First Peoples Disability Network:

Draft lists of NDIS Supports

Submission to the Department of Social Services

August 2024

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First Peoples Disability Network:

Response to the Draft Lists of NDIS Supports and Discussion Paper

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About First Peoples Disability Network

FPDN is the community-controlled disability peak and a member of the Coalition of Peaks, a partner to all Australian governments to the National Agreement on Closing the Gap. We are also the First Nations Disability Representative Organisation actively representing the voices of First Nations peoples across Australia's Disability Strategy, the NDIS and related governance structures.

For millennia, First Nations peoples, communities, and cultures have practiced models of inclusion.

However, despite this, since colonisation, First Peoples with disability and their families have been and continue to be amongst the most seriously disadvantaged and disempowered members of the Australian community. FPDN gives voice to their aspirations, needs and concerns and shares their narratives of lived experience. Our purpose is to promote recognition, respect, protection, and fulfilment of human rights, secure social justice, and empower First Peoples with disability to participate in Australian society on an equal basis with others.

To do this, we proactively engage with communities around the country, influence public policy and advocate for the interests of First Peoples with disability in Australia and internationally.

We are also guided by both the social and cultural models of disability. The social model views disability to be the result of barriers to equal participation in the social and physical environment. These barriers can and must be dismantled. However, FPDN recognises the critical need to move beyond a social model to ensure the cultural determinants of what keeps First Nations people with disability strong is centered when working with and in designing policies and programs to improve outcomes for First Nations people. We call this a cultural model of inclusion.

A cultural model of inclusion recognises the diversity of cultures, languages, knowledge systems and beliefs of First Nations people and the importance of valuing and enabling participation in society in ways that are meaningful to First Peoples.[1].

Our work is underpinned by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention on the Rights of Persons with Disability (CRPD).

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[1] S Avery, 'Culture is Inclusion,' 2018, First Peoples Disability Network.

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25 August 2024

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To whom it may concern,

FPDN Submission: Consultation on Draft Lists of NDIS supports

To the extent that it is possible within the timeframe that has been given, this submission reflects the position of the First Peoples Disability Network (FPDN) on the draft lists of NDIS supports (the ‘Draft Lists’), which were released by DSS on 4 August 2024.

FPDN considers that Disability Representative Organisations (DROs) have not been given a meaningful chance to engage with the process of creating the lists, nor has the consultation period of approximately three weeks (following an extension) been anywhere near what is required for us to meaningfully consult with First Nations people with disability on the impacts of the Draft Lists. FPDN is participating in this consultation, but that should by no means be taken as approval, endorsement of or ‘rubber-stamping’ of the Government or department’s conduct or the content of the Draft Lists.

To the extent that DSS considers that the Draft Lists have been created following consultation with FPDN and DROs, FPDN respectfully disagrees. Up until 4 August 2024, no versions of the Draft Lists had been provided to FPDN for feedback, nor does it appear that the feedback of DROs has been sought ought and meaningfully implemented at any stage. The set of online ‘consultation sessions’ that were carried out by the NDIA and DSS are better described as information sessions.

Even without the opportunity to meaningfully consult with our community, FPDN fundamentally opposes the Draft Lists which have been put forward. The approach taken by DSS:

(i) does not preserve the reasonable and necessary supports which participants require

(ii) is needlessly reliant on exclusions that are inadequate, confusing and poorly thought out; and

(iii) fundamentally disregards the concerns which have been expressed by representatives of the disability community throughout the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People and Disability* (‘DRC’) itself,[2] and the subsequent NDIS Review.[3]

[2] Royal Commission into Violence, Abuse, Neglect and Exploitation of People and Disability, ‘Final Report’ 29 September 2023.

[3] Independent Review of the National Disability Insurance Scheme, ‘Working together to deliver the NDIS, NDIS Review: Final Report’, 27 October 2023.

Summary of Recommendations

1. DSS must extend the consultation period for these Draft Rules.
2. These Draft Lists should not go into effect as soon as DSS is proposing, which is 28 days after the NDIS Bill receives royal assent.
3. An initial, more immediate transitional measure must exist for determining supports, until the co-design process can be completed for a more robust transitional measure. This immediate transitional measure should fully preserve the scope of supports available under the current NDIS Act.
4. DSS must abandon any position that the Australian Constitution prevents any implementation of a principles-based approach to determining NDIS supports. If DSS proceeds with lists of 'supports that are NDIS supports' and 'supports that are not NDIS supports', then those categories should operate alongside 'overriding' or 'overarching' principles-based criteria.
5. DSS must properly consult with DROs and then rethink its approach to the Draft Lists.
    5.1. Recontextualising the lists of 'Supports that are NDIS supports' and 'supports that are not NDIS' to properly embody the content and recommendations of the NDIS Review.
    5.2. Removing the concept of haphazard and confusing 'carve outs' from the list of 'supports that are not NDIS supports.'
    5.3. Redesigning descriptions for categories of 'supports which are NDIS supports', in order to address the unfairness and lack of clarity when compared to the categories of 'supports which are not NDIS supports'.
    5.4. Making significant revisions to the 'day-to-day living costs' category of 'supports that are not NDIS supports'.
    5.5. For 'day-to-day living costs', reincorporating the 'carve out' for 'a*dditional living costs that are incurred by a participant solely and directly as a result of their disability support needs*' back into existing as one part of an overriding principles-based test (see Recommendation 4).
6. DSS and NDIA cannot rely on the 'substitution rule' as a blanket fix for issues with the construction of the Draft Lists.

FPDN's Recommendations in Detail

Recommendation 1: DSS must extend the consultation period for these Draft Rules. The allocated period of 3 weeks has not given Disability Representative Organisations (DRO's) any meaningful opportunity to consult with the community. Furthermore, it is not appropriate or even feasible for DSS to attempt to design a functional transitional provision within these time constraints. The categories of supports which DSS has put forward are outdated, harmful to participants, and must be reviewed.

Recommendation 2: These Draft Lists cannot go into effect as soon as DSS is proposing, which is 28 days after the NDIS Bill receives royal assent. Until such time as DSS is able to carry out a legitimate process of co-design, resulting in an outcome which acknowledges the concerns of DROs and delivers a competent transitional provision, DSS must not move forward with the implementation of the Draft Lists.

Recommendation 3: An initial, more immediate transitional measure must exist for determining supports until the co-design process can be completed for the Draft Lists. Participants cannot be put in a position where the status of new supports cannot be determined by the NDIA. This immediate transitional measure should preserve the current scope and definition of supports by referring to or replicating the criteria for reasonable and necessary supports in Section 34 of the current NDIS Act, in order to minimise disruption and maintain continuity of supports.

Recommendation 4: DSS must abandon any position that the Australian Constitution prevents any implementation of a principles-based approach to determining NDIS supports as part of the Draft Lists, such as the criteria for reasonable and necessary supports in Section 34 of the current NDIS Act. Since its introduction, the NDIS has operated for 11 years without any serious challenge to its constitutional validity. If lists of supports are going to be utilised, then it must be alongside a set of criteria which are comparable to the reasonable and necessary criteria for supports. If this is not done, the NDIS Bill will not be capable of operating effectively or clearly.

Recommendation 5: DSS must properly consult with DROs and then rethink its approach to the Draft Lists, including:

- **Recommendation 5.1:** Recontextualizing the lists of 'supports that are NDIS supports' and 'supports that are not NDIS' to properly embody the content and recommendations of the NDIS Review. The lists should exist to provide additional guidance on reasonable and necessary disability supports, informed by an NDIS Evidence Committee that routinely engages with DROs.

- **Recommendation 5.2**: Removing the concept of haphazard and confusing 'carve outs' from the list of 'supports that are not NDIS supports'.

  Regardless of DSS's nomenclature, many these 'carve outs' are themselves (extremely narrow) principles-based exceptions, which are both a poor replacement for the existing 'reasonable and necessary' criteria from Section 34, and proof that the Draft Lists do not at all provide 'clarity'.

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As the Draft Lists develop, the 'carve outs' must be replaced by a principles-based approach, which can apply to every category, and 'override' the lists in the event that the criteria are met. This will most often be utilised for uncommon items that are highly dependent on an individual's circumstances, such as hydrotherapy pools. DSS can still include 'carve outs' in the list of 'supports that are not NDIS supports', but should generally only do so for specific and notable items that:

(i) would otherwise be 'captured' by the description of a 'support that is not an NDIS support';
(ii) don't belong/ fit in a category of 'supports that are NDIS supports;' and
(iii) DSS needs to clarify will generally still be funded.

An example of what might be added is 'fast food in unexpected circumstances where a support worker is unavailable to assist with meal preparation'.

For clarity, the above does not apply to the Draft List's 'carve outs' for the list of 'supports that are NDIS supports'. However, all of these 'carve outs that are not NDIS supports' should also be renamed to something with the effect of 'carve outs that are not usually NDIS supports for most participants'. This will then parallel the 'carve outs that may be considered NDIS supports for certain participants'.

- **Recommendation 5.3**: Redesigning the descriptions for categories of 'supports which are NDIS supports', in order to address the unfairness and lack of clarity when compared to the descriptions for categories of 'supports which are not NDIS supports'.

  DSS has ensured that the 'supports which are not NDIS supports' contain extensive lists items. For example, the category of 'day-to-day living costs' alone lists 45 'dot points' (each containing multiple items) which are excluded. A participant should equally be able to look at a category of 'supports which are NDIS supports' and see a large, clear list of specific items which NDIS acknowledges as falling within the category (e.g. A participant looking at the 'hearing equipment' category should not have to guess exactly which devices the category might cover, or ask questions such as whether specialised hearing aid batteries fit the given description). These sets of lists must be codesigned with DROs to be as comprehensive and appropriate as is possible, but should (once again) still be complemented by an 'overriding' principles-based test as a safety measure for unexpected, unusual and highly individual situations.

- **Recommendation 5.4**: The 'day-to-day living costs' category must be heavily revised. To begin with, any items that are included should be described with sufficient clarity to ensure that (disability) specialised equivalents of those goods/services are not captured, including for white goods and consumables (e.g. listing the battery sizes/standards which are generally 'day-to-day living costs'). Also see Recommendation 5.5.

- **Recommendation 5.5**: In relation to 'day-to-day living costs', the 'carve out' for 'additional living costs that are incurred by a participant solely and directly as a result of their disability support needs' (which is derived from Rule 5.2(a) of the current NDIS (Supports for Participants) Rules should be reincorporated into the overriding principles-based test (see Recommendation 4). This would also involve reintroducing an equivalent of Rule 5.2(b), which clarifies that daily living costs also do not include *'costs that are ancillary to another support that is funded or provided under the participant's plan, and which the participant would not otherwise incur'*.

  Otherwise, the concept of 'day-to-day living costs' does not function in a logical manner, and becomes harsh and oppressive. A participant should not be put in a position of confusion (or worse, dispute with the NDIA). Incidentally, following this recommendation should also then allow DSS to remove most of its current 'carve out' items for 'supports that are not NDIS supports' (other than where DSS wishes to be very specific). The overriding principles-based test would be sufficient to address outliers.

Recommendation 6: DSS and NDIA cannot rely on the 'substitution rule' as a panacea for issues with the construction of the Draft Lists. The substitution rule (which was inserted into Section 10 of the NDIS Bill as a last minute amendment via sheet SK118 revised) gives the CEO a very limited and discretionary power to allow a participant, who is already entitled to a particular form of support, to replace it with a different, cheaper item that would not otherwise be funded under the Draft Lists.

At most, the substitution rule should be considered as a 'backup' power which operates alongside Draft Lifts which are generally coherent and comprehensive in their ability to cover any supports which NDIS participants could legitimately expect to obtain. In almost all circumstances, participants should not have any need to consider making a special application (which can be rejected without appeal).

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FPDN Reflections, Analysis Findings and Conclusions

Lack of consultation and co-design for the transitional rule

From the outset, NDIA and DSS have continuously told FPDN (and other DROs) that the proposed Draft Lists must be designed rapidly because the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No.1) Bill 2024* (the 'NDIS Bill') will require a transitional rule to be in place for determining the scope of NDIS supports.[4]

As a result, DROs have been presented with rigid, poorly structured and completely inadequate lists of 'supports that are NDIS supports' and 'supports which are not NDIS supports', which blatantly do not reflect the scope of currently available NDIS supports and cannot possibly be implemented without eliminating whole categories of crucial support items from the NDIS entirely. This will apply to all NDIS participants, with barely any hint of nuance or discretion based upon their individual needs, circumstances and goals.

At the absolute minimum, these lists would need to be fundamentally redesigned before FPDN would consider expressing support. There can be no doubt --- the implementation of these Draft Lists will worsen the already poor rates of plan access and utilisation for First Nations people with disability.

There is also the matter of DSS and NDIA's refusal to justify a departure from a principles-based approach to positively determining NDIS supports. From the first moment that NDIA revealed its intentions, a multitude of DROs have consistently raised concerns, but neither DSS or NDIA have ever meaningfully engaged with these criticisms. During the session held on 17 July 2024, NDIA would not go any further than making a brief response to the effect that, because of constitutional restrictions (which neither NDIA or DDS have since discussed at length), no other approach to a transitional measure is considered possible or seen as desirable.

FPDN does not agree. There are no constitutional limitations that would prevent NDIA / DSS from maintaining a principles-based approach as part of the transitional rule (i.e. the criteria for 'reasonable and necessary supports'), in combination with a far more refined implementation of the 'set list' approach which DSS is currently insisting upon. In effect, the argument which is being advanced by Government and propagated by DSS requires the disability community to accept that the NDIS scheme (which has operated for the last 11 years and was launched by the same Government party) is and always was unconstitutional, and that nothing was ever said or done.

Furthermore, if DSS's intention is truly to increase clarity for NDIS participants regarding what supports will or will not be funded, DSS must understand that any transitional rule that omits a robust, principles-based approach is doomed to fail. Rather than resolve and 'clarify' available supports, the Draft Lists will only foster more confusion and uncertainty. As currently drafted, the NDIS Bill is a piece of legislation that simply cannot be supported by the type of transitional rule that NDIA / DSS has presented.

[4] *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (Cth)

A 'transitional rule' should never have been required

There can be no justification for forcing DROs to accept the burdens and consequences of any perceived time constraints, particularly in the form of pressure to reluctantly work with whatever transitional measures that DSS is able to construct during the limited time available.

Action 2.6 of the NDIS Review Final Report specifically put forward that a new disability intergovernmental agreement must be negotiated between the Commonwealth and States/Territories as the replacement for the APTOS.[5]

Had this been done prior to the Commonwealth responding to the NDIS Review Final Report or seeking to amend the NDIS, this would have prevented the need for a transitional rule entirely. To date, the Commonwealth has failed to engage with or respond to the findings of the NDIS Review, instead pushing forward with a piece of incomplete legislation that is almost entirely dependent on subordinate legislation which does not exist. We cannot pretend that under these circumstances, there is any realistic possibility of codesigning a coherent, representative and sensible transitional rule. The additional week of consultation does not change this position.

Had the legislation been drafted responsibly, there would be no need for a 'transitional measure', nor would the department need to design one as quickly as possible at a significant cost and sacrifices to the disability community at large. FPDN has already made these points in our prior submissions to the Senate Committee regarding the NDIS Bill.[6]

Before going any further, FPDN must stress that the approach which is represented by the Draft Lists is a significant departure from the current position under the current *National Disability Insurance Scheme Act 2013* (Cth) (the 'Current NDIS Act').

Section 34 of the Current NDIS Act has been very deliberately designed to set out a principles-based approach to determining whether any given item is a 'reasonable and necessary' support, based on a nuanced examination of multiple factors, ranging from the needs and goals of the specific individual requesting the support to the overall appropriateness of the NDIS as the vehicle for that support to be provided.[7]

The method/ criteria for determining what is (or is not) an NDIS support is a fundamental underlying component of the NDIS, which should always be contained within the legislation itself. Whatever reassurances might be made by the department, the NDIA or governments, ultimately members of the disability community are yet again being asked to place their trust in the Government, without any transparency or legitimate reasons to expect that somehow 'things will be different this time'.

For First Nations people with disability this is especially concerning as the Priority Reforms under the National Agreement on Closing the Gap which set out a clear framework and commitment from government to do better have not been considered, adhered to or acknowledged in any meaningful way. These actions not only undermine governments efforts across all areas of socio-economic reform

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[5] Above n 3, 76.
[6] FPDN, 'Submission: National Disability Insurance Scheme Amendment Bill 2024', 11 June 2024.
[7] *National Disability Insurance Scheme Act 2013* (Cth) s 34.

with First Nations people, but add yet another example of betrayal, maladministration and broken promises on the behalf of the Australian Government in First Nations communities.

Additionally, First Nations people with disability have never been able access the NDIS at rates comparable to non-Indigenous participants, and no indication has been provided that the NDIA is equipped to alter its processes in any way that will meaningfully address this. On the contrary, every aspect of the rigidly constructed Draft Lists emits 'red flags' which that First Nations people will have to fight harder than ever just to receive the bare minimum of disability supports.

FPDN acknowledges that some transitional measure will be required, so that it can be finalised within 28 days from the NDIS Bill receiving royal assent. However, the focus should absolutely remain on minimising disruption and maintaining continuity of supports until the Commonwealth, states and territories finalise a revised intergovernmental agreement.

A 'transitional period' is absolutely not the time for the department to enact changes that will fundamentally alter the scope of the entire NDIS. Furthermore, it must be emphasised that Government has provided absolutely no guarantee whatsoever that any 'transitional rules' will only remain in place for short period.

It is true that, through the last-minute amendments to Section 5 of the NDIS Bill (via sheet 2653),[8] the Minister must now publish proposed timeframes for seeking the agreement of the States and Territories to each category of NDIS rule. However, this ultimately changes little. The Minister can simply publish updated timeframes if the original ones are not met.

Logistically, it is completely possible (if not probable) that a satisfactory intergovernmental agreement will not be reached for over 12 months. The transitional rule must be approached with the assumption that it will potentially govern the NDIS for a great deal of time.

As will be detailed throughout this submission, FDPN's hope is that, with time, the department will work with FPDN and other DROs to craft an approach which neatly integrates the concept of the Draft Lists of 'supports that are NDIS supports' and 'supports that are not NDIS supports' with the criteria for reasonable and necessary supports upon which the NDIS was founded upon. Additional 'clarity' should not and need not come at the cost of compromising supports for NDIS participants

[8] *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (Cth), sheet 2653.

Hidden impacts and changes on what are currently available NDIS Supports

For such a seismic change to the scope of the NDIS, the 'Consultation on draft lists of NDIS Supports' (the 'Discussion Paper') provided by DSS is far too short and without useful details/ explanations.[9] The draft lists do and will impact what supports participants can access under the NDIS.

Fundamental misunderstanding and misrepresentation of NDIS Review Findings

The DSS discussion paper states *'[t]he NDIS review recommended providing more clarity to participants about what is and is not an NDIS support'*, the focus of crafting the definition of an 'NDIS Support' must be *'[m]aking it clear about what the NDIS does and does not fund [to] help participants make more informed choices'*.[10] Concluding that the legislation necessitates the creation of, and sole reliance upon, a set of lists that are divided into 'supports that are NDIS supports' and 'supports that are not NDIS supports.

In this regard, FPDN has concerns that DSS's interpretation of the recommendations of the NDIS Review is highly inaccurate. The NDIS Review expressed a belief that *'a lack of clarity about what supports should be considered reasonable and necessary is at the heart of the scheme's issues*.'[11] At no point did the NDIS Review state or suggest that this would best be rectified by abolishing the 'reasonable and necessary' test. On the contrary it was explicitly recognised that *'[t]he criteria for reasonable and necessary supports were deliberately kept broad, to make sure supports can be tailored to the individual'*.[12] Whilst the NDIS Review did put forward that the current application of the *criteria 'has made it difficult for NDIA decision-makers to make consistent decisions'*,[13] it was never suggested that the criteria are inappropriate, fundamentally flawed or in need of wholesale replacement.

The exact recommended action (no. 23.2) of the NDIS Review was that *'[t]he Department of Social Services, in consultation with the National Disability Insurance Agency, the new National Disability Supports Quality and Safeguards Commission and the Independent Health and Aged Care Pricing Authority, should establish and manage an NDIS Evidence Committee to provide guidance on reasonable and necessary disability supports'*.[14]

The approach taken by DSS to date is absolutely inconsistent with NDIS Recommendation 23.3. The Recommendation necessitates that the criteria for 'reasonable and necessary' supports must remain, and that improvements are to occur in the form of the development of new guidance. Conceivably, some form of 'NDIS support lists' could become that additional guidance, but these cannot exist on their own.

The NDIS Review focused on process-based critiques of the current implementation of the 'reasonable and necessary' criteria, including taking steps to minimise the 'adversarial' and 'deficit-based approach in assessing need'.

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[9] Australian Government Department of Social Services, 'National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 Consultation on draft lists of NDIS Supports', 4 August 2024.
[10] Ibid 5.
[11] Above n 3, 26.
[12] Ibid.
[13] Ibid.
[14] Ibid 265.

When reading the relevant content of the NDIS Review, it is abundantly clear that the drafters anticipated that problems such as *'[t]he confusion and contested nature of what is reasonable and necessary [that can] play out for every single support item for a participant'* should be resolved by a proactive effort on behalf of the NDIA to achieve consistency (via modifying their behaviour and guidance documents).[15]

Put bluntly, the current approach while making things simple for the government, will have inevitable consequences for participants. The concept of the Draft Lists will abolish any nuance and allow NDIA Decision-makers to enforce what is or is not included within the scheme by pedantically enforcing rigid, deterministic, 'set lists' of accepted/excluded supports.

This will undermine every aspect of the NDIS (which was founded on the principle of self-determination) and is completely at odds with the aims of the NDIS Review, which encouraged greater flexibility for participants at every opportunity. In particular:

- Action 3.5: *'The National Disability Insurance Agency should allow greater flexibility in how participants can spend their budget, with minimal exceptions'*.[16]
- Action 3.6: *'The National Disability Insurance Agency should adopt a trust-based approach to oversight of how participants spend their budget, with a focus on providing guidance and support'*.[17]

Flexibility for NDIS participants has been eradicated

The Draft Lists have been designed in a way that eradicates any meaningful kind of flexibility for NDIS participants cannot be disputed, regardless of whether this was unintended consequence.

The Draft Lists require a participant to (i) prove that their desired support fits within the exact wording of a category of 'supports that are NDIS supports', and then (ii) prove that it is not captured by any of the extensive lists of 'supports that are not NDIS supports', minus a few select 'carve outs'.

Even if the set of Draft Lists was entirely comprehensive and contained unambiguous descriptions (which is not the case and will be addressed further below), this is an approach that, by its very nature, cannot foster flexibility for participants. At the end of the process, the lists will demand that a participant's requested support is simply 'in' or 'out'.

With the exception of a few 'carve outs', no meaningful level of nuance exists within the Draft Lists. Even to the extent that a 'carve out' might otherwise be relevant, they do not come anywhere near close to replicating the flexibility that is offered by the criteria for 'reasonable and necessary' supports under Section 34 of the Current NDIS Act. This is especially true for the first 'carve out' in the 'day-to-day living costs' category, which will merit its own separate discussion further below.

In most cases, any two participants who attempt to use the Draft Lists will get the exact same results, regardless of possessing widely different disabilities, circumstances, needs and goals. One does not need to look hard at all before beginning to find numerous examples of situations where the Draft Lists would

[15] Ibid 84.
[16] Ibid 93-94.
[17] Ibid 94.

deny a support to an NDIS participant, despite (i) it being painfully clear that certain participants would need the support as a result of their disability, and (ii) the support being one that they would be able to receive under the Current NDIS Act.

Notable examples are hydrotherapy pools, menstrual products, white goods and specialist batteries (e.g. hearing aid and wheelchair batteries). However, these problems overlap with the overarching issue of the lists being poorly structured and confusingly worded, as will be addressed repeatedly throughout this submission.

The Draft Lists substantially change the types of supports which NDIS participants can purchase

According to DSS, the intention is that the set of proposed Draft Lists *'does not change the types of supports that have always been appropriate to purchase with NDIS funding'*.[18] This is not correct. The Draft Lists remove the principles-based approach to determining supports and set out draft categories of supports (and exclusions) that are both demonstrably inconsistent with and narrower than the types of supports which NDIS participants can currently obtain.

Within the Discussion Paper, DSS does not further justify, explain or elaborate upon any of its choices or conclusions regarding the categories of support which DSS has selected (or the wording of the descriptions for those categories). At best, the general 'gist' of the Draft Lists' categories has been briefly summarized, but DROs have been left in the position of having to analyse whether the lists actually cover all of the appropriate disability supports. To the extent that NDIA / DSS has conducted their own analysis, it has not been provided.

Unfortunately, the Draft List has such far reaching implications that FPDN cannot possibly, within the time allotted, (i) identify every possible situation where supports have been removed (both deliberately and unintentionally) or (ii) consult upon and properly set out the consequences for every support that has been removed.

Instead, FPDN will focus on a select few examples. Some of these supports have been explicitly excluded, some have seemingly been removed via their absence within any category of 'supports that are NDIS supports', and others are technically included within the Draft Lists, but have been redefined or described in a way which imposes significant restrictions.

There is no place for an NDIS which is hyper-focused on the provision of 'specialist supports', but disregards the inconvenient reality that none of those supports will ever be accessed by communities who are the victims of intergenerational poverty, suffering from hunger and malnutrition, lacking basic necessities, and socio-economically bound to rural and remote areas which lack the basic infrastructure and utilities which DSS routinely assumes that First Nations people with disability must already have access to 'as a matter of course'. Particular examples include:

Menstrual Products – To be Excluded as a 'lifestyle related' 'day-to-day living cost'.[19] Currently, participants with funding for consumables (support category 03) can purchase disposable pads, pull-ups,

[18] Above n 9, 4.
[19] Australian Government Department of Social Services, 'NDIS Supports List', 4 August 2024, 12.

reusable and washable pads and briefs, absorbent sleepwear, swim shorts and tampon inserters.[20]

This exclusion is farcical and should have immediately signalled that the general structure of the 'day-to-day living costs' category is going to be incredibly problematic. For reference, other items that sit within the 'lifestyle related' subcategory include cigarettes, vapes, gambling and gaming PCs.[21] These are not comparable.

People with disability can suffer from motor impairments, lack of sensation and any number other circumstance which drastically increase the costs and difficulties of managing menstruation. For these persons, menstrual products are not a 'day-to-day living cost'; their availability is a matter of ensuring basic hygiene, personal care and dignity.

Under the draft lists, a person who previously could have relied solely on purchases of 'off the shelf' menstrual products may now have little choice but to try and seek funding for a solution under the *'assistive products for personal care and safety'* category, which has now been described in a way that only covers 'specialist products'.[22] This represents no consideration for the 'sustainability' of the NDIS, as it will counterintuitively force participants towards significantly more expensive products.

More importantly, each participant's basic dignity and right to choose the support that best fits their disability needs has been compromised in the process. This is an incredibly dangerous area for DSS to make changes to, especially in light of the related risk that cuts to funding will potentially lead to an increased reliance on non-therapeutic sterilisation as an alternative.

Items designated as **'***beauty services related'* - To be to be excluded as 'not value for money/ not effective or beneficial'.[23] Currently, participants who, by reason of their disability, cannot tend to their own needs regarding hair washing, nail care, skin care, foot care (outside of a podiatrist) and general grooming can and do often elect to use mainstream services and salons for their needs. The NDIS currently funds this, and it is absolutely cost effective, given the alternative of using a support worker.

Respite – As is elaborated upon in a case study below, 'respite' has effectively been redefined, such that it must be carried out in a 'shared living environment' with a focus on skill development, and does not focus on the original benefit for carers who need a break from caretaking responsibilities. Forcing First Nations people to access their supports within institutional settings is not acceptable, endorsed, safe or adequate in any circumstance.

Many of the items designated as '*alternative and complementary therapies*' - To be excluded as 'not value for money/ not effective or beneficial'.[24] FPDN would draw particular attention to sound therapy

[20] NDIA, 'NDIA Assistive Technology & Consumables Code Guide', 9-10.
[21] Above n 19.
[22] Ibid 3.
[23] Ibid 14.
[24] Ibid.

and yoga therapy, for which the NDIA/ DSS has seemingly imposed the designation of 'alternative/complementary' unilaterally.

Sound therapy/ music therapy is backed by a substantial evidence base, and is used by a large number of NDIS participants who actively report significant benefits from the treatment. It can currently be funded by the NDIS, is recognised by Allied Health Professions Australia (AHPA), and registration as a music therapist requires (amongst other things) the completion of a Bachelor or Master's degree accredited by the Australian Music Therapy Association (AMTA).[25] To demonstrate, the AAT overruled the NDIA and allowed for music therapy support to be funded in the matter of *QZHH and National Disability Insurance Agency [2018] AATA 1465 (31 May 2018).*[26]

Likewise, yoga therapy can currently be funded by the NDIS for participants with core or capacity funding. Many of the providers are NDIS-registered, and there is ample evidence of health benefits and effectiveness. As for the issue of cost effectiveness, the alternative for someone seeking what NDIA/ DSS might consider to be a 'medical' treatment is physical therapy, which is certainly not cheaper and is not always constantly required for every participant with mobility, muscular and other core capacity issues. To demonstrate, the AAT overruled the NDIA and allowed for yoga therapy support to be funded in the matter of *Kupara and National Disability Insurance Agency [2022] AATA 3091 (16 September 2022).*[27]

General furniture removal and services – Even where a participant is moving houses for a reason that is not solely related to their disability, the NDIS will currently fund these types of services for those who cannot reasonably do so because of their disability. E.g. Packing up items, furniture dismantling/ reassembly, removalists for those who cannot drive, etc.

Countless other problems are already being highlighted by every other DRO making a submission, the passage of time will no doubt only allow for more gaps in coverage to be identified.

FPDN's Position

Our understanding requires that FPDN fundamental rejects the department's position that the Draft Lists *'does not change the types of supports that have always been appropriate to purchase with NDIS funding'*. Rather, our analysis has found that any NDIS supports that have been considered "controversial", "contested" or the subject of public debate, regarding "effectiveness", "value for money" or "appropriate" have been, at the department's discretion have been reclassified or excluded with any transparency. Such as:

- Items which the NDIA has previously sought to exclude via general statements in their operational guidelines, but has then has their decisions overruled the AAT / Federal Court. Like yoga, music therapy, hydrotherapy and the funding of white goods (as an alternative to the costs of more expensive, unnecessary support workers).

[25] See Allied Health Professions Australia, 'Music Therapy', accessed 24 August 2024.
[26] *QZHH and National Disability Insurance Agency [2018] AATA 1465* (31 May 2018).
[27] *Kupara and National Disability Insurance Agency [2022] AATA 3091* (16 September 2022)

- Items which have only ever been covered in limited circumstances for participants with specific needs, but which have been publicly misrepresented in the media by government and journalists, subsequently become a topic of controversy. For example, the '$15,000 NDIS cruise' controversy,[28] and the ludicrous claims that NDIS participants have widespread access to funding for sex workers.[29]

Disproportionate Impacts on First Nations people with Disability

FPDN also wishes to draw DSS's attention to a particular trend with many of the items below which makes their exclusion particularly devastating for First Nations persons with disability, who are even more disproportionately likely to live in rural/remote areas, or in circumstances of poverty, or both. This follows a pattern of privileged assumptions that underpin policies and programs in Australian public policy, further embedding systemic discrimination and disadvantage for First Nations people. For example. throughout this process this is being achieved though the poorly informed and paternalistic assertions about what disabled persons do or do not need and should or should not be able to provide for themselves.

Time and time again, FDPN has urged DSS / NDIA to listen to the First Nations community about the types of supports which they truly need from the NDIS, but those pleas have gone unanswered. The draft lists overwhelmingly assume that, just because a non-disabled person might buy an item for themselves as a form of living expense or discretionary spending, a disabled person should therefore be able to do the same without the assistance of the NDIS. For so many First Nations persons with disability, this is a fantasy.

RESPITE CASE STUDY: THE REINSTUTIONALISATION OF PEOPLE WITH DISABILITY

In redefining 'respite' in the current Draft Lists, why would NDIA/ DSS make such drastic changes to the description of respite that it no longer resembles the original meaning of the term within a disability setting?

According to the NDIA's own current operational guidelines for 'short term accommodation or respite':

> *'Short term accommodation, including respite, is support for when you need to live out of home for a short period.*
>
> *Short Term Accommodation funding can be used for respite to support you and your carers. This gives your carers a short break from their caring role* *[emphasis added].*
>
> *Sometimes* *[emphasis added] a short stay away from home:*
>
> - *gives you the chance to try new things*

[28] See 9News – Andrew Probyn, 'A cruise holiday funded by the NDIS? Bill Shorten says not on his scheme', March 26 2024.

[29] See ABC News – Jake Evans, 'Sex work access under NDIS to be banned, removing supports for 'ordinary life', say disability advocates', 7 July 2024.

- *can be a place to make new friends or develop new skills*
- *may help to maintain your current living situation by giving your informal supports a break.*

Short Term Accommodation may suit your needs if your usual support network isn't available for a short period.

Short Term Accommodation includes:

- *personal care*
- *accommodation*
- *food*
- *activities you and the provider agree to.*

Usually, we fund up to 28 days of Short Term Accommodation per year. You can use your Short Term Accommodation funding flexibly. For example, you might want to use it in a block of up to 14 days at a time or for one weekend a month.'[30]

In that operational guideline, it is patently clear that funding is available for 'respite' (as a form of short-term accommodation) for the benefit of carers who need a break from those responsibilities. This should be obvious, given that the natural meaning of the term is a short period of rest/relief from something difficult or unpleasant.

Nevertheless, for some reason, as part of the Draft Lists, NDIA / DSS has reclassified respite into the 'assistance with daily life tasks in a group or shared living arrangement' category, where the description now reads:

> *'Assistance with and/or supervision of tasks of daily life in a shared living environment [emphasis added], which is either temporary or ongoing, with a focus on developing the skills of each individual to live as autonomously as possible* [emphasis added]*, including short term accommodation and respite'.*[31]

Despite still attempting to use the term, the reality is that this support is no longer 'respite':

- Firstly, the focus of respite on the needs of carers is now completely absent, seemingly replaced with a 'focus' on something was previously described as a benefit that may 'sometimes' occur during the stay away from home, being the development of individual skills to live autonomously.[32]

- Secondly, and perhaps most importantly, the description explicitly restricts the support to taking place 'in a shared living environment', which is absolutely not the case under the current NDIS. Reading the phrase (and knowing that other parts of the Draft Lists have seemingly gone to great

[30] NDIA, 'Our guideline - Short Term Accommodation or Respite', 24 June 2022.
[31] Above n 19, 2.
[32] Above n 13, 1.

pains to exclude anything that might even resemble a ‘vacation’), FPDN can only assume that this means group homes, SDA, and other institutionalized settings.

- Thirdly, there is now a condition of assistance/supervision of ‘tasks of daily life’, which is not currently the case, and seems antithetical to the ‘chance to try new things’ in a setting outside of what might normally be considered as a participant’s standard daily routine. Once again, this seems to be designed to mesh with the Draft List’s numerous restrictions on ‘vacations’.

Put simply, ‘respite’ is now more or less a stay in a group home or other institutional setting for the purposes of skill development, and has no connection to the benefits of a break from carer responsibilities.

For First Nations persons with disability, this approach is unacceptable and will only enforce the pattern of rerouting disabled persons into the types of institutions where, historically, they are most vulnerable to poor outcomes, cultural insensitivity and incidences of abuse. Even where abuse does not occur, participants who are placed in these facilities are (rightfully) liable to view the situation as a punishment. At a minimum, these types of facilities can foster disruption and resentment, which is not an ideal environment to ‘try new things’, ‘make new friends’ or ‘develop new skills’, and certainly jeopardizes the whole underlying point of a respite experience.

It is clear that these changes are likely a reaction to the media controversy, having nothing to do with those who legitimately have an allocation in their funding for respite, of which, no concrete evidence has been provided that abusing or defrauding the scheme on a widespread basis has occurred under this item. What we do know is that in every consultation held with First Nations communities, in particular with First Nations women (see Wiyi Yani U Thangani Report,[33] and recent Caring About Care publication),[34] not to mention recent Government funded consultations on the development of the National Carers Strategy, is that the need for respite support in our communities is URGENT.

Currently, respite is by no means an easy support item to secure plan funding for, and plan managers are not in the business of encouraging ‘lavish holidays’. On the contrary, the NDIA’s current pricing arrangements and price limits for this support are abundantly clear. For a relatively ‘high end’ example, a participant whose disability needs are sufficient to justify respite funding at a 1:1 support ratio (which is already unusual) can incur a maximum daily cost of $1,928.00, (weekday rates for a non-remote area). At a more typical 1:3 support ratio, this amount is just $771.24.

The bulk of this is support worker costs, and the NDIA will only fund a maximum of 28 days respite per year (even offering a suggestion that it could be taken in 14 day blocks). $15,000 would be a perfectly reasonable amount, which the participant would need to choose to expend from their own flexible pool

[33] Australian Human Rights Commission, ’Wiyi Yani U Thangani (Women's Voices) - Securing Our Rights, Securing Our Future Report’, 9 October 2020.

[34] Australian Human Rights Commission, ’Wiyi Yani U Thangani - Women's Voices - Caring about Care’, accessed 24 August 2024.

of core support funding (assuming that respite is included as an available support, and that the participant has enough funding left in that pool).

The focus of the NDIS is supposed to be self-determination, where participants are free to spend their various funding pools in any way that they choose, as long as the rules are adhered to. NDIA would absolutely be aware that, given the choice between a group home and an individualised respite experience, many participants elect to use respite funding at activities such as cruises, which (in any other circumstance) could resemble a vacation. This is perfectly legitimate, and countless providers (many who are also registered) also publicly advertise and provide more tailored experiences.

In fact, it is absolutely not uncommon for such a participant's respite expenses to be significantly lower than another participant who relies on an institutional setting, which should not be that surprising. Instead of automatically charging the maximum amounts permitted by the pricing arrangements and price limits, (i) the provider/s of the accommodation venue and activities will likely be charging standard consumer rates, and (ii) the participant has the option to rely on, for example, a trusted support worker who is unregistered, but familiar with their needs and charging less than the maximum price limits.

Nothing about the above should pose any issue. Regardless, the Draft Lists also go out of their way to place the following in the 'supports that are not NDIS supports' category of 'travel related' 'day-to-day living costs': cruises, holiday packages, holiday accommodation...'.[35] These are all activities that the current operational guidelines would permit to some extent, within the context of respite and up to the allowable maximums. It has also always been acknowledged that expenses like meals are not covered.

When taken together with the Draft Lists' 'redefining' of respite ('assistance with daily life tasks in a group or shared living arrangement'), FPDN cannot see how a participant would be able to secure funding for respite outside of an institutional, skill-development setting. The extent of the redefinition is so punitive (forcing participants towards more expensive and less safe institutionalized supports) that it almost appears if DSS's policy goal here is as petty as 'no fun allowed'.

Despite the current focus on 'sustainability', the construction of the Draft Lists demonstrates that, when it comes to restricting freedom of choice for participants, cost effectiveness has not been factored in at all. Time and time again, the Draft lists force NDIS participants towards 'registered', large scale or specialist supports, when a mainstream product would perfectly fulfill their support needs.

[35] Above n 19, 12.

Lack of clarity resulting from the Draft Lists, and the resulting loss of NDIS supports.

The Draft Lists leave the status of numerous supports wholly uncertain

FPDN now wishes to return its focus to the results of DSS's stated goal of *'[m]aking it clear about what the NDIS does and does not fund [to] help participants make more informed choices'*,[36] which has repeatedly been stressed to DROs as the primary reason that the Draft Lists are both necessary and beneficial.

The prior section of this submission primarily focused on a few supports which FPDN is relatively confident that, for one reason or another, will no longer be fundable under the Draft Lists. However, entire other categories of supports have effectively left in a state of general confusion and unrest.

Concerningly, the Discussion Paper sometimes reads as if the department does not fully understand the inner workings of the impact of Draft List. This is perhaps most clearly demonstrated by the assertion that *'[t]he overarching test will remain whether: a person has a need for the support as a result of their disability, and… whether the support is most appropriately funded by the NDIS.'*[37] This is decidedly not the case.

The Draft Lists have specifically been designed in a way that removes the 'overarching test' that a current NDIS participant can rely upon. The issue of whether a 'support is most appropriately funded by the NDIS' is completely absent from the Draft Lists. Not one of the (inadequately defined) categories of 'supports that are NDIS supports' are described by reference to this factor. It cannot even be said that any of the (inadequate) 'carve outs' for the categories of 'supports that are not NDIS supports' provide for an exception where this 'appropriateness' exists.

The same goes for *almost* any assessment of whether 'a person has a need for the support as a result of their disability' (once again, outside of some woefully inadequate 'carve outs', which only apply to some categories in specific circumstances, and will be discussed further below). It is simply not true that either of the Draft Lists contain any sort of consistent principle that, if a participant can demonstrate that their requested support is required as a direct result of their disability, that the support should be funded.

<u>The reality is that the Draft Lists do not contain any overarching tests at all.</u> Those tests were abandoned alongside the 'reasonable and necessary' criteria. The Draft Lists are a rigid and predetermined statement of supports which are either included or excluded from funding under the NDIS. If a participant is seeking a necessary support item that does not meet the provided descriptions, then they have almost absolutely no recourse.

Even if the Draft Lists had (as the Discussion Paper claims) actually facilitated those two overarching tests ('need for the support as a result of their disability' and 'whether the support is most appropriately funded by the NDIS'), it would still be a completely inadequate 'downgrade' from the current NDIS arrangements. At the absolute best, DSS's vision of 'the overarching test' encompasses only two of the existing six criteria that must be considered under Section 34.

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[36] Above n 9, 5.
[37] Ibid.

RESPITE CASE STUDY: HYDROTHERAPY (Favouritism towards the list of 'supports that are not NDIS supports')

The issue of hydrotherapy is one of countless examples of supports which have been jeopardized, which FPDN will return to a number of times. Under the Current NDIS Act, participants have successfully established that a hydrotherapy pool can be a 'reasonable and necessary' support for them to be funded for. This is beyond contention, and is exactly what occurred in the matter of *Spires and National Disability Insurance Agency* [2023] AATA 1230 (17 May 2023).[38]

The details of *Spires* are too long to set out in full, but amongst numerous other circumstances, the participant had a chromosome deficiency, required 24-hour assistance, suffered from constant levels of fatigue and exhaustion, possessed ligaments that were described to be 'like an elastic band that's over stretched',[39] wore support braces and needed to carry around vomit bags wherever she went. The AAT Member had absolutely no difficulties finding that she would benefit from hydrotherapy, that this was an appropriate support for the NDIS to fund, and that the other 'options' offered up on behalf of the NDIA were completely unsuitable (e.g. walking to the closest pool, when the evidence supported that this would likely leave her in a state requiring hospitalization).[40]

As a matter of course, the NDIA attempted to raise every legal argument that was technically available to it, regardless of overall merit, including that:

- It was not appropriate for the NDIS to fund the support, as *"[f]unding for a pool or a spa is a cost which many Australians may choose to purchase themselves"*… and *"[t]he Agency also characterises the support as a 'swim spa' and submits that its installation in Ms Spires' home is a luxury and primarily to meet her own convenience"*;[41] and

- The NDIA was deferring to its own 'Operational Guidelines', which set out that funding will 'generally' not be provided for "swimming pools and spas, including hydrotherapy".[42]

In short, the AAT ruled in favour of the participant. In addition to *"not accept[ing] the categorization of this support as a 'swim spa'…"*, the AAT Member clarified that *"Ms Spires, however, falls into a sub-category of persons affected by a disability of which proximity to a public swimming pool does not resolve the issue of access to hydrotherapy. On this basis I consider that deviation from the Operational Guidelines is appropriate and warranted."*[43]

This issue, of the NDIA refusing to deviate from its own guidelines which are not binding legislative instruments and do not supplant the 'reasonable and necessary' criteria, is a repeated pattern.

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[38] *Spires and National Disability Insurance Agency [2023] AATA 1230* (17 May 2023)
[39] Ibid [50].
[40] Ibid [54], [116].
[41] Ibid [113].
[42] Ibid.
[43] Ibid [116].

In *KXHC and National Disability Insurance Agency [2024] AATA 2277 (4 July 2024)*, the AAT Member helpfully explained that:

> *'[19] The National Disability Insurance Scheme (Supports for Participants) Rules 2013 ("the Rules") made pursuant to subsection 35(1) of the NDIS Act provides further guidance with respect to the assessment of reasonable and necessary supports that will be funded. Pursuant to section 209 of the NDIS Act, the Rules are a legislative instrument and are therefore binding to the Tribunal…*
>
> *[20] The NDIS Operational Guidelines provide detailed policy to assist the NDIA in exercising its functions and powers in making decisions relating to the approval of specific types of supports in participant plans. Although this policy is not binding upon the Tribunal, it should be applied by the Tribunal unless it is inconsistent with the provisions of the NDIS Act: Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634.'*[44]

This is part of why it is extremely concerning that, in the 'pre-reading material' provided by NDIA on 16 July 2024, the NDIA noted its guidelines as one of the sources that it would reference and incorporate into the Draft Lists (which had not yet been completed at that time).[45]

In relation to hydrotherapy, this appears to be exactly what NDIA / DSS has gone ahead and done. Currently, the NDIA's 'operational guidelines' on 'home modifications' states that '*[w]e* ***generally*** *[emphasis added] don't fund…Swimming pools and spas including hydrotherapy*'.[46] Coincidently, in the list of 'Day-to-Day living costs' which are 'not NDIS supports', the heading of 'accommodation and household related' now contains a blanket exclusion for '*pools, pool heating and maintenance, spa baths, saunas, stream rooms*'.[47]

On top of this, any direct mention of hydrotherapy pools is completely absent from the draft lists. There is (i) no category of 'supports that are NDIS supports' with a description that clearly includes hydrotherapy pools, and (ii) using the wording of the draft list, any type of pool or spa is nevertheless excluded as a 'day-to-day living cost'.

This then leads directly into another issue regarding the construction of the draft lists, which is the unfairness and inequity between the construction of the lists for 'supports that are NDIS supports' and 'supports that are not NDIS supports'.

'Supports that are not 'NDIS supports' have lengthy, detailed descriptions which specifically exclude clear, expansive categories of items. E.g. *Standard household items (dishwasher, fridge, washing machine, nonmodified kitchen utensils and crockery, fire alarms, floor rugs, beanbags, lounges, standard mattresses, and bedding), replacement of appliances, including hot water services, solar panels, etc.'*.[48] This is only a single one of around 45 items described under the 'day-to-day living costs' category alone. Most other lists of 'supports that are not NDIS supports' are similarly expansive in scope.

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[44] *KXHC and National Disability Insurance Agency [2024] AATA 2277* (4 July 2024) [19-20].
[45] NDIA, 'Legislation reforms – NDIS Supports', 16 July 2024, 4.
[46] NDIA, 'Home modifications', 11 October 22,
[47] Above n 19, 11.
[48] Ibid.

In contrast, categories of 'supports that are NDIS supports' are consistently given brief, vague descriptions. Once again, hydrotherapy provides a good example of an affected support. Even though there are potentially categories of 'supports that are NDIS supports' which might conceivably allow funding for a hydrotherapy pool, no answer is forthcoming.

Assuming that a participant isn't immediately confused and disheartened by the 'pools and spas' exclusion in 'day-to-day living costs' (which is already a big assumption to make), they might first turn to the *'Exercise Physiology & Personal Well-being Activities'* category.[49] For an NDIS participant like the one in *Spires*, it so happened that the most reasonable and cost effective way to facilitate their ability to perform these types of activities was for a hydrotherapy pool to be installed in their own house.

However, the participant would very quickly encounter the issue that the category's description is nothing more than *'[p]hysical wellbeing activities to promote and encourage physical well-being, including exercise.'*[50] Nothing at all about the category clearly indicates whether (or not) it could be used to fund the installation and maintenance of home-based equipment/facilities in order to perform those exercise activities. Based on a strict reading of the words, one would tend to assume that it may not.

Next (again making assumptions that the participant knows where to look, and hasn't simply given up), the participant would probably turn to the *'home modification design and construction'* category.[51] At which point, the participant will see that they can only be funded for:

> *'Design and subsequent changes or modification to a participant's home, including installation of equipment or changes to building structures, fixture or fittings to enable participants to live as independently as possible or to live safely at home.'*

Does this include a hydrotherapy pool, or does it not? In actual fact, no kind of helpful clarity has been provided at all, and the description abjectly fails at any supposed goal of making it clear what participants can and cannot spend their funding on. Because of the lack of a category by category 'breakdown' within the Discussion Paper, FPDN has no real way of determining this (which is not to suggest that a longer Discussion Paper by itself would actually solve the issues with the construction of the Draft Lists).

Finally, if there was some reasons to have a higher degree of confidence that the hydrotherapy pool meets the description of 'Home Modification Design and Construction', there is still every reason to think that NDIA would then 'point back' to the exclusion of 'Pools, pool heating and maintenance, spa baths, saunas, steam rooms' in the 'day-to-day living costs' category. NDIA would almost certainly argue that the more specific exclusion 'trumps' the general description of 'Home Modification Design and Construction'. The participant would in turn need to argue that this inconsistency allows the NDIA/ AAT to 'read down' the exclusions for pools and spas, insofar as hydrotherapy pools are concerned.

[49] Ibid 5.
[50] Ibid.
[51] Ibid 6.

As far as FPDN can tell, the Draft Lists contain no effective mechanism for resolving a conflict when the exact same item could plausibly satisfy the descriptions of both (i) an item that is a daily living expense, and (ii) a category of specialist NDIS supports.

Overwhelmingly, these new categories of 'supports that are NDIS supports' are no less 'up for interpretation' than the arrangements under the current NDIS. They aren't even something like 'novel' information which the current NDIS does not facilitate access to. More often than not, the new categories read like bastardized versions of information that a current NDIS participant could readily obtain from (i) any of the numerous existing NDIA Guidelines (which are published on the NDIS website)--- such as those for 'assistive technology', 'home modifications', and 'social and recreation supports', or (ii) the supplementary guidance material published on the NDIS website, such as the 'What does NDIS fund?' page,[52] which points to a drop down menu that sets out general categories of items (e.g. 'assistive technologies' and 'home and living supports'), and then can be further broken down into even more specific items (e.g. 'funding for vehicles' and 'larger bed sizes').

In this respect, the Draft lists are not providing anything of value. On the contrary, they tend to be less detailed than the existing operational guidelines and rely on imprecise language which can only increase confusion for participants. Much of this probably owes to their brevity and the rushed timeline for their creation.

Furthermore, this alone is not the only (or even primary) reason for their ineffectiveness. The heart of the issue remains that, wherever the Draft Lists leave any doubt or confusion, they do not contain a coherent, principles-based approach which can be used to resolve the uncertainty. This was never a 'bug' with the criteria for 'reasonable and necessary supports; it is a feature, and without it the entire concept of flexible, individualized NDIS supports will fall apart.

FPDN suspects that DSS's answer to these critiques might be that, in order to resolve any issues, a participant should turn to one of the available 'carve outs', such as the 'carve outs that may be considered NDIS supports for certain participants' for 'day-to-day living costs'.[53] FPDN will address the complete inadequacy of those below.

The issues with 'carve outs' and 'day-to-day living costs' in the Draft Lists

Fundamental issues with the design of the category of 'day-to-day living costs'

Next, FPDN wishes to address any potential response from DSS that any of the issues with supports addressed above (such as in relation to menstrual products, fast food, hydrotherapy, respite, and 'standard household items) would be addressed by any of the various 'carve outs' set out within the Draft List of 'supports that are not NDIS supports'. If this is DSS's current plan, it is not going to work.

The category of 'day-to-day living costs' is by far the most affected area of the Draft Lists. This is due to a combination of (i) the sheer number of items that the category excludes, which are spread out over 45

[52] NDIA, 'What does NDIS fund?', accessed 24 August 2024.
[53] Above n 19, 13.

sets of dot points (each containing multiple items),[54] and (ii) the nature of 'day-to-day living costs' as a difficult to define, unique exclusion which can overlap with a person's legitimate support needs.

As an example, take 'menstrual products' (which were discussed earlier in this submission). The inherent crux of the issue is that the items listed in 'day-to-day living costs' are, more so than anything else, consumer/ 'mainstream' products and services that will sometimes not be related to a person's disability needs and will not be an NDIS support. However, for different participants in different situations, the exact same product/service will be a disability related support in certain circumstances. The issue is one of 'context', which is incredibly difficult to represent in a 'set list' of exclusions.

This is not to say that other categories, such as 'mainstream - health' are not also relevant and affected; only that 'day-to-day living costs' is a 'special case.' Amongst the five different 'carve outs', the exception for *'additional living costs that are incurred by a participant solely and directly as a result of their disability support needs'* must be distinguished,[55] as it appears to be DSS's attempt to provide a sort of 'catch all' for nonstandard situations, yet does not even come close to functioning in such a way:

Attempting to use the 'carve out' for 'additional living costs that are incurred by a participant solely and directly as a result of their disability support needs' as a way of resolving inconsistences and confusion

Situations will arise where, at the same time, an item appears to match the Draft List's descriptions of both a daily living expense, and a category of specialist NDIS supports, yet the Draft Lists contain no clear indication as to what should happen.

For example, something which should be as straightforward as a participant trying to seek funding for a specialized battery, such as hearing aid batteries or a wheelchair battery'. 'Batteries' are listed as 'accommodation and household related' 'day-to-day living costs'.[56] A participant seeking to claim either of these things (under the categories of 'supports that are NDIS supports' of 'hearing equipment' and 'personal mobility equipment') is at an impasse.[57]

A participant might (reasonably) think that, in this situation, the issue can be resolved by simply establishing that the specialist battery is not actually a 'day-to-day living cost', and that it is covered by the 'additional living expenses' 'carve out'. However, this is immediately problematic, as these batteries are not actually a living expense; they are specialist items which a person with disability would not typically purchase.

Common sense would dictate that DSS must have intended that anything in the list of 'day-to-day living cost' items must be able to be affected by this 'carve out' from the same category. However, if this is the case, it means that, in order to use the Draft List 'correctly', the participant has to advance an argument founded upon trying to classify these particular batteries as something that they are clearly not. At the

[54] Ibid 11-13.
[55] Ibid 13.
[56] Ibid 11.
[57] Ibid 6, 8.

absolute best, this is unacceptably confusing and counterintuitive. At worst, the ‘carve out’ is impossible to use in these types of situations.

Presumably, the only time that the ‘additional living costs’ ‘carve out’ would actually assist such a participant is if they were seeking funding for additional batteries of a standard type (e.g. AA, AAA) that were required for disability related equipment. However, even in this case, although the ‘additional living costs’ carve out would probably function ‘well enough’ in this instance, the fact that the participant would need to rely on it really only draws attention to the additional problem that in creating the ‘carve outs’, DSS has taken inspiration from Rule 5.2 of the current NDIS (Supports for Participants) Rules, yet only recreated half of the relevant rule for ‘day-to-day living costs’:

> *5.2. The day-to-day living costs referred to in paragraph 5.1(d) do not include the following (which may be funded under the NDIS if they relate to reasonable and necessary supports):*
>
> > *(a) additional living costs that are incurred by a participant solely and directly as a result of their disability support needs;*
> >
> > *(b) costs that are ancillary to another support that is funded or provided under the participant’s plan, and which the participant would not otherwise incur.*[58]

Any equivalent of Rule 5.2(b) is absent from the Draft Lists. In truth, a participant who requires additional ‘standard’ batteries specifically for a piece of equipment that falls within a category of ‘support that is an NDIS support’ (e.g. ‘assistive products for household tasks’) has that requirement as an ancillary consequence of their funded supports. From the outset, the list should definitely have contained some equivalent of Rule 5.2(b). However, as will be addressed immediately below, rather than now adding it in as another stand-alone ‘carve out’, the better alternative is to ‘roll it into’ an overarching principles-based test that applies to every category.

The inability of participants to meet the harsh threshold requirements of proving ‘additional living costs that are incurred by a participant solely and directly as a result of their disability support needs’

A predominant issue with the way in which the Draft Lists have been crafted is that, despite ‘day-to-day living costs’ being overwhelming the largest set of ‘supports that are not NDIS supports’, it is evident that ‘additional living costs’ (which is by far and away the most applicable ‘carve out’) will be interpreted in a way that has little meaningful applications for participants, with threshold requirements bordering on the level of unreasonable and oppressive.

It was noted above that the ‘additional living costs’ ‘carve out’ has clearly been derived from Rule 5.2(a). However, in the Draft Lists, ‘day-to-day living costs’ is little more than the name/title of a category, followed by a list of items which have been deemed to fall under that heading. This is a completely different context from the current NDIS (Supports for Participants) Rules, where (under Rule 5.1(d)) ‘day-to-day living costs’ are approached as a concept which does not exist within and vacuum and is subject to interpretation:

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[58] *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth), Rule 5.2.

'5.1 A support will not be provided or funded under the NDIS if...
(d) it relates to day-to-day living costs (for example, rent, groceries and utility fees) that are not attributable to a participant's disability support needs.'[59]

This is far more than a mere difference of 'layout'. This can be seen in *McKenzie and National Disability Insurance Agency [2019] AATA 3275 (5 September 2019)*,[60] where the participant (with Multiple Sclerosis) had funding approved for the replacement of an air conditioner. Of course, the NDIA argued that this was not fundable and was a 'day-to-day living cost'. The AAT Member had this to say:

[69] As to the argument posed by the Respondent that the replacement of air-conditioning is a "day-to-day living cost", I consider the examples given in rule 5.1(d) of rent, groceries and utility fees, suggest regular and ongoing outgoings of the type incurred by all householders. I do not therefore consider the replacement of an air-conditioning system, which has the nature of a one-off, or at most, several times in a lifetime, cost to be in the same category. To the extent to which air-conditioning is, as submitted by the Respondent in their written submissions, "an ordinary cost of Mr McKenzie and his wife of owning the home" and "ubiquitous in modern houses in Queensland, especially Far North Queensland", I do not accept that it flows from that that air-conditioning is a day-to-day living cost. In this regard I respectfully agree with the reasoning of Deputy President Constance in Milburn v National Disability Insurance Agency when considering gym membership. In that case the Deputy President said "In my view, it is in the nature of discretionary spending for those who do not suffer from a disability. On the basis of Ms Curdie-Evans' evidence, I am satisfied that, in Ms Milburn's case, it is attributable to her support needs." Likewise, in this case, I am of the view that air-conditioning 'is in the nature of discretionary spending for those who do not suffer from a disability'. However, in Mr McKenzie's case I am satisfied that the replacement of the air-conditioning system in his home relates to Mr McKenzie's need for support.[61]

Amongst other things, FPDN wishes to draw the utmost attention to the above explanation of 'discretionary spending for those who do not suffer from disability'. The idea that, for example, the replacement of an air conditioner must be a 'day-to-day living expense' (because persons without disability would also view it as a desirable purchase to make) is, within the greater context of the Current NDIS Act, incorrect. Even the NDIS (Supports for Participants) Rules are distinctly focused on examples of 'day-to-day living costs' which are regular expenses (e.g. 'rent, groceries and utility fees').

The principles of the NDIS are broad enough in scope to recognize that the division between 'day-to-day living costs' and 'fundable support' cannot be applied in that harsh of a fashion. In reality, the presence of disability in a person's life is something which holistically affects every aspect of their life; a

[59] Ibid Rule 5.1.
[60] McKenzie and National Disability Insurance Agency [2019] AATA 3275 (5 September 2019)
[61] Ibid [69].

participant can be in a situation where large 'discretionary purchases' are simply not something they are typically able to consider, and this is attributable to their disability.

In stark contrast, under the 'day-to-day living costs' category of the Draft Lists, an air conditioner is almost certainly an 'support that is not an NDIS support', as a 'standard household item'.[62] The Draft Lists do the same to countless other items which, in the right circumstances for certain participants, could also be in the nature of 'discretionary spending for those who do not suffer from disability'.

To DSS's credit, the Draft Lists themselves appear to have done a little better in one specific area, by including the 'carve out' for '*additional costs to upgrade standard household items to household items that include accessibility features*'.[63] Note that the 'include accessibility features' restriction would, for example, still exclude things like air conditioners. Ultimately, whilst the inclusion of this individual 'carve out' is positive, it does not solve the issue at large.

In the grand scheme of things, individual 'carve outs' barely 'scratch the surface'. The sheer number of different needs that a participant can have due to their disability, in combination with the sheer number of different circumstances which a participant can find themselves in (both as part of their 'anticipated' daily lives and during unforeseen events) creates an effectively infinite number of permutations which are impossible to completely foresee, yet alone encompass within a few 'carve outs' as part of the Draft Lists.

Given the NDIA's history of taking an increasingly adversarial approach to the determination of supports (discussed further below), First Nations persons with disability simply cannot take the risk, and trust that the NDIA will look at 'carve outs' which are described in a single sentence, and then apply them in a way that both recognizes the nebulous nature of 'day-to 'day living expenses' and is fair to persons with disability.

The NDIA already has enough difficulties in dealing with 'day-to-day living costs' in a consistent manner under the Current NDIS Act framework, which ensure that all of the NDIS (Supports for Participants) Rules, including Rule 5.1 and Rule 5.2, are all ultimately contained within a document that, from the absolute outset (at Rule 1.1), makes it clear that '*<u>[t]hese Rules are about assessment and determination of the reasonable and necessary supports that will be funded</u> [emphasis added] and the general supports that will be provided for participants under the NDIS.*'[64]

'At the end of the day', everything that has been discussed above is supposed to come back to the overarching criteria for 'reasonable and necessary supports', and that the Draft Lists do not allow for this is a fatal design flaw.

For completeness, FPDN briefly wishes to address the fact that, for the only time in the entire Draft List, the first sentence of the description of the 'carve outs' for 'day-to-day living costs', does actually make a single use of the of the phrase 'reasonable and necessary supports', being that '*[t]he following day to*

[62] Above n 19, 11.
[63] Ibid 13.
[64] *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth), Rule 1.1.

day living costs may be funded under the NDIS if they relate to reasonable and necessary supports:...'.[65] For all intents and purposes, FPDN has disregarded this. This is because (i) without setting out the principles which support it, the phrase effectively does nothing within the Draft Lists, and (ii) in any event, the principles would need to apply to the determination of every support, not just a single set of 'carve outs'.

Incidental benefits of redesigning the 'carve outs'

Redesigning the Draft Lists of 'supports that are NDIS supports' and 'supports that are not NDIS' in a manner that is subject to an 'overriding' principles-based test (i.e. the equivalent of the 'reasonable and necessary criteria, supplemented by the equivalents of relevant NDIS Rules such as Rule 5.1 and 5.2) would be a viable pathway to granting participants additional clarity about the types of supports which can and cannot be funded.

At the same time, it would allow DSS to greatly simplify and 'prune' the lists of 'carve outs' from the list of 'supports that are not NDIS supports', such that any nebulous and confusing 'carve outs' can simply be removed. The principles-based criteria will serve as a safety measure for unexpected, unusual and highly individual situations.

DSS can still include 'carve outs' in the list of 'supports that are not NDIS supports', but will then be free to do so for specific and notable items that:

i. would otherwise be 'captured' by the description of a 'support that is not an NDIS support';
ii. don't belong/ fit in a category of 'supports that are NDIS supports;' and
iii. DSS needs to clarify will generally still be funded.

An example of what might be added is 'fast food in unexpected circumstances where a support worker is unavailable to assist with meal preparation'.

As for 'carve outs' for the list of 'supports that are NDIS supports', those could also be simplified. References to 'principles' within the 'carve outs' themselves, DSS would still be free to focus the 'carve outs' on fairly specific items that would otherwise match the description of a category, but for which DSS needs to clarify will generally not be funded. E.g. Retaining the 'carve out' of '[g]*eneral hearing services or supports otherwise provided by Hearing Australia*'.[66]

Ideally, it would also be better to rename all of these 'carve outs that are not NDIS supports' to something like 'carve outs that are not usually NDIS supports for most participants'. This will then parallel the 'carve outs that may be considered NDIS supports for certain participants'.

[65] Above n 19, 13.
[66] Ibid 6.

Other concerns with the Draft Lists

Dangers of the 'substitution rule'

Whilst not explicitly part of the Draft Lists, FPDN wishes to briefly address the issue of the 'substitution rule', which was inserted into Section 10 of the NDIS Bill as a last-minute amendment (via sheet SK118 revised).[67]

FPDN's position is that the existence of the 'substitution rule' should have zero bearing on DSS's processes for constructing and improving the Draft Lists. FPDN is deeply concerned about the potential danger of NDIA / DSS coming to view the 'substitution rule' as a remedy for any issues which may arise with the construction of the Draft Lists.

The substitution rule only gives the CEO a limited and discretionary power to allow a participant to replace a support with another, cheaper alternative item that would not otherwise be funded and would fulfil the same needs, and only where that participant is already entitled to some form of support from the Draft Lists in the first place.

At most, the substitution rule should only be considered as a 'backup' power which operates alongside Draft Lifts which are already coherent and comprehensive in their ability to cover any supports which an NDIS participants could legitimately expect to obtain.

In almost all circumstances, participants should not have any need to consider making a special application. This is crucial, given that the CEO can simply refuse a special application and that would not be a reviewable decision. The 'substitution rule' is absolutely not an alternative to carefully designing the Draft Lists.

Concerns about the conduct of the NDIA following disputes about the status of a support

FPDN also has serious concerns about the consequences of the rapid introduction of the Draft Lists, both in terms of (i) the inevitable disagreements that will arise between participants and the NDIS regarding the interpretation of the Draft Lists, and (ii) how the NDIA will go about resolving these disputes.

For AAT matters (soon to be ART matters), the NDIA (including the legal firms which are routinely hired out to represent the NDIA) are already known to fall short of model litigant obligations. There are significant indicators (corroborated by highly qualified and experienced entities such as Legal Aid NSW) of the NDIA having adopted an 'increasingly adversarial approach' towards all AAT matters.[68] This includes refusing to settle matters or make reasonable concessions, persisting with technical arguments with little prospects of success, failing to provide documentation, consistently failing to meet deadlines, and harassing participants for 'more evidence', often in the form of completely unnecessary and

[67] *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (Cth) sheet SK118 Revised.

[68] Legal Aid New South Wales, 'Senate Legal and Constitutional Affairs Reference Committee's inquiry into the performance and integrity of Australia's administrative review system', 30 November 2021, 6.

expensive medical reports which the NDIA will not pay for. The reports are a source of trauma and too often go on to provide little, if any, assistance to the AAT member.

To add 'insult to injury', the current form of the Draft Lists will also place all NDIS participants at an even more significant (if not insurmountable) disadvantage during any AAT disputes centred upon whether a particular support can be funded. This is because, in a majority of cases, the AAT will no longer have the ability to rely upon the 'reasonable and necessary' criteria in order to conduct their own wholistic assessment of the participant's need for the support, but will instead for the most part be restricted to arguments about whether a support 'matches' the description for a category or not.

Within the Senate Legal and Constitutional Affairs References Committee's own findings and recommendations on the performance and integrity of Australia's administrative review system in 2022, it was acknowledged that:

> *'[T]he fact that the AAT is setting aside the decisions of departments at consistently high levels indicates problems with the decision-making process in departments themselves. This is exemplified by the National Disability Insurance Scheme (NDIS) Division, where more than half of the relevant agency's decisions have been changed by the Tribunal.*
>
> *The caseload at the AAT will not diminish while departments and agencies continue to make decisions which are not the correct or preferred ones.'*[69]

Since that time, the AAT NDIS division has consistently been burdened nationwide with (i) an ever increasing number of total NDIS appeals,[70] and (ii) median finalisation times which appear to be far closer to 20 weeks,[71] as opposed to the aspirational goal of 60 days.

If the Draft Lists are implemented in their current state, FPDN considers that the situation can only get worse, and that First Nations persons with disability will suffer the most. First Nations persons with a disability routinely face a combination of racism, ablism, and a historical lack of opportunities, resulting in a unique experience of intersectional discrimination at the hands of government systems and institutions key. FPDN has little confidence that the NDIA will alter their litigation strategies following the implementation of the Draft Lists. Rather, all evidence tends to suggest that the NDIA will instead be emboldened.

Constitutional limitations

Lastly, during what little consultation has been undertaken, DROs (including FPDN) have attempted to seek answers from both NDIA and DSS as to why any transitional measure could not also incorporate the principles-based test for 'reasonable and necessary' supports from Section 34 of the Current NDIS Act.

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[69] Senate Legal and Constitutional Affairs References Committee, 'The performance and integrity of Australia's administrative review system', March 2022, [7.21-7.22].
[70] Ibid [3.69-3.70].
[71] Ibid 20.

To date, the NDIA has not engaged with these lines of questioning at length. DSS has also not provided any material addressing this issue. At best, during the 'consultation session' on 17 July 2024, NDIA made a relatively threadbare reply to the effect that it considered that the Draft lists are required in order for the legislation to be constitutionally compliant, and that these limitations would prevent any reliance on a principles-based approach to underpin the NDIS

FPDN must stress that, fundamentally, any position to the effect that NDIS legislation which relies on a principles-based test for determining supports cannot be constitutionally supported, is in reality also a position that the NDIS scheme was unconstitutional upon its introduction and has remained so throughout its entire existence. In that time, the same Government which originally introduced the scheme has, for the last 11 years, never said or done anything about this would-be disaster. Additionally, some explanation would be required as to why, despite the incredibly novel, contentious and troubled rollout of the NDIS, no interested litigant has ever raised serious issues about the constitutional validity of the scheme.

Quite frankly, this suggestion beggars belief and verges upon the completely absurd. If DSS wishes to implement its Draft Lists in their current form, then FPDN encourages DSS to explore genuine reasons as to why its chosen approach is justified, but this surely cannot be one of them. FPDN assumes that the position/argument has been sourced from the Government's brief explanation in the Revised Explanatory Memorandum for the NDIS Bill to the effect that, to have a constitutional basis under the external affairs power (s 51 (xxix)), a 'positive definition' of NDIS supports is required.[72] This position is extremely puzzling and concerning.

Additionally, how does DSS reconcile its stance with the fact the Draft Lists themselves contain numerous 'carve outs that may be considered NDIS supports for certain participants' which (despite their complete inadequacy in scope) also require a level of interpretation which can also only be described as principles-based? E.g. '*Additional living costs <u>that are incurred by a participant solely and directly as a result of their disability support needs</u>*'.[73] As was discussed above, the first sentence of the description of the 'carve outs' for 'day-to-day living expenses' even tries to use the phrase 'reasonable and necessary' once (without allowing for any of the criteria that are required for it to function).

Moreover, FPDN cannot locate any feasible grounds for contending that a principles-based test for determining NDIS supports exceeds the Commonwealth's constitutional powers. As mentioned above, despite the incredibly innovative and contentious launch of the current NDIS, its constitutional validity has never come under any serious challenge in over 10 years.

This is not a partisan issue, and FPDN acknowledges that this submission is not the ideal venue to advance detailed constitutional arguments. Therefore, FPDN would instead like to simply point DSS towards what is perhaps one of the most relevant and detailed resource on this exact topic. As part of the DRC's own research program, it commissioned a *'Research Report – Persons with Disability and the*

[72] National Disability Insurance Scheme Amendment (Getting the NDIS back on track No.1) Bill 2024 (Cth), 2-4.
[73] Above n 19, 13.

Australian Constitution', co-authored by three different subject matter experts.[74] Recounting the full details of the research report would go beyond this submission, but (amongst other things) it was unambiguously stated that:

> *'There is no reason to doubt that the relevant provisions of the Disability Discrimination Act 1992 (Cth) and National Disability Insurance Scheme Act 2013 (Cth) could be supported by the external affairs power as an implementation of the Convention on the Rights of Persons with Disabilities and other relevant treaties to which Australia is party.'*[75]

The *Convention on the Rights of Persons with Disabilities 2006* ('CRPD') does commit the Australian Government to sufficiently specific obligations regarding persons with disability.[76] The obligations within are clearly more than aspirational, and no serious argument has ever been pursued that Section 34 (or any other part of the Current NDIS Act) is not reasonably appropriate and adapted to the implementation of the CRPD (to say nothing of other relevant sources of international law, such as the *International Covenant on Economic, Social and Cultural Rights 1965*).[77]

The external affairs power (s 51(xxix)) is clearly enlivened and does not place strict or formulaic requirements on the Commonwealth's bona fide attempts to comply with its international obligations. Historically, the Commonwealth's ability to enact the external affairs power has been interpreted quite liberally,[78] and is certainly not so narrow that the Commonwealth's exercise of power would be invalid because it did not choose to commit itself to some arbitrary list of permissible supports --- a type of restriction which also has no basis in the CRPD.

Even outside of the external affairs power, the research report also identifies numerous other powers which the Commonwealth could reasonably rely upon in order to justify exercises of power concerning disability (including the NDIS Act).[79] Notably, the grants power (s 96) gives the Commonwealth immense powers to place terms upon tied funding which is accepted by the states. This is directly relevant to the NDIS, under which states agree to accept tied funding under the condition that it is then redirected (by the states) to the NDIA, prior to the states receiving partial reimbursement from the Disability Care Australia Fund in exchange for their own responsibilities under the NDIS.[80]

[74] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – Matthew Stubbs, Adam Webster and John Williams, 'Research Report – Persons with Disability and the Australian Constitution', October 2020.
[75] Ibid 27.
[76] United Nations, 'Convention on the Rights of Persons with Disabilities 2006'.
[77] United Nations, 'International Covenant on Economic, Social and Cultural Rights 1966'.
[78] Above n 74, 28-29.
[79] Ibid 29-34. See in particular, the discussions about the grants power (s 96) and the executive power (s 61) (insofar as it applies to the results of intergovernmental agreements).
[80] Ibid 32-33.

Conclusion

Thank you for your time and consideration of the issues, opportunities and recommendations we have provided throughout the above submission. We always welcome the opportunity to represent the concerns of First Nations people with disability. However, it should be noted that given the short time period of time for consideration our commentary favours the shared concerns of the disability community and representative organisations that we know will have a disproportionate impact on First Nations people with disability.

With respect,

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