

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the National Disability Insurance Scheme

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1)
(Miscellaneous Provisions) Transitional Rules 2024*

Purpose

The *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024* (the Instrument) provides for a number of transitional arrangements that will support implementation of amendments to be made to the *National Disability Insurance Scheme Act 2013* (NDIS Act) by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Amending Act).

The Instrument makes three specific transitional arrangements. The transitional arrangements provided for in the Instrument will:

- provide that a participant does not owe debt for purchasing a support that is not an NDIS support in some circumstances, to allow for an educative approach around what is and is not an NDIS support
- ensure that participants with recurring transport payments in their plan do not need to lodge a claim for these payments, and
- ensure that reasonable and necessary supports identified in a participant's plan are most appropriately funded by the National Disability Insurance Scheme (NDIS, Scheme).

The Instrument is a transitional rule made under item 138 of Schedule 1 to the Amending Act.

Background

The Amending Act

On Tuesday 18 October 2022, the Government announced there would be an independent review into the NDIS to improve the wellbeing of Australians with disability and the Scheme's sustainability (NDIS Review). The Terms of Reference for the NDIS Review provided 3 overarching objectives:

- put people with disability and their families back at the centre of the NDIS to create a more personal experience
- restore trust and confidence
- ensure the long-term sustainability of the NDIS.

The NDIS Review, which was co-chaired by Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM, delivered its final report 'Working together to deliver the NDIS' in

December 2023. It included 26 recommendations with 139 integrated actions which were intended to provide a blueprint to renew the promise of the NDIS and deliver a more accessible and inclusive Australia.

The Amending Act addresses priority recommendations from the NDIS Review and represents the first tranche of amendments to the NDIS Act to improve participant experience. It followed agreement by National Cabinet that the Commonwealth would work with state and territory governments to implement legislative and other changes to return the NDIS to its original intent of supporting people with permanent and significant disability, within a broader ecosystem of supports.

The changes to be made by the Amending Act are critical to improving the experience of people with disability participating in the Scheme while ensuring the long-term sustainability of the NDIS, so that it is available to support Australians with disability for many years to come.

One of the key NDIS Review recommendations to be implemented by the Amending Act is a move towards a more flexible budget-based planning framework. That framework will not commence until supporting NDIS rules and legislative instruments have been made. This will take time, to ensure there is deep engagement with the disability community about the content of key instruments.

Until the new planning framework is operational, the existing planning framework (now known as the 'old framework') will continue to operate with some important changes. The amendments relevant to this Instrument are explained below.

NDIS supports

One of the key changes to be made by the Amending Act was to insert a new concept of 'NDIS support' into the NDIS Act. The concept of an NDIS support will be defined in new section 10 of the NDIS Act, and will appear in numerous places throughout the NDIS Act. It is central to the operation of the future of the NDIS in a number of ways.

In particular, the Amending Act will amend:

- section 34 of the NDIS Act (which deals with reasonable and necessary supports for old framework plans) to ensure a reasonable and necessary support is an NDIS support, and
- section 46 of the NDIS Act (which deals with how funding provided under the NDIS can be used). Section 46 of the NDIS Act will now require participants to spend funding provided under their plan only on NDIS supports. This will apply in addition to the existing requirement to spend in accordance with the participant's plan.

Claims and payments

The Amending Act will insert new section 45A into the NDIS Act. This new section will provide a claims and payments framework that clarifies how people, including participants and providers, may make 'claims' for NDIS amounts and how and when the Agency must 'pay' relevant amounts. This section is consistent with the Agency's

existing operational practice but provides set parameters and more clarity around how the framework operates.

Power to make the Instrument

The Instrument is made under item 138 of Schedule 1 to the Amending Act.

Subitem 138(1) provides that the Minister may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by the Bill.

Subitem 138(2) confirms that without limiting subitem (1), rules made under this item before the end of the period of 12 months starting on the day this Schedule commences may provide that provisions of this Schedule, or any other Act or instrument, have effect with any modifications prescribed by the rules. Those provisions then have effect as if they were so modified.

Outline of instrument

Debts arising out of failure to spend only on NDIS supports

The new concept of 'NDIS support' includes the supports that have always been appropriately funded by the NDIS. It provides further clarity on the boundaries that have always existed so that it is easier for participants and other members of the disability community to identify supports that can and cannot be purchased using NDIS funding.

The Amending Act inserts new paragraph 46(1)(a) into the NDIS Act to require a participant (or person receiving funding on behalf of a participant) to spend money under a participant's plan only on NDIS supports.

Subsection 182(3) of the NDIS Act provides that a person who does not comply with section 46 in relation to an NDIS amount will owe a debt to the Agency equal to that amount. This means a participant who purchases a support that is not an NDIS support will owe a debt for the amount of the support they purchased. This is consistent with the general principle that any person who receives money from the Commonwealth that they are not legally entitled to will owe a debt to the Commonwealth in the same amount.

That being said, the Government recognises that introducing the concept of NDIS supports is a change for participants. While participants are becoming more familiar with the concept of NDIS supports, there are may be circumstances where a person purchases a support that is not an NDIS support. In particular, this may happen due to previous uncertainty about what can be purchased under the NDIS.

To mitigate the potential effect during the transition period, particularly on participants, the Instrument includes a transitional provision that ensures a debt will not be raised against a participant for purchasing a support that is not an NDIS support in certain circumstances.

A debt will only exist if a participant purchases a support that is not an NDIS support if it costs less than \$1,500, unless that have been given two prior 'notifications' that they have purchased supports that are not NDIS supports. This will require the Agency to take an educative approach by contacting participants twice to explain that what is and is not an NDIS support without a debt being raised against the participant. A debt will still be raised if the support cost \$1,500 or more.

It is important to note that any debts that are raised in relation to purchase or provision of a support that is not an NDIS support can be written off or waived under the existing provisions of the NDIS Act (including the 'special circumstances' waiver in section 195, which will be amended by the Amending Act to ensure it has a broader application).

Recurring transport

NDIS participants may receive funding for transport where that is a reasonable and necessary support for them. There are different types of transport support available, one of which is described in participant plans as 'recurring transport'.

Currently (that is, prior to the commencement of the Amending Act), funding for this support is paid directly to participants without the need to submit a claim. This is possible due to the claims and payments framework being operational rather than specified in the NDIS Act. However, when the Amending Act commences there will be a legislative requirement for a claim to be lodged before any payment can be made for a support. This means that participants will be required to lodge a claim to be able to receive their recurring transport support funding.

This instrument creates a transitional arrangement that 'switches off' the requirement to lodge a claim in respect of recurring transport. This will apply only for old framework plans, and only for recurring transport. All other supports will still need to have a valid claim lodged before they can be paid.

This transitional arrangement is necessary to ensure participants are not disadvantaged by the new claims and payments framework and can continue to receive access to funding for supports in the same way they did prior to the Amending Act commencing.

Appropriately funded or provided by the NDIS

The Instrument will also impose a requirement that the Chief Executive Officer (CEO) of the National Disability Insurance Agency must specifically consider whether reasonable and necessary supports are appropriately funded by the NDIS under subsection 34(1). This is particularly relevant to supports that may otherwise be provided through statutory compensation schemes.

This requirement exists in paragraph 34(1)(f), which currently provides that to be a reasonable and necessary support the CEO must be satisfied that:

- (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered

by a person, agency or body, or systems of service delivery or support services offered:

- (i) as part of a universal service obligation; or
- (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

As noted above the Amending Act repeals and replaces this with a requirement for a support to be an NDIS support.

One of the criteria for prescribing a support as an NDIS support is that it is appropriately funded by the NDIS (or is not appropriately funded by the NDIS, in the case of something that is not an NDIS support).

Further work is required to understand how some supports interact with other supports on the list and the responsibility of the NDIS compared to other service systems. This is primarily a concern for supports that are available through statutory insurance schemes and other similar compensation arrangements. This needs to be carefully worked through to ensure participants are not disadvantaged by any change.

In the interim, the Instrument re-imposes the requirement to consider whether a support is appropriately funded or provided by the NDIS in assessing whether it is reasonable and necessary. This will apply only until rules are made that provide how the CEO is to take into account a support that may be funded or provided under a scheme of insurance, or under a Commonwealth, State or Territory law.

It should be noted that the consideration of whether a support is most appropriately funded or provided by the NDIS is done by the transitional section 10 rules for the vast majority of supports. In those circumstances, the CEO will be easily satisfied of whether the support is most appropriately funded or provided by the NDIS by considering the transitional section 10 instrument and deciding whether the support is or is not an NDIS support. The only circumstance in which a support may be an NDIS support but not appropriately funded or provided by the NDIS is where that support is not captured by the transitional section 10 instrument. This will primarily be those provided by statutory insurance schemes and other similar compensation arrangements.

Commencement

The Instrument commences on the later of the day after it is registered and the day that the Amending Act commences. The Amending Act commences on 3 October 2024.

Consultation

In early August 2024, the Department of Social Services released draft lists of NDIS supports for public consultation. Feedback was provided through survey responses and email submissions with over 7,000 responses received. The Government welcomes the significant engagement both from the disability community and the broader Australian community.

The public consultation process was undertaken from 4 August 2024 to 25 August 2024 via the Department's DSS engage.dss.gov.au website. A discussion paper outlining the purpose of the proposed transitional rule for section, as well as the draft lists of NDIS supports were published on the DSS Engage website.

The feedback from the disability community has been vital to help clarify the supports that can be funded by the NDIS and those that cannot.

A number of overarching themes were raised through the public consultation, consistent with written submissions received from peak and disability representative organisations including:

- fear about participants unknowingly purchasing something that NDIS funding cannot be used for resulting in debts being owed
- the need for time to understand what the new definition of NDIS Supports means for participants without the risk of incurring a debt.

A detailed consultation report outlining the views of the community on the draft lists of NDIS supports was prepared to inform the Schedules to the Instrument. The report has been published on the DSS Engage website and can be accessed using the following link:

<https://engage.dss.gov.au/consultation-on-draft-lists-of-ndis-supports/consultation-on-the-draft-lists-of-ndis-supports-report>

The National Disability Insurance Agency conducted a series of targeted engagements from August to September 2024 and heard from over 100 stakeholders including:

- Disability Representative and Carer Organisation members
- Independent Advisory Council members
- Participant Reference Group members
- Industry Chief Executive forum members
- Participant focus groups
- Self managers
- Child representatives
- Rural and remote
- Neurodegenerative, Palliative Care and Rare Diseases Advisory Group
- NDIA Board members

Many of these groups also raised concerns and fear about the immediate impact of introducing the concept of NDIS supports on participants with stated supports in their

plans that will no longer be NDIS supports, including accidental expenditure on a non-NDIS support giving rise to a debt.

In addition to engagement with the disability community, there has been significant consultation with States and Territories from July through September 2024 utilising established governance arrangements under the Disability Reform Ministerial Council.

Regulation Impact Analysis (RIA)

The Office of Impact Analysis has agreed to the use of the Final Report of the Independent Review of the NDIS delivered to Governments in December 2023 as an Impact Analysis Equivalent. A link to the report can be found on the NDIS Review website - <https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis> .

Explanation of the provisions

Part 1 – Preliminary

Section 1 – Name

This instrument is the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024*.

Section 2 – Commencement

This instrument commences on the later of the day after the instrument is registered and the day on which Schedule 1 to the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Amending Act) commences. The Amending Act commences on 3 October 2024.

Section 3 – Authority

This instrument is made under item 138 of Schedule 1 to the Amending Act.

Section 4 – Definitions

Section 4 provides definitions for the purpose of the Instrument.

Subsection 4(1) provides that in the Instrument:

amending Act means the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024*.

NDIS Act means the *National Disability Insurance Scheme Act 2013*.

Subsection 4(2) notes that an expression that is defined for the purposes of the NDIS Act has the same meaning when used in this instrument as it has in that Act.

Part 2 – Transitional provisions

Section 5 – Debts due to the Agency – complying with requirement to spend NDIS amounts only on NDIS supports

Section 5 provides for circumstances where a debt does not arise for spending NDIS funding on supports that are not NDIS supports.

Subsection 5(1) provides that this section applies in relation to a person's failure to comply with paragraph 46(1)(a) of the NDIS Act, as in force on and after the commencement of Schedule 1 to the amending Act, during the following period:

- (a) if the person is an NDIS provider and the person received the amount on behalf of a participant—the period of 30 days starting on that commencement;

- (b) in any other case—the period of 12 months starting on that commencement.

Paragraph 46(1)(a) requires a participant, or a person who receives an NDIS amount on behalf of a participant, to spend that amount only on NDIS supports. In effect, this means section 5 applies where a person has spent NDIS funding on something that is not an NDIS support within 30 days (for providers) or 12 months (for all others) of when the Amending Act commences.

Subsection 5(2) provides that subsection 182(3) of the NDIS Act does not apply in relation to the failure unless:

- (a) the NDIS amount is \$1,500 or more; or
(b) before the failure occurred, the Agency had notified the person about at least 2 previous failures by the person to comply with paragraph 46(1)(a) of the NDIS Act.

Subsection 182(3) provides that a person who does not comply with section 46 in relation to an NDIS amount owes a debt to the Agency equal to that amount.

Subsection 5(2) has the effect of ‘switching off’ subsection 182(3) in limited circumstances, which means a debt will not be raised unless:

- the support purchased cost \$1,500 or more, or
- the support cost less than \$1,500, but the participant has previously purchased at least 2 non-NDIS supports and been contacted by the Agency about this issue.

In effect, this ensures that participants will receive two notices before a debt is raised for a low-cost support. This allows the Agency to take an educative approach in the first instance.

Section 6 – Claims not required for certain supports

Section 6 provides an exception to new section 45A, which will be inserted into the NDIS Act by the Amending Act. Section 45A establishes a legislative claims and payments framework, requiring a valid claim to be lodged before a payment can be made in relation to a participant’s plan.

Subsection 6(1) provides that section 45A of the NDIS Act, as in force on and after the commencement of Schedule 1 to the amending Act, does not apply in relation to a payment in respect of the acquisition or provision of a recurring transport support under an old framework plan. This means that a claim is not required to be made for a participant to receive funding for a support identified in their plan as a ‘recurring transport support.’

Subsection 6(2) provides that subitem 132A(1) of Schedule 1 to the amending Act has effect as if the words “and subsection 6(1) of the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024*” were added at the end of that subitem. Subitem 132A(1) is an application provision for section 45A which confirms that it applies in relation to payments made from a participant’s NDIS plan on or after commencement of the Amending Act.

A legislative note to subsection 6(2) points the reader to subitem 138(2) of Schedule 1 to the Amending Act, which provides for the power to modify the effect of provisions of that Schedule.

This section is necessary to ensure that participants can continue to receive funding for transport supports in the same way while they have under an old framework plan. The new planning framework will change how supports are described in a participant’s plan and that will make this provision no longer necessary.

Section 7 – Requirement for supports to be most appropriately funded or provided through the National Disability Insurance Scheme

Section 7 provides an additional requirement for the CEO to be satisfied of in deciding whether a support is reasonable and necessary in accordance with section 34 of the NDIS Act. This relates to a change that will be made by the Amending Act to replace existing paragraph 34(1)(f) with a requirement for a support to be an NDIS support. The change made by section 7 will require the CEO to also be satisfied that the support is appropriately funded or provided by the NDIS. This additional requirement will only apply until new Category A NDIS rules are made that specify how the CEO is to take into account supports in respect of personal injury that may be funded or provided under a scheme of insurance, or under a Commonwealth, State or Territory law. This is because it is intended to primarily capture supports that are more appropriately provided by a scheme of statutory insurance or other similar compensation arrangement, which will no longer be necessary once specific rules have been made.

Subsection 7(1) provides that this section applies only until Category A NDIS rules are made for the purpose of paragraph 35(4)(d). That paragraph allows for rules to be made prescribing how the CEO is to take into account supports in respect of personal injury that may be funded or provided under a scheme of insurance, or under a Commonwealth, State or Territory law. Once those rules are made, section 7 of the Instrument will cease to have any effect.

Subsection 7(2) provides that for the purpose of specifying in the participant’s statement of participant supports the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of the matter mentioned in subsection (3) in relation to the funding or provision of each such support. This applies in addition to the matters of which the CEO must be

satisfied mentioned in subsection 34(1) of the NDIS Act, as amended by the Amending Act.

Subsection 7(3) provides that the additional matter of which the CEO must be satisfied is that the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

- (a) as part of a universal service obligation; or
- (b) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

This is consistent with the language of paragraph 34(1)(f) that was in force prior to commencement of the Amending Act.

Subsection 7(4) provides that in deciding whether or not he or she is satisfied of the matter mentioned in subsection (3), the CEO must apply any methods or criteria, and have regard to any matters, that:

- (a) were prescribed for the purposes of subsection 34(2) of the NDIS Act by NDIS rules in force immediately before the commencement of Schedule 1 to the Amending Act; and
- (b) related to the matter mentioned in paragraph 34(1)(f) of the NDIS Act, as in force immediately before that commencement.

This means any rules that were in force prior to commencement of the Amending Act will be applied for the purpose of this transitional rule.

Subsection 7(5) provides that this section applies in relation to a statement of participant supports included in an old framework plan for a participant if the statement is approved or varied on or after the commencement of Schedule 1 to the amending Act (whether the participant becomes a participant and, in the case of a variation, whether the plan comes into effect, before, on or after that commencement).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024

The legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024* (the Instrument) provides for a number of transitional arrangements that will support implementation of amendments to be made to the *National Disability Insurance Scheme Act 2013* (NDIS Act) by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Amending Act).

The Instrument makes three specific transitional arrangements, which make minor but important changes to the operation of amendments made by the Amending Act. The transitional arrangements provided for in the Instrument will:

- provide that a participant does not owe debt for purchasing a support that is not an NDIS support in some circumstances, to allow for an educative approach,
- ensure that participants with recurring transport payments in their plan do not need to lodge a claim for these payments, and
- ensure that reasonable and necessary supports identified in a participant's plan are most appropriately funded by the NDIS.

The Instrument is a transitional rule made under item 138 of Schedule 1 to the Amending Act.

Human rights implications

The Instrument engages the following human rights:

- Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Rights of people with disability – Article 4(3) of the CRPD

Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the CRPD and Articles 2, 16 and 26 of the ICCPR

Article 3 of the CRPD reflects the need for respect of the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), non-discrimination, full and effective participation and inclusion in

society, the need for respect for difference and acceptance of persons with disabilities, equality of opportunity, accessibility, gender equality and respect for the evolving capacities of children with disabilities, including their right to preserve their identities.

In addition, Article 4 of the CRDP outlines the need to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disability without discrimination of any kind on the basis of disability.

Article 5(2) of the CRPD seeks to prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds. Article 12 of the CRPD reaffirms that persons with disability have the right to recognition everywhere as persons before the law and shall enjoy legal capacity on an equal basis with others, with appropriate measures being taken to provide access and support in exercising their legal capacity, including appropriate safeguards. The Article also provides that persons with disability should be given equal rights to, among other things, control their financial affairs and not be arbitrarily deprived of their property.

The Instrument promotes these rights by providing for circumstances in which a debt will not arise, to allow time for participants to adjust to the changes made by the Amending Act. This will allow the changes made by the NDIS Act to operate as intended while also providing an appropriate safeguard for participants and ensuring they do not arbitrarily have a debt raised against them.

In addition, the Instrument allows participants to continue accessing funding for transport in the manner it was paid prior to commencement of the Amending Act. For some participants, who have a reasonable and necessary support in their plan described as 'recurring transport', the Instrument provides that a claim is not required to be lodged for this funding to be paid. This promotes the rights of people, and in particular advances the inherent dignity and individual autonomy of participants by allowing access to funding for this particular support in a simple manner consistent with longstanding practice.

To the extent that the Instrument may be seen to limit some of the rights mentioned above by re-introducing a consideration of whether a support is appropriately funded or provided by the NDIS, this is a necessary and appropriate limitation. This consideration is consistent with the law as in effect prior to commencement of the Amending Act, and it will operate only for a transitional period until specific NDIS rules are made. In practical terms, it will have very little work to do as the majority of supports will be captured by the transitional section 10 rule that prescribes supports that are, and are not, NDIS supports. Consideration of whether the support in question is appropriately funded or provided by the NDIS is built into the section 10 transitional rule in almost all circumstances. As such, the change made by the Instrument is minimal. It is also an important consideration to ensure that supports remain available

outside the NDIS, including for participants who have a disability resulting from a compensable event or circumstance.

Rights of people with disability – Article 4(3) of the CRPD

Article 4(3) of the CRPD seeks to ensure necessary consultation with, and active involvement of, persons with disabilities in the development and implementation of legislation and policies.

Although the specific instrument has not been consulted on publicly, the changes made by this Instrument are, for the most part, to address concerns and questions raised by people with disability and the broader disability community about provisions of the Amending Act and how they will be implemented. This is consistent with Article 4(3) of the CRPD.

Conclusion

This instrument is compatible with human rights as it advances the protection of the rights of people with disability.