plans change the way funding is allocated to participants and how it can be spent, incorporating an element of flexible funding into a participant's funding arrangements.
- The NDIS Bill establishes two pathways of NDIS support, a disability pathway and an early intervention pathway. CAF understands that the early intervention pathway is potentially limited in duration. Proposed subsection 30A(1) establishes the legislative framework for the CEO to decide if a person remains eligible for the early intervention pathway, and if not, the disability pathway, and if not, the CEO may revoke a participant's status. The circumstances in which the CEO will make this decision are to be set out by Category A NDIS Rules.
- The Minister for the NDIS has the power to develop the needs assessment tool by way of legislative instrument (see proposed subsection 32L(8)), which will be used to prepare the needs assessment report and feed into the assessment of a participant's budget, among other things (see proposed subsections 32E(2) and (3) and proposed subsections 32L(5) and (6)). This is discussed further, below, in Part 2.
- A new ground for revoking the status of a participant in the NDIS has been included in the Bill. In the context of making a decision about whether to revoke a participant's status (either under the existing subsection 30(1) or the proposed section 30A, the CEO is entitled to request additional reports and information reasonably necessary to make such a decision. The CEO can revoke a participant's status in the NDIS if the CEO does not receive such reports or information within 90 days (or such longer period as agreed) from the participant or an identified third party. This revocation must occur unless the CEO is satisfied that it was

reasonable for the request not to have been complied with in that period (see proposed subsection 30(5) and (6) and proposed subsection 30A(7)). This is discussed further in Part 4.

In the next phase of the reform, genuine and meaningful engagement with the disability community, and state and territory governments, is needed. In particular, the list of authorised and unauthorised NDIS supports, as well as the design of new budget setting assessment tools, require detailed consultation to ensure people with disability can continue to access the supports they need. The support needs of people with disability vary widely, and at times, are not self-evident.

- For example, for a person with Multiple Sclerosis, access to cooling devices and technologies may be critical for the individual, and should be funded through the NDIS. It is vital that these decisions are informed by strong, detailed engagement with people with disability and the sector.

CAF welcomes the opportunity to work with the Commonwealth to improve consultation with the disability community, and to work collaboratively to deliver the next phase of reforms, and any future tranches of legislation.

No.	Recommendation
1	The Commonwealth Government should undertake genuine and meaningful consultation with the disability community, service providers, and state and territory governments on reforms, including in particular, the list of authorised and unauthorised NDIS supports and the design of new budget setting assessment tools, as well as any future tranches of legislative amendments.

Part 2. The NDIS Bill reforms are outpacing the development of complementary disability reforms, including Foundational Supports

- CAF is concerned that the Bill makes fundamental changes to the NDIS, and provides for broad powers to redraw the boundaries between the NDIS and other service systems, in a manner that undermines the in-principle agreement between the Commonwealth and the states and territories on NDIS reform and Foundational Supports.
- It is vital that people with disability understand how the different parts of the disability ecosystem will work together; the services that will be provided under the different parts; and understand how people can enter and move through the ecosystem – prior to the significant changes proposed.
- The rules that will define NDIS supports need to be developed in conjunction with, and have regard to, the development of Foundational Supports to ensure a holistic and unified disability support system.

The work to design and deliver Foundational Supports is in its early stages

The NDIS Review advocates for all Australian governments to work together to develop a unified system of support for people with disability. The central component of this vision is the delivery of new Foundational Supports.

Foundational Supports will be disability-specific supports provided outside of the NDIS, for people with disability and, where appropriate, their families and carers.

In agreeing to design Foundational Supports, it was the expectation of state and territory governments that legislative changes to narrow the scope of the NDIS would not occur prior to improvements to the disability service system, including the creation of Foundational Supports.

To date there has been no decision as to the specific services that will be provided as Foundational Supports, or the client groups who should access them. This work is underway through interjurisdictional forums, with critical policy decisions to be made in late 2024.

The NDIS Bill initiates a re-design and contraction of the NDIS. Careful design and sequencing of reforms is needed to mitigate the risk of service gaps for people with disability

The Bill will make immediate and fundamental changes to the way the NDIS operates, including how access to the Scheme is determined, how participant needs are assessed and how participant budgets are set. The Bill also signals a further narrowing of the Scheme as new NDIS Rules are developed in due course. CAF has significant concerns with the pace at which these reforms are being pursued without appropriate consultation, and the decision to make these amendments ahead of the development of complementary reforms to the disability ecosystem, including new Foundational Supports.

A number of features of the NDIS Bill **have the potential to change access to the Scheme, and the supports offered to participants on new framework plans**, in particular:

- The new definition of NDIS supports (proposed section 10), replacing “reasonable and necessary” supports,
- The redesign of the needs assessment tool (proposed subsection 32L(8)),
- Consideration of total funding amounts under budgets and a focus on “reasonable and necessary budgets” (proposed sections 32E-32K),
- Changes to the eligibility requirements for the disability and early intervention pathways (to be determined by Category A NDIS Rules) (proposed amendments to sections 24, 25 and 27), which is the anticipated mechanism for creating new definitions of impairments which are likely to be “permanent” and “substantially reduced functional capacity”.

The sequencing of these reforms is paramount in ensuring that changes to the defined supports that can be funded through the Scheme are not introduced until adequate preparation has taken place in the development of Foundational Supports.

CAF also has concerns about the proposed **use of legislative instruments to implement many of these key features**, as this gives the Minister for the NDIS the ability to make unilateral changes to

important aspects of the operation of the NDIS which may occur immediately after commencement of the Act. This is discussed in detail in Part 4, below.

The complexity of the interaction between the provisions of the NDIS Bill, future legislative instruments and future NDIS Rules means that it is not possible to say now, with certainty, what the NDIS will look like for participants once the amendments commence. It is likely there will be narrowed access to the Scheme and reduced scope of services funded, as an immediate result of these reforms.

- For example, at the moment, it is not clear what the difference in application pathway, assessment, and supports will be for a child with autism who will be applying for NDIS in 2025, versus a child with the same level of need who had applied in early 2024. States and territories expect this level of detail will be worked through later this year – but it is not available now.

The proposal to develop NDIS Rules in the future does not alleviate CAF's concerns regarding the changes to contraction of the NDIS. Upon commencement of the Bill, several provisions will have immediate effect. For example, the Bill introduces the definition of "NDIS supports" (proposed section 10), to be used as part of determining access to the scheme, and the supports an individual can receive. On commencement, this provision will rely on the APTOS. There is a risk that this could narrow access to the Scheme as the APTOS is not sufficiently detailed in regard to the specific services that are to be funded by the NDIS. CAF's concerns with this are further outlined in part 3.

Further, both new and old framework plans will be subject to "total funding amount" caps (see proposed section 32K for new framework plans and proposed subsection 33(2A) for old framework plans). It is possible this may be a mechanism to reduce the amount of funding a recipient receives in an individual package, thereby limiting the services that an individual can access. For participants, there may be a risk that they can no longer afford to access services they had previously accessed through their NDIS budget.

This is complex reform, and careful, detailed consideration is required to design new services that appropriately and effectively meet the needs of the people with disability who will rely on them. All governments need to give careful thought to the sequencing of the delivery of NDIS legislative reforms and new Foundational Supports, to avoid unintended consequences that could result from a rushed rollout.

Any change that constrains access to the NDIS, or the scope of services that are provided, risks creating service delivery gaps for people with disability, particularly if this is done in advance of the design of Foundational Supports. It is also likely to considerably increase pressure on mainstream services.

While the NDIS is responsible for provider-of-last-resort arrangements for NDIS participants, mainstream services, such as schools, hospitals and community service organisations, regularly become the default providers-of-last-resort in instances where the NDIS is not able to appropriately meet the needs of people with disability. For example, hospitals are currently inappropriately used to accommodate NDIS participants when their supports breakdown. Disability service providers and families sometimes choose to relinquish NDIS participants at emergency departments when they can no longer cope, placing additional pressure on state hospitals.

Careful planning is needed to manage the potential impact of the reforms on disability service providers, to avoid unintended consequences, and to ensure the provider market is ready. Workforce availability and preparedness, as well as available infrastructure, will be key factors in the ability of governments and service providers to deliver new services.

The only way to preserve, and improve, the overall quality of people with disability's access to supports in Australia is to ensure that Foundational Supports are operational and effective before the commencement of the changes to the NDIS contained in the Bill.

For these reasons, CAF recommends that there should be more time between the assent of the Bill and the commencement Schedule 1 (Main Amendments) to allow for further work to be undertaken on wider NDIS reforms, and on the scope, design and implementation of the new Foundational Supports.

No.	Recommendation
2.	<p>Schedule 1 to the NDIS Bill (Main Amendments) should commence on proclamation:</p> <ul style="list-style-type: none">• on a date after new Category A NDIS Rules envisaged by the Bill are agreed;• only if the NDIS Bill is amended to make new legislative instruments Category A NDIS Rules, as per recommendation 8; and• on a date after the scope, design and implementation of the new Foundational Supports has been agreed between the Commonwealth and the states and territories. <p>Schedule 2 to the NDIS Bill (Quality and Safeguards Amendments) should commence 28 days after the Act receives Royal assent, in line with the current intent of the Bill.</p>

The definition of NDIS supports will have a significant impact on eligibility for the Scheme and the supports participants receive

The NDIS Bill introduces a new definition of NDIS supports by inserting a new section 10 into the NDIS Act. The definition attempts to more closely link the supports provided under the NDIS to the external affairs and social welfare heads of power in the Australian Constitution by focusing on Australia's obligations under various international treaties relevant to the rights of persons with disabilities.

The definition of NDIS supports is key to not only the supports participants might receive in the NDIS but also their eligibility (see proposed amended subsection 24(1)(e) and proposed subsection 25((1)(d)).

Despite the significance of this definition, the immediate impact remains unclear. Further clarity is needed on the rationale for including the definition in the primary legislation and the rationale for incorporating select elements of the United Nations Convention on the Rights of People with Disability in the definition.

CAF's detailed concerns with the definition of NDIS supports are outlined in the following section, and in Part 3.

No.	Recommendation
3	The Commonwealth should provide clear and detailed explanation of the decisions made in the drafting of subsection 10(a), and how this will impact access to the NDIS.

The definition of NDIS supports will need to account for the development of Foundational Supports

The scope of services provided through the NDIS, and through mainstream and Foundational Supports should be complementary, to create a holistic service system for people with disability. As such, the development of a definition of NDIS supports and Foundational Supports should take place concurrently.

Australian governments have agreed that Foundational Supports will be phased in over time, commencing with an initial tranche of services in mid-2025.

The details of the scope of NDIS supports will be set out in Category A NDIS Rules made pursuant to proposed subsections 10(b) and (c). The NDIS Rules are legislative instruments made under the NDIS Act that set out the detailed operation of the Scheme. Category A NDIS Rules require the agreement of all states and territories before they can be implemented.

CAF is pleased that the use of Category A NDIS Rules will ensure that state and territories can provide input into the scope of these important NDIS supports.

It is CAF’s submission that the implementation of this new definition, and NDIS Rules, relating to NDIS supports, as envisaged by the NDIS Bill, is problematic until the Commonwealth and states and territories have agreed on the future boundaries between the NDIS, and non-NDIS service systems, including Foundational Supports, and until Foundational Supports are in place. Further, the current proposal to utilise the APTOS in the initial transition period is problematic and should be avoided. This is discussed in further detail in Part 3, below.

CAF submits that, consistent with Recommendation 2 above, proposed section 10 of the NDIS Bill (containing the definition of NDIS support) should commence after further work has been done in relation to the design and development of new Foundational Supports. After the commencement of section 10, the NDIS Rules defining NDIS supports should be adjusted, alongside the staged increase in the development of Foundational Supports, to minimise support gaps for people with disability.

CAF recommends that the Commonwealth agree to the periodic review and revision of the NDIS Rules regarding NDIS support, to minimise or eliminate support delivery gaps resulting from NDIS reform. This would allow for the scope of NDIS supports to be developed iteratively and in conjunction with the phasing in of Foundational Supports. This review requirement should be provided for in the Bill.

No.	Recommendation
4	The NDIS Bill should require NDIS Rules made pursuant to proposed subsections 10(b) and (c) to be periodically reviewed and revised, to accommodate the phased implementation of the complementary Foundational Supports.

Part 3. Transitional arrangements are unsuitable

- The APTOS is an unsuitable and problematic mechanism for defining NDIS support. CAF strongly objects to its use as a transitional mechanism for implementing the NDIS reforms.
- Subitem 138(2) of the NDIS Bill permits the Minister for the NDIS to alter the effect of a provision in existing legislation through a legislative instrument (a Henry VIII clause). The impact of this subitem is unclear and it is unnecessary as a transitional measure in the NDIS Bill.

The APTOS should not be used to define NDIS supports as part of the transitional arrangements

The proposed subsections 10(b) and (c) create a new rule making power to permit new Category A NDIS Rules to be developed. These new NDIS Rules are intended to further define the scope of supports to those that are appropriately funded by the NDIS, within the constitutional limits of the Scheme.

The transitional arrangements in the Bill provide that until the new NDIS Rules relating to NDIS supports are made, the APTOS is to be the identified mechanism to define the scope of NDIS supports (item 124 of the NDIS Bill). CAF has significant concerns about this proposal. There are several critical limitations with the APTOS, which makes it inappropriate to use as an interim mechanism.

The NDIS Review reaffirms the position of states and territories that, in practice, the APTOS has failed to provide a useful or meaningful tool to define the scope of the NDIS and other service systems. The APTOS is the existing framework to govern the relationship between the NDIS and other service systems. It is a high-level, principles-based document which is designed to outline the roles and responsibilities of different sectors to provide supports to people with disability. The APTOS was never designed to have legal standing.

There is no shared statement by the Commonwealth and state and territory governments on the operational interpretation of the APTOS, leading to ongoing disagreements between state and territories and the National Disability Insurance Agency regarding its interpretation. There are a number of examples where misinterpretation of the APTOS is leading to funding decisions that are inconsistent with the current policy intentions and causing poorer outcomes for people with disability, including:

- A) ***The provision of concurrent supports***: State and territory health systems make reasonable adjustments so that people with disability are appropriately supported while they are in hospital. However, a small minority of patients will also need access to one or more disability specific supports (concurrent supports). Under the APTOS, the NDIS is responsible for providing concurrent supports to participants who require disability specific supports during hospital stays. However, the criteria for approval of concurrent supports are not clear.
- B) ***Intersections of disability with child protection and family support, mental health, justice or aged care*** are also currently open to misinterpretation, and participants can risk losing or

missing out on services, which can lead to escalating behaviours of concern or deteriorating health and wellbeing.

Significant policy positions agreed to by the Disability Reform Ministerial Council following the initial agreement to the APTOS (e.g., voluntary-out-of-home-care and disability-related health supports) are also not reflected in the current version and risk being misinterpreted or forgotten in the development of interim NDIS supports.

- For example, during the transition period, certainty around the responsibilities between the NDIA and state and territory child protection systems is needed so that a child with a significant disability who is in voluntary out-of-home-care continues to receive the supports they need, even where supports are not captured in the APTOS.

Furthermore, the risk of utilising the APTOS for defining NDIS supports is exacerbated by contradictions between definition of “NDIS supports” in proposed section 10 of the Bill, and the current list of NDIS supports in the APTOS.

- For example, subparagraph 10(a)(v) of the Bill, which refers to rehabilitation as a possible “NDIS support”, appears to conflict with the APTOS, which states that such services are not to be provided by the NDIS. NDIS participants who would seek to access rehabilitative supports will likely face confusion as to whether these supports are available through their individual budget.

Ultimately, the NDIS Review found that the principles, roles and responsibilities outlined in the APTOS have not translated into consistent collaboration or coordination between services for people with disability. The Review recommended that the APTOS should be replaced with an alternative tool that better clarified the division of responsibilities between the NDIS and other service systems, and better reflects the reality that people with disability are often supported by multiple systems at once.

State and territory governments are concerned that the initial reliance on APTOS will lead to increased and prolonged disputes regarding roles and responsibilities for service provision, and in turn, risk creating unintended service gaps. Additionally, an initial reliance on the APTOS risks creating complexity and confusion for NDIS participants to understand which supports they can access through their individual budgets, as the APTOS does not detail specific services that are within the scope of the NDIS or other service systems.

As such, CAF recommends that the new definition of NDIS supports should not become operational until the new NDIS Rules envisaged by proposed subsections 10(b) and (c) have been developed, and engagement with states and territories has occurred. This would be addressed by implementing recommendations 2 and 3.

No.	Recommendation
5	The APTOS should not be used as part of the transition mechanisms of the NDIS Bill. This would be addressed by implementing recommendations 2 and 4.

The use of transitional rules in subitem 138(2) may change the effect of the NDIS Rules without the participation of states and territories over an unspecified time period

Item 138 of the NDIS Bill allows the Minister for the NDIS to make transitional rules by legislative instrument:

- Subitem 138(1) provides that the Minister for the NDIS may make transitional rules on any matter relating to the amendments made by Schedule 1.
- Subitem 138(2) provides that, if made within the first 12 months of the Schedule’s commencement, transitional rules may modify the effect of any of the provisions in Schedule 1, or any other Act or instrument. Although those provisions would not be amended directly, they would apply as if they were so modified. This does not limit subitem (1).
- Subitem 138(3) provides that the transitional rules may not create an offence or civil penalty, provide powers of arrest, detention, entry, search or seizure, impose a tax, set an amount to be appropriated from the Consolidated Revenue Fund, or directly amend the text of an Act.

Subitem 138(2) lacks clarity in its terms and may allow the Minister for the NDIS to alter the effect of a provision in existing legislation through a legislative instrument. Henry VIII clauses are generally an inappropriate delegation of legislative powers, particularly as legislative instruments do not receive the same level of parliamentary scrutiny as primary legislation.

In this case, the Minister would have the discretionary power to amend the effect of any piece of legislation without having to consult any of the states or territories. As currently drafted, subitem 138(2) could allow the Minister to amend the effect of the NDIS Rules, including Category A NDIS Rules.

Of further concern is the fact that subitem 138(2) is not subject to a clear sunset provision. Although the provision specifies that only transitional rules made within the first 12 months of Schedule 1 commencing can amend the effect of legislation, it does not place any time limit on how long those rules may apply for. CAF recognises that rules made under item 138 are meant to prescribe “matters of a transitional nature”. However, there is concern that where there is no explicit limit on the duration of any such rules, including modifications to the operation of Category A NDIS Rules, they may continue to apply indefinitely.

This is a significant and expansive legislative power for the Minister, which excludes the participation of states and territories from the NDIS. In the context of significant reform to the NDIS, and the disability ecosystem, changes to the NDIS should be done in partnership with state and territory governments. This is of particular concern where there is a risk that those changes may apply beyond the intended transitional period.

CAF recommends the removal of subitem 138(2) from the NDIS Bill.

No.	Recommendation
6	Subitem 138(2) of the NDIS Bill should be removed.

Part 4. The Bill significantly increases the Commonwealth's power in making critical decisions about the operation of the Scheme

- The success of the NDIS relies on collaboration with the states and territories who have a legislative responsibility to shape the policy direction of the NDIS, and are co-governors and co-funders of the scheme.
- The Bill diminishes the role of states and territories in the governance of the Scheme.
- CAF commends the use of Category A NDIS Rules, which require agreement of all states and territories, to develop new features of the NDIS.
- CAF is concerned with the increased use of Ministerial legislative instruments, which do not require input or agreement by the states and territories, to develop key aspects of the NDIS reforms relating to eligibility and budgets of participants.
- The use of Ministerial legislative instruments also limits the opportunity for the disability community to shape these reforms.
- CAF is also concerned about broad powers being given to the NDIA, without appropriate oversight.

The NDIS is a shared Scheme, which is co-funded and co-governed by all Australian governments. States and territories remain strongly committed to maintaining their roles as co-governors and co-funders of the NDIS. States and territories have committed to increasing financial contributions to the Scheme from 1 July 2028 and taking on an increasing role in providing complementary disability services via Foundational Supports.

Shared governance arrangements are essential to maintaining Scheme accountability and oversight, and to coordinating governments' efforts across the entire disability service system. Further, shared Scheme governance is a crucial way of ensuring that the unique needs and issues of people with disability – due to the geographic and demographic differences of all states and territories – are considered in reform to the Scheme.

This Bill diminishes the role of states and territories in the governance of the NDIS by using legislative instruments to establish and develop key new features of the operation and scope of NDIS reforms. Legislative instruments would be enacted by the Minister for the NDIS, without the need for agreement of states and territories. This undermines state and territory governments' ability to play a meaningful role in the implementation of the new legislative architecture, and to shape the future direction of the NDIS.

The use of NDIS Rules (in particular, Category A NDIS Rules) is recommended as an alternative to the use of legislative instruments. Category A NDIS Rules require the agreement of states and territories before they can be enacted and are a critical means for ensuring inter-governmental collaboration in the future development of the NDIS.

Use of Category A NDIS Rules is the preferred mechanism for developing the NDIS reforms

Section 209 of the NDIS Act gives the Minister for the NDIS the power to make NDIS Rules prescribing matters that are required or permitted by the NDIS Act or that are necessary or convenient to give effect to the NDIS Act.

The NDIS Act utilises NDIS Rules to expand and develop the legislative framework that establishes the NDIS. NDIS Rules are a useful mechanism for ensuring certainty around details of key aspects of the NDIS, such as access and supports, while also maintaining flexibility to accommodate changing best practice. They are an essential component of a strong and flexible NDIS.

NDIS Rules are also the primary mechanism by which state and territory governments exercise their role in shaping the operation and policy direction of the NDIS. The level of state and territory involvement is dependent on the category of rules to be developed under the NDIS Act.

There are four different categories of NDIS Rules. Each category has different requirements regarding the consultation or agreement of the states and territories before the rules can be made:

- **Category A** – states and territories must agree to the proposed rules being made
- **Category B** – each state or territory with an area, law or program affected by the proposed rules must agree to the rules being made
- **Category C** – the majority of states or territories must agree to the proposed rules being made
- **Category D** – states or territories must be consulted on the proposed rules before they are made.

The NDIS Act also sets out the procedures to be followed by the Minister when seeking the agreement of, or consulting with, host jurisdictions.

The NDIS Bill proposes to insert multiple new powers, or amend existing powers, for the making of new NDIS Rules. Almost all of these new rule making powers are Category A NDIS Rules, ensuring adequate consultation with state and territories in their development on these significant issues.

CAF commends this aspect of the NDIS Bill.

While CAF recognises the critical role that rule-making powers have in operationalising the NDIS, it is important that rule-making powers are clearly targeted to serve a specific purpose, so participants have clarity as to their intended use. The Bill includes several broad powers to make NDIS Rules, including the proposed new section 27, section 32(H) and item 138(1). There is some uncertainty regarding the potential substance of the NDIS Rules, and the impact of the Rules on participant's experience of the Scheme. The Committee should closely scrutinise amendments that seek to create a broad rule-making power to ensure appropriate safeguards are in place.

Furthermore, given the significant issues that are determined through NDIS Rules, CAF suggests the insertion of an additional provision in the NDIS Act to require the agreement of state and territory governments in the event of any recategorisation of NDIS Rules under the NDIS Act.

No.	Recommendation
7	The NDIS Act should be amended to include a legislated requirement to seek agreement of all states and territories for amendments to the NDIS Act:

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- that categorise any new NDIS Rules, and
 - that recategorise or remove any existing NDIS Rules
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The use of legislative instruments does not allow adequate input by the disability community, or states and territories, into key parts of the NDIS reforms

In contrast to the Category A Rule making powers, the proposed use of legislative instruments to implement critical features of the NDIS reforms, would require no meaningful consultation with the states and territories; or people with disability.

There is significant Ministerial discretion in the development of the key operational elements of the NDIS reforms.

The NDIS Bill introduces six new instances in which the Minister must or may make determinations by legislative instrument. Four of these relate to new framework plans (see 1-4 below), one relates to the old framework plans (see 5 below), and one is a transitional measure (see 6 below).

The new instruments will allow the Minister to make unilateral changes to important aspects of the operation of the NDIS. This significantly diminishes the role of states and territories in Scheme governance and is inconsistent with the collaborative and concurrent operation of the NDIS by both the Commonwealth and the states and territories.

The six new powers to make legislative instruments are:

1. **Section 32B(1)** – Minister to determine classes of participants on new framework plans and the period for such transition (new framework plans)
2. **Section 32C(2)** – Minister to extend or condense the overall transition timeframe (new framework plans)
3. **Section 32K(2)** – Minister to determine the method for working out the total funding amounts for flexible funding and stated supports (new framework plans). This method must apply information contained in a needs assessment report.
4. **Section 32L(8)** – Minister may determine the needs assessment tool or tools for undertaking participant’s needs for support (new framework plans)
5. **Section 33(2E)** – Minister may determine matters relating to statement of participant supports (old framework plans)
6. **Item 138(1)**– Minister may make rules prescribing matters of a transitional nature.

The Minister retains significant power and discretion in relation to the implementation of new framework plans and the means of accessing NDIS funding, through developing a needs assessment tool and determining a method for establishing total funding amounts. These elements of the NDIS reforms represent the major operational changes to the NDIS and will have a significant impact on participants’ rights and abilities to access services and supports. The approach to developing participant plans is a central policy decision that influences the success of the Scheme and the experience of its participants. Members of the disability community, service providers, and states and

territory government must have a role in overseeing this process to mitigate risks to participants and the broader services ecosystem. In particular, it is critical the new needs assessment tool (proposed subsection 32L(8)) and budget setting method (proposed subsection 32K(2)) must be co-designed with all jurisdictions and the disability community.

The use of legislative instruments impinges on the extent to which the disability community, and states and territories, can have meaningful input into the reforms covered by these instruments.

Legislative instruments do not ensure adequate state and territory involvement in NDIS reform.

All new legislative instrument making powers are subject to the requirement that the rule-maker (the Minister) must be satisfied that appropriate and reasonably practicable consultation has been undertaken pursuant to section 17 of the *Legislation Act 2003* (Cth) (**Legislation Act**).

The Explanatory Memorandum to the NDIS Bill states that section 17 of the Legislation Act requires that “appropriate consultation must be undertaken in relation to the proposed legislative instrument before it is made... [t]his means that relevant stakeholders and the States and Territories will need to be consulted on the legislative instrument and have the opportunity to make comment before it is made.”

CAF does not consider this to be an adequate consultation mechanism for such significant reforms to the NDIS. The consultation process pursuant to the Legislation Act suffers from significant drawbacks.

Section 17 of the Legislation Act prescribes a general rule only and gives the rule-maker a large discretion as to the means and mechanism of the consultation. In determining whether any consultation undertaken was appropriate, the rule-maker may have regard to matters including whether the persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

“Consultation” may take the form of notification only, or it may require submissions and public hearings. Section 17 does not require consultation to include stakeholder responses to a legislative instrument (although it does identify such consultation as potentially appropriate under the Legislation Act). The section does not prescribe any minimum time limit or scope of consultation.

Section 19 of the Legislation Act states that “the fact consultation does not occur does not affect the validity or enforceability of the legislative instrument”. This means that although consultation is required, a failure to consult, or adequately consult, does not impact the validity of any legislative instrument.

The use of legislative instruments for the development of, in particular, the determination of the needs assessment tool and the total funding amount, excludes states and territories from involvement in the development of the most consequential changes to the NDIS.

There is particular risk associated with the use of legislative instruments to transition participants to new framework plans.

CAF is particularly concerned about the use of legislative instruments in transitional arrangements under the Bill.

The new proposed subsections 32B(1) and 32C(2) allow the Minister to, by legislative instrument, unilaterally determine the classes of prescribed participants to be reassessed under the new

framework plans, and the timing of the assessment. As the transition to new framework plans occurs, existing participants may either receive fewer NDIS supports, or may be found to be no longer eligible for the NDIS at all.

- For example, the Minister may determine that all current participants where psychosocial disability is the primary diagnosis will be re-assessed under the new framework, which may result in certain participants transitioned out of the NDIS. If this is done without the appropriate input and agreement from states and territories, this may result in service gaps for individuals, and a substantial impact on mainstream state and territory services.

The reclassification of these transitional legislative instruments as Category A NDIS Rules would ensure that states and territories agree that the timing of the movement to new framework plans for existing classes of NDIS participants is suitable, appropriate and in their best interests. It would allow for all Australian governments to agree that appropriate supports are established and available for people with disability who may be transitioned out of the NDIS – potentially under Foundational Supports.

- In the above example, this would allow the Commonwealth, states and territories to work together to determine when it would be appropriate for participants with psychosocial disability to be assessed under the new framework, having regard to the broader availability of supports outside of the NDIS.

No.	Recommendation
8	The power to make legislative instruments in proposed subsections 32B(1), 32C(2), 32K(2), 32L(8) and 33(2E), and the transitional rules under item 138(1), should be amended to instead require Category A NDIS Rules.

The exemption from sunseting removes an opportunity for jurisdictions to work together to ensure the NDIS Rules and legislative instruments remain fit for purpose

The Bill (item 123) provides that the NDIS Rules and other legislative instruments made under the NDIS Act are exempt from sunseting; this is not limited to the new Rules enabled by this Bill.

The Explanatory Memorandum for the Bill argues that this exemption should apply on the basis that the NDIS is an intergovernmental scheme under the Legislation Act, and the Legislation Act specifies that intergovernmental schemes are not subject to sunseting.

While all state and territory governments are deeply committed to preserving the shared governance of the Scheme, it is our position that the NDIS is not an intergovernmental scheme within the meaning of the Legislation Act. This is because the NDIS Rules are made by the Commonwealth Minister (not an intergovernmental body), and because the NDIS Rules only exist in one jurisdiction (the Commonwealth).

Sunseting is an important mechanism to enable periodic review and revision of legislative instruments. Further, it provides a point in time for all Australian governments to work together to ensure the instruments governing the scheme remain fit for purpose. This will be particularly important as the disability ecosystem evolves and matures in the coming years.

No.	Recommendation
9	Item 123 of the Bill should be removed. No NDIS Rules or legislative instruments under the NDIS Act should be exempt from sunseting.

The Bill provides the NDIA CEO expansive powers, without appropriate oversight.

The Bill contains broad powers for the NDIA CEO to place requirements upon participants that may impact on their eligibility for the NDIS, the supports that they may receive, and their funding. There must be appropriate checks and balances in place to ensure a high degree of accountability and scrutiny over the NDIA’s decisions, to avoid perverse outcomes for NDIS participants and preserve participant choice and control as far as possible.

For the new broad powers in the Bill, CAF recommends that Category A NDIS Rules are made that regulate the use of the NDIA’s powers in relation to these critical elements of the operation of the Scheme. In particular, the power to make Category A NDIS Rules should be attached to the following new provisions:

1. **Subsection 30(2)-(6), and subsection 30A(4)-(7)** – the power of the CEO to request information and reports in order to consider the revocation of a participant’s status, and the power of the CEO to revoke a participant’s status due to failure to comply such a request
2. **Section 32H** – the circumstances under which the NDIA may make requirements in relation to the acquisition or provision of supports
3. **Subsection 44(1)(c)** – the additional powers of the CEO to make a decision that a participant must not manage their funding
4. **Section 46** – the circumstances under which an individual may be found to have failed to comply with provisions regarding the acquittal of NDIS amounts.

As per recommendation 2, these further Category A NDIS Rules ought to be developed prior to the commencement of the relevant sections.

Many of the new sections outlined above will increase the requirements for people with disability to undertake specialised assessments in requesting access to the Scheme. This includes increased powers for the NDIA to request information and reports from current and prospective participants.

States and Territories request that new assessment requirements inserted by the Bill, be amended to reflect that any assessments and/or examinations will be paid for by the NDIA and will not increase costs on the individual applicant.

No.	Recommendation
10	Category A NDIS Rules should be developed as a check and balance to regulate the use of the NDIA’s powers provided for in proposed subsections 30(2)-(6), proposed subsections 30A(4)-(7), proposed section 32H, proposed subsection 44(1)(c) and proposed section 46. As per recommendation 2, all Category A NDIS Rules should be developed and agreed prior to commencement of these amendments.

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- 11 The Bill should be amended to specify that any new assessment, or examination required of participants under this Bill, will be paid for by the NDIA, and will not increase costs for the individual.
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Part 5. The Bill's priority should be to improve quality and safeguarding measures

- CAF supports the Commonwealth's intention to improve quality compliance measures in the Scheme.
- CAF considers that the Commonwealth can take further action to create safeguards against provider fraud and misconduct and to promote compliance with the NDIS Act.

The NDIS Bill does not adequately address the issues of provider fraud and misconduct identified in the NDIS Review.

CAF strongly advocates for the Commonwealth to take firmer action to improve quality and safeguarding measures, and address fraud in the Scheme. Both the NDIS Review Final Report and the Disability Royal Commission made clear that much more needs to be done to protect against harm, exploitation, and abuse of people with disability across all service systems. The NDIS Review found that stronger regulatory controls are required to improve quality of NDIS supports, and to prevent fraud and misconduct in the Scheme.

Schedule 2 of the NDIS Bill contains some amendments directed at improving quality and compliance measures in the Scheme. These amendments seek to allow the Commission to impose requirements and/or limitations for approvals of quality auditors, including to ensure that an approved quality auditor does not engage a person that is subject to a banning order.

States and territories note, however, that these amendments focus on addressing the approval of quality auditors and do not deter providers from engaging in fraud during the registration process or during the provision of services. States and territories are concerned that these provisions do not go far enough to address the serious known issues of provider fraud and misconduct.

There are further opportunities to improve the integrity of the NDIS through legislative changes, which should be progressed and implemented as a priority.

States and territories have expressed a strong willingness to work with the Commonwealth on measures to strengthen quality, safeguards, fraud-prevention and compliance within the NDIS. State and territory governments welcomed the Commonwealth's efforts to address these issues through the 2023-2024 Federal Budget, which committed a total of \$910 million over four years to improve the NDIS, and support and safeguard people with a disability and the Scheme. The Commonwealth should urgently commit to build on these measures with further reforms.

No.	Recommendation
12	The NDIS Bill should be amended to strengthen quality, safeguarding, fraud and compliance measures.
