

10th August 2021



To: Senator, The Hon Linda Reynolds CSC
Minister for the NDIS

Dear Minister,

Re: Sex services and the NDIS

Who we are

Touching Base developed out of the need to assist people with disability and sex workers to connect with each other, focusing on access, discrimination, human rights, legal issues and attitudinal barriers. Touching Base has brought the disability sector and the sex industry together in respectful and meaningful ways, through education, policy development, and training workshops for disability workers and sex workers.

Background

We appreciate that to a degree you have inherited the current situation, in relation to sex services being accepted as a reasonable and necessary support for some NDIS participants, We acknowledge that the moves towards a prohibitive approach were created and driven by previous Federal Ministers.

We would like to also acknowledge the shifts in directions which have occurred within the last month in relation to proposed changes to the NDIS Act and we would like to take advantage of the reset offered by yourself and the NDIA CEO at the recent Where To From Here (WTFH) conference.

Having previously been engaged in negotiations with the NDIA we are seeking to re-engage to bring about sensible movement ahead in this area.

Misconstrued attempt to unlawfully prohibit sex services as an NDIA support

Here is some specific background information related to your office as Minister for the NDIS, that you may not be aware of.

Successive Ministers, starting with Christian Porter, have tried to unilaterally, therefore unlawfully¹, rule out the funding of sex services in participants plans. In the case of WRMF, it was made clear by the Federal Court that the Minister for the NDIS has never had the power to make such a decision. As you are no doubt aware, any decision to rule out a specific support requires unanimous support of State and Territory Ministers through the Disability Reform Council.

After the WRMF decision was handed down Minister Robert sought to get such a prohibition through the Disability Reform Council but his approach was rejected by State and Territory Ministers.

Then Minister Robert proposed to have the NDIS Act changed to remove the requirement for unanimous decision making to rule out particular supports. We understand that this proposal was recently put forward to the Disability Reform Council and the resulting communique suggests to us that that proposal has been rejected by State and Territory Ministers, along with the planned Independent Assessments.

We have recently been reliably informed that a decision was made in 2012/13 at the Disability Reform Council, which endorsed sex services as a funded support under the NDIS. We would greatly appreciate it if you could confirm the particulars of this prior decision and bring it to the attention of the other State and Territory Ministers.

¹...S.35(1)(b) of the Act, ... enables rules to be made prescribing reasonable and necessary supports that will not be funded under the National Disability Insurance Scheme. Such rules need to have the unanimous agreement of the host jurisdictions, therefore including the States and the Commonwealth, all of which contribute funds to pay for the Scheme. The requirement for unanimity arises from s.209 of the Act." (at para 43, [7]), FEDERAL COURT OF AUSTRALIA, National Disability Insurance Agency v WRMF [2020] FCAFC 79

This is consistent with the public statement made by Senator Fifield at the National Press Club in 2013 when this issue was raised in a question from the ABC

“This issue has come up before. When the Senate was having public hearings into the NDIS legislation, this particular proposition was put: would the sorts of services that you mentioned qualify as reasonable and necessary?”

I’m not going to, I guess, give an on-the-spot ruling, but what I will say is the NDIS isn’t there to provide a range of things which individuals, whether they have a disability or not, might seek to have as part of their life. It’s there to provide supports so that they can do and achieve things which are made a little more difficult because of the disability that they had.

I’ll leave the comments there. Partly because, you know, I don’t want to have a headline that says, you know, “Minister says x, y, z is in, shock horror”.

So I’m going to leave it there because the essence of the NDIS is working on a plan for an individual. Is: what are the goals, what the plans, what are the objectives for an individual? And each plan will be different, each plan will be personalised, and I’ll leave it at that.”²

Is it time for your office and the NDIA to accept reality - that every attempt to prohibit these supports being funded has failed, in the AAT, the Federal Court and the Disability Reform Council? It is our understanding that such a move would not get past the current Federal Senate.

Having announced a reset of the relationship between the disability sector and the NDIA, we call upon you as Minister for the NDIS to take this opportunity to instigate the development of relationships and sexuality policies by the NDIA.

² The Hon. Mitch Fifield’s address to the National Press Club on the topic ‘A Better Deal for Australians With Disability’- Dec 2013.

This would action a request made by State and Territory Ministers at an earlier Disability Reform Council meeting for further consultation to be conducted by the NDIA in relation to these matters.

Statements and information put out by NDIA and prior Ministers are creating a substantial and unlawful barrier

We refer you to the following extracts of an information paper published by the NDIA in November 2020 ³:

- ***More guidance on the boundaries of the NDIS for...***

Under this category, a new rule will make clear that NDIS funding is not to be used to purchase the services of a sex worker or devices solely for sexual stimulation [p.5]

- ***When supports should be purchased using personal income or government income support...***

NDIS funds are not intended to pay for goods and services that are not related to a participant's disability and that people generally pay for out of their ordinary income or government income support that people generally pay for out of their ordinary income or government income support. For example:

- *rent (other than specialist disability accommodation)*
- *groceries*
- *clothing*
- *utility fees.*

³ [Information Paper](#) Improving the National Disability Insurance Scheme - Better Participant Experience and Improved Access and Planning, Published: 24 November 2020 (Updated 1 December 2020 to refer to NDIA papers now released)

The Government and the NDIA will provide detailed guidance around supports relating to ordinary living expenses or day-to-day living costs.

This will assist participants to make informed choices about how they should use their NDIS funding and what is more appropriately purchased with personal income or government payments. Changes to the legislation will also make it clear that NDIS funds should not be used to purchase the services of a sex worker or devices solely intended for sexual stimulation and arousal. [p.20]

We have heard repeated reports of participants having NDIS staff refuse to include sex services as a funded support within their plans, on the basis of the information paper referred to above, and/or high profile media statements made by prior Ministers around this issue.

We note that the proposed NDIS Act reforms have been set aside.

As Minister, could you please advise us what steps you will be taking to bring the NDIA back into lawful practice? Please advise us what steps you will be expecting the CEO to take to correct the misinformed view held by many NDIS staff (Call Centre Staff / Planners / Support Coordinators / LACs) and external planners, that the prohibition of funding of sex services is a fait accompli.

Other matters of concern

We would like an opportunity to discuss the following issues with you at your earliest convenience:

- Problems with processing invoices and payments
- Unauthorised changes to management of plans
- Development of clear NDIS policy on sex and relationship

We would be pleased to arrange a video conference or phone call with your office. You can email Saul via saul@touchingbase.org or phone 0412 144 282

Yours sincerely

Saul Isbister	President
Rose Handley	Committee Member