

Submission to Department of Social Services: Consultation on Draft Lists of NDIS supports

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.



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Recommendations

Recommendation 1 – The transitional rules not impose new restrictions on the range of supports the NDIS will fund

These transitional rules must not prevent the NDIS from funding supports it currently funds. Any new determinations to exclude supports from the NDIS should be left to the development of the NDIS Rules that will define ‘NDIS supports’, which will be subject to a full co-design process.

Recommendation 2 – Participants with approved funding for ‘reasonable and necessary’ supports not be prevented from spending that funding

Proposed section 46 of the NDIS Bill should be amended to insert a grandfathering provision to allow NDIS amounts to be spent where a support has been found to be reasonable and necessary for a participant and funding for that support is already included in the participant’s plan.

Recommendation 3 – The transitional rules not impose blanket exclusions

The transitional rules should not impose blanket exclusions for funding types of supports that may be necessary to address participants’ disability needs.

Recommendation 4 – The ‘substitution’ process creates a rights-based mechanism for participants

The Government’s proposed substitution process should be reformulated to:

- not be dependent on prescribing supports in NDIS Rules (per proposed subsection 10(6)(a));*
- not impose mandatory conditions (per proposed subsection 10(6)(d)) for a substitution to be approved and instead assess applications based on relevant factors;*
- require the CEO to approve the substitution if relevant factors are met; and*
- ensure participants have a right to seek review of the CEO’s determination not to approve a substitution.*

Recommendation 5 – Categories of ‘NDIS supports’ be clarified

The intended purpose, scope and description of categories of ‘NDIS supports’ should be clearer for participants to have clarity and certainty.

Recommendation 6 – Threshold requirements be avoided

Threshold requirements for ‘NDIS supports’ should be avoided. If a threshold requirement is necessary, guidance must be provided so it is sufficiently clear to participants how the threshold will be evaluated and satisfied.

Recommendation 7 – References to ‘specialist’ and ‘disability-specific’ supports be removed

References to ‘specialist’ and ‘disability-specific’ supports should be removed. Instead of requiring supports to be specialised in nature, the supports should address ‘disability-related needs’.

Recommendation 8 – Lists of ‘non-NDIS supports’ be removed

The lists of ‘non-NDIS supports’ should be removed. Where the specification of ‘non-NDIS supports’ are needed, it should be included as a carve out to the relevant category of ‘NDIS support’ list and framed as narrowly as possible.

Recommendation 9 – Lists of ‘NDIS supports’ be grouped by subject matter

Lists of ‘NDIS supports’ should be grouped solely by subject matter, such that all stipulations as to a type of support can be found together in the lists.

Recommendation 10 – The NDIS fund the purchase, training and range of costs of maintaining an assistance animal

The reference to ‘accredited assistance animal provider’ is inconsistent with the DDA and should be removed. The NDIS should fund the purchase, training and costs of maintaining an assistance animal (including vet services, pet food, vaccinations, flea and worm treatments, grooming, pet insurance, ongoing training costs and any costs to obtain/maintain assistance animal status).

Recommendation 11 – Define categories of ‘NDIS supports’ and carve outs correctly

Categories of ‘NDIS supports’ and any appropriate carve outs should be redrafted and defined correctly to avoid being misleading and legally inaccurate.

Recommendation 12 – Mainstream supports excluded under the NDIS

The interface between ‘NDIS supports’ and mainstream supports should:

- be set out in a separate section of the transitional rule, instead of under ‘non-NDIS supports’;*
- not exclude supports that have previously been the responsibility of the NDIS;*
- only exclude supports from the NDIS where state and territory services/programs are currently available to people with disability; and*
- make clear how a participant accesses the mainstream support ie the specific state or territory service/program providing that support.*

1. Introduction

The Justice and Equity Centre ('JEC'), formerly the Public Interest Advocacy Centre, welcomes the opportunity to make this submission to the Department of Social Services ('DSS') consultation on draft lists of National Disability Insurance Scheme ('NDIS' or 'Scheme') supports.

The JEC's work focuses on tackling barriers to justice and fairness experienced by marginalised communities. We have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability.

Since July 2019, we have used our legal and policy expertise to advocate for better outcomes under the NDIS. We do this in close consultation with national peak disability rights organisations, as well as legal and advocacy groups with similar expertise and reform concerns. This submission draws on our direct experience representing applicants in external reviews of decisions of the National Disability Insurance Agency ('NDIA' or 'Agency') and our experience in policy development related to the NDIS.

We, and many in the disability community, welcomed the removal of the Applied Principles and Tables of Support ('APTOS') as a transitional measure from the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Bill 2024 ('Bill') due to the serious legal and policy problems they would have created. It is vital the transitional rules defining NDIS supports do not replicate these same concerns, and protect the needs and priorities of people with disability.

Given this, we are concerned the disability community was initially provided with only two weeks to consult on the draft lists. While we recognise transitional rules need to be developed and in place upon commencement of the Bill, there needs to be genuine consultation with the disability community. This is even more important, where the introduction of these lists as the basis for defining NDIS supports will significantly change how participants access disability-related supports through the Scheme.

In relation to the draft lists themselves, we make two broad comments. First, the draft lists take an unduly restrictive approach to defining NDIS supports – this is not in the interests of participants. Second, these lists as drafted would not provide the much-needed clarity to participants about what they can spend their funding on. Our submission elaborates on these two broad points and addresses issues with drafting and policy decisions as reflected in the draft lists.

In this submission we use the terms 'NDIS supports' for items in the categories listed under 'Supports that are "NDIS supports"' and 'non-NDIS supports' for items in the categories listed under 'Supports that are not "NDIS supports"' or otherwise carved out.

2. Participants with approved funding for supports that would be 'non-NDIS supports'

Given the transitional nature of these lists, and the limited time available for their development and consultation with the disability community, they should not be making significant substantive

changes to the range of supports the NDIS currently funds. However, these draft lists would enact significant shifts, particularly in ruling out a number of supports that have previously been funded by the NDIS.

Several supports currently recognised as ‘reasonable and necessary’ to meet disability needs for some participants and/or found as such in decisions of the AAT or Federal Court (including gym memberships, vehicles, sex work¹) are listed as ‘non-NDIS supports’.

This approach will be highly disruptive for participants who are currently funded for these supports. In some cases, participants will have structured their lives and affairs around the availability of these supports from the NDIS. In other cases, participants will already have been allocated funding for such supports in their existing NDIS plans, and will seek to spend those funds; however, in doing so, they may breach the prohibition in the Bill’s proposed subsection 46(1) against spending NDIS amounts on things that are ‘non-NDIS supports’. This breach could have serious adverse consequences for the participant, including the raising of a debt against them, loss of preferred plan management arrangements, or sequestration of future flexible funding in a new framework plan. Such consequences would be highly unfair.

We recommend these transitional lists avoid imposing new restrictions upon the range of supports the NDIS will fund. This will require engagement with the disability community to understand how participants currently use their funding in practice, and removing from the draft lists ‘non-NDIS supports’ which have been funded (including pursuant to decisions of the AAT and courts, as referred to above).

Further, either the transitional lists or the Bill must include ‘grandfathering’ provisions that permit participants with funding already allocated in their NDIS plans to spend that funding on the intended supports.

Recommendation 1 – The transitional rules not impose new restrictions on the range of supports the NDIS will fund

These transitional rules must not prevent the NDIS from funding supports it currently funds. Any new determinations to exclude supports from the NDIS should be left to the development of the NDIS Rules that will define ‘NDIS supports’, which will be subject to a full co-design process.

Recommendation 2 – Participants with approved funding for ‘reasonable and necessary’ supports not be prevented from spending that funding

Proposed section 46 of the NDIS Bill should be amended to insert a grandfathering provision to allow NDIS amounts to be spent where a support has been found to be reasonable and necessary for a participant and funding for that support is already included in the participant’s plan.

¹ NDIA v WRMF [2020] FCAFC 79.

3. Exclusion of supports undermines flexibility

We have previously noted our concern that the potential blanket exclusion of items, without reference to the specific needs of participants, could:

- significantly limit choice and control;
- prevent participants from accessing vital disability-related supports; and
- introduce inefficiencies in the NDIS.²

This remains our view. We are concerned the draft lists take an unduly restrictive approach to categories and types of supports, as outlined below.

This approach is also likely to introduce inefficiencies – where a participant is prevented from spending their funding on their chosen supports to meet a disability-related need, the need will still remain. Participants would likely be compelled to spend their funding on a support included in the ‘NDIS support’ list to meet the same need, which may be more costly, less efficient, and less effective than their preferred solution.

For example, if a participant is prevented from purchasing a standard household item that would allow them to perform household tasks they could not otherwise perform as a result of their disability, that participant will instead spend their funds on support workers to help them with this task each time it arises.

Recommendation 3 – The transitional rules not impose blanket exclusions

The transitional rules should not impose blanket exclusions for funding types of supports that may be necessary to address participants’ disability needs.

3.1 The proposed ‘substitution’ process is not an adequate response to blanket exclusions

We note the Government is proposing to introduce a ‘limited “substitution” process’ by which a participant may apply to the CEO to have a support that would not otherwise be an ‘NDIS support’ considered an NDIS support for them.³ While this mechanism may assist some participants, the proposed ‘substitution’ process does not resolve the concerns we outline in this submission.

For a substitution to be approved, a participant must meet a high threshold. First, the support would need to be prescribed in NDIS Rules (yet to be made). Second, the CEO must be satisfied of numerous mandatory listed conditions, including potential other unknown conditions to be specified in NDIS Rules. There may be circumstances which do not meet all these conditions but

² Public Interest Advocacy Centre, Submission to *Senate Community Affairs Legislation Committee National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (17 May 2024) <https://jec.org.au/wp-content/uploads/2024/05/24.05.17-Submission-to-Senate-Community-Affairs-Legislation-Committee.pdf>, 22.

³ Australian Government, Amendment sheet SK118, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, item 1.

where a support is nonetheless appropriate – for example, when a ‘non-NDIS support’ may be nominally more costly than an ‘NDIS support’ but would clearly provide a better outcome for the participant. At a minimum, we suggest a re-structure of the substitution provision to ensure cost of a ‘non-NDIS support’ does not present a technical barrier.

Third, even if all conditions are met, the CEO still retains a discretion whether to approve a substitution. This does not align with the objects and guiding principles of the NDIS Act which specifically support choice in the delivery of supports. The substitution process should create a rights-based mechanism for participants – if relevant factors are met, the CEO ‘must’ approve the substitution.

Fourth, the participant is required to provide evidence to ‘clearly demonstrate that the substituted support would be equally or more cost effective *and* equally or more beneficial to the participant’.⁴ The NDIS Review heard overwhelmingly that the process of participants obtaining reports can lead to inconsistent outcomes, as well as being costly and inequitable for participants without the ability to obtain such reports. Therefore, as part of the co-design of the needs assessment process, consideration should be given to whether it is appropriate for the needs assessment to consider the benefits of any ‘non-NDIS supports’ for the participant.

Additionally, it is not clear whether the CEO’s determination under proposed subsection 10(6) of the Bill would be reviewable in relation to old and new framework plans. This is in part because it is not clear at what stage of the planning or funding process the application/determination would be made. Given an adverse CEO determination squarely impacts a participant’s rights, there must be an opportunity for participants to seek review of the CEO’s determination not to approve a substitution.

Recommendation 4 – The ‘substitution’ process creates a rights-based mechanism for participants

The Government’s proposed substitution process should be reformulated to:

- *not be dependent on prescribing supports in NDIS Rules (per proposed subsection 10(6)(a));*
- *not impose mandatory conditions (per proposed subsection 10(6)(d)) for a substitution to be approved and instead assess applications based on relevant factors;*
- *require the CEO to approve the substitution if relevant factors are met; and*
- *ensure participants have a right to seek review of the CEO’s determination not to approve a substitution.*

⁴ Supplementary Explanatory Memorandum to Amendment Sheet SK118, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, 3 [emphasis in original].

4. Approach to ‘NDIS supports’

4.1 Chilling effect on participants

In many places, the terms and scope of the draft lists are unclear, as we outline below. This is concerning as it denies participants necessary certainty to obtain their disability-related supports. Moreover, the lack of certainty will have chilling effects on participants, given the potential consequences for them if they were to (even inadvertently) spend their funding on ‘non-NDIS supports’ (ie changes to their plan management preferences, raising of debts, etc). Accordingly, we urge that the drafting issues we identify below are addressed before the lists are implemented.

Recommendation 5 – Categories of ‘NDIS supports’ be clarified

The intended purpose, scope and description of categories of ‘NDIS supports’ should be clearer for participants to have clarity and certainty.

4.2 Threshold requirements

Several categories provide a support will only be an ‘NDIS support’ if a certain threshold requirement is met.

For example, the category of ‘Community Nursing Care’ provides certain types of care can be provided for ‘participants who have high care needs requiring a high level of skill’. In this example, it is unclear how it will be determined whether a participant has high care needs, or whether a high level of skill is required. If these requirements are met, the support can be funded; if they are not met, it is prohibited. The lack of clarity means a participant cannot be sure how to meet the conditions or whether the conditions are met in their case, and thus contributes to the chilling effects described above.

Accordingly, given the uncertainty created by the threshold requirements and the limitations it imposes on participants, we recommend these threshold requirements be avoided wherever possible. If a threshold requirement is necessary, guidance must be provided so it is sufficiently clear to participants how the threshold will be satisfied.

Recommendation 6 – Threshold requirements be avoided

Threshold requirements for ‘NDIS supports’ should be avoided. If a threshold requirement is necessary, guidance must be provided so it is sufficiently clear to participants how the threshold will be evaluated and satisfied.

4.3 Emphases on ‘specialist’ and ‘disability-specific’ supports at the expense of mainstream supports

Many categories refer to ‘specialist’ or ‘disability-specific’ supports being able to be funded, while excluding ‘mainstream’ or ‘standard’ supports. This approach is concerning for several reasons.

First, it is often unclear whether this would include the purchase of a standard support that is subsequently modified to make it appropriate for people with disability. This lack of clarity contributes to the issues raised above at [3] and [4.1].

Second, the exclusion of mainstream supports that can be used for disability-specific purposes prevents people with disability from developing creative solutions, and utilising mainstream products in innovative and cost-effective ways to address their disability-related needs.

Third, this approach entrenches segregation of people with disability, and perpetuates a view that NDIS participants live outside of mainstream community. This has longer-term exclusionary effects for people with disability and should be avoided.

We therefore recommend the draft rules be amended to remove these distinctions. Instead of requiring the supports themselves to be specialised in nature, it would be more appropriate to require supports to address 'disability-related needs' in order to qualify as 'NDIS supports'.

Recommendation 7 – References to 'specialist' and 'disability-specific' supports be removed

References to 'specialist' and 'disability-specific' supports should be removed. Instead of requiring supports to be specialised in nature, the supports should address 'disability-related needs'.

5. Approach to 'non-NDIS supports'

The structure of this transitional rule, with overlapping categories of 'NDIS supports' and 'non-NDIS supports' – many of which contain carve outs – means it is unclear for administering agencies, courts and Tribunals, and participants how these should be interpreted.

For example, there is currently a category of 'NDIS supports' for 'Accommodation/tenancy assistance', described as 'Supports that guide, prompt or assist a participant to undertake activities that ensure they obtain/retain appropriate accommodation', together with carve outs that cross-reference the 'Day-to-day living costs' category of 'non-NDIS supports'. The 'Day-to-day living costs' category then includes several 'Accommodation and household related' items.

However, the 'non-NDIS supports' category of 'Mainstream – Housing and Community Infrastructure' also lists several relevant items, including 'The provision of accommodation for people in need of housing assistance, including routine tenancy support' and 'Homelessness-specific services including homelessness outreach and emergency accommodation'.

A participant is therefore required to cross-reference several parts of the lists (and their corresponding carve outs) to understand what types of housing supports they can access through the NDIS. Further, it is unclear how these separate sections interact – for example, where a support that assists a participant to undertake activities to obtain appropriate accommodation is also a response to homelessness, there is no guidance as to which 'listing' takes priority, or whether the NDIS will fund that service.

It is not clear why this approach to drafting the transitional rule has been taken. As supports that are not declared 'NDIS supports' by proposed subsection 10(1) are excluded from being 'NDIS supports', there is no need for separate lists of 'non-NDIS supports'.

Therefore, the lists of 'non-NDIS supports' have limited utility and should be removed. Where the specification of 'non-NDIS supports' is intended to preserve the current policy status quo and/or provide greater clarity about an 'NDIS support', it should be included as a carve out to the relevant category in the 'NDIS support' list. In doing so, carve outs should be framed as narrowly as possible so as not to undermine the flexibility of participants spending their funding, including to account for the issues raised at [3].

Following the removal of the lists of 'non-NDIS supports', we recommend the lists be grouped solely by subject matter. For example, all stipulations as to housing and accommodation should be listed together, rather than being split across several categories of 'NDIS supports' and 'non-NDIS supports', and corresponding carve outs.

Recommendation 8 – Lists of 'non-NDIS supports' be removed

The lists of 'non-NDIS supports' should be removed. Where the specification of 'non-NDIS supports' are needed, it should be included as a carve out to the relevant category of 'NDIS support' list and framed as narrowly as possible.

Recommendation 9 – Lists of 'NDIS supports' be grouped by subject matter

Lists of 'NDIS supports' should be grouped solely by subject matter, such that all stipulations as to a type of support can be found together in the lists.

6. Categories of 'NDIS supports' – specific comments

Our comments in this section identify issues with the drafting and policy approaches for specific categories or examples of 'NDIS supports'. These should not be taken to be a comprehensive survey of all issues.

Our comments and recommendations should be addressed and incorporated when transposing any of their content into a consolidated list of 'NDIS supports'.

6.1 Assistance animals

6.1.1 Trained by 'an accredited assistance animal provider'

The draft lists stipulate an assistance animal must be 'trained by an accredited assistance animal provider'. There are a number of difficulties with this requirement.

First, the requirement is inconsistent with the *Disability Discrimination Act 1992* (Cth) ('DDA'). The DDA recognises the rights of people with disability to the aid of an assistance animal, without

requiring that it be trained by an accredited provider or accredited by a particular person or organisation.⁵ The same approach should be taken by the NDIA.⁶

Second, it is not clear who is an ‘accredited assistance animal provider’ or how a provider becomes accredited. Such a requirement may unnecessarily limit a participant’s ability to access appropriate assistance animal support.

Third, through our casework, we are aware the NDIA has on multiple occasions agreed an assistance animal is a reasonable and necessary support for a participant, where their assistance animal has not been trained by ‘an accredited assistance animal provider’. Likewise, in *Nottle and NDIA*, the AAT found an assistance dog to be a reasonable and necessary support, in circumstances where the dog was owner-trained.⁷ These outcomes demonstrate the NDIA itself accepts that assistance animals do not need to be trained by ‘an accredited assistance animal provider’ in order to provide important and cost-effective support to participants.

Fourth, this requirement raises the overarching practical issue in [2] – in cases where the NDIA has found funding for assistance animals to be a reasonable and necessary support, notwithstanding the assistance animal was not trained by an accredited assistance animal provider, this list would prevent the participant from spending their funding on their assistance animal. Not only would this adversely impact the participant’s support system, it could also expose the participant to consequences should they continue to spend their funding on a ‘non-NDIS support’ the Agency previously determined to be reasonable and necessary.

6.1.2 Inclusions and carve outs

The draft lists in respect of assistance animals demonstrate some of the difficulties with the specification of inclusions and carve outs in the drafting of the lists.

For example, the draft lists do not make clear whether NDIS funding can be used for the purchase and training of a future assistance animal. The Operational Guideline *Assistance animals including dog guides* dated 20 June 2022 (‘AA Guideline’) contemplates the NDIS funding this.⁸ We support that approach. The AAT has found this to be a reasonable and necessary support,⁹ and similarly through our casework we are aware the NDIA has agreed to fund the purchase and training of an assistance animal for participants. This should be made clear.

⁵ Section 9(2)(c) of the DDA requires an assistance animal to be relevantly trained. The Full Court in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130; 234 FCR 207 at [127], [151] said, ‘the word “trained” in s 9(2)(c) should be given its ordinary meaning and does not require training by an accredited or recognised dog training body’.

⁶ The Discussion Paper for this consultation states the draft lists ‘come from current operational guidance’. The NDIA’s Operational Guideline *Assistance animals including dog guides* dated 20 June 2022 (‘AA Guideline’) indicates at footnote 2 that the NDIA relies on the definition of assistance animals in section 9(2) of the DDA. That footnote also cites a 2019 report commissioned by the NDIA from La Trobe University, which recommends using the definition of assistance animal in the DDA. Therefore, the NDIA itself intends to rely on the DDA in its funding decisions about assistance animals.

⁷ [2021] AATA 1014.

⁸ AA Guideline, 20.

⁹ See for example, *TYKL and NDIA* [2021] AATA 135; *Nottle and NDIA* [2021] AATA 1014; *CYHY and NDIA* [2021] AATA 4751.

The draft lists state an ‘NDIS support’ will include ‘maintenance costs such as vet fees, transport and special diets’. However, later in the ‘non-NDIS supports’ list, ‘veterinarian costs’ are excluded. This highlights the need for a single list of ‘NDIS supports’, with any necessary carve outs, as discussed above at [5]. In any event, excluding vet fees/costs would be contrary to the NDIA’s current approach.¹⁰

Similarly, the ‘non-NDIS supports’ list excludes ‘pet food for animals other than for approved NDIS assistance animals’ but the reference in the ‘NDIS support’ list to ‘special diets’ means it is not clear whether ordinary pet food for an assistance animal is allowed.¹¹ The ‘non-NDIS supports’ list also excludes ‘pet grooming’ which is currently recognised as part of maintenance costs.¹²

NDIS supports should include the range of costs a participant may face in maintaining an assistance dog, including vet services, pet food (not just special diets), vaccinations, flea and worm treatments, grooming, pet insurance, ongoing training costs and any costs to obtain/maintain assistance animal status.

The ‘non-NDIS supports’ list refers to ‘approved NDIS funded assistance animals’. This is another example of the threshold issue we raised at [4.2]. It is not clear who will determine whether an assistance animal is ‘approved’ or how that determination should be made.

Recommendation 10 – The NDIS fund the purchase, training and range of costs of maintaining an assistance animal

The reference to ‘accredited assistance animal provider’ is inconsistent with the DDA and should be removed. The NDIS should fund the purchase, training and costs of maintaining an assistance animal (including vet services, pet food, vaccinations, flea and worm treatments, grooming, pet insurance, ongoing training costs and any costs to obtain/maintain assistance animal status).

6.2 Assistance in Coordinating or Managing Life Stages, Transitions and Supports

This category provides for the NDIS to fund:

Active involvement in planning and transition supports on the basis of a person having reached a point of stability in regard to functional capacity, prior to hospital discharge (or equivalent for other healthcare settings) wherever there is a need for ongoing maintenance support. [emphasis added]

It is unclear why the requirement to reach a point of stability prior to discharge is required before this support is accessed. A person may wish to access assistance to co-ordinate their transition out of hospital even as their functional capacity is continuing to stabilise; particularly where further

¹⁰ The AA Guideline (page 21) expressly recognises ‘vet services’ are part of the maintenance costs of an assistance animal, and costs covered by the NDIS.

¹¹ This would be contrary to the AA Guideline (page 21) which expressly recognises pet food as part of the maintenance costs of an assistance animal.

¹² AA Guideline, 21.

stabilisation of their condition might occur in a home-based setting. This assistance would not overlap with the ongoing responsibilities of the health system to plan ongoing improvement and delaying this assistance may extend a person's stay in hospital. This requirement should be removed.

6.3 Assistance With Daily Life Tasks in a Group or Shared Living Arrangement

This refers to supports for assistance with these tasks, where the support has 'a focus on developing the skills of each individual to live as autonomously as possible, including short term accommodation and respite'. It is unclear what is meant by 'focus' in the context of a rule establishing binary categories of supports that can and cannot be funded. If this reference to a 'focus' indicates only supports with such a focus can be funded by the NDIS, this is an inappropriately narrow restriction of the category of support, and the reference to 'focus' should be removed.

6.4 Assistance with Travel/Transport Arrangements

The draft lists would only enable funding to be spent on transport 'where the participant cannot travel independently or use public transport due to the impact of their impairment/s on their functional capacity'. In our view, the requirement that a person 'cannot travel independently or use public transport...' is too high a standard. For example, a person theoretically may be able to use public transport, but doing so would cause them serious distress or discomfort.

Additionally, this category raises our concern as articulated above at [4.2], in that it is not clear how a support will be evaluated against this standard.

6.5 Assistive Equipment for Recreation

This category, and its reference to 'specialist products', raises the issues outlined above at [4.3] about emphasising 'specialist' supports at the expense of mainstream supports. This category should be reformulated as per **Recommendation 7** to only require these supports to address 'disability-related needs'.

6.6 Assistive Products for Household Tasks

This category, and its reference to 'specialist products', raises the issues outlined above at [4.3] about emphasising 'specialist' supports at the expense of mainstream supports. This category should be reformulated as per **Recommendation 7** to only require these supports to address 'disability-related needs'.

6.7 Assistive Products for Personal Care and Safety

This category, and its reference to 'specialist products', raises the issues outlined above at [4.3] about emphasising 'specialist' supports at the expense of mainstream supports. This category should be reformulated as per **Recommendation 7** to only require these supports to address 'disability-related needs'.

6.8 Community Nursing Care

This category, and its references to ‘high care needs requiring a high level of skill’ and ‘complex needs’, raises the issues outlined above at [4.2] about threshold requirements. This category should be reformulated as per **Recommendation 6** to remove the threshold requirement.

6.9 Customised Prosthetics (includes Orthotics)

This category and its reference to ‘customised prostheses or orthoses’, to the presumed exclusion of standard prostheses and orthoses, raises the issues outlined at [4.3] about emphasising ‘specialist’ supports at the expense of mainstream supports. This category should be reformulated as per **Recommendation 7** to only require these supports to address ‘disability-related needs’.

6.10 Disability-Related Health Supports

This category requires close reading in conjunction with the ‘non-NDIS supports’ category of ‘Mainstream – Health’ and, as such, risks overlaps and lack of clarity as outlined at [5]. The rules should be amended as per **Recommendations 8 and 9** to remove the lists of ‘non-NDIS supports’ and list ‘NDIS supports’ by subject matter.

6.11 Exercise Physiology & Personal Well-being Activities

This category is described as ‘activities to promote and encourage physical well-being’. While this seems broad and there are no carve outs, the ‘non-NDIS supports’ lists exclude several ‘wellness’ supports such as reflexology, aromatherapy, yoga therapy and general massage. This raises the issue outlined above at [5]. The intended purpose and description of this category should be clearer for participants to have clarity and certainty, and to avoid the chilling effects we foreshadow above at [4.1], as per **Recommendation 5**.

6.12 Hearing Equipment

This category, and its reference to ‘specialist hearing supports’, raises the issues outlined above at [4.3] about emphasising ‘specialist’ supports at the expense of mainstream supports. This category should be reformulated as per **Recommendation 7** to only require these supports to address ‘disability-related needs’.

Additionally, the requirement for these supports to ‘directly relate to a person’s permanent impairment’ is unclear and difficult to apply. The Senate is currently considering amendments proposed by the Government to the Bill that would establish a framework for considering where there is a relationship between a participant’s disability-related support needs and their impairments;¹³ it would be confusing and potentially inconsistent for these transitional rules to establish a differently-worded requirement framed in the terms ‘directly relate[d]’, in order for one category of supports to be obtained. This requirement should be removed.

¹³ Australian Government, Amendment sheet PA112, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, items (6), (11) and (12).

6.13 High Intensity Daily Personal Activities

This category appears very similar to ‘Daily Personal Activities’, with the distinction that it is addressed towards a participants’ ‘complex needs’. This qualification appears unnecessary, as those supports would already be covered by the wording of ‘Daily Personal Activities’; as such, the duplication of these categories is confusing.

This category should be removed or its intended meaning further clarified.

6.14 Home Modification Design and Construction

We recognise the shared responsibilities of the Federal Government and state and territory housing authorities for providing social housing with appropriate features and supports for people with disability. However, the carve out from this category of any ‘Design and subsequent changes or modifications to state or territory owned public housing’ is inappropriately restrictive. While state and territory housing authorities may be required by applicable discrimination laws to make some reasonable adjustments, these adjustments may not cover all necessary modifications required for many NDIS participants. In those circumstances, the NDIS should fund appropriate housing modifications for participants.

To this end, we note the findings of the AAT in the recent decision of *HTDD and NDIA*, which considered governmental policy documents including *Australia’s Disability Strategy 2021-2031* in finding ‘the requirement of Commonwealth and State governments to work together’ to provide housing for people with disability, and the need for an ‘appropriate interplay’ between the NDIS and state services.¹⁴ We further note the AAT in *Willcocks* found ‘stable housing to be a fundamental foundation for most social and economic life’.¹⁵

The foundational nature of appropriate housing, and the need for intergovernmental collaboration to deliver this, mean this carve out should be removed.

6.15 Household tasks

While this category includes ‘house or yard maintenance’, the ‘Day-to-day living costs’ category of ‘non-NDIS supports’ excludes ‘Standard home security and maintenance costs’, and ‘General home repairs, general renovations and maintenance’. These categories overlap in a manner that appears directly contradictory, raising the lack of clarity described above at [5]. The rules should be amended as per **Recommendations 8 and 9** to remove the lists of ‘non-NDIS supports’ and list ‘NDIS supports’ by subject matter.

Additionally, this category is drafted to only allow funding for these supports where a participant ‘is not able to undertake’ the relevant tasks. This would prevent a participant from accessing the supports where their disability did not technically prevent them from undertaking the tasks, but caused them significant additional fatigue, pain or difficulty in doing so. This is an inappropriately narrow definition; the category should be amended to permit NDIS funding for household tasks in

¹⁴ *HTDD and NDIA* [2024] AATA 725, [300]-[310].

¹⁵ *Willcocks and Chief Executive Officer, NDIA* [2024] AATA 2722, [242].

circumstances where a participant's capacity to engage in those tasks is reduced as a result of their disability.

6.16 Innovative Community Participation

This category refers to activities not included under 'other community participation registration groups', a term which is not used elsewhere in the lists. Its meaning in this context is unclear.

This category should be reformulated to clarify its meaning.

6.17 Interpreting and Translation

The description of this category limits access to this support only 'in 'essential personal, social or community activities'. The threshold of 'essential' is unclear, and will depend on the context and/or subjective view of the participant in need of that support. Additionally, this threshold raises the issue outlined above at [4.2]. The word 'essential' should be removed, as per

Recommendation 6.

6.18 Personal Mobility Equipment

The term 'mobility', in the context of the NDIS, has been repeatedly construed by the AAT to *exclude* the ability to 'move around in the community for the purposes of accessing services', and to *only* refer to 'whether a person can move about in shops or a park once they have reached them, say by car or public transport'.¹⁶ Accordingly, the AAT has found the concept of 'mobility' only applies to distances that are 'relatively short'.¹⁷

Given this construction, the framing of this category might be taken to only apply to mobility aids for covering short distances, rather than mobility equipment used to move around in the community. This would be an unduly narrow framing. The category should be amended to clarify that 'personal mobility' refers to equipment that enables a person to move around in a variety of settings including their home or in the community.

6.19 Specialised Hearing Services

As the category of 'Hearing Equipment' is framed so as to refer to 'specialist hearing supports', the services within this category would appear to be covered already within the more general category of 'Hearing Equipment'. As such, the duplication of these categories is confusing.

Subject to our recommendations as to the wording of 'Hearing Equipment' at [6.12] above, this category should be removed or its intended meaning further clarified.

6.20 Specialised Support Coordination

As the category of 'Assistance In Coordinating or Managing Life Stages, Transitions and Supports' already includes 'support coordination', it is unclear what additional services would be

¹⁶ See for example, *Madelaine and NDIA* [2020] AATA 4025, [105].

¹⁷ *Ibid.*

covered by this more specific and specialised category. As such, the duplication of these categories is confusing.

This category should be removed or its intended meaning further clarified.

6.21 Vehicle Modifications

The carve out to this category includes 'mechanical repairs'. This would appear to exclude even repairs to the vehicle modifications themselves, despite the fact that such repairs may be particularly specialised and relate directly to the participant's disability needs. This carve out should be reframed to permit mechanical repairs to disability-related vehicle modifications.

Additionally, this category and its carve outs overlap with the 'non-NDIS supports' category of 'Day-to-day living costs' (travel related), in the manner outlined at [5]. The rules should be amended to ensure clarity.

6.22 Vision Equipment

The carve out of prescription glasses is broad, in circumstances where such glasses (particularly in the case of specialist prescriptions) may not be available to a participant under other government service delivery programs. As an example, in *KLMN and NDIA*, the AAT found:

- the applicant required prism lenses;
- the lenses would 'more than pay for themselves in reducing the amount of reliance KLMN would have on support persons and taxi usage';
- the lenses allowed KLMN to 'be more independent, feel more confident about driving, be better able to undertake personal grooming and a range of other positive benefits'; and
- no other government program would allow KLMN to access the type and number of lenses she required.¹⁸

The AAT decided KLMN should be funded for six pairs of prism lenses. These facts provide a compelling example of a case where the NDIS should fund prescription glasses. The carve out should be amended to allow for such instances.

7. Categories of 'non-NDIS supports' – specific comments

We reiterate our **Recommendation 8** that the lists of 'non-NDIS supports' should be removed. Where specification of 'non-NDIS supports' is needed, this should be included as a carve out to the relevant category of 'NDIS support' list and framed as narrowly as possible.

Our comments in this section identify issues with the drafting and policy approaches for specific categories or examples of 'non-NDIS supports'. These should not be taken to be a comprehensive survey of all issues.

¹⁸ [2017] AATA 1815, [37]-[39].

Our comments and recommendations should be addressed and incorporated if transposing any of their content into carve outs to ‘NDIS supports’.

We also acknowledge and support comments from Disability Representative Organisations and others in the disability community about the ‘non-NDIS supports’ list inappropriately excluding vital disability-related supports, including those that have been funded by the NDIS.

7.1 Day-to-day living costs

7.1.1 Incorrect categorisation of supports

Some supports excluded in this category are not appropriately classified as ‘day-to-day living costs’. For example, the Federal Court in *Warwick* found that ‘general furniture removal and services’ cannot be correctly described as a ‘day-to-day living cost’; accordingly, the listing of these supports under this heading is misleading and legally inaccurate.¹⁹ Many other supports are affected by the reasoning in *Warwick*; it is inapt to list them under this heading.

Other supports listed in this category are mischaracterised as ‘lifestyle related’ (eg ‘menstrual products’; menstruation is not a lifestyle choice). These categories should be redrafted and redefined. In many cases – such as menstruation – the exclusion should be removed and menstrual products should qualify as ‘NDIS supports’ alongside other assistive products for personal care and safety for disability-related needs.

Recommendation 11 – Define categories of ‘NDIS supports’ and carve outs correctly

Categories of ‘NDIS supports’ and any appropriate carve outs should be redrafted and defined correctly to avoid being misleading and legally inaccurate.

7.1.2 Proposed exclusions contradict AAT decisions

Many of the supports excluded by this category have been independently found by the AAT to be reasonable and necessary supports for participants, including that they are value for money, effective and beneficial, and most appropriately funded or provided by the NDIS (and not more appropriately funded or provided by other service systems). To illustrate:

- *Pools, pool heating and maintenance*: the AAT has found the installation of a hydrotherapy pool is a reasonable and necessary support, would come at a ‘much lower

¹⁹ In *Warwick v NDIA* [2024] FCA 616, [14], the Federal Court found relocation costs were not day-to-day living expenses. The Federal Court found the ordinary meaning of ‘day-to-day living costs’ only included ‘everyday expenses which are incurred in the course of living for the purpose of living’ such as rent, groceries and utility fees. The Federal Court said relocation costs of ‘engaging an agent to sell one’s home, the costs of moving from one home to another, conveyancing fees and the payment of stamp duty on the conveyance of a new home are not everyday costs which are incurred in the course of living for the purpose of living.’

cost than any proposed alternatives,' and would have a large number of significant benefits.²⁰

- *Electricity generators, solar panels, and batteries:* the AAT has found a power inverter to be a reasonable and necessary support, and related to the participant's disability.²¹
- *Standard household items, replacement of appliances, including hot water services, solar panels, etc:* there are numerous cases where the AAT has found standard household appliances to be reasonable and necessary supports and value for money, including air conditioners²² and a Thermomix.²³

For each of these examples, we would expect the disruption described above at [2] to result as a direct consequence of these lists.

Given the AAT's findings in each instance, the blanket exclusion of these types of supports is also inefficient and unhelpful – to do so would deny at least some participants a support that addresses their needs, at a cost to the NDIS found to be reasonable. This reflects the concerns we express above at [3].

The exclusion of supports could also result in participants experiencing serious consequences to their health and wellbeing (such as impacts of heat for participants unable to obtain an air conditioner). Consequential harms to participants could impose substantial costs on the NDIS and/or health system to address, while the denial of these sensible supports would require spending on other, less efficient, supports.

Notably, the Discussion Paper for this consultation says these lists are not intended to 'change the types of supports that have always been appropriate to purchase with NDIS funding' – the exclusion of these supports would be contrary to that intention.

We strongly recommend these lists be reconsidered to significantly reduce the range of supports that are excluded, and allow participants to exercise greater choice and control over how they use their funding, in line with **Recommendation 3**.

We note the carve out of 'Additional living costs that are incurred by a participant solely and directly as a result of their disability support needs' may be intended to ameliorate the issues outlined above. However, we do not consider this carve out adequately addresses the dynamics

²⁰ *Spires and NDIA* [2023] AATA 1230, [87]-[91]. In that case, the NDIA suggested Ms Spires should do her hydrotherapy at a public pool. Instead, the AAT found the evidence showed this would be counterproductive (travel to the public pool exhausted Ms Spires so that she could not benefit from the hydrotherapy), dangerous and/or harmful to Ms Spires (as she developed hives and rashes from the chlorination, was at risk of slipping and falling, found the swimming pool environment extremely stressful) and inefficient (as it would require multiple support workers and travel time), and wasteful cancellation fees whenever she was unable to attend pre-booked sessions.

²¹ *RHRD and NDIA* [2022] AATA 1766. The AAT found a Thermomix to be a reasonable and necessary support in weighing, stirring, cooking and blending food which could then be fed into a 'G-port' that goes into the participant's stomach via a tube. In that case, the AAT also noted the Thermomix was value for money because, among other things, it would avoid the costs associated with a support worker to make blended food.

²² *MKKX and NDIA* [2024] AATA 805. The AAT found the Applicant, who experiences 'significant temperature dysregulation' as a result of Ehlers Danlos Syndrome and other impairments, would receive significant benefits from an air conditioner (particularly given the hot and humid climate at her home in Brisbane). This mirrors the reasoning in *McKenzie and NDIA* [2019] AATA 3275 where the AAT also found a participant should be funded for an air conditioner.

²³ *RHRD and NDIA* [2022] AATA 1766.

listed above. It will be difficult for participants to know if a support falls within this carve out, leading to the chilling effects outlined above at [4.1]. Further, 'solely and directly' creates an extremely high threshold; if the participant, a member of their household, or another person gains even some benefit from obtaining the support, the support could be taken to fall outside the carve out. The threshold is accordingly so high as to be functionally impossible to apply to many participants. We therefore consider this carve out will have limited application in practice, and does not address our concerns with the approach taken to this category of 'non-NDIS supports'.

7.1.3 Sex work and other sexual supports

The blanket exclusion of sex work does not take account of the many reasons people with disability may seek this support. This includes to address sexual pain, to support healing after sexual abuse and trauma, or to experience sexual physical touch. Additionally, the Full Federal Court has found sex work to be a reasonable and necessary support, and in line with the 'values, objectives, purposes and guiding principles with which this legislative scheme is replete' in particular in forming part of the spectrum of social interaction between individuals and community.²⁴

We support the *Joint Statement: Ten Organisations Call for People with Disability's Access to NDIS Funded Sexuality Services to be Protected* and its call for the Government to engage with the disability community in developing a framework for NDIS funded sex work and sexuality services that reflects the needs and rights of people with disability.²⁵ In line with our **Recommendations 1 and 3**, the Government should follow the views of Disability Representative Organisations.

8. Interfaces with Mainstream Services

In line with our comments above at [5], it is inappropriate and inaccurate to address areas of interface between the NDIS and other service delivery systems solely through listing things that will not be funded by the NDIS. The transitional rules should instead define these interfaces by outlining the supports the NDIS will fund, and any applicable carve outs the NDIS will not fund.

We expect the finalised NDIS Rules will take account of the role of State and Territory Governments in addressing each interface between the NDIS and other service systems, and the delivery of foundational supports by States and Territories.

²⁴ *NDIA v WRMF* [2020] FCAFC 79, [141]-[143].

²⁵ Women With Disabilities Australia, 'Joint Statement: Ten Organisations Call for People with Disability's Access to NDIS Funded Sexuality Services to be Protected', *Publications* (Web Page, 15 July 2024) <<https://wwda.org.au/our-resources/publication/joint-statement-ten-organisations-call-for-people-with-disabilitys-access-to-ndis-funded-sexuality-services-to-be-protected/>>.

In the interim, however, these foundational supports do not exist, and a workable interface has not been designed.²⁶ This means it is vital the NDIS does not withdraw supports from participants on the basis that future State and Territory programs may cover those gaps.

At least until NDIS Rules under proposed section 10 are made, across all areas of interface with mainstream support systems, all supports that have previously been provided by the NDIS should continue to be available under the Scheme.

Further, where there is uncertainty about the responsibilities of the NDIS and mainstream support systems, the NDIS should provide the support until NDIS Rules can be developed with State and Territory Governments.

As a general principle, for the period that these transitional rules apply, the Federal Government should only exclude mainstream supports from the NDIS where State and Territory services/programs exist and offer that support. While States and Territories are expected to provide greater supports through to-be-developed foundational support services/programs, equivalent supports should not be excluded from the NDIS until they are actually available to people with disability.

Where these transitional rules do intend to exclude a mainstream support from the NDIS, the Federal Government should make clear how a participant is expected to access that support (ie the specific state or territory service/program providing that support). Since the NDIS was established, government agencies, people with disability and service providers have had difficulties understanding the boundaries between different government service systems. The burden of liaising with governments and trying to align disparate agency policies has often fallen upon people with disability.

People with disability describe this as fatiguing, disheartening and intimidating, and often with the end result of them being denied supports they need from either government system. Providing clarity to participants about the specific state or territory service/program providing that mainstream support (whether in the transitional rule itself, or in accompanying public communications), will provide necessary guidance to participants to avoid gaps in service provision.

Recommendation 12 – Mainstream supports excluded under the NDIS

The interface between ‘NDIS supports’ and mainstream supports should:

- *be set out in a separate section of the transitional rule, instead of under ‘non-NDIS supports’;*
- *not exclude supports that have previously been the responsibility of the NDIS;*

²⁶ In this regard, we note the issues with the Bill’s original proposal to use APTOS for this purpose, as outlined in our previous submission: Public Interest Advocacy Centre, *Submission to Senate Community Affairs Legislation Committee National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024* (17 May 2024) <https://jec.org.au/wp-content/uploads/2024/05/24.05.17-Submission-to-Senate-Community-Affairs-Legislation-Committee.pdf>, 24-27.

- *only exclude supports from the NDIS where state and territory services/programs are currently available to people with disability; and*
- *make clear how a participant accesses the mainstream support ie the specific state or territory service/program providing that support.*