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The National Disability Insurance Scheme

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INTRODUCTION

The National Disability Insurance Scheme (NDIS) provides funding for supports and services for eligible people living with disability.

The NDIS is administered by the National Disability Insurance Agency (NDIA), a federal government agency. The NDIA is responsible for assessing applications from people with disability seeking access to supports and services, and subsequently determining the nature of the supports to be provided to successful applicants (participants).

The law that underpins the NDIS is the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act). There are a number of accompanying Rules, including the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) (Becoming a Participant Rules) and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) (Supports for Participants Rules).

A review of the NDIS led to substantial changes to the NDIS Act in 2024 and the commencement of new Rules, including the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024* (Cth) (Transitional Supports Rules). As at the date of publication of this chapter, further reform is expected, including the introduction of ‘needs assessments’ as a basis for determining the supports a participant will receive.

The NDIA applies the Act and Rules to determine a person’s eligibility to access the NDIS and to determine the funded supports a participant will receive in their NDIS plan.

The NDIA also relies on their Operational Guidelines, however, the guidelines cannot be relied upon when they are inconsistent with the Act and Rules (see *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179).

Most legal issues arise when the NDIA refuses to grant a person access to the NDIS or approves an NDIS Plan that does not include supports requested by a participant. These decisions are reviewable.

This chapter will outline these decision-making processes of the NDIA including the considerations it must make and the steps a person can take if they are not satisfied with a decision made by the NDIA that impacts them.

HOW TO ACCESS THE NATIONAL DISABILITY INSURANCE SCHEME

A person can apply to access the NDIS by downloading and completing an ‘access request form’ and sending it, along with supporting evidence (see below for what evidence is required), to the NDIA.

A person will be eligible to access the NDIS (and become a participant) if they:

- are under 65 years of age at the time they lodge their access request and
- live in Australia and are an Australian citizen, permanent resident or protected special category visa holder and
- meet the 'disability requirements' and/or 'early intervention requirements' (s 21 NDIS Act).

The criteria for the disability requirements and the early intervention requirements are different.

To meet the disability requirements, a person must show:

- they have an impairment that is permanent (or likely to be permanent) and
- the impairment results in the person having a substantially reduced capacity to undertake certain activities of daily life and
- the impairment impacts their ability to engage in employment and/or the community and
- they will be likely to require support for their lifetime (s 24 NDIS Act).

To meet the early intervention requirements, a person must show:

- they have an impairment that is permanent (or likely to be permanent) or they are a child under six years of age with a developmental delay and
- the provision of early intervention supports (that are NDIS supports) is likely to reduce their future need for support and
- the provision of early intervention supports will likely benefit them in one or more specified ways (s 25 NDIS Act).

When a person is approved by the NDIA as meeting the access criteria, they should be given a written notice that states whether they meet the disability requirements, the early intervention requirements, or both sets of requirements (s 28 NDIS Act).

Most commonly, people experience difficulty in accessing the NDIS due to a failure to establish their impairment is permanent (as required by ss 24 and 25 of the NDIS Act) and/or a failure to establish their impairment impacts them to such an extent that their capacity to undertake activities of daily living is substantially reduced (as required by s 24 of the NDIS Act).

In all cases, evidence from independent sources, such as medical specialists and allied health professionals, is required.

What is an impairment?

Impairments may be:

- intellectual (impacting how a person thinks)
- cognitive (impacting how a person concentrates, remembers information and makes decisions)
- neurological (impacting how a person's nervous system works)
- sensory (impacting a person's senses such as hearing and seeing)
- physical (impacting a person's ability to move parts of their body)
- psychosocial (associated with a diagnosis such as anxiety or depression).

The Federal Court of Australia in *Mulligan and National Disability Insurance Agency* [2015] FCA 544 noted the term impairment involves the '... loss of or damage to a physical, sensory or mental function', and confirmed the NDIS Act requires an assessment of a person's impairment(s), not the person's underlying diagnoses or conditions (how the person came to have the impairment(s)).

It is advisable for applicants to the NDIS to list and describe all impairments with which they live in their requests to access the NDIS. This is because supports may only be funded through the NDIS if they are needed, at least in part, because of an impairment that has been accepted by the NDIA as meeting the disability or early intervention requirements (see below for more detail regarding this requirement under s 34(1)(aa) of the NDIS Act).

Successful applicants to the NDIS are provided with an 'impairment notice', which lists the category or categories of impairment on which the NDIA has based its decision to grant access to the NDIS. A person can request a variation of an impairment notice (if, for example, the person has multiple impairments but the NDIA has only recognised one impairment), and a decision to refuse to vary an impairment notice is reviewable (s 32BA, s 99 item 3A NDIS Act).

When is an impairment permanent?

An impairment will be considered permanent (or likely to be permanent) when there are no known, evidence-based treatments available that will likely remedy the impairment(s) (rr 5.4–5.7 Becoming a Participant Rules).

The Federal Court of Australia in *National Disability Insurance Agency v Davis* [2022] FCA 1002 interpreted the meaning of the words 'available' and 'remedy' as:

- A treatment (e.g. surgery, medication, psychological and physical therapy) will be 'available' if it is available to the person. If there is a treatment that a person

cannot access because it is only available overseas or is unaffordable for them, then it is arguably not available to them.

- A treatment will ‘**remedy**’ an impairment if it substantially relieves or cures it. In Ms Davis’s case, the court noted ‘... the word ‘remedy’ should be understood to mean something approaching a removal or cure of the impairment’. If a treatment merely helps a person manage the day-to-day impact of their impairment, then this is not a remedy (see *MHZQ and National Disability Insurance Agency* [2019] AATA 810 (at [67]–[72]), in which the Administrative Appeals Tribunal (tribunal) noted that although the applicant’s mobility may improve with weight loss, it would not remedy the applicant’s bilateral knee impairment).

A fluctuating or episodic impairment may be permanent despite the changeable nature of the impairment (ss 24(2), 24(3), 25(1A) NDIS Act; see *National Disability Insurance Agency v Davis*, in which the court noted that while the impact of an impairment on a person might fluctuate from time to time, the impairment will be permanent if it endures).

Evidence of permanency

Generally, it is insufficient for a medical practitioner to state that the impairment is permanent. Rather, the medical practitioner will need to provide detailed information about past treatments considered and/or trialled, current treatments and any future treatments, their availability to the person and the likely outcome of those future treatments.

In the absence of one detailed report regarding the treatment of a person’s impairment, evidence collected over time that demonstrates the longevity of a person’s impairment and continued symptoms despite treatment may be sufficient to rely on as evidence of permanency (see *KDYG and National Disability Insurance Agency* [2019] AATA 3411 (10 September 2019) (at [26]–[28]), a case that concerned a person with long-standing mental health conditions).

If medical letters or reports provided to the NDIA suggest additional treatment is open to a person (e.g. via a referral to a therapist), it will be important for the person to demonstrate, via the provision of a further letter or supplementary report, that the suggested treatment has been explored and/or trialled but will not remedy their impairment, if that is the case.

See *MacFarlane and National Disability Insurance Agency* [2018] AATA 4727, in which the tribunal concluded Mr MacFarlane’s chronic pain impairment was not permanent because there was evidence that he had started treatment at a multidisciplinary pain program but stopped the program before it was finished. A further report by Mr MacFarlane’s pain specialist explaining that even if Mr

MacFarlane had completed the program, the benefits were limited to helping Mr MacFarlane manage his day-to-day symptoms (and not substantially relieving them), may have addressed this evidentiary gap.

What is a substantial reduction in functional capacity?

A person will have a substantial reduction in functional capacity if they usually require help from others or are dependent on equipment (other than commonly used items), technology or home modifications in order to completely and effectively undertake activities of daily life (r 5.8 Becoming a Participant Rules).

See *Mulligan and National Disability Insurance Agency* [2015] AATA 974 (17 December 2015), in which Mr Mulligan failed to establish he had a substantial reduction in functional capacity to mobilise because

Mr Mulligan's evidence is that he can undertake these activities without assistive technology, equipment other than a walking stick, or home modification. He is able safely to complete these tasks or activities within an acceptable time period even if he does so more slowly or in a different manner from others. He does not usually require assistance from other people to mobilise. (at [124]).

Activities of daily life are categorised into the following areas:

- mobility—moving physically within and outside of the home
- communication—expressing needs, being understood and understanding others
- learning—possessing skills required to learn, including concentration and memory
- social interaction—making and keeping relationships and interacting with others in the community
- self-care—maintaining personal hygiene, grooming, feeding and health care
- self-management—having the capacity and skills required to take responsibility for oneself, including making decisions, planning, managing and organising daily tasks, finances and accommodation.

A person will need to demonstrate they have a substantial reduction in functional capacity in at least one area of daily life, and not merely with one task. See *National Disability Insurance Agency v Foster* [2023] FCAFC 11, in which the court found that Mr Foster, who relied on a catheter to void his bladder, and could otherwise bathe, groom, dress and feed himself, did not have a substantial reduction in his functional capacity to undertake the activity of self-care.

Just because a person may cope somehow without help from others, equipment, technology or home modifications does not mean they do not require that help. See *KDYG and National Disability Insurance Agency* [2019] AATA 3411 (10 September 2019), in which the tribunal noted (at [87]) ‘... that the Applicant struggled and survived before having the current level of assistance does not persuade the tribunal that she does not require the assistance she is currently receiving’.

What qualifies as specialist disability equipment has been considered in the following cases:

- In *Beaumont and National Disability Insurance Agency* [2024] AATA 891, Mr Beaumont used a light-weight aluminum folding chair, purchased from Kmart, to help him access the community, pausing every now and then and sitting on the chair to help him manage his pain and fatigue. The tribunal found that although the chair was not a walker prescribed by a medical practitioner, it could be classified as disability equipment as it was being used by Mr Beaumont ‘... to improvise for equipment that is assistive in nature like a walker’.
- In *Gardner and National Disability Insurance Agency* [2023] AATA 1287 the tribunal concluded that Mrs Gardner’s walking stick, which she used inside her home, was a commonly used item but her walker, which she used outside, was specialist disability equipment. Because Mrs Gardner was always reliant on her walker outside her home (meeting the minimum threshold of ‘usually’) she had a substantially reduced functional capacity in the area of mobility.

The NDIS Operational Guidelines purport to limit specialist disability equipment to that which is prescribed by a doctor, allied health professional or other medical professional, however, the tribunal has found this is inconsistent with the law (see *Pallier and National Disability Insurance Agency* [2024] AATA 157 (at [100])).

Evidence of function

Statements of lived experience by the person with disability and their friends and/or family are helpful to paint a picture for the NDIA about the person’s capacity to undertake activities of daily life. The more detail that can be incorporated into the statements, including examples of help the person requires, the better.

Where a person’s functional capacity changes over time, it is important to include detail within statements and/or diary notes of the person’s good and bad days, and note their frequency. Variation in functional capacity was considered in the following cases:

- In *Baranowski and National Disability Insurance Agency* [2023] AATA 1701, the tribunal found that while Ms Baranowski's difficulties were more intense on days she was experiencing severe psychological symptoms, the symptoms appeared to be present all the time, and the tribunal concluded Ms Baranowski had a substantially reduced functional capacity to undertake the activity of social interaction.
- In *Galea and National Disability Insurance Agency* [2022] AATA 2263, the tribunal found Mr Galea's bad days were relatively infrequent, only one every two months, and his function between them, while impaired due to his complex regional pain syndrome, was not substantially reduced.

While detailed lived experience statements are helpful, prospective NDIS participants will also generally need to provide a report by a health professional (typically an occupational therapist) who has undertaken a functional capacity assessment of the person or who can otherwise objectively comment on the person's capacity to undertake activities of daily life, based on direct observation. The expense of a comprehensive functional capacity assessment and report can be prohibitive for some people seeking access to the NDIS. In these cases, information about the person's functional capacity can be provided from the person, their carers and/or their GP instead, and if the person's application to access the NDIS is refused, an occupational therapist may be engaged (and paid for) by the NDIA to do a functional capacity assessment on review, when there is generally opportunity to gather further evidence (see below for more detail).

Access via the early intervention requirements

Access to the NDIS based on the early intervention requirements is available to both children and adults.

Young children (under six years of age) who have been diagnosed with developmental delay do not need to demonstrate their impairment is permanent and do not need to provide evidence regarding the benefit of early intervention supports (rr 6.8–6.11 Becoming a Participant Rules).

For everyone else, access to the NDIS via the s 25 of the NDIS Act early intervention requirements should be considered where a person is unlikely to satisfy the NDIA that they experience a substantial reduction in functional capacity, as required by the s 24 (NDIS Act) disability requirements. The person may be eligible to access the NDIS if they can instead demonstrate that intervention (e.g. psychological or physical therapy that would qualify as NDIS supports) will likely:

- reduce the person's future support needs and

- lessen the impact of their impairment or
- improve or prevent a deterioration of their functional capacity or
- strengthen the sustainability of their informal supports.

‘Early’ does not relate to the timing of a person’s diagnosis, but rather the onset of the person’s impairment(s). A person who has a long-standing diagnosis, including a diagnosis of a degenerative condition, may be eligible to access the NDIS via the early intervention requirements if the impairments that flow from the diagnosis are at an early stage. This was considered by the tribunal in the case of *James and National Disability Insurance Agency* [2019] AATA 4248 (18 October 2019), in which the tribunal noted that ‘... the early intervention requirements look at the likely trajectory and impact of a person’s impairment over time and the potential benefits of early intervention on the impact of the impairment on the person’s functional capacity’ (at [49]).

There are few reported decisions regarding access to the NDIS via the early intervention requirements (see *Van Hout and National Disability Insurance Agency* [2023] AATA 2771), however, following amendments to the NDIS Act in 2024, which require the NDIA to provide written notice to eligible applicants regarding the nature of their access (via the disability and/or early intervention requirements), it is likely that access to the NDIS via the early intervention requirements will increase.

Streamlined access for people diagnosed with certain conditions

The NDIA has published lists of conditions within their Operational Guidelines that enable a streamlined access process for people diagnosed with certain conditions.

People diagnosed with a List A condition will be likely to be accepted as meeting the disability requirements without further assessment. People diagnosed with a List B condition will be likely to be accepted as having an impairment that is permanent and will only require assessment in relation to the remaining criteria concerning the impact of their impairment and need for support from the NDIS throughout their lifetime. Children under seven years of age diagnosed with a condition on List D will be accepted as meeting the early intervention access requirements without further assessment.

It is therefore important to review these lists in the first instance to avoid unnecessary assessments in cases where a streamlined option is available to the person seeking access to the NDIS.

Revocation of participant status

Sections 30 and 30A of the NDIS Act allows the NDIA to revoke a participant's status if the NDIA considers the person no longer meets the access criteria. These sections empower the NDIA to request information from a participant and/or undergo an assessment, and if the participant unreasonably fails to comply with a request, their NDIS participant status may be revoked. If a person receives an information or assessment request in relation to their participant status from the NDIA, it should be acted on promptly and legal advice and/or advocacy support should be sought (see Free Advocacy and Legal Services below).

A decision to revoke a participant's status is a reviewable decision (see How to Appeal a National Disability Insurance Agency Decision below) and, as seen in the case of *Stephan-Miller and National Disability Insurance Agency (Practice and procedure)* [2025] ARTA 43, is a decision that can be stayed to enable a person continued access to NDIS supports pending the determination of the review application. In the *Stephan-Miller and National Disability Insurance Agency (Practice and procedure)* case, the tribunal granted a six-month stay of the decision so the applicant could continue to receive NDIS funded supports, noting:

The NDIS Act is beneficial legislation which is intended to confer a benefit on the Applicant if she is qualified to receive such a benefit. Removal of such benefits in their entirety is a matter to be approached with good procedure and solid evidence ... The impact of the loss of services on a vulnerable person with a disability or medical conditions is serious and has a much greater impact on their health and quality of life than the continued provision of those services on an interim basis to a single individual would have on the Respondent (at [52]).

SUPPORTS FOR PARTICIPANTS

Once a person becomes a participant in the NDIS, the person will be invited to discuss their support needs with the NDIA and their first NDIS plan will be issued.

Each plan includes a statement of supports, setting out each support that the NDIA has agreed to fund.

The NDIA can only approve funding for a support if the support:

- meets the 'reasonable and necessary' support criteria and
- complies with the Supports for Participants Rules.

Any newly accepted participant in the NDIS should prepare for their first planning discussion by considering the supports they want the NDIA to fund, and how they may demonstrate to the NDIA that the supports meet the above requirements.

More information to help people prepare for their first planning meeting is available on the NDIS website.

Reasonable and necessary support criteria

The 'reasonable and necessary' support criteria are listed in s 34 of the NDIS Act. To be funded, a support must:

- be necessary to address needs arising from an impairment that meets the disability requirements or the early intervention requirements (s 34(1)(aa))
- assist the person to pursue their goals, objectives and aspirations (s 34(1)(a))
- assist the person to undertake activities that facilitate the person's social and economic participation (s 34(1)(b))
- represent value for money (s 34(1)(c))
- be, or likely be, effective and beneficial for the participant, having regard to current good practice (s 34(1)(d))
- take into account what is reasonable to expect families, carers, informal networks and the community to provide (s 34(1)(e))
- be an NDIS support for the participant (s 34(1)(f)).

The Supports for Participants Rules and the Transitional Supports Rules are applicable in the interpretation of these criteria.

- The Supports for Participants Rules set out what the NDIA must consider when assessing whether a support meets some of the reasonable and necessary criteria in assessing what is value for money, and what is effective and beneficial. The Supports for Participants Rules also include 'general criteria for supports' in rr 5.1 to 5.3, which provide that a support will not be funded if it is likely to cause harm to a participant or if the support duplicates other supports that are already funded.
- The Transitional Supports Rules relate to the s 34(1)(f) criterion (the support must be a NDIS support) and also specify some supports that are excluded by means of the general criteria in rr 5.1 to 5.3 of the Supports for Participants Rules.

Most commonly, people have trouble satisfying the NDIA that their requested support is needed because of an 'accepted' impairment, that it represents value for money, that it is beyond what is reasonable to expect of their family/carers and/or community to provide, that the support is related to their disability and/or that the support is most appropriately funded by the NDIA. More detail regarding

these reasonable and necessary support criteria and the applicable rules is set out below.

Support needs arising from an impairment

Supports will only be funded if they are necessary to address needs arising from an impairment that the NDIA has accepted meets the disability and/or early intervention requirements.

For participants with multiple categories of impairment, some of which have not been accepted by the NDIA, this requirement can be challenging where it is difficult to distinguish which needs arise from which impairment.

However, showing there is a connection between the support and an impairment that the NDIA has accepted as meeting either the disability and/or early intervention requirements, will generally be sufficient. This is because:

- the phrase ‘arising from’ is to be given a broad meaning (see *Telstra Corporation Limited v Bowden* [2012] FCA 576 and
- so long as an impairment that meets the disability and/or early intervention requirements contributes to a participant’s need for the support, it does not matter if the participant requires the support to address needs arising from other impairments.

See *Eastham and Chief Executive Officer of the National Disability Insurance Agency* [2025] ARTA 198, in which the tribunal approved funding for a mobility scooter for a participant where that scooter was required to address a combination of needs arising from vision and hearing impairments (both of which met the disability requirements) and physical impairments associated with, for example, osteoarthritis of the lower back and hip (which did not meet the disability and/or early intervention requirements). The tribunal referred to the note within the NDIS Act for the purposes of s 34(1)(aa) and also considered environmental factors in concluding funding for a scooter met this criterion (at [98]) the tribunal

... considers that it is able to take into account the “*environment factors*” such as the distance between Mr Eastham’s home and the closest bus stop being 1.1 km. The Tribunal is satisfied that this is a distance which Mr Eastham would experience substantial difficulty if he were to regularly traverse that distance on foot due to his physical and sensory impairments, and he is otherwise unable to traverse that distance by car due to his vision-related impairments which prevent him from obtaining a drivers’ licence.

Value for money

A support will represent value for money if, among other things, there are no comparable supports that would achieve the same outcome at a substantially lower cost (r 3.1 Supports for Participants Rules).

See *PPFQ and National Disability Insurance Agency* [2019] AATA 1092 (31 May 2019), in which the tribunal accepted evidence to approve funding for more expensive, but equally more beneficial hearing aids for the participant, rather than the lesser expensive standard issue hearing aids the NDIA suggested were sufficient.

See also *Mazy and National Disability Insurance Agency* [2018] AATA 3099 (9 August 2018), in which the tribunal determined that nursing assistance for the administration of insulin to a participant with diabetes did represent value for money in circumstances where the participant was not able to self-administer insulin or use an insulin pump. The tribunal noted that ‘... it should not fall to the participant to fully explore alternative supports which may be less expensive ... If the Agency claims that there are alternative supports which are preferable to those sought by the Applicant, it is incumbent on the Agency to assist the Tribunal by providing evidence to support its argument ...’ (at [59]).

What is reasonable to expect of families, carers and other supports

Families with people with a disability do a lot to support their loved ones. But what is reasonable to expect of them, and what is beyond reasonable? Rule 3.4 of the Supports for Participants Rules provides what factors the NDIA must consider in answering this question, including whether a child’s needs are substantially greater because of the child’s disability, the extent of any risks to the wellbeing of the participant arising from their reliance on their family/carers/others (informal supports), and the intensity and type of support required and whether it is age and gender appropriate for the family member or carer to be providing that support.

While the NDIA expects families to provide support to their loved ones with a disability, it is clear there are limits. See *JQJT and National Disability Insurance Agency* [2016] AATA 478 (6 July 2016), in which the tribunal determined that while parents are expected to meet a child’s transport needs, it was not reasonable to expect parents of a child with complex and high-level needs to drive their child to and from respite, because ‘... without the inclusion of transport in his plan, transporting JQJT to community access support increases the burden

on them, reduces the benefit of respite during those hours, and poses a risk to their wellbeing ...' (at [40]).

This decision can be contrasted with *NLXY and National Disability Insurance Agency* [2024] AATA 2275, in which the tribunal did not approve funding for transport for a child participant to and from school because '... it would be the general expectation of the Australian community that families bear the responsibility and cost of transporting their children to and from school, being an everyday transport requirement' (at [70]).

See also *Dudgeon and National Disability Insurance Agency (NDIS)* [2024] ARTA 154, which concerned the level of support that is reasonable to expect to be provided by ageing parents to an adult child with disability.

What supports are disability supports and not day-to-day living costs

Rule 5.1(d) of the Supports for Participants Rules provides that a support will not be funded if it relates to a day-to-day living cost. This is subject to r 5.2 which provides that day-to-day living costs may be funded if they are incurred solely and directly as a result of a participant's disability needs (e.g. an ipad may be required as a communication aid) and/or the costs are ancillary to another support that is funded through a participant's NDIS plan (e.g. additional insurance premiums that are payable for a modified vehicle).

See *Warwick v National Disability Insurance Agency* [2024] FCA 616, in which the Federal Court of Australia found the costs associated with moving house for a participant whose Parkinson's disease had progressed to such an extent that he needed to move to a more accessible home were not day-to-day living costs because selling and buying a house is not an everyday expense (like rent, groceries and utility fees, which are incurred on a recurring and regular basis).

The Transitional Supports Rules, which must also be applied, now exclude many items described as day-to-day living costs irrespective of whether they are incurred solely and directly because of a participant's disability needs and/or are ancillary to another funded support.

See *VPYC and Chief Executive Officer of the National Disability Insurance Agency* [2025] ARTA 3, in which the tribunal rejected a request for a weighted blanket for a 15-year-old with emotional dysregulation because the blanket was a '... day-to-day living cost – accommodation and household ...' under the Transitional Supports Rules. However, see also *Dudgeon and National Disability Insurance Agency (NDIS)* [2024] ARTA 154, in which the tribunal approved funding for home modifications rejecting the contention that certain aspects of the

modifications, such as tiling, waterproofing and plastering, could not be funded as they were ‘... day-to-day living costs - accommodation and household ...’ under the Transitional Supports Rules.

What is an NDIS support

The Transitional Supports Rules list what are and are not NDIS supports. Schedule 1 lists supports that are NDIS supports. It is subject to sch 2, which lists supports that are not NDIS supports (ss 10(1), 10(4) NDIS Act). The Transitional Supports Rules will be replaced by permanent lists once these are negotiated by Commonwealth, state and territory governments.

In limited circumstances, the NDIA has discretion to approve funding for a non-NDIS support within sch 2, if the non-NDIS support replaces an NDIS support and provides the same or greater benefit to the participant at no extra cost (s 10(6) NDIS Act and pt 3, replacement support determinations of the Transitional Supports Rules). The NDIA is otherwise required to apply the Transitional Supports Rules strictly.

The following cases demonstrate how the lists within these rules are applied, the difficulties in their interpretation and how supports that may previously have been approved as reasonable and necessary are now excluded.

- In *Johnstone and National Disability Insurance Agency* [2025] ARTA 106, the tribunal found the term ‘generally’ means the rules apply to all participants, and not, as the applicant had argued, that there is some discretion to not apply the rules. The tribunal noted the application of the rules is not straightforward and approved funding for dietary supplements, categorising these as a modified food under item 9(a) sch 1, but noted the supplements could also have been excluded as day-to-day living costs – food and groceries under item 3(a) sch 2.
- In *WVGM and Chief Executive Officer of the National Disability Insurance Agency* [2025] ARTA 47, the tribunal rejected a request for funding for an air-conditioner in a social housing unit, preferring the conclusion that the air-conditioner was a standard household appliance and housing and community infrastructure, both categories of items that are excluded by sch 2 rather than a home modification, which is an NDIS support in sch 1.

Several items are declared not to be NDIS supports in sch 2 because they are standard items (items that are not modified or adapted to address a participant’s functional impairments as defined in r 4).

- In *Hyde and National Disability Insurance Agency (NDIS)* [2025] ARTA 365, the tribunal considered what is meant by the term ‘standard’ and rejected the

NDIA's contention that a home automation system was a standard home security cost. The tribunal noted Ms Hyde could not use the standard security system that was already installed in her home and the requested automation system was '... a support for Ms Hyde that is adapted, modified and customised to put her in control of her own home safety by allowing her the independence to lock and unlock her own home amongst other voice automation tasks, without the dependency of requiring direct support from another person.'

Schedule 2 of the Transitional Supports Rules also excludes supports that are the responsibility of other service systems, such as health, justice and housing, to fund. These expand on funding responsibility distinctions set out in sch 1 of the Supports for Participants Rules, which are still applicable. For example, the intersection of responsibility for funding supports in the area of health is set out in rr 7.4 to 7.7 of the Supports for Participants Rules, and item 12 of sch 2 of the Transitional Supports Rules lists supports that are health related and excluded as not NDIS supports. Responsibilities for funding supports in other areas, including early childhood development, child protection and family support, education, employment, housing and infrastructure, and justice, are similarly differentiated.

The intersection in funding responsibility has been considered in:

- *LNMT and National Disability Insurance Agency* [2018] AATA 431 (6 March 2018), in which the tribunal considered the intersection of funding responsibility between the child protection service system and the NDIS
- *Winn and National Disability Insurance Agency* [2024] AATA 3034, in which the tribunal concluded that a participant was not eligible for specialist disability accommodation, noting (at [97]) '... it is not for the NDIS to provide public or community housing that would be the responsibility of State or other authorities, or to remedy a scarcity in the private market ...'.

THE CHALLENGE OF OBTAINING NECESSARY EVIDENCE

The NDIA, as a Commonwealth agency, is bound to apply the law and must be satisfied the legislative criteria are met before granting a person access to the NDIS or approving funding for a requested support. It is for this reason that the NDIA requires independent evidence from experts upon which it may base its assessment about a person's eligibility to access the scheme and/or their reasonable and necessary supports.

However, the gathering of recent, relevant and sufficiently detailed evidence can be burdensome for people with a disability seeking access to funded supports. A

person may have difficulty securing necessary evidence because of their disability and/or because of the cost involved.

Independent medical examinations, which typically involve an assessment by a therapist or specialist commissioned by the NDIA, can be helpful to address gaps in evidence. It is relevant to note that:

- a person cannot be directed to participate in an assessment (see *Liddle and National Disability Insurance Agency* [2018] AATA 5071 (7 June 2018), in which the tribunal refused a request of the NDIA to direct a person to undergo an assessment by an occupational therapist)
- while in some cases the tribunal has ordered proceedings be stayed until a person voluntarily agrees to participate in an assessment, the Federal Court of Australia in *Andrews v National Disability Insurance Agency* [2025] FCA 272 noted that whether the tribunal could stay a review in these circumstances was ‘... open to serious doubt’ (at [29]).

The tribunal in *Brown and National Disability Insurance Agency* [2024] AATA 3318 considered the responsibilities of parties to provide evidence in an appeal by Mr Brown for reinstatement of previously funded supports. Mr Brown contended that his circumstances had not changed and therefore he ought not be required to provide information nor participate in an independent medical examination. The tribunal commented on the obligations of the parties to assist the tribunal to reach the correct or preferable decision, noting (at [56]) while Mr Brown was entitled to refuse to participate in an independent medical examination, the tribunal would have been better assisted had he done so. In relation to the NDIA’s obligation, the tribunal noted that ‘... when a participant is requesting maintenance of supports previously found to be reasonable and necessary, there is a responsibility on the Agency to base their reassessment on probative information that can be provided to the Tribunal. If that information gathering has not occurred during the assessment and internal review process, there is a responsibility on the Agency to address these information gaps during the Tribunal review process’ (at [46–51]).

SCHEDULED REVIEWS, REASSESSMENTS AND VARIATIONS

Once a person is a participant in the NDIS, their support needs will be reviewed on a scheduled basis. Scheduled reviews occur prior to the end date specified on the participants’ NDIS plans (which typically run for a period of 12 to 36 months). As a result of a scheduled review, a new plan will be issued for the participant for a further defined period (s 49 NDIS Act).

The NDIS Act requires participants to spend funding within their plan in accordance with approved budgets (s 46 NDIS Act). However, in recognition that a person's needs may change prior to the date of a scheduled review, the NDIS Act provides a mechanism for a person to request a variation (s 47A) or reassessment (s 48) of their plan.

Circumstances that may lead to a participant requesting a plan variation or reassessment include a change in a participant's impairment (e.g. a deterioration of functional capacity), a change in their family or informal support network, or provision of an updated assessment recommending different care, support or assistive technology for the participant.

Under ss 47A and 48 of the NDIS Act and the *National Disability Insurance Scheme (Variation and Reassessment of Participants' Plans) Rules 2025* (Cth), the circumstances in which a plan may be varied or reassessed are quite limited (and may not be available to participants who otherwise spend their funding at a faster rate). Therefore, if an NDIS plan is approved that does not meet a participant's needs, it is important to request an internal review of the decision to approve the plan (see How to Review an NDIA Decision) rather than wait and seek to rely on a reassessment or variation application at a later date.

HOW TO REVIEW A NATIONAL DISABILITY INSURANCE AGENCY DECISION

A person affected by a decision of the NDIA can ask for a review of that decision if it is reviewable. All decisions that are reviewable are listed in s 99 of the NDIS Act.

A decision to refuse a person access to the scheme, to revoke a person's status as a participant, to not vary an impairment notice and a decision to approve a participant's statement of supports are all reviewable decisions (items 1, 3, 3A and 4 of s 99 of the NDIS Act).

There are two stages of review:

- internal review (sometimes referred to as an s 100 NDIS Act review)
- external review (to the Administrative Review Tribunal (ART)).

Although there are no costs associated with pursuing either an internal or external review, **time limits apply**.

Internal review

Under s 100 of the NDIS Act, a person affected by a reviewable decision of the NDIA can ask for an internal review of the decision over the phone, by email, by

letter or by completing an internal review application form. For more information about the process of requesting an internal review, visit the NDIS website.

Requests for internal review must be lodged within three months of a person receiving the notice of the decision with which they are dissatisfied.

It is important that a person seeking review is clear about the nature of their request. That is, they should state that they are seeking ‘... a section 100 internal review of a reviewable decision’ and explain why they are seeking the review (e.g. they do not agree with the NDIA decision to refuse to grant them access to the NDIS, or they do not agree with the NDIA decision to refuse to fund certain supports). This will help to minimise the chances of the person’s request for an internal review being mischaracterised as a complaint about the NDIA’s processes.

The NDIA must complete the internal review generally within 90 days of receiving the review request (s 100(6A)(b) NDIS Act). The internal review decision will be in writing and, in that decision, the NDIA will either confirm (agree with the original decision), vary or set aside and substitute a new decision (s 100(6) NDIS Act).

External review

Under s 103 of the NDIS Act, a person who does not agree with the outcome of their internal review can ask for an external review of the decision at the ART. A request for external review must be lodged within 28 days of a person receiving the notice of the NDIA’s internal review decision. A request lodged outside of this 28-day time period may only be accepted where a person can provide good reasons for their delay.

Where a person has not received an outcome to their request for an internal review from the NDIA within the prescribed period, an internal review decision will have been deemed to have been made under s 16 of the *Administrative Review Tribunal Act 2024* (Cth) (ART Act) and the person may apply for an external review in the ART. See *NNXF and National Disability Insurance Agency [2019] AATA 5552* (23 December 2019), in which ART determined that it has jurisdiction to determine certain applications where an internal review decision may be deemed to have been made.

For information about the process of requesting an external review, which may be lodged online, or via letter or application form, visit the ART’s website. The application is free and the process relatively straight forward.

An external review by the ART is a ‘hearing de novo’, which means that the ART will look at a person’s case afresh and consider all the material, including new material filed by an applicant and/or the NDIA, to determine the person’s case.

This is important for applicants to be aware of in a review of decision to approve a statement of supports in their NDIS plan as the ART may review all supports within the plan, even where an applicant is only seeking review of one particular support (see *Gabriela and Chief Executive Officer, National Disability Insurance Agency* [2024] AATA 741 and *YBLR and National Disability Insurance Agency* [2023] AATA 1472 (at [14])).

External review applications usually involve the following steps once an application has been lodged:

- Provision of T-documents—all the documents that are in the NDIA's possession that are relevant to the review should be collated by the NDIA and filed in the ART and provided to the applicant. These should be sent within 28 days of the NDIA becoming aware of the application (s 23 of ART Act).
- Case conference—the ART will schedule a case conference, which is an informal meeting, usually held by phone but can also occur by video conference or in person at a ART registry office, if requested. At the case conference, the parties discuss whether an agreement can be reached and, if not, prepare a to-do list for the progress of the external review application. To-dos may require an applicant to file further evidence and the NDIA to consider and respond to that evidence by set dates before the listing of a further case conference.
- Conciliation—is usually held after two or three case conferences, and prior to a final hearing. A longer period of time is allocated by the ART for conciliations (usually two to three hours) and the parties are expected to attend ready to try to resolve the application by agreement.
- Directions hearing—this hearing is held prior to a final hearing for the purpose of preparing a timetable for the progress of a case to a hearing.
- Final hearing—the applicant and NDIA present arguments in support of their case and can call witnesses to give evidence to the ART member(s).

Most commonly, external review applications resolve by agreement between the applicant and the NDIA (s 103 ART Act), without the need for the ART to determine the matter at a final hearing. In all cases, the ART will issue a decision either confirming, varying or setting aside and substituting a new decision once a matter is determined (either by agreement reached between the parties or as a result of a final hearing).

In reviews of decisions concerning funded NDIS supports, where a higher level of support is approved and an applicant has either spent their own funds on the support or has outstanding invoices for the support, the applicant can seek

reimbursement or payment, respectively, for the support accessed from the date of the original NDIS plan under review (see *Williamson and National Disability Insurance Agency* [2019] AATA 2944 (at [25])) and *Johnstone and National Disability Insurance Agency (NDIS)* [2025] ARTA 106 (at [262-263])).

Model litigant rules and complaints

In cases where a person is concerned about the NDIA's conduct in review proceedings, it may be helpful for the person to raise the requirement of the NDIA to comply with the model litigant rules with the NDIA directly. The NDIA, as a Commonwealth Government agency, is required to comply with these rules, which set standards for conduct of NDIA staff and its lawyers, and are found in Appendix B to the Legal Services Directions 2017.

Complaints about the NDIA may be made directly to the NDIA (via email: feedback@ndis.gov.au) or to the Commonwealth Ombudsman. The NDIS Quality and Safeguards Commission receives and investigates complaints against service providers.

In addition, in Queensland, complaints may be made about registered NDIS service providers under the *Human Rights Act 2019* (Qld) (Human Rights Act), where the complainant considers that the provider has acted or made a decision in a way that is not compatible with human rights or, in making a decision, the provider has failed to consider a human right that is relevant to the decision (s 58 Human Rights Act). Complaints that progress to the Queensland Human Rights Commission may be referred by the Queensland Human Rights Commissioner to the NDIS Quality and Safeguards Commission (s 73 Human Rights Act). For more information about the right to complain and the complaint-making process, visit the Queensland Human Rights Commission website.

FREE ADVOCACY AND LEGAL SERVICES

There are a number of disability advocacy agencies that receive funding to help people with appeals of NDIA decisions. Advice and/or representation services are offered, subject to organisational capacity. Advocacy organisations' contact details are listed on the National Disability Advocacy Program page on the Department of Social Services website.

Legal Aid Queensland also operates an advice and representation service. There is no means test for applicants seeking help through this service. Advice is provided to all people who contact the service, subject to capacity, and representation in appeals cases is provided in limited circumstances (subject to assessment on application).

LEGAL NOTICES

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