

Submission to public consultation on new framework planning NDIS Rules

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Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au



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.

Contact

Mitchell Skipsey
The Justice and Equity Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6500

E: mskipsey@jec.org.au

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

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Recommendations

Recommendation 1: NDIA planning decisions attribute support needs to impairments on the same basis as set out in Notices of Impairments

Government should ensure the NDIA bases decisions regarding the attribution of support needs to impairments using the same basis for characterising impairments as required by s 32BA for Notices of Impairments.

Recommendation 2: Individual participants receive clear advance notice of their transition to new framework planning

Participants should be told at least six months in advance of their anticipated transition to new framework plans.

Recommendation 3: Where prevention of risk of harm is a potentially relevant factor to a decision addressed in the Spending Rules, such consideration should be confined to significant risks where no less restrictive means is available to avoid the risk

In relation to decisions as to funding periods, restrictions being placed on flexible funding, and imposition of requirements that supports be provided by a specified person or persons in a specified class, the rules should only permit consideration of prevention of harms (including harms to the participant, misuse of NDIS funds or fraud, non-compliance with s 46 of the NDIS Act, or a participant not acquiring NDIS supports) where:

- the risk of the relevant harm is significant; and*
- there is no less constraining means of reducing the risk of that harm to a non-significant level (such as through educative approaches).*

Recommendation 4: Assistance animals be listed as a support to which funding periods do not apply

- Assistance animals should be listed as a support to which funding periods do not apply.*

Recommendation 5: Where alternative or direct commissioning is relevant to a decision, the alternative or direct commissioning arrangement be specified

- Where support for market intervention activities is relied upon as a basis for applying funding restrictions to a participant's plan, the rules should require that the decision-maker specify and provide details to the participant of the relevant market intervention activity/ies.*
- Where market intervention arrangements are considered as a relevant factor to a decision to impose a requirement in a participant's plan that supports be provided by a specified person or persons from a specified class, the rules should require that the decision-maker specify and provide details to the participant of the relevant market intervention activity/ies.*

Recommendation 6: The rules not require consideration of a participant's transition back into the community

Consideration of a participant's transition back into the community from a hospital, mental health, rehabilitation or justice setting should not be listed in the rules as a factor relevant to whether a participant should have a restriction imposed on their funding due to their being at risk of physical, mental or financial harm.

Recommendation 7: The rules not require consideration of a participants' history of compliance with information-gathering requests

Consideration of a participant's previous compliance with requests to give or produce information or documents should not be listed in the rules as a factor relevant to whether a participant should have a restriction imposed on their funding due to the potential for non-compliance with s 46 of the NDIS Act.

Recommendation 8: The definition of assistive technology for the purpose of stated supports be crafted narrowly

The definition of 'assistive technology' for the purposes of specifying stated supports must be drawn narrowly to avoid undue restriction of participants' use of flexible funding.

Recommendation 9: The costs associated with assistance animals provided as a stated support include training costs

The description of 'assistance animals' as a stated support should be broadened to include training costs, including the costs incurred by people who self-train.

Recommendation 10: Lower cost repairs and maintenance of disability-related home modifications not be stated supports

The listing of 'home modifications' as a stated support should not encompass lower cost repairs and maintenance of relevant home modifications that address a participants' disability-related needs.

Recommendation 11: 'Home modifications' include repairs to damage arising 'substantially' from disability-related behaviours or use of NDIS funded equipment

The description of 'home modifications' as a stated support should be amended to include repairs to damage arising 'substantially', as opposed to 'exclusively', from disability-related behaviours or use of NDIS funded assistive technology or equipment.

1. Introduction

The Justice and Equity Centre ('JEC') is a leading social justice law and policy centre. Our 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 National Disability Insurance Scheme ('NDIS') for people with disability. We do this in close consultation with disability representative organisations ('DROs'), as well as legal and advocacy groups with similar expertise and reform concerns.

Our submission is limited to matters for which an 'Explanatory Document' has been published, these being the issue of Notices of Impairments, the transition of participants to new framework plans, nomination of stated supports, and the new framework plan spending rules.

We are not able to give considered feedback on any proposals for which little information has been provided to date, including support needs assessments and the budget method. Our silence on these matters should not be taken as endorsement of any proposal or component of the new framework planning rules.

Further, we are concerned the piecemeal release of information has made it challenging for the disability community and DROs to meaningfully respond to the consultation. Where the policy package is comprised of several instruments, publishing detailed information about only some components without information about core components of the package makes it difficult to situate these in their broader context. The permitted timeframe for responding to this consultation allows limited opportunity for DROs to engage with their communities on the issues and provide complete feedback.

The inaccessibility of this consultation is amplified by the absence of 'Easy Read' materials explaining the Fact Sheets and Explanatory Documents. This presents a further barrier to engagement for many people with disability, with a disproportionate impact on particular cohorts affected by the proposed policies.

Given the limitations of this consultation process, we stress the importance of engaging in further rounds of consultation to ensure government receives feedback on *all* proposed rules, including preparing 'Easy Read' materials to support community engagement. These measures are essential to fulfilling governmental commitments to co-design of these reforms.

2. Notice of Impairments

At this stage, we have no specific comments on the proposed rules regarding Notices of Impairments.

We are, however, concerned to ensure that Notices of Impairments, and the NDIA's approach to attribution of support needs to a participant's impairment(s) that meet the NDIS access criteria set

out in s 24-25 of the *National Disability Insurance Scheme Act 2013* (Cth) ('the Act'), operate as intended by the Act.

When the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) Act 2024* (Cth) ('Back on Track amendments') was proposed in 2024, it included provisions clarifying the question of attribution of support needs to disability.¹ These provisions now describe the relationship between an impairment that meets the access criteria ('an access impairment') and an NDIS support. As reinforced by the Federal Court in the recent decision of *Chief Executive Officer of the National Disability Insurance Agency v Eastham* [2026] FCA 147 (in which the JEC acted for Mr Eastham), for a support to be funded by the NDIS:

- the participant must have one or more access impairments that cause the need for the support; but
- the relevant access impairment(s) need not be the sole or most proximate cause.²

In light of the legislation now setting out this necessary relationship, the Back on Track amendments also inserted provisions requiring the NDIA to issue Notices of Impairment, to ensure participants know the basis on which the NDIA will consider their support, and to provide a mechanism for participants to seek a variation of a Notice if it is inaccurate.

However, Notices of Impairment identify impairments at the level of 'domains,' as required by the Act, whereas the NDIA has operationalised the attribution provisions at the far more specific level of medical diagnoses. This approach was subject to criticism by the Administrative Review Tribunal in *HRSV and National Disability Insurance Agency (Practice and procedure)* [2026] ARTA 91 (at [64]):

One of the problems with relying on the administrative recordings is that the Agency's practice appears to be to record *diagnoses*. Access to the NDIS and the contents of a statement of participant supports depends primarily on *impairments* (loss of or damage to a bodily function, which may arise from some – or a combination of – medical conditions or diagnoses).

The Tribunal went on to observe that this recording of diagnosis appeared to be the basis of NDIA funding decisions, which would require the relevant attribution to be the diagnosis recorded rather than the impairment.³ This accords with our own observations from our casework, and those of other lawyers and advocates we have spoken to who represent NDIS participants.

Where the NDIA continues to record individual diagnoses for participants, and using them as the basis for supports decisions under ss 34(1)(aa) and 32L(6)(a), a Notice of Impairment will have little utility. That is, it will give participants limited clarity regarding the basis on which the NDIA assesses their support needs and funding, and will not provide an opportunity to meaningfully challenge that basis.

¹ *National Disability Insurance Scheme Act 2013* (Cth), ss 34(1)(aa) and 32L(6)(a) (each with associated legislative notes).

² At [74]-[101], and particularly [86].

³ *Ibid*, at [65].

Government must ensure that NDIA planning decisions are not based on diagnosis, and that the level of specificity at which the NDIA assesses support needs aligns with what is represented in Notices of Impairment.

Resolving this issue is a matter of some urgency, as the current misalignment will become more difficult to detect and challenge at the ART once participants are receiving new framework plans that contain limited NDIA decisions as to individual supports will .

Recommendation 1: NDIA planning decisions attribute support needs to impairments on the same basis as set out in Notices of Impairments

Government should ensure the NDIA bases decisions regarding the attribution of support needs to impairments using the same basis for characterising impairments as required by s 32BA for Notices of Impairments.

3. Transition to New Framework Plans

The proposed transitional rule provides little information regarding how participants will be transitioned to new framework plans beyond a start date for the overall transition period (1 July 2026), and that children under the age of 16 will only commence this transition from 1 July 2027.

This suggests additional detail regarding cohort selection and sequencing for transition will be set at policy level, rather than delegated legislation. While this may be appropriate to allow flexibility for government to amend the transition process, it also means the proposed rule provides little guidance or certainty to participants about when they can expect to move to new framework plans.

If this proposed rule is adopted, it will therefore be vital for government to communicate clearly to individual participants when they can expect to transition to new framework plans. Participants should be given ample notice, for example, of at least six months, to allow participants to plan for their transition and make necessary arrangements in relation to their existing supports.

Recommendation 2: Individual participants receive clear advance notice of their transition to new framework planning

Participants should be told at least six months in advance of their anticipated transition to new framework plans.

4. Spending Rules

It is difficult to interpret and therefore comment on the relevant explanatory document for the proposed spending rules, given the references to clauses of a draft Rule that has not been published. Nevertheless, we make the following observations.

4.1 Overarching recommendation: ‘no less restrictive means’ to prevent harms

The proposed rules refer to constraints or controls on participants’ use of funding to reduce the risk of harms, including harm to participants, or fraud or misuse of funding.

While we agree with the policy intention of reducing these risks, we are concerned at the possibility of broader than intended application of these powers by NDIA decision-makers. Where reduction of these harms is a mandatory ‘relevant consideration’, a decision-maker will almost always be permitted to give weight to it. As the amount of weight a decision-maker gives to any relevant factor will be given a high degree of deference by a judicial reviewer, listing these harms as relevant considerations provides a lawful justification for NDIA planners to impose constraints in almost any case – even where the risk sought to be addressed was already minimal or tolerable.⁴

These concerns are not simply theoretical. Taking one example of the NDIA’s approach to funding periods, s 33(2E) of the Act and ss 7(2) of the *National Disability Insurance Scheme (Old Framework Plans) Determination 2024* (Cth) require the NDIA to weigh a variety of factors in determining the appropriate duration of funding periods in each participant’s plan. The permissible factors include consideration of risks of various fraud-related outcomes, mismanagement of the plan funds, or harm to the participant, along with the participant’s preferences and the nature of the relevant supports.

Notwithstanding the balancing exercise required by the legislation which contemplates an individualised assessment, the disability community and DROs have reported that, since mid-2025, the majority of participants are now subject to ‘default’ 3-month funding periods for most types of support. While participants are concerned the NDIA is simply applying its own policy preferences under cover of a multifactorial weighting exercise in each case, it is difficult to interrogate (and challenge) decisions to understand whether and how decision-makers have applied their own view of the relevant weight to be given to these factors.

Importantly, even if the NDIA is considering the factors permissibly in each case, the approach taken to funding period rules and legislation has reduced confidence of many participants in NDIA decision-making, creating a fear that the NDIA may use purported fears of harm to constrain their choice and control.

It would therefore be appropriate for the rules to permit consideration of prevention of harm as a relevant factor only where:

- the risk of the harm is significant; and
- there is no less constraining means of reducing the risk of that harm to a non-significant level (such as through educative approaches).

⁴ See, for instance, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at [42], Mason J describing the circumstances in which a court would intrude into considering the weighting given by an administrative decision-maker to various competing factors as only arising where the decision is ‘manifestly unreasonable’.

This should apply, at minimum, to the following determinations:

- in relation to setting funding periods (for both flexible and stated supports funding): the risk of physical, mental or financial harm to a participant, of the participant experiencing fraud or financial exploitation, or the risk of non-compliance with s 46 of the Act;
- in relation to restrictions on how flexible funding is spent: the risk of physical, mental or financial harm to a participant, the risk of non-compliance with s 46 of the Act, or the participant is unlikely to acquire particular NDIS supports that they need to improve, maintain or slow the decline in their functional capacity;
 - with regard to the first two of these, the drafting of mechanisms in the Rules to implement this approach will need to take into account the inclusion of these as relevant circumstances in the Act; and
- in relation to imposing requirements that supports be provided by a specified person or persons in a specified class: whether imposing requirements will reduce the risk of fraud or unethical or dishonest practices.

Recommendation 3: Where prevention of risk of harm is a potentially relevant factor to a decision addressed in the Spending Rules, such consideration should be confined to significant risks where no less restrictive means is available to avoid the risk

In relation to decisions as to funding periods, restrictions being placed on flexible funding, and imposition of requirements that supports be provided by a specified person or persons in a specified class, the rules should only permit consideration of prevention of harms (including harms to the participant, misuse of NDIS funds or fraud, non-compliance with s 46 of the NDIS Act, or a participant not acquiring NDIS supports) where:

- *the risk of the relevant harm is significant; and*
- *there is no less constraining means of reducing the risk of that harm to a non-significant level (such as through educative approaches).*

4.2 Supports for which funding periods do not apply

Assistance animals should be listed as a support to which funding periods do *not* apply, as common assistance animal costs (ie, veterinary, training and matching costs) would be incurred on a more irregular sporadic basis, rather than regularly or consistently.

Recommendation 4: Assistance animals be listed as a support to which funding periods do not apply

Assistance animals should be listed as a support to which funding periods do not apply.

4.3 Matters relating to restrictions on how flexible funding is spent

We have not recommended changes to this aspect of the proposed rules, but observe that the following section on page 8 of the explanatory document appears to suggest the budget planning rules will allocate a specific amount of funding within an overall flexible funding budget based on the presumed supports to be accessed by that funding:

The CEO will be required to consider the basis on which the total funding amount for flexible funding that will be provided under the participant's plan is calculated under paragraph 32K(1)(a) of the Act. This ensures that the amount of funding that is subject to a restriction reflects the actual amount of funding that was calculated for that support. For example, if the CEO decides to restrict a portion of the flexible funding to be spent on therapy supports, they should apply the restriction to the amount of funding the budget method allocated for therapy supports.

This highlights the difficulties associated with providing feedback in this consultation given the budget method itself is yet to be provided. The potential restriction of funding on a support by support basis sits uncomfortably with the notion of flexible funding worked out on a total quantum directed at allowing participants to meet their needs in personalised ways. However, we are unable to comment further without having seen the proposed budget method.

4.4 Support for alternative or direct commissioning

The explanatory document refers to prescribing circumstances where funding restrictions may be applied in order to support market intervention activities. It also refers to mandating consideration of whether arrangements, including market intervention arrangements, have been implemented when considering imposing a requirement supports be provided by a specified person.

In each case, these seem to refer to use of these powers to support 'alternative commissioning' arrangements. Where either is relied upon by the NDIA in making a decision as to a participant's funding, the rules should require the NDIA to specify and provide details of the alternative commissioning arrangements to the participant in the interests of transparency and to allow the participant to challenge the decision if required.

Recommendation 5: Where alternative or direct commissioning is relevant to a decision, the alternative or direct commissioning arrangement be specified

Where support for market intervention activities is relied upon as a basis for applying funding restrictions to a participant's plan, the rules should require that the decision-maker specify and provide details to the participant of the relevant market intervention activity/ies.

Where market intervention arrangements are considered as a relevant factor to a decision to impose a requirement in a participant's plan that supports be provided by a specified person or persons from a specified class, the rules should require that the decision-maker specify and provide details to the participant of the relevant market intervention activity/ies.

4.5 Matters relevant to imposing restrictions

4.5.1 Additional matters to be taken into account – circumstances relating to physical, mental or financial harm

In addition to our comments at [4.1] above, we note this section of the explanatory document states the CEO will be required to consider whether the participant is, has or will transition back into the community from a hospital, mental health, rehabilitation or justice setting.

While these transition processes may present 'extra risks', it is not clear why these risks would not already be taken into account as a result of the other listed factors. The separate listing of these as a relevant factor may make them susceptible to undue weight in favour of imposing restrictions on funding. It would instead be more appropriate for decision-makers to be directed by policy guidance to turn their minds to the way these transitions might affect other risk factors.

Recommendation 6: The rules not require consideration of a participant's transition back into the community

Consideration of a participant's transition back into the community from a hospital, mental health, rehabilitation or justice setting should not be listed in the rules as a factor relevant to whether a participant should have a restriction imposed on their funding due to their being at risk of physical, mental or financial harm.

4.5.2 Additional matters to be taken into account – circumstances relating to acquittal of NDIS amounts exist

Contrary to the position set out in the explanatory document, the CEO should not be required, or permitted, to consider the history of compliance with requests or requirements made under the Act to give or produce information or documents.

The information-gathering powers in the Act carry their own penalties for non-compliance to ensure participants co-operate with the NDIA in administering the Scheme. It is therefore not appropriate for a participant's failure to comply with information-gathering requests to weigh in favour of imposing restrictions on their funding.

Recommendation 7: The rules not require consideration of a participants' history of compliance with information-gathering requests

Consideration of a participant's previous compliance with requests to give or produce information or documents should not be listed in the rules as a factor relevant to whether a participant should have a restriction imposed on their funding due to the potential for non-compliance with s 46 of the NDIS Act.

5. Stated Supports

We are concerned as to the formulation of several of the items listed to be stated supports in this proposed rule, as set out below.

5.1 Assistive technology assets

Stated supports can only be obtained using funding specified for that purpose, and cannot be purchased using participants' flexible funding. The definition of 'assistive technology' is therefore concerning in its breadth and, on its face, may capture a range of low-cost but essential items, thereby restricting participants' ability to obtain these types of supports.

For example, 'modified or adapted furniture, household items and fixtures' could include things like cutlery or chopping boards modified for easier use, or non-slip mats for use in bathrooms and

showers. ‘Communication tools’ could include cards and boards used for communication by people who are non-verbal. ‘Mobility aids’ could include walking sticks. Restrictions along the lines of these examples would unreasonably restrict participants’ choice and control.

While we have not yet seen the proposed text of the stated supports rule, it is vital these provisions are sufficiently narrow so as not to unduly restrict participants’ use of flexible funding.

Recommendation 8: The definition of assistive technology for the purpose of stated supports be crafted narrowly

The definition of ‘assistive technology’ for the purposes of specifying stated supports must be drawn narrowly to avoid undue restriction of participants’ use of flexible funding.

5.2 Assistance animals

Supports in relation to an eligible assistance animal include ‘assessment, matching and provision’ of the animal, which would cover costs associated with the animal being provided through an organisation such as Guide Dogs Australia. However, the description does not clearly cover the costs associated with training an animal for those who choose to self-train.

Given many individuals prefer to self-train their assistance animal – including where self-training reflects best professional practice for certain disability needs, such as where the animal is intended to support a psychosocial disability – this gap may cause inequity for self-trainers. This item should be amended to cover all assistance animal training costs where applicable.

Recommendation 9: The costs associated with assistance animals provided as a stated support include training costs

The description of ‘assistance animals’ as a stated support should be broadened to include training costs, including the costs incurred by people who self-train.

5.3 Home Modifications

Where accessibility features of a person’s home need repairs, these are likely to arise ad hoc, potentially urgently, and sometimes at low cost.

Accordingly, unless such repairs are particularly expensive, it would be most appropriate for a participant to use flexible funding for this purpose. The current description of ‘home modifications’ in the explanatory document does not make clear whether repairs are a stated support, except potentially where they are required as a result of damage caused by disability-related behaviours, or use of NDIS funded assistive technology or equipment.

The stated supports rules should explicitly state that low cost repairs or maintenance of disability-related home modification features are *not* stated supports. The rules should also define which supports are, and are not, ‘NDIS supports’ to clarify that these types of repairs and maintenance are ‘NDIS supports’.

Recommendation 10: Lower cost repairs and maintenance of disability-related home modifications not be stated supports

The listing of 'home modifications' as a stated support should not encompass lower cost repairs and maintenance of relevant home modifications that address a participants' disability-related needs.

Item (b) in the description of home modifications provides for repairs to damage that arises 'exclusively' from disability-related behaviours or use of NDIS funded assistive technology or equipment to be a stated support. In many cases, however, it will be difficult or impossible to determine whether the need for repairs arises 'exclusively' from these causes. The description should therefore refer to repairs to damage arising 'substantially' from these causes.

Recommendation 11: 'Home modifications' include repairs to damage arising 'substantially' from disability-related behaviours or use of NDIS funded equipment

The description of 'home modifications' as a stated support should be amended to include repairs to damage arising 'substantially', as opposed to 'exclusively', from disability-related behaviours or use of NDIS funded assistive technology or equipment.