

Submission to NDIS Supports rules consultation

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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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Contents

Recommendations	1
1. Introduction	3
2. Preferred overarching approaches to drafting the Permanent Rule	4
3. Facilitating access for people with disability to appropriate mainstream products to meet disability needs	5
3.1 The replacement supports system is ineffective and inefficient.....	5
3.2 Redefining the concept of a ‘standard item’	6
3.3 Preclearance of supports	7
4. Combining the ‘in’ and ‘out’ lists	8
4.1 Interpretation issues for participants and decision-makers.....	8
4.2 Re-structuring the lists	10
5. Interfaces between service systems	11
5.1 Revisit and renegotiate APTOS	11
5.2 Identifying the most appropriate service system	12
5.3 Mechanisms to resolve interface confusion and disputes.....	13
5.4 Equipping participants to enforce applicable discrimination laws	14

Recommendations

Recommendation 1: Exclusions of ‘standard items’ be framed in terms of the absence of a distinct functional benefit for a person with disability

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In particular, the exclusion should not exclude items by virtue of them not having been ‘modified or adapted’ for the relevant NDIS participant.

Recommendation 2: Government explore developing a pre-clearance approach for purchase of NDIS supports

Government should give serious consideration to developing a system to provide rapid advice to participants in a structured way that would provide them with confidence in making purchasing decisions and allow the intended flexibility with NDIS funds. Any such system must:

- be capable of providing rapid responses to participant inquiries; and*
- provide a complete defence against future debts being raised for a participant acting in compliance with the advice they receive.*

Recommendation 3: Combine the ‘in’ and ‘out’ lists into a single ‘in’ list with carve outs

The Transitional Rules should be re-structured to combine the ‘in’ and ‘out’ lists into a single ‘in’ list, which would, at a minimum, categorise supports by ‘subject matter categories’, carve out excluded supports from included supports, and address exclusions on the basis of interfaces with other service systems.

Recommendation 4: APTOS be replaced

The Commonwealth and State Governments come to a new intergovernmental agreement to replace that represented by the current APTOS.

Recommendation 5: The Permanent Rule identify other service systems intended to be responsible for providing types of supports excluded from its definition of NDIS supports

Where the Permanent Rule excludes supports from being funded on the basis that they are more appropriately provided by another service system, it should specify this is the case and identify the other service system(s).

Recommendation 6: Mechanisms to resolve disputes over responsibilities of other service systems be designed and implemented

Specific measures should be implemented in relation to each of the service systems identified in the Permanent Rule (per above Recommendation 5) to allow the NDIA and other governmental

agencies to confer and agree together on resolutions to disputes over system responsibility that relate to individual participants, and that arise on a wider systemic basis.

Recommendation 7: A dedicated national advocacy service be funded to support NDIS participants to consider and lodge complaints of disability discrimination complaints against service systems that fail to meet their relevant legal obligations

The Commonwealth Government should fund a national service of advocates, accessible to NDIS participants referred by the NDIA, to advise individuals on their rights under disability discrimination law in relation to service systems that decline to provide them with supports they need. Where a service system may have breached discrimination laws, this advocacy service should assist the participant to draft and lodge a complaint with the appropriate body.

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 the permanent rule to define National Disability Insurance Scheme ('NDIS' or 'Scheme') supports for the purposes of s 10 of the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act') ('the Permanent Rule').

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.

Our submission focuses on structural and systemic issues with the current approach reflected in the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024* (Cth) ('Transitional Rules') and the ways these can be addressed, rather than specific supports that should be included or the drafting of individual category definitions that should be amended. Notwithstanding this, we note we made the following observations in our submission to the August 2024 DSS consultation on the Transitional Rules:

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.

These concerns persist. We encourage DSS to give particular weight to the views provided by disability rights organisations and others in the disability community in response to this consultation where they itemise particular types of supports that are so affected and suggest improvements.

The body of our submission focuses on:

- addressing interpretive confusion by condensing the separate listing of 'non-NDIS supports' and 'NDIS supports' into a single list broken down by category;
- reforms to the lists and surrounding legislative and administrative provisions to improve interfaces between the NDIS and other support systems; and
- proposed measures to improve access to standard items for participants to address their disability support needs in cost-effective and creative ways.

Some of these proposals could only be enacted through actions beyond the drafting of the Permanent Rule, including legislative amendments and administrative measures. The breadth of

these proposals reflects the need for a cohesive and Scheme-wide vision to implement the ongoing NDIS reforms.

2. Preferred overarching approaches to drafting the Permanent Rule

The Transitional Rules do not allow sufficient flexibility for participants in their spending. To a degree, this is a product of the current approach to list 'NDIS supports' exhaustively (if by category), as there will always be cases where participants identify supports that would be useful in practice but were not considered in advance by drafters.

We consider a more appropriate approach to defining the scope of supports on which NDIS funds can be used would be to have only lists of supports on which NDIS funds cannot be spent (ie, an 'out' list). This would be far more user-friendly for participants, who would only need to confirm their planned uses of funds are not expressly prohibited, and provide the necessary flexibility to allow participants to find appropriate, efficient and sometimes creative solutions to their disability support needs. It would also avoid any uncertainty or complex decision-making that might flow from principles-based lists.

We understand the Government considers section 10 of the NDIS Act requires the existence of lists setting out the range of supports that are NDIS supports. We also understand section 10 is drafted in this way so as to give constitutional validity to the Scheme grounded in relevant treaty obligations pursuant to the external affairs power in s 51(xxix) of the Constitution. However, the attempts to define NDIS supports in this way through the Transitional Rules has demonstrated this approach does not work for participants. In order to develop an approach that does provide participants with the flexibility they need, alternatives to the current reliance on 'in' and 'out' lists must be considered, including amending the Act if necessary.

If the apparent constitutional concerns are seen as preventing such an alternative approach, we suggest the Commonwealth and the States and Territory governments consider how these could be overcome. For example, the Commonwealth Government could ask the State Governments to refer power as necessary for the Government to disburse NDIS funds without constraining their expenditure by participants to items on a list of approved NDIS supports. Given the NDIS is co-funded and delivered in partnership between the Commonwealth and State and Territory governments, it would be appropriate for States to provide any such referrals where they were seen as necessary for better administration of the Scheme. This would, in turn, allow any necessary amendments to section 10 to be made to implement our preferred 'out list only' approach as above.

While we consider this would represent the optimal approach to defining the range of permitted NDIS supports, to the extent and as long as the current prescriptive NDIS supports lists are retained, the general approach taken to drafting the Permanent Rule should expand flexibility for participants and the scope of supports that can be purchased. This should involve drafting the categories of allowable NDIS supports broadly and permissively, and providing notes on interpretation directing a permissive approach in the case of uncertainty.

Many NDIS participants are likely to be very cautious about spending NDIS funds on supports where they are unsure if they are permitted out of fear of incurring debts to the Agency for impermissible spending; and providers (including support co-ordinators) may also be inclined to err on the side of caution in their advice about use of funds. This means any measures to improve flexibility through drafting of the Permanent Rule must be expressed clearly and in unmistakable language so as to give participants the necessary assurance when spending funds and avoid chilling effects.

These aims of clarity and flexibility need to be reflected throughout the Rules in an approach driven by an overarching drafting philosophy. We suggest below, at sections [3]-[5], several specific measures we believe would help to achieve these goals.

3. Facilitating access for people with disability to appropriate mainstream products to meet disability needs

The Transitional Rules dramatically restrict the use of generally-available items to meet participants' disability needs. We understand this is aimed at preventing inappropriate spending and ensuring the NDIS as an insurance scheme remains directed at addressing participants' disability support needs rather than general life expenses. However, in pursuit of these goals the current Transitional Rules dramatically reduce participants' choice and control, increase segregation of people with disabilities by barring them from accessing mainstream products and services, and lead to inefficiencies by compelling participants to purchase expensive bespoke items rather than making creative use of general products to meet the same needs. This is commonly referred to as the 'Disability Store' problem. As such, the approach in the Transitional Rules and accompanying legislation to standard items must change.

3.1 The replacement supports system is ineffective and inefficient

While the 'replacement supports' process in s 10(6)-(8) of the NDIS Act is aimed at alleviating the Disability Store problem, it fails to do so. Some of the structural problems with the replacement supports process will be difficult if not impossible to address without removing and replacing the replacement supports process itself. These structural problems include:

- the test provided for determining a replacement support for a participant in s 6(d) of the Act is too high; participants must show a support will meet *all* of the four criteria in the subsection, ruling out, for example replacements that might cost slightly more but yield much a better outcome for a participant;
- the test requires a participant show the replacement support would 'replace' something they already have, with the result the participant would have to 'give up' an existing support or portion of funding in order to obtain the replacement support. This significantly dilutes the incentive for participants to find cost-effective solutions that would make the NDIS more efficient;
- participants will need to provide evidence to support their replacement support requests, which will likely need to be in the form of professional reports. Most professional reports will cost a comparable or greater amount than any replacement support the participant

might seek, meaning preparation of the replacement support request is an inefficient use of the participant's NDIS funding;

- s 6(a) of the Act requires any potential replacement support to be prescribed in the NDIS rules. Even if government sought to significantly broaden the scope of these prescribed supports, it would still not be able to envisage the full range of creative supports participants might need to seek to make the best use of their NDIS funding.

The above issues with the replacement supports process cannot be resolved by simply including a wider range of supports in the Permanent Rule.

3.2 Redefining the concept of a 'standard item'

The current Transitional Rule provides that:

standard item for a participant or prospective participant means an item that is not modified or adapted to address the functional impairments of the participant or prospective participant.¹

This definition of a 'standard item' is inappropriate and, as the term is used in many of the exclusions listed in Schedule 2 of the Transitional Rule, has led to overly broad exclusions of items from being NDIS supports.

The current definition's focus on an item being 'modified or adapted to address the functional impairments...' emphasises the bespoke nature of the item and therefore rules out standard items that can be put to creative uses by people with disability to address their disability support needs. For example, this would rule out a piece of outdoor furniture being used as a shower chair (as opposed to more expensive specialised shower chairs), notwithstanding the outdoor furniture item being potentially cheaper, safer and/or better suited to meeting the person's needs.

A similar example arose in the Administrative Review Tribunal ('Tribunal') decision of *VPYC and the CEO, NDIA (NDIS)* [2025] ARTA 3, where a participant sought funding for a large beanbag and a weighted blanket (among other supports). Even though the participant successfully used these two supports to address his sensory needs stemming from his autism – in the case of the beanbag, by putting it to novel use by lying under it rather than sitting on it – the Tribunal found the beanbag was excluded, and the weighted blanket probably excluded by virtue of being 'standard items'. The Tribunal's reasoning reflected the fact the items had not been 'modified or adapted' for the participant. By contrast, a bespoke product for addressing the participant's sensory needs – which may have proved more expensive, and would not have been already tested and found effective as the beanbag and weighted blanket had – would presumably have satisfied this criterion.

This definition of a 'standard item' should not be reproduced in the Permanent Rule. Instead, the Permanent Rule should only exclude on this basis items that do not deliver a distinct functional benefit to the participant through assisting them to address their disability support needs. A definition framed in this way could exclude everyday living costs incurred by all Australians on an

¹ Transitional Rules, s 4(1).

equivalent basis, while allowing greater room for participants to use everyday products to address their disability needs.

Recommendation 1: Exclusions of ‘standard items’ be framed in terms of the absence of a distinct functional benefit for a person with disability

Where the Permanent Rule seeks to prevent NDIS funds being used to purchase standard items for people with disability, the relevant exclusion should be framed to only exclude those items that do not deliver a distinct functional benefit to the person with disability.

In particular, the exclusion should not exclude items by virtue of them not having been ‘modified or adapted’ for the relevant NDIS participant.

3.3 Preclearance of supports

With the anticipated rollout of ‘new framework plans’, the Permanent Rule will need to function effectively for participants who have not had supports approved in their plan on a line-by-line basis but will have been given a flexible budget to spend on NDIS supports. While this flexibility will be welcome for many participants, we note it is likely to increase the chilling effects of existing ambiguity in the scope of allowable supports as participants may only discover their interpretation differs from that of the NDIA when a debt is raised against them. These chilling effects are likely to be particularly pronounced in relation to supports involving ordinary products being used for novel disability support purposes.

One means by which Government could address this would be to provide an effective method of preclearance of supports, utilising the needs assessment process to identify needs and allow participants to get quick responses about the permissibility of a prospective purchase. This preclearance could involve:

- during a needs assessment, the assessor determines the range of disability needs a person will need to obtain supports for (including those that are and are not considered the responsibility of the NDIS to provide). These are noted on the participant’s NDIS file for later reference;
- after the participant has received their new framework plan and funding, they identify a support they wish to purchase. If the support is an everyday item and the participant is unsure whether it is excluded by the functional benefit-based definition outlined above at [3.2], they can contact a team at the NDIA by either phone or email before purchasing it (noting this could be resourced via current ‘planning’ resources);
- the relevant NDIA team will consider whether the support would address a disability need identified on the file, and whether the support would deliver a distinct functional benefit;
 - this consideration would be straightforward and should be able to be conducted within 24-48 hours. This quick turnaround would be necessary in order for the process to be practicable for participants making purchasing decisions in their everyday lives.
- where the NDIA team determines the support is permissible, they provide confirmation of this in writing to the participant. This confirmation would serve as an absolute defence against any debt being raised or other negative consequences levied against the

participant as a result of the spending, in the event a different staff member at the NDIA subsequently took a different view.

This preclearance process could serve as a more effective and efficient form of the replacement supports process, or it could be designed as a new and separate process altogether.

Recommendation 2: Government explore developing a pre-clearance approach for purchase of NDIS supports

Government should give serious consideration to developing a system to provide rapid advice to participants in a structured way that would provide them with confidence in making purchasing decisions and allow the intended flexibility with NDIS funds. Any such system must:

- *be capable of providing rapid responses to participant inquiries; and*
- *provide a complete defence against future debts being raised for a participant acting in compliance with the advice they receive.*

4. Combining the ‘in’ and ‘out’ lists

4.1 Interpretation issues for participants and decision-makers

The existence of an ‘in’ list and ‘out’ list requires participants to have a complete understanding of both lists in their entirety to be able to assess whether their spending will be compliant. This structure, in addition to other issues with drafting and lack of clarity, creates serious practical challenges for participants and providers.

Additionally, operationalising two ‘competing’ lists has created unnecessary legal and administrative complexity, as illustrated by relevant ART jurisprudence. In its decision in the case of *FSWN*, the Tribunal member proposed a staged enquiry as follows:²

1. Is the support in the ‘out’ list?
 - a. If yes, then it cannot be an NDIS support and is the end of the inquiry and the support is not ‘reasonable and necessary’.
 - b. If no, then is the support on the ‘in’ list?
 - i. If no, it cannot be an NDIS support and is the end of the inquiry and the support is not ‘reasonable and necessary’.
 - ii. If yes, proceed with considering whether the support can be funded by moving to stage 2.
2. Does the support meet the other relevant criteria in the NDIS Act?

This approach offers a very prescriptive process in which the first distinct step proposes considering only the ‘out’ list. This encourages an approach where the Transitional Rules, and items it lists on the ‘out’ list, are not read as a whole (as required by typical statutory construction), and can accordingly lead to a broader interpretation of ‘out’ list items than desirable or appropriate. This approach seems at odds with the interpretative approach suggested by a

² *FSWN and National Disability Insurance Agency (NDIS)* [2025] ARTA 114 (20 February 2025) at [43].

natural reading of the Transitional Rules themselves – the ordinary meaning of the words in rule 5 would provide that the ‘in’ list is subject to the ‘out’ list.³

The confusion associated with operationalising the two lists is most apparent where there are overlapping descriptions in the ‘in’ and ‘out’ lists, such that a support may plausibly be covered by descriptions of items in both Schedule 1 and Schedule 2. In that situation, it is possible the strict prescriptive steps proposed in *FSWN* could result in a different decision being made about whether the support is an NDIS support or not; rather than balancing the two lists to arrive at the most appropriate decision. As an example, the Tribunal has had to consider whether a ‘mobility scooter’ is an NDIS support. On the approach asserted in *FSWN*, a decision-maker may mistakenly end their inquiry after considering the ‘out’ list in isolation and arriving at the conclusion that a mobility scooter is excluded simply because it overlaps with the description in item 6 of Schedule 2, which excludes day-to-day living costs for travel and transport, specifically:

...

(b) vehicles, including motor vehicles, motorbikes, watercraft, all-terrain vehicles, standard bikes and scooters, and other recreational vehicles;

...

(f) personal mobility devices, including e-scooters, electric bikes and skateboards;...⁴

However, on the *Johnstone* approach, the decision-maker’s inquiry would likely involve reading the description in item 6 of Schedule 2 as against the context of the full Transitional Rule, including the description in item 28 of Schedule 1 which permits ‘personal mobility equipment’ to ‘support[] or replace[] a participant’s capacity to move indoors and outdoors and to transfer from one place to another’ such as motorised mobility devices – while also having regard to the structure of the Transitional Rule and the legislative context.

A further statutory interpretation issue arises because of the inherent structure of the two lists. The legal maxim *lex specialis derogat legi generali* means that if a particular matter is being regulated by a general norm and a more specific one, the specific shall prevail over the general. As the ‘in’ list provides non-exhaustive examples of included supports and the ‘out’ list exhaustively lists supports that are not NDIS supports,⁵ one application of the maxim could lead to the conclusion that where a support overlaps with both lists, the more specific ‘out’ list prevails over the more general ‘in’ list. Accordingly, the current structure of the lists encourages a more

³ *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024* (Cth) s 5(1).

An alternate (if not contrary) approach was taken in *Johnstone and National Disability Insurance Agency (NDIS)* [2025] ARTA 106 (17 February 2025) where the Tribunal member at [189] stressed the importance of reading the ‘in’ list together with the ‘out’ list to properly understand the scope of each listed item.

⁴ See for example the NDIA’s argument in *Eastham and Chief Executive Officer of the National Disability Insurance Agency (NDIS)* [2025] ARTA 198 at [102]-[117].

⁵ Explanatory Statement, *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024* (Cth) 16, 32.

conservative interpretation, resulting in the undesirable outcome of participants forgoing vital disability supports.

4.2 Re-structuring the lists

To address the issues raised in [4.1] above, a more accessible and appropriate approach would be to re-draft the two lists into a single ‘in’ list with certain exclusions.⁶ To this extent this presents a challenging technical task to draft, the Commonwealth Government should invest significant resources into re-structuring the lists in this way given the substantial value for clarity, usability and sound legal interpretation. At a minimum, the single ‘in’ list should:

1. Re-categorise the supports to provide more intuitive groupings. Currently, the items are listed alphabetically by category, and align with the categories in the *Pricing Arrangements and Price Limits*. This is neither intuitive nor user-friendly for participants. The lists should be re-categorised so similar supports are grouped together under ‘subject matter categories’; eg with categories of supports relating to:
 - housing, accommodation, home modifications, specialist disability accommodation, etc;
 - travel, transport, vehicle modifications, personal mobility equipment, etc;
 - therapies, exercise physiology and personal well-being activities, etc;
 - daily personal activities;
 - etc.
2. Create a single ‘in’ list of permitted supports, from which any supports that are to be excluded are ‘carved out’ from categories of included supports (rather than separately ‘prohibited’). This will be facilitated by the above step of grouping supports by ‘subject matter categories’.

As some excluded supports could correspond to more than one ‘subject matter category’, further consideration will need to be given to whether each carve out can correspond to a single most relevant corresponding ‘subject matter category’; or whether the excluded support would need to be placed against more than one ‘subject matter category’.

3. Separately address interface supports: to the extent a determination is made that the NDIS should not fund a support or type of support because of an interface with another service system, and these excluded supports would not otherwise be listed as exclusions alongside a corresponding category of included supports, these exclusions may need to be separately referred to in order to implement our Recommendation 5 below at [5.2] that the document specify the responsible service system for that support).

We observe the Commonwealth Government’s recent aged care reforms have created service lists which group supports into broad categories, and then detailed within each category the

⁶ While we observe above at [2] that a single ‘out’ list, with all other supports being permissible, would be the ideal approach, we understand government’s view is that neither current legislation nor the constitutional position of the NDIS would permit this. This section and associated recommendations should be understood as alternatives to the adoption of that preferred structure.

service type, services, and the services that are in and out of scope.⁷ Relevantly, the *Aged Care Act 2024* (Cth) engages the external affairs power to fund supports for individuals with impairments.⁸ We consider this provides an appropriate example for drafters to consider.

Recommendation 3: Combine the ‘in’ and ‘out’ lists into a single ‘in’ list with carve outs

The Transitional Rules should be re-structured to combine the ‘in’ and ‘out’ lists into a single ‘in’ list, which would, at a minimum, categorise supports by ‘subject matter categories’, carve out excluded supports from included supports, and address exclusions on the basis of interfaces with other service systems.

5. Interfaces between service systems

Part of the rationale for the NDIS supports lists is to identify which types of supports the NDIS is responsible for, and which are to be the responsibility of other service delivery systems (including those administered by State and Territory governments). In particular, many exclusions will be on the basis that support should be provided elsewhere. The lists must perform this task of interface-definition as the previous criterion of s 34(1)(f) has been replaced.⁹

To date, there has been a persistent and thoroughgoing lack of clarity around this interface. This creates confusion, frustration and administrative load for participants and public servants alike. More seriously, this lack of clarity can lead to each system disclaiming responsibility, leaving participants unsupported. This latter problem is widespread and pronounced, having been documented in public materials and Tribunal decisions as occurring across education,¹⁰ health,¹¹ criminal justice systems,¹² housing¹³ and elsewhere.

The Permanent Rule must contain mechanisms and a drafting approach that contributes to resolving these issues.

5.1 Revisit and renegotiate APTOS

As outlined above, the existing interface arrangements have not worked. The policy document representing the intergovernmental agreement reached in 2015, the Applied Principles Tables of Supports (‘APTOS’), has not led to a clear practical division of responsibilities. In some cases this reflects uncertain drafting in APTOS itself; in others, failure to implement the agreement (and a lack of enforcement mechanisms). The breadth and complexity of the compromises APTOS

⁷ See for example, Australian Government Department of Health, Disability and Ageing, ‘Support at Home Service List’ (16 June 2025) <<https://www.health.gov.au/resources/publications/support-at-home-service-list?language=en>>.

⁸ *Aged Care Act 2024* (Cth) s 67; Revised Explanatory Memorandum, *Aged Care Bill 2024* (Cth) 108.

⁹ We note this requirement has been reproduced in the *NDIS (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024* (Cth) at s 7, but that this will cease to have effect when the Permanent Rule commences.

¹⁰ See *XNTW and National Disability Insurance Agency* [2023] AATA 759.

¹¹ See *Young and National Disability Insurance Agency* [2014] AATA 401; *Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706.

¹² See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report – Executive Summary* (2023) 132-133.

¹³ See *BDRY and National Disability Insurance Agency* [2023] AATA 3379.

represents means it was predictable these issues would arise, and that the document would require iteration to reflect practical learnings.

It is essential the Federal, State and Territory governments now renegotiate these intergovernmental agreements to address problems that have emerged and take account of the feedback from the disability community about where gaps in service delivery persist. Only a refreshed and improved agreement can provide a sufficiently considered and principled basis for the design of the interface elements of the Permanent Rule.

In this regard, we echo similar recommendations from the NDIS Review, the Grattan Institute, the Disability Royal Commission, and others.¹⁴ This new intergovernmental agreement may take the form of an updated APTOS, a National Disability Agreement, or some other arrangement. Regardless of form, it must:

- provide sufficient levels of detail about which service system is responsible, to avoid confusion between the NDIS and other services or evasion of responsibilities;
- take account of and address issues with the current arrangements raised by the disability community; and
- include mechanisms for review whereby the governments party to the agreement can reconsider the arrangements where needed and raise concerns with other government implementation.

An improved replacement for APTOS will provide a clear and sound basis for drafting the interface components of the Permanent Rule.

Recommendation 4: APTOS be replaced

The Commonwealth and State Governments come to a new intergovernmental agreement to replace that represented by the current APTOS.

5.2 Identifying the most appropriate service system

Where the Permanent Rule excludes a support from being provided through the NDIS on the basis that it is best provided by another service system, it should clearly state this. For example, if the table format used for the Transitional Rule were retained, it could also incorporate an additional column that specified the exclusion was on the basis of an interface with another service system and, crucially, identify the other service system expected to provide the support.

This specification would help distinguish supports that are acknowledged as valuable for meeting participants' disability needs, but are not the responsibility of the NDIS, from supports excluded on other bases such as being inappropriate, or a support participants are expected to fund privately. This would assist in clarifying the Permanent Rule, as these bases would assist courts

¹⁴ Independent Review into the National Disability Insurance Scheme, *Final Report* (October 2023), available <<https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf>>, pp 66-80; Sam Bennett, Mia Jessurun, Hannah Orban, *Saving the NDIS: How to rebalance disability services to get better results*, (29 June 2025), available <<https://grattan.edu.au/wp-content/uploads/2025/06/Saving-the-NDIS-Grattan-Institute-Report.pdf>>, pp69-70; above n 12.

and Tribunals to construe the scope of the exclusion in the context of its rationale. It would also bolster the legitimacy of these exclusions for participants and providers.

In many cases the identification of the other service system expected to provide the support will assist participants by directing them to the right service to meet their relevant need. Where that service then fails to meet the participants' support need, this clarification of responsibility – reflecting an agreed position between the governments which drafted and approved the relevant Rules – will allow the disability community and their representatives to direct their advocacy for reform to the appropriate agency and/or level of government.

Recommendation 5: The Permanent Rule identify other service systems intended to be responsible for providing types of supports excluded from its definition of NDIS supports

Where the Permanent Rule excludes supports from being funded on the basis that they are more appropriately provided by another service system, it should specify this is the case and identify the other service system(s).

5.3 Mechanisms to resolve interface confusion and disputes

The specification of the appropriate other service system will also enable other mechanisms to be designed and implemented to overcome interface issues. For instance, in some cases it would be appropriate for a mechanism to be implemented for joint-funding of individual supports between the interface (as recommended by the Disability Royal Commission in relation to the interface between the NDIS and the criminal justice system).¹⁵

In others, it would be appropriate for legislation to mandate the relevant service systems speak directly to one another to develop a coherent plan for service delivery. For example, we have seen challenges commonly arise where an NDIS participant is homeless and requires a home with specific modifications (but whose needs do not rise to the threshold required for Specialist Disability Accommodation eligibility). The relevant state or territory housing authority may be unable to offer an appropriate home, and unwilling to set aside a property from their limited stock where it will only be habitable by the person after modifications whose funding is uncertain. The NDIA may find it challenging to agree to fund modifications for a (hypothetical) property that the person does not currently inhabit, and/or may interpret a request for this funding as part of a response to homelessness, as understood to be a state and territory responsibility. The participant may be caught shuttling between both services that struggle to co-ordinate with one another and mutually disclaim responsibility for parts of the service provision, while the frontline service delivery staff they encounter lack the authority and expertise to understand and address their needs.

However, where the support lists identify the NDIS will not fund certain supports based on the interface with state and territory housing authorities, legislation could also require the NDIA and the relevant housing authority to confer *directly* and develop a solution. This would prevent situations where each service tells the participant a support is the others' responsibility; and could help broker arrangements whereby, for example, the housing authority agrees to supply a 'bricks

¹⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report, Volume 8: Criminal justice and people with disability*, (2023) 25 (recommendation 8.17).

and mortar' home, on the condition the NDIA agrees in advance to fund appropriate modifications for the person.

Such interface resolution mechanisms may need to be designed and implemented on an area-by-area basis; but the broad specification in the Permanent Rules of which other service system is responsible could form the basis for these mechanisms.

Recommendation 6: Mechanisms to resolve disputes over responsibilities of other service systems be designed and implemented

Specific measures should be implemented in relation to each of the service systems identified in the Permanent Rule (per above Recommendation 5) to allow the NDIA and other governmental agencies to confer and agree together on resolutions to disputes over system responsibility that relate to individual participants, and that arise on a wider systemic basis.

5.4 Equipping participants to enforce applicable discrimination laws

Agreements as to the interface between the NDIS and other services have always envisaged a role for disability discrimination law in defining the appropriate division of responsibilities. Most directly, the terms of the criterion in former s 34(1)(f) – currently preserved in transitional rules – provide consideration of whether another service delivery system would 'more appropriately' deliver a given support must include evaluation of 'reasonable adjustments required under a law dealing with discrimination on the basis of disability'.¹⁶ The terminology of 'reasonable adjustments' in this context directly invokes legal duties imposed by the *Disability Discrimination Act 1992* (Cth), as well as other State- and Territory-level discrimination legislation.¹⁷

This theoretical framework nonetheless creates significant practical challenges for people with disability. The barriers faced by people with disability asserting their rights through discrimination law are well-documented. The Disability Royal Commission identified:

...one of the principal deficiencies of the DDA: the protection of a person's rights depends on that person being prepared to make and pursue a complaint of discrimination on the ground of disability. Even if the complaint does not reach a court, the complainant must have the personal resources and determination to identify and support the claim...¹⁸

Accordingly, a participant might be denied NDIS funding for a support, on the basis the support should be the responsibility of another service system as determined by the relevant discrimination laws; but where that other service system does not provide the support, the participant is unable to bring the necessary discrimination law action to compel it.

Where the NDIA determines the NDIS should not fund a support on this basis, it should assist participants to seek an appropriate remedy. We recommend this take the form of a funded advocacy service to which the NDIA could refer participants for assistance with, specifically,

¹⁶ *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024* (Cth), s 7(3).

¹⁷ *Disability Discrimination Act 1992* (Cth), ss 5(2), 6(2).

¹⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report, Volume 4: Realising the human rights of people with disability*, (2023), 298.

exploring and pursuing discrimination claims against service providers who fail to meet their obligations under discrimination law.

This service could be made accessible by referral only to ensure it is appropriately focused. With regard to old framework plans, these referrals could be triggered by any refusal based on a failure to meet the relevant 'most appropriate service' funding criterion; for participants with new framework plans, they could be triggered by a needs assessor identifying an (unmet) need that is determined to be out of scope of the needs assessment and NDIS funding package.

Increasing the prospect of such discrimination claims being brought would discourage agencies responsible for delivering services from withdrawing supports or decreasing accessibility for people with disability, in light of their greater exposure to risk of complaints. Where such complaints are ultimately necessary, they can help to achieve individual justice for participants and systemic changes to improve the accessibility of the relevant services. While these advocates will not resolve the issue for all participants faced with such interface gaps – many participants will face other personal barriers to pursuing such a complaint – they would introduce an important enforcement mechanism to disincentivise service retreat.

Recommendation 7: A dedicated national advocacy service be funded to support NDIS participants to consider and lodge complaints of disability discrimination complaints against service systems that fail to meet their relevant legal obligations

The Commonwealth Government should fund a national service of advocates, accessible to NDIS participants referred by the NDIA, to advise individuals on their rights under disability discrimination law in relation to service systems that decline to provide them with supports they need. Where a service system may have breached discrimination laws, this advocacy service should assist the participant to draft and lodge a complaint with the appropriate body.