

## Response to the NDIS background paper: NDIS Supports Rules Consultations

In October 2024, changes to the NDIS ACT passed the Australian Parliament, changes which amended the rule of the NDIS including significantly, amending the rules about accessing the NDIS and the support services that would be agreed within an NDIS plan. These are known as section 10 rules.

In October 2024, when introducing changes to the operation of the National Disability Insurance Scheme, then then Minister Bill Shorten stated in his second reading speech:

*The NDIS represents the best about our country.*

*It fulfills a sense of collective responsibility—the essence of the fair go.*

*It's integral to our national identity.*

*Its value is measured in human terms, not just economic.*

*People with disability should have the support they need to participate in the community.*

*Every Australian deserves the peace of mind of knowing that if they or someone they love acquires a significant and permanent disability the NDIS will be there for them.*

*And all of us benefit from building a more inclusive and accessible society.*

*This is a 21st century story of successful political change driven by Australians with disability who demanded more control over their destiny<sup>1</sup>.*

And

*this government and myself have worked every day with the disability sector to do everything we can to make life on the NDIS and life for people with disability in Australia better.*

*We promised to make the NDIS a priority and not penalise people with disability for wanting to live fulfilled lives.*

*We promised to put more people with disability on the NDIS board and conduct a root-and-branch review of the scheme.*

*We promised to make the scheme sustainable so that future generations of Australians with disability have an NDIS to access.*

*We made a promise to ensure that every dollar was going to the people for whom it was intended—NDIS participants.*

*And we promised to restore trust in the scheme<sup>2</sup>.*

Intellectual Disability Rights Service (IDRS) welcomes the opportunity to provide this submission to Department of Social Services (DSS) consultations on the NDIS support rules.

<sup>1</sup><https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F27626%2F0059%22>

<sup>2</sup> *ibid*

We believe that the rules must be drafted, amended and interpreted through a co-design process, that is with lived experience informing decision making. IDRS also believes that any amendment, interpretation and implementation of the Rules must uphold the intent and the spirit of the Minister's second reading speech.

### **About Intellectual Disability Rights Service**

The Intellectual Disability Rights Service (IDRS) is a community legal centre and disability advocacy service for people with cognitive impairment in NSW. IDRS is the only service of its kind in Australia, with two key service functions.

Firstly, the IDRS Ability Rights Centre (ARC), offers free criminal and civil legal assistance to people living with a disability across NSW and supports on average 850 people per year. Our NDIS appeals team operates from the CLC, supporting approximately 90 people per year with access to the NDIS or matters arising from an NDIA decision relating to their plan.

Secondly, the IDRS Justice Advocacy Service (JAS) provides 24/7 support across NSW to people with cognitive impairment who come in contact with the criminal justice system, whether as victims, defendants or witnesses. Each year, JAS supports on average 2,500 people with cognitive impairment, including approximately 2,250 people recorded as offenders and 200 people recorded as victims of crime.

### **How well do you understand the NDIS Support rules?**

IDRS thinks the rules are open to interpretation and are creating confusion.

Our clients tell us that the rules have created barriers to purchasing previously accessible supports or have caused them confusion about what supports are now available to them.

IDRS clients want to understand and be clear about what they can spend their NDIS funds on. Many have experienced that the changes have reduced either or both the level of supports they have been able to purchase or the type of support they have been able to purchase. This results in IDRS clients' anxiety, confusion and frustrations.

### **At the planning stage supports have been denied:**

In many cases supports that have been denied are for support worker hours or therapeutic supports that have been excluded on the basis of being either on the 'not support list' or falling within a narrow interpretation of the support needs a person has that is not directly disability related.

Examples:

- a person with Down Syndrome being refused physiotherapy (as the NDIA deemed this not related to disability).
- A woman with moderate intellectual disability being denied support for speech therapy and dietitian (deemed not related to disability).

- A child being denied SECP (Social and Community Participation) for the school holidays (on the basis that this support is excluded by the 'not an NDIS support')

### **At the claiming stage plan managers have refused to pay back participants:**

#### **Confusion about what is permitted:**

IDRS has many examples where supports are purchased by participants (or their carers and family on their behalf) that their plan managers have subsequently refused to pay unless there is an express indication from the NDIA that the support is permitted to be purchased. On some occasions the NDIS states a support in a plan but generally the funds in Core and Capacity are flexible, meaning participants can choose what supports they wish to receive.

With respect to the replacement support classification, it's unclear how the replacement is approved. The rules say the CEO may make a replacement support determination but it is not clear to IDRS or our clients, the process that might trigger a CEO (or delegate) review.

#### **What would help make the rules easier to understand?**

The creation of five criteria for determining if a support can be purchased with a participant's plan has made a previously complex system, incomprehensible for many of our clients.

Those criteria are:

1. Is the requested support on the NDIS support list? [Schedule 1—Supports that are NDIS supports unless otherwise provided]
2. Is the support allowable as a 'replacement support'? [see Part 3— Replacement support determinations - Supports for which determinations may be made]
3. Is the support on the 'not generally an NDIS support' list? [Schedule 2—Supports that generally are not NDIS supports]
4. Is it a support that is better provided by another mainstream service? [Schedule 2— Supports that generally are not NDIS supports]
5. Is related to my disability [this is where the NDIA seems to making assumptions about what is related or not to a person's impairment, or not related to a person's impairment. The NDIA does not take into consideration the effect of the impairment for which that support/s are often required and essential for the person.

The way in which the rules operate adds to the uncertainty of what supports participants can spend their funding on:

1. A participant might be able to spend their funding on supports in the first list
2. A participant might be able (with an application to the NDIA for consideration) to spend their funding if the support would be cheaper than a disability alternative plus other criteria (such as the number of times the participant applied within the plan period for a replacement support)

3. A participant will definitely not be able to spend their funding on the 'not generally an NDIS support'.
4. A participant will definitely not be able to spend their funding on mainstream services or supports. Support falling into this category are broadly defined, meaning that previously allowable supports appear to fall into the mainstream categories. IDRS has evidence of the NDIA defining a support as 'mainstream' which is automatically disallows it from being purchased through plan funding. Without the service and support infrastructure for mainstream and foundational supports being firmly established, funded and accessible, this means that people with disability, who are NDIS participants are having their plans amended to their detriment. There is not the alternative supports available.

### **How have the lists of NDIS Supports helped you to know what the NDIS can and cannot fund?**

The NDIS support list has not assisted in providing clarity about what the NDIS can and cannot fund.

### **What have you found hard about using or understanding the lists for:**

- a) **supports that are NDIS supports** – insufficient logic around the ordering of the supports in the list – The list is vague and has no logical order.

For example, the first nine (9) supported listed begin with an 'A' and are either 'assistance to' or 'assistive'. The presence of a word beginning with 'A' should not determine where a support falls in a list of 37 supports.

IDRS suggests that the support should be listed by its utility and context. For example, the list should present the supports in a familiar format such as Core/Capacity and Capital and contains a much better description of what they are, written in plain English.

- b) **supports that are not NDIS supports?** This list is not exhaustive however it tediously long with inclusions of supports that have never been permitted, for example, tarot card reading, and alcohol. At best these inclusions are redundant and worst they are insulting.

### **What are some examples of things in the NDIS Supports lists that aren't clear?**

A few examples of ambiguity are:

1. Health: (k) health transport services – it is unclear if health transport services are defined as any support to take a participant to any type of health or allied appointment
2. Child protection and family support: (a) travel or accommodation for parents visiting their children that are in out-of-home care. This seems to indicate that a participant parent is not able to receive support if they are visiting their child who happens to be in out of home care, which implies that transport is available to support a participant visiting their child in any other setting.

3. Early childhood development (a) early childhood supports or therapies to support the general child development needs of a child. The way that the NDIA defines 'general developmental needs' requires clarity.
4. School education- (a) fees or payments for outside school hours care. This seems to imply that if a child is school aged then they will not have any supports in their plans for the hours outside of school hours. This is arbitrary and discriminatory.

IDRS has an example where a child attended a program in the holiday which was considered to fall into the 'not a support', even though the child's parent purchased the program from a disability provider thinking it was approved. The NDIA's decision was reversed at the Administrative Review Tribunal.

5. Justice - (c) the day-to-day care and support needs of a person in custody (including in a secure mental health facility), including supervision, personal care and general supports. This should be clarified to provide certainty to a participant who is in prison, either on sentence or remand, who might need to purchase an item to support their daily living, for example a wheelchair. If the Authorised Version Explanatory Statement is to be understood as accurately defining custody then support is not available to those on bail. This is a significant concern for people's access to justice and their ability to receive reasonable adjustments in such settings. ( see further below the extracted section on justice)

## NDIS Supports

Supported Independent Living needs clearer and more precise definition. Access to SIL is emerging as a significant theme in the support services being denied by the NDIA to IDRS clients.

|   |                                                                          |                                                                                                                                                                                                                                                                                                                                                                  |                                                    |
|---|--------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
| 5 | Assistance with daily life tasks in a group or shared living arrangement | Supports that provide assistance with or supervision of daily living tasks to participants in a shared living environment. This includes the following:<br>(a) supports provided on a temporary or ongoing basis;<br>(b) supports for short term accommodation and respite;<br>(c) supports provided to participants living in residential aged care facilities. | Participants or prospective participants generally |
|---|--------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|

## Intersection of Justice System and NDIS

### Justice

The NDIS does not fund supports that are more appropriately funded by the justice system. Whether or not certain services are NDIS supports will depend on whether or not a participant is in custody.

A participant is in custody if they are:

- in custody in a correctional facility, for example a prison, remand centre, youth detention centre or secure mental health facility
- on remand, awaiting or following sentencing
- required by a court order to regularly report to a correctional or community correctional agency, for example on bail, probation or parole
- serving a community based order, or are on a leave of absence order or therapeutic leave
- under forensic orders, which may include restrictions on your movements or other requirements, such as drug testing or attending prescribed treatment.

If in custody, the justice system is responsible for a participant's day-to-day care and support needs. This includes supervision, personal care and general supports. If a participant is in custody, the justice system will provide help with personal care, such as showering, eating and dressing as well as disability-related health supports. IDRS is concerned that the NDIA is [mis]interpreting the definition of custody and has amended plans for participants on community orders (for example a person on bail restrictions) meaning that they have supports removed when the case against them is not heard and not proved. Supports that are 'not usually NDIS supports' should not limit fundamental disability supports including home supports.

## **Concluding Remarks**

The Act that supports the operations of the National Disability Insurance Scheme says the Scheme has four goals:

Firstly, that it should provide a good experience for participants.

Secondly, the Scheme should support people with significant and permanent disability (and IDRS asserts that the interpretation of disability should be more inclusive of people with intellectual disability, cognitive impairment and psychosocial disability; that people with 'invisible' disability should not face discrimination and harmful interpretations of their ability or be forced to confront myths about the permanency of their condition).

Thirdly, the Scheme should be equitable.

Fourthly, the Scheme should be sustainable.

People with disability, their family, friends and their advocates all want a Scheme that former Minister Bill Shorten promised in his second reading speech in October 2024 would be "dignified, person-centred...that assesses needs to determine a consistent, accurate and fair budget, and that the budget can be spent flexibly"<sup>3</sup>. In determining assessments, the NDIA should not assume that a participant is seeking supports that are not directly linked to their full and active social and economic participation. Being mealy-mouthed about individual participant's plans will not contribute significantly to the sustainability of the Scheme.

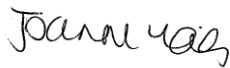
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<sup>3</sup><https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F27626%2F0059%22>

The Scheme's sustainability should be better linked to the regulation, governance and administrative rigour underpinning providers and the provider workforce. Rules about supports provided by the NDIS, mainstream services and the foundational supports all require clarification, certainty of jurisdictional boundaries and secure funding. Additional attention should be urgently paid to the architecture built around the service infrastructure of the Scheme to ensure the Scheme's future financial viability.

Thank you for receiving our submission. We would be pleased to offer any additional views or information that might be helpful in settling the NDIS Rules. Please do not hesitate to contact me at [joanne.yates@idrs.org.au](mailto:joanne.yates@idrs.org.au) or on 0493 892 965 should you require anything further.

Yours sincerely

A handwritten signature in black ink that reads "Joanne Yates". The signature is written in a cursive, flowing style.

Joanne Yates  
**Chief Executive Officer**

## **Case Example One**

### **Supports that are Generally Not NDIS Supports**

#### **Aged Care**

According to NDIS transitional rules, the following are generally not funded by the NDIS under aged care responsibilities:

(a) Any of the following within the meaning of the Aged Care Act 1997:

- (i) Basic daily care fees
- (ii) Refundable accommodation deposits
- (iii) Extra service fees

(b) Any of the following services provided by a residential aged care service:

- (i) Daily assistance with tasks such as cleaning, cooking, and laundry
- (ii) Personal care supports including bathing, dressing, and going to the toilet
- (iii) Access to health practitioner services, clinical care, and therapies
- (iv) Social and emotional support services and entertainment

Note: Supports for a participant who entered residential aged care before the age of 65 are not included in paragraph (b) if there is an agreement in place between the NDIA and the Department of Health and Aged Care to continue NDIS funding.

### **Case Study: Frances – Accessing Appropriate Disability Supports in Aged Care**

#### ***Background:***

Frances is a woman with a progressive degenerative condition that significantly affects her mobility, cognition, and ability to manage daily tasks independently. At age 64, she could no longer be safely supported at home and transitioned into a residential aged care facility with an active NDIS plan in place. Frances's condition was rapidly declining. She was losing her ability to walk and needed a wheelchair. She required a hoist to transfer between lying and sitting, and a suitable supportive chair when she was not in bed.

#### ***Scenario:***

Upon turning 65, the NDIS determined that Frances' supports were more appropriately delivered under the aged care system, and her funded NDIS supports were substantially reduced. The rationale was based on her age and residence in aged care, rather than an assessment of her individual disability-related support needs.

However, the aged care provider was not equipped to deliver the level or type of support Frances required, particularly in relation to her complex disability-related needs, including a high level of hoisting support at a 2:1 ratio, communication and swallowing therapy, and assistance with eating and mobility. As a result, she was at significant risk of neglect and reduced quality of life.

Frances' family sought a review of the NDIS decision through the Administrative Appeals Tribunal (AAT)<sup>4</sup>, arguing that the removal of disability supports was inconsistent with her rights and the NDIS's obligation to provide reasonable and necessary supports based on functional need.

**Outcome:**

Through NDIS Appeals advocacy and the strong support of her family, the NDIA agreed to a settlement in the Alternative Dispute Resolution stage of the process to meet all her support needs, as they related to her disability, which far exceeded what is typically available under the aged care system.

**Key Point:**

NDIS does not fund supports that are the clear responsibility of the aged care system, such as basic care fees, personal care, or general aged care services. However, where a person under 65 enters aged care and their disability support needs exceed what the aged care system can provide, the NDIS should still fund additional supports. Each case must be assessed on the basis of functional need, not age alone.

## **Case Example two**

### **Supports that are Generally Not NDIS Supports**

#### **Justice**

- (a) Supports in secure mental health facilities that are clinical in nature
- (b) Supervision and monitoring to prevent or observe offending behaviour or to monitor adherence to justice system-imposed conditions
- (c) The day-to-day care and support needs of a person in custody (including in a secure mental health facility), including supervision, personal care and general supports
- (d) Pre-sentence psychological and psychiatric reports
- (e) Secure accommodation facilities where the purpose of this accommodation is to safeguard the community or prevent reoffending, including secure mental health facilities

### **Case Study: Mark – Navigating the Justice System with Disability Support Needs**

#### ***Background:***

Mark is a 28-year-old man with a significant intellectual disability and a long-standing history of behaviours of concern, including aggression and impulsivity. He is an NDIS participant and, prior to recent legal issues, received comprehensive supports under his plan—such as specialist behaviour support, daily living assistance, and supported accommodation.

#### ***Scenario:***

Mark was recently charged with property damage and assault following an incident during a behavioural episode. He is currently on bail while awaiting court proceedings. A condition of his bail is that he may not enter the small regional town where the offence occurred, except to attend court. This restriction required Mark to relocate to another town approximately 200 kilometres away.

His support coordinator notified the NDIS of the change in circumstances, including that Mark was now on bail. Following this, Mark experienced a sudden reduction in the supports he had previously relied on.

Despite there being no change to Mark's functional impairment or eligibility, several key supports—such as community access support workers, behaviour support services, and transport—were either reduced or removed. NDIS advised that certain needs now fell under the justice system, such as supervision mandated by the court or transport for court attendance. However, some of the withdrawn supports, like in-home supports and

community transport, had already been identified as necessary disability-related supports prior to Mark's involvement with the justice system.

***Implications:***

This misapplication led to a serious risk of Mark breaching bail or reoffending—not out of defiance, but due to lack of appropriate disability support. His ability to maintain routines and regulate behaviour was compromised.

IDRS NDIS Appeals advocacy became involved early in the process, helping the support coordinator distinguish between genuine justice-related supports and those that should still be funded through the NDIS.

Fortunately, during the external merits review process, the NDIA recognised that the relevant NDIS rules had been misapplied. An early offer was made to reinstate appropriate supports.

***Key Point:***

Supports required solely to meet justice obligations—such as legal services, court-ordered supervision, and supports in custody—have never been the responsibility of the NDIS. However, disability-related supports must continue regardless of an individual's legal status. A collaborative and well-informed approach between the justice and disability systems is critical to ensure people with disability are not further disadvantaged.