



MDAA submission response to: NDIS (getting the NDIS back on track) Bill 2024

**Multicultural Disability
Advocacy Association NSW
Inc.**

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This submission is produced by the Multicultural Disability Advocacy Association of NSW Inc. (MDAA) in response to the NDIS (getting the NDIS back on track) Bill 2024.

MDAA is a state-wide advocacy service for all people with disability, their families, and carers, with a specific focus on people from Culturally and Linguistically Diverse (CALD) and non-English speaking backgrounds (NESB). We aim to promote, protect, and secure the rights and interests of people with disability, their families, and carers in NSW with the view to empower communities through systemic and individual advocacy, advocacy development, capacity building and networking, as well as industry development and training.

In the last financial year, MDAA has supported 603 consumers, addressing 779 issues and provided 12,000 direct support sessions to consumers. It is from this direct work with people with lived experience that we build on our systemic program for evidence-based advocacy.

MDAA is guided in our work by national and state legislations namely, but not limited to, the United Nation Convention on the Rights of Persons with Disabilities (UNCRPD), the National Disability Service Standards, Disability Discrimination Act, Anti-Discrimination Act, and the Disability Inclusion Act. MDAA respectfully implements the human rights framework and social justice principles, exercising fairness and equity, and combating violence, abuse, neglect, and exploitation. The essence of the social justice principles is that no consumer seeking assistance is excluded because of their background.

MDAA welcomes the opportunity to comment on the Bill, and appreciates the move it makes to implement some changes in the short term. There is an urgent need to redesign a number of areas of the NDIS. This has been made clear to us by the experiences of our consumers and supported by the NDIS Review. We have been pleased to see a relatively fast response to recommendations that came out of this review. However, MDAA finds the lack of detail in the proposed changes within the Bill, and moreover, the lack of detail in the scaffolding for the changes to come, concerning and in need of further clarity to ensure the disability community is able to provide a meaningful contribution. We have outlined our main concerns below.

Greater efficiency in planning and flexible budgets

Among our various programs, MDAA supports people with disability, their family and carers with individual advocacy and NDIS Appeals and Reviews. These programs in particular have highlighted the inefficiency in the NDIS planning process as well as the overly complicated nature of funding packages being divided into individual support items with no flexibility. This is particularly so for people from CALD background who may not be familiar with the disability support system in Australia.

In line with action 3.4 of the NDIS Review, the Bill's Explanatory Memorandum describes that under the new framework NDIS plans will focus on setting a reasonable and necessary funding package at a whole-of-person level- rather than for individual support items- and will allow greater flexibility in how participants can spend their budgets. MDAA is pleased with this move, particularly in that the change is based on the principle that people with disability know their own support needs and are best placed to determine how to meet these needs. Nonetheless, some of the details in this change are of concern.

- 1) NDIS participants are expected to transition from old framework plans to new framework plans within 5 years. While we acknowledge that in Subsection 32C(1) there exists a contingency if this timeframe is too short or too long, **MDAA considers 5 years to be too long a target and calls for the timeframe to be shortened from the on-set.**
- 2) The flexible budget will be based on a 'needs assessment' designed to determine what supports a person needs. The Bill states that a needs assessment tool will be used to assess a person's supports needs (subclause 32L(2)). We have yet to receive a proper indication of what this assessment tool will look like but the bill does make it clear that the tool will be determined by the Minister (subclause 32L(8)). **MDAA holds concerns that the needs assessment will fail to address the specific needs of people from CALD backgrounds without having a clear indication of who will be conducting the assessment. Specifying this information, and having assurances that a co-design process will take place that considers the cultural needs in the 'whole of person' approach is necessary.**
- 3) Importantly, the Bill outlines that the needs assessment will be given directly to the CEO 'as soon as practicable after the assessment' (32L(5)(6)). There is no indication that the participant will be able to review their own needs assessment prior to it going to the CEO to flag whether or not it is appropriate or truly reflective of their needs.

Moreover, as we understand it, a 'needs assessment' would not be a 'reviewable decision' under section 99 of the NDIS Act nor can it be reviewed

through internal or external review. This is highly problematic. Our experiences working with people with disability from CALD background shows continuous barriers to communicating specific needs to those in the medical and allied health community. While the process in which the 'needs assessment' will be conducted is yet to be determined, MDAA sees it highly unlikely that, a 'needs assessment' without review from the individual will be truly reflective of the needs of a diverse community. If we see this eventuate, people will have very limited avenues to remedy the gaps. **The ability for the participant to request a review of the 'needs assessment' is imperative and needs to be made explicit.**

New discretionary powers to the Minister.

It is not unusual for us to see discretionary powers granted to the Minister and MDAA acknowledges the need for a level of discretion in the context of a highly codified system. However, in its current form, the Bill lacks the clarity needed to justify the power afforded to the Minister that will directly impact the way participants experience the changes proposed. This includes making Rules and determinations that do not need to be passed by Parliament. The details of the Bill need to be clarified and the powers afforded to the Minister assigned accordingly.

In other areas of Government we have seen such powers result in 'a perception of favouritism or bias in the way the powers are used; a lack of transparency and accountability; concerns about the adequacy of discretionary powers to implement international legal obligations that are not discretionary.'¹ **Clear transparency and accountability mechanisms need to be in place to avoid this.**

Concerns around the use of APTOS principles.

The Bill proposes new Rules that will narrow the scope on what is considered constitutionally valid supports and those funded by the NDIS. These Rules have yet to be agreed on and the Bill specifies that APTOS principles will be used as an interim measure to determine what is and is not an NDIS support. APTOS principles were developed in 2015 and need to be reframed and updated in a human rights

¹ Parliament House, C. (2013) *Chapter 9 - appropriateness of the minister's discretionary powers, Home – Parliament of Australia*. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/report/c09#:~:text=Briefly%20restated%2C%20these%20are%3A%20weaknesses,transparency%20and%20accountability%2C%20due%20to (Accessed: 16 May 2024).

framework, 'consistent with, and reflecting the seven international human rights treaties to which Australia is a party.'²

Despite the principles being unsuitable, significant feedback has already been provided to the inadequacy of the current implementation of these principles. MDAA would like to draw specific attention to Principle 6 which states:

'The interactions of people with disability with the NDIS and other service systems should be as seamless as possible, where integrated planning and coordinated supports, referrals and transitions are promoted, supported by a no wrong door approach.'³

The experience of the people and communities engaged with MDAA has been quite the opposite to this. People from CALD backgrounds face countless barriers to accessing services and information given is often unclear. This is made evident when looking at the statistics of CALD engagement with various service systems. **We believe that using a set of principles that have been in place since 2015 and proven to be consistently challenging to apply, will be detrimental for participants. We call for an alternative interim solution to be put in place.**

Restrictions on Plan Management

We find the proposed restrictions that the NDIA can place on how a participant can spend flexible funding as overly reactive. This is particularly so in the power the Agency yields in rejecting a participant's plan management request on the basis of new subsections 43(2A), (2B), (2C) and (2D). These subsections deal with situations in which the CEO may reject a participant's plan management requests. Section 46 in particular, states that the CEO can make this decision if the participant has not 'complied with in relation to the plan or any of the participant's previous plans'.

MDAA believes the wording in this section is too broad and risks contradicting the purpose of flexible funding in aligning with the principle that people with disability know their own support needs and are best placed to determine how to meet these needs.

In a case currently with our NDIS Appeals Team, MDAA Advocates are supporting a participant to challenge a decision rejecting her plan management requests based on the shallow assumption that the participant has misused her funds. The participant is receiving evidenced-based therapies that are considered current good practice. Seemingly, plan management was rejected because the business name of the company providing this service alluded to 'holistic therapies' in its name. The

² Women With Disabilities Australia (WWDA) (2023). Submission to the NDIS Review: Review of the Applied Principles and Tables of Supports

³ DSS (2015) Principles to determine the responsibilities of the NDIS and other service systems. Available at: https://www.dss.gov.au/sites/default/files/documents/02_2024/ndis-principles-determine-responsibilities-ndis-and-other-service.pdf

reactive and superficial reasoning to restrict a participant's control of their plan highlights the need for more informed and flexible decision-making within the NDIS to avoid arbitrary rejections and ensure participants receive appropriate care.

In cases where MDAA has supported people in what would be deemed as 'non-compliance', we have seen evidence of funds being used for a genuine disability related need and not with the intention to misuse funds. It is crucial to recognize that such wording around compliance can instil unease, especially among individuals from CALD backgrounds who speak English as an additional language. This apprehension may affect their confidence in executing their plans. By refining this language, we can mitigate the anxiety these adjustments might evoke and bolster individuals' confidence in navigating their plans effectively.

People from CALD background already experience barriers to have their cultural needs met through registered providers. The change would create a greater barrier to CALD participants in accessing culturally appropriate services.

Recommendations

The Bill proposes some significant changes. We feel it necessary to emphasise that many challenges are specific to CALD participants in a way that can only be addressed by specific considerations.

- 1) MDAA holds concerns that the needs assessment will fail to address the specific needs of people from CALD backgrounds without having a clear indication of who will be conducting the assessment. Specifying this information, and having assurances that a co-design process will take place that considers the cultural needs in the 'whole of person' approach is necessary.
- 2) NDIS participants are expected to transition from old framework plans to new framework plans within 5 years. MDAA considers 5 years to be too long a target and calls for the timeframe to be shortened from the on-set.
- 3) Participants should have an opportunity to review their needs assessment report before it is handed to the CEO, and certainly before a decision is made on a budget.
- 4) MDAA calls for explicit provisions that allow participants to have the ability to request a review of the 'needs assessment'.
- 5) In regard to APTOS principles being used as an interim measure, we believe that using a set of principles that have been in place since 2015 and proven to

be consistently challenging to apply, will be detrimental for participants. We call for an alternative interim solution to be put in place.

- 6) People from CALD background already experience barriers to have their cultural needs met through registered providers. Rejecting a participant's plan management request would create a greater barrier to CALD participants in accessing culturally appropriate services. Wording around this should indicate this option only as a last resort.

MDAA thanks the committee for considering the feedback regarding proposed changes and would welcome the opportunity to further comment on service providers responsibility to ensuring the NDIS is viable into the future rather than placing the onus entirely on participants.