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To whom it may concern,

Thank you for the opportunity to provide feedback on the draft list of NDIS Supports (the List).

The feedback on the draft list provided by National Legal Aid (NLA) has been developed in consultation with Legal Aid Commissions across the country, who have provided invaluable insights due to their work through the national NDIS Appeals Program. The Program has been funded by the Department of Social Services since 2018 and includes advice clinics and legal representation at the Administrative Appeals Tribunal (AAT). In 2022-2023 Legal Aid Commissions provided over 2,300 legal advices and over 300 legal representations as part of the Program. The following advice has been informed by this extensive experience in supporting people to appeal reviewable decisions of the National Disability Insurance Agency (NDIA) under the current NDIS arrangements.

NLA is concerned that creating a check list of NDIS Supports further frames the Scheme as disability rather than person centred, which reinforces the overall concern regarding the draft NDIS legislation outlined in NLA's submission to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*. While noting that the NDIS Support List will be an interim document until a co-produced document can be developed, NLA notes that the use of an interim list sets a precedent and could influence the formation and application of the Rules.

NLA is also concerned that the List is difficult to interpret and navigate. This is particularly problematic considering many participants will need to determine what supports are NDIS Supports without any legal or other assistance, as well as the potential consequences for a participant, including debts being raised against them. In particular, the interaction between a list of NDIS supports with carve outs and a list of things that are not NDIS supports with carve outs does not provide sufficient certainty about what NDIS participants can and cannot spend their funds on. For example, it is unclear whether any support that is included in a carve out for a category in *Supports that are not NDIS supports* would be considered an NDIS support regardless of whether it is included in a category in *Supports that are NDIS supports* or not. NLA strongly recommends that a new structure for the list is considered to improve the accessibility and useability of the List.

In addition to concerns regarding the overarching structure of the List, NLA also recommends amending the List to include or improve the clarity of key concepts and definitions included in the list to:

- identify how a participant can seek clarification if a particular support meets the definition for an NDIS support, as well as a review of decisions determining whether a support meets the relevant definitions through an independent reviewer such as the AAT, particularly given the descriptors used in the List are broad, ambiguous, and consequential;
- further clarify key definitions to provide greater certainty, such as:
  - more detailed definition of unlawful goods and services which are currently very broad (for example, provide clear definitions for weapon and seclusion room);
  - a clearer understanding of the difference between mainstream services and NDIS supports to ensure that participants do not fall through the cracks because a needed service is deemed a mainstream service but is not accessible to them; and

- clarify the use “specialist products” (and use consistently, rather than only ‘products), possibly through a list of eligible products that is clearly identified as “examples” or “guidance” rather than an exclusive or exclusionary list used to limit options;
- include a section with frequently asked questions or common scenarios to better understand the practical application of the List;
- clarify how the List intersects with the NDIS National Disability Insurance Scheme (Supports for Participants) Rules 2013, NDIS guidelines and existing factsheets, and ensure that the List refers to these documents, including links, where relevant and use similar language and concepts; and
- clarify the intended use of the List, particularly regarding which stage of the application and/or approval process it is intended to be used, noting that it would provide limited assistance if provided alongside an individual’s approved plan.

In addition, NLA would make a number of recommendations in relation to the drafting and implementation of the List to:

- ensure that participants are not precluded from obtaining personalised supports related to their disability and support needs, particularly when the supports are evidenced based and recommended by the participants’ qualified providers, if it is not specified as an NDIS support in the List;
- increase participant choice and control by amending the list of supports that are not NDIS supports, given that it currently includes a broad range of therapy and supports available in the community and viewed as having a subjective benefit by the participant;
- clarify how exceptional circumstances may be applied to the list, for example, where a support sought is not addressed in the list but would be captured by the current legislation and is beneficial to the participant;
- ensure sufficient flexibility to address the challenges faced by participants in rural and remote communities, including a greater reliance on technology to deliver therapies and services, as well as a greater need for additional support to access the community or workforce; and
- review the implementation of the List to ensure that it is adapted to continue to meet the evolving needs of participants and accommodate new technologies and therapies etc.

NLA also recommends specific amendments to the inclusion and exclusion of supports as outlined in Attachment A.

Thank you for the opportunity to comment on the draft list, and we look forward to continuing to provide feedback on the development of the new NDIS framework and its supporting documents. Should you require further information, please contact Katherine McKernan, Executive Director, National Legal Aid on 0425 288 446 or [katherine.mckernan@legalaid.nsw.gov.au](mailto:katherine.mckernan@legalaid.nsw.gov.au).

Yours sincerely



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Chair, National Legal Aid

## **Recommendations in relation to the description of *Supports that are 'NDIS supports'***

### *Assistance In Coordinating or Managing Life Stages, Transitions and Supports*

- Include support for transitions from prison to community settings.

### *Access and Maintain Employment or higher education*

- Provide guidance about higher education supports that might be accessible in the description, as it currently does not make any reference to higher education or education support.
- Include supports to assist a participant to complete a placement or other work-integrated learning activities required to complete a course, which are typically short-term and provide specific support to ensure a participant can successfully and safely complete their placement activity.
- Amend the description of the first dot point in the carve outs to ensure it does not exclude supports targeted at supporting a participant's specific learning needs (for example coaching around time management).

### *Assistance with daily life tasks in group or shared living arrangement*

- Clarify if the definition of a shared living environment includes families and include respite care for family members as an NDIS support.

### *Specialist Positive Behaviour Support*

- Amend the final sentence to "training and ongoing monitoring of staff and **informal supports** in plan implementation" to ensure the description specifically covers informal supports for plan implementation.

### *Assistive Technology*

- Create a single category for not limited by purpose, including supports related to *Communication and Information Equipment, Customised Prosthetics* and *Personal Mobility Equipment*, to be more in keeping with the objects of the Act of encouraging innovation in supports, and specifically include repairs of eligible supports as an NDIS support.

### *Consumables*

- Include additional category of *Consumables*, which are referenced in some of the existing categories but require a separate category for clarity, and provide guidance on specific products that are considered NDIS supports.

### *Disability Related Health Supports*

- Amend the description to remove the requirement for the supports to be regular and to use "relate to" rather than "result from" (for example, a LAC represented a client at the AAT who received approval for diabetic management to be included in her plan as her disabilities meant she couldn't manage her diabetes herself, which may not be allowed under the current wording of the List).
- Clarify how the List intersects with other funding Schemes such as the Continence Aids Payment Scheme when those schemes do not cover the full cost of the items need for the clients' functional impairments.
- Clarify items relating to the ongoing management of the support, such as appointments with relevant providers, associated assistive technology and consumables are considered NDIS supports, in either this section or in *Assistive Products for Personal Care and Safety*

### *Early Intervention Supports for Early Childhood*

- Amend the description "provision of a mix of therapies, and a key worker for the family" as it is too prescriptive and will not necessarily apply to all children.

### *Hearing Equipment and Services*

- Clarify the distinction between "specialist hearing services" and "general hearing services" as the current description does not provide sufficient detail (for example, a LAC represented a client at the AAT where it was agreed that a particular high technology hearing aids were a reasonable and appropriate support, overturning a decision by the NDIA that the need could be met by generalist services).

### *Home Modification Design and Construction*

- Remove the blanket exclusion of design and subsequent changes or modifications to state or territory owned public housing, noting that participants may require modifications that do not fall within the reasonable adjustments required to be implemented by state or territory housing authorities under relevant Anti-Discrimination laws and as such these should be considered NDIS supports.

### *Vehicle Modifications*

- Increase flexibility under the category to allow for consideration the purchase of a vehicle as an NDIS support if it is the most efficient way of spending funds under a plan (for example a LAC represented a client at the AAT where it was agreed that the purchase of a vehicle with particular features required to transport the participant was an appropriate and reasonable support, given it was more economically to purchase rather than hire this vehicle).

## **Recommendations in relation to *Supports that are not 'NDIS supports'***

### *Day-to-day living costs*

- Amend the description and carve outs to increase flexibility to meet the needs of individual participants with specific disabilities, for example:
  - participants who require additional (above everyday user levels) usage of services such as internet access to use interpreting services, additional electricity for electrically powered medical devices and higher insurance costs to cover assistive technology;
  - participants with intellectual disability who require fencing and gates to ensure safety;
  - smart watches are commonly used by participants to monitor safety concerns relating to falls; and
  - remove the word “solely” from the carve out in the first dot point so as to ensure supports are not exclude if they are also required for other reasons (for example, a participant may wish to install multiple fire alarms to assist them to feel safe in their home in the context of a mental health condition, and the fact that they are also required to manage fire risk should not mean that it is not an NDIS support).
- Clarify if short term accommodation and respite are an NDIS supports, as they are listed as an NDIS support for *Assistance With Daily Life Tasks in a Group or Shared Living Arrangement* and only holiday accommodation is specifically excluded under *Day-to-day living costs* (noting LACs have assisted participants who have been advised that it was appropriate to use short term accommodation funding on commercial hotels, only to be later advised by the NDIA that this was considered a day-to-day expense).

### *Not value for money/not effective or beneficial*

- Amend the description and carve outs should to increase flexibility to meet the needs of individual participants with specific disabilities, for example:
  - yoga therapy may address specific disability-related needs and promote social participation, particularly in remote areas where other therapeutic options and social opportunities are limited; and
  - nail salons service may be the most cost-effective option for participants who are unable to cut their nails due to disability, and whose carers cannot assist, particularly in rural communities.
- Clarify the definition of Gaming therapy to specify if it includes online social group where games are played, or allied health services delivered in a digital format (e.g. VR), noting that these can be particularly beneficial for participants in remote communities where face-to-face interactions are limited, or where participants have social and communication impairments due to their disability (eg ASD/ADHD).

#### *Mainstream – Health*

- Provide increased flexibility to ensure supports that overlap with mainstream health services can be included, especially for participants with complex medical needs (for example, “Hospital in the home services” needs to be better defined to ensure that people with very high needs for support are not denied this care on the basis that their needs are too intensive).
- Amend the description and carve outs to increase flexibility to meet the needs of individual participants with specific disabilities, for example:
  - ongoing functional capacity building and maintenance supports, including for chronic health and psychiatric conditions, for which the participant has gained access to the scheme;
  - supports (excluding acute and post-acute treatment and rehabilitation and clinical care) which would likely result in a long-term benefit to the participant and would likely reduce the cost of funding of supports for the participant in the long term and which would result in the improved functional capacity;
  - nursing as critical care (for example, a LAC represented a client at the AAT where it was agreed that nursing care as a critical backup support was an appropriate and reasonable NDIS support for a family in crisis who were supporting children with complex care needs); and
  - recommendations from hospitals for equipment or assistive technology prescribed as a result of clinical care that address disability-related support needs, which may not be available through mainstream health services.

#### *Mainstream – Mental Health*

- Remove the phrase “clinical in nature” in the fourth dot point of the description, given that clinical means in relation to a patient and as a result the current definition does not adequately delineate between mental health supports and treatment.
- Remove “or where the service model primarily employs clinical staff” from the final dot point in the description, as this confuses the intent of the description which is to define inpatient treatment or rehabilitation as not being an NDIS support.
- Amend the description and carve outs to increase flexibility to meet the needs of individual participants with specific disabilities, for example:
  - supports required to manage an exacerbation of the participant’s disability following an event which may trigger and impact the participant’s disability (for example, an exacerbation/aggravation of a psychosocial disability caused by physical injury i.e. falling in the shower; and
  - for some participants treatment for drug and alcohol dependency, eating disorders or other gambling addictions would assist a participant with early intervention outcomes and/or accessing and engaging with other supports.

#### *Mainstream – Child Protection and Family Support and Mainstream – School Education*

- Amend the carve outs to:
  - ensure personal care support for children is not excluded, in line with section 3.4(a)(ii) of the current *NDIS Rules—Supports for Participants*, where support can be provided if “because of the child’s disability, the child’s care needs are [substantially] greater than those of other children of a similar age”;
  - include out of school hours care, vacation care where the support is related to the participant’s disability and/or is not reasonable to expect the participant or their family to provide, in line with the inclusion of group and centre-based activities as a category of allowed NDIS supports; and
  - include allied health and behaviour supports that are provided in school.



#### *Mainstream – Early Childhood Education*

- Amend the description of the fourth dot point as it is an unnecessarily broad and would exclude supports that could be required under early intervention supports, such as dietitians (meeting the care needs of a child ensuring proper nutrition, feeding methods etc), or speech pathology (to work on language to meet early childhood education).
- Amend the carve outs to ensure sufficient flexibility so that consideration can be given on case-by-case basis as to whether fees related to disability rather than general childcare should be an NDIS support.

#### *Mainstream - Higher Education and Vocational Education and Training*

- The inclusion of the eighth dot point of the description of *Supports that are not NDIS supports*, ‘Transport between education or training activities’ is inconsistent with the inclusion of ‘transporting participants to funded supports and other activities including school, educational facility’ in *Assistance With Travel/Transport Arrangements* category in the list of NDIS supports.
- In particular, funding transport supports to assist a participant to attend training and higher education should be an NDIS support when it is required as a result of the participant’s functional impairments.

#### *Mainstream – Employment*

- Amend to increase flexibility to meet the needs of individual participants, such as building modifications that are not affordable for employers in remote communities that may enable a participant to participate in the workforce.

#### *Mainstream – Housing and Community Infrastructure*

- Amend to include prison as well as hospitals and aged care in the exclusions for “crisis housing” given the support specific support need of participants exiting prisons.

#### *Mainstream – Transport*

- Amend to increase flexibility to meet specific needs of individual participants with specific disabilities, such as:
  - consideration of modifications to public transport/taxis in rural and remote communities where transport is limited or otherwise not available; and
  - purchasing of a vehicle where a person has shown that there is no other cost-effective alternative and the vehicle is needed to facilitate their social and economic participation (for example, a LAC represented a client at the AAT where the NDIA agreed funding a vehicle was a reasonable and necessary support because the person demonstrated there is no other cost-effective alternative and the vehicle was required to facilitate their social and economic participation).

#### *Mainstream – Justice*

- Amend the second dot of the description, ‘Supervision and monitoring of offenders’ as it is too broad and it is unclear if it is intended only to apply to people in custody.

#### *Mainstream – Aged Care*

- Amend the description to specifically refer to residential care or home care provided in accordance with the *Aged Care Act 1997*.

### **Recommendations in relation to interactions with other legislation**

- Several items require amendment to provide greater clarity regarding interactions with other legislation, specially to note that if a participant’s support needs are beyond what is required under relevant state and Commonwealth legislation then they should be considered an NDIS supports. For example:
  - the carve out regarding work specific supports under *Access and Maintain Employment or higher education*;

- the carve outs regarding student supports, learning and teaching aids in *Mainstream - Higher Education and Vocational Education and Training*; and
- the carve outs regarding teaching aids and building modifications in *Mainstream – Early Childhood Development*.

### **Suggestions for specific supports that should be considered NDIS Supports**

- Include monitoring equipment as a specialist product for personal care or safety under *Assistive Products for Personal Care And Safety*.
- Include supports related to communication such costs associated with learning Auslan for the participant and family members/carers, possibly under *Communication And Information Equipment*.
- Include motorised mobility scooters and similar devices under *Personal Mobility Equipment* and ensure they are not excluded in any other sections of the List.
- Broaden the *Specialised Hearing Services* category to include other types of services, such as those for vision, or create a separate category for *Specialised Vision Services*.
- Increase flexibility under a number of categories under *Supports that are not 'NDIS supports'* to respond to the specific support needs of participants, such as:
  - specific furniture such as beds and/or mattress that may be required for participants with severe mobility issues;
  - participants with ASD/ADHD may require play equipment like trampolines that offer therapeutic benefits, particularly those who might not be able to access other therapeutic options in remote and rural communities;
  - specialist sports equipment such as hearing or vision friendly equipment, that may be required to address functional impairments; and
  - sleep consultant services that are of benefit for participants with ASD/ADHD.