

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 (Old Framework Plans) Determination 2024

Purpose

The *National Disability Insurance Scheme (Old Framework Plans) Determination 2024* (the Determination) will operationalise key changes to section 33 of the *National Disability Insurance Scheme Act 2013* (NDIS Act) made by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Amending Act).

The changes to section 33 operationalised by the Determination require a participant's statement of participant supports to:

- specify a 'total funding amount' for all supports funded under the plan,
- categorise the participant's reasonable and necessary supports into one or more 'groups' of supports,
- specify a 'funding component amount' for each group of reasonable and necessary supports, and
- specify 'funding periods' during which funding will be available.

The Determination is made under subsection 33(2E) of the NDIS Act.

Background

The Amending Act

The Amending Act was introduced into Parliament on 27 March 2024. It passed both houses on 5 September 2024 and commenced on 3 October 2024.

The Amending Act was the first in a series of legislative reforms intended to give effect to recommendations made by the Independent Review into the National Disability Insurance Scheme (NDIS Review).

One of the key themes captured by the NDIS Review in its December 2023 report was around returning the National Disability Insurance Scheme (NDIS, Scheme) to its original intent. Many of the changes made by the Amending Act work towards this important outcome, which will ensure the NDIS continues to be available to support Australians with disability for many years to come.

The changes 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.

Power to make the Determination

The Determination is made under subsection 33(2E) of the NDIS Act, which was inserted by the Amending Act.

It provides that the Minister may, by legislative instrument, determine:

- (a) requirements for categorising reasonable and necessary supports into groups for the purposes of paragraph (2A)(b); and
- (b) how to work out a funding component amount for a group of supports; and
- (c) how to work out when a first funding period is to start for the purposes of subparagraph (2D)(d)(i) or (e)(i); and
- (d) requirements with which the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) must comply, methods or criteria that the CEO is to apply, and matters that the CEO may, must or must not take into account, in doing any of the following:
 - (i) working out a funding component amount;
 - (ii) specifying funding periods for the purposes of paragraph (2C)(a);
 - (iii) deciding any other matter for the purposes of subsection (2A), (2C) or (2D).

Subsection 33(2F) provides that despite subsection 14(2) of the *Legislation Act 2003*, a determination under subsection 33(2E) may make provision for, or in relation to, a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Since the commencement of the Amending Act, all NDIS rules and other instruments made under the NDIS Act are exempt from sunseting (see changes to the *Legislation (Exemptions and Other Matters) Regulation 2015* made by item 123 of the Amending Act). The Determination is therefore exempt from sunseting, but is still subject to disallowance under section 42 of the *Legislation Act 2003*. The Determination is not an NDIS rule within the meaning of section 209 of the NDIS Act.

Outline of instrument

Once a person becomes a participant in the National Disability Insurance Scheme (NDIS), they receive a participant plan which includes (among other things) a statement of participant supports. The statement of participant supports is approved and prepared under subsection 33(2) of the NDIS Act, and includes any general supports that will be provided for, or in relation to, the participant and any reasonable and necessary supports that will be funded for the participant.

Changes made to section 33 by the Amending Act will require a participant's plan to clearly specify the total amount of funding available as well as the time period during which this can be used. This will allow participants and the people who manage funding under their plans to have greater certainty about the amount of NDIS funding available and make informed decisions about the supports they access, including planning for the frequency and intensity of their supports.

Specifically, the Amending Act inserted new subsections 33(2A) to (2F) of the NDIS Act.

Subsection 33(2A) provides that a participant's statement of participant supports must:

- (a) specify a 'total funding amount' for all supports funded under the plan,
- (b) categorise the participant's reasonable and necessary supports into one or more 'groups' of supports,
- (c) specify a 'funding component amount' for each group of reasonable and necessary supports, and
- (d) specify 'funding periods' during which funding will be available.

Subsection 33(2B) provides that the 'total funding amount' is equivalent to the total of all funding component amounts. If there is only one funding component amount, that will also be the total funding amount.

The remaining aspects of subsection 33(2A) are to be worked out in accordance with a determination made under subsection 33(2E).

The Determination is made under subsection 33(2E) for this purpose. It determines:

- (a) requirements for categorising reasonable and necessary supports into groups (for the purpose of paragraph 33(2A)(b)),
- (b) how to work out a funding component amount for a group of supports (for the purpose of paragraph 33(2A)(c)),
- (c) how to work out when the first funding period starts paragraph (for the purpose of paragraph 33(2A)(d)), and
- (d) matters that must be considered in deciding the length of any funding period(s) (for the purpose of paragraph 33(2A)(d)).

Note: paragraph 33(2D)(a) provides that a funding period cannot be more than twelve months.

These provisions do not come into effect until a determination is made under subsection 33(2E) (see item 129 of Schedule 1 to the Amending Act). This means that the Determination will effectively 'switch on' the new requirements inserted by the Amending Act.

Once the Determination commences, plans will begin to include a statement of participant supports that was prepared in accordance with subsections 33(2A) to (2D). This will initially be completed only by an NDIA planner, as they will have specific training and tools to assist in applying the Determination. After an NDIA planner has made a decision to approve a statement of participant supports using the Determination, a participant can seek internal and external merits review of that decision. The reviewer will be able to see how the original decision-maker applied the Determination which will inform their review of the decision.

Funding periods will be specified for reasonable and necessary supports as a whole (i.e. the total funding amount) or for groups of supports (i.e. funding component amounts). If funding periods are specified for different groups of supports these may be for different periods. The plan will also specify the proportion of funding that will be available during each funding period.

Funding component amounts will be allocated based on individual participant needs and funding periods will be adjusted to suit a participant's individual circumstances with a focus on maximum flexibility to support choice and control.

It is important to note that preparing a participant's plan in accordance with the Determination and new requirements of section 33 will not change the way the plan looks. Most reasonable and necessary supports will continue to be described generally as they currently are to allow participants choice and control with the specific supports they purchase, although some supports will be identified as 'stated' supports consistent with current practice. Participants will have the option to request additional information on how their total funding amount, and the funding components that make this up, were arrived at. This will provide transparency for participants as well as supporting decision-makers undertaking internal and external merits review.

Commencement

The Determination commences the day after it is registered on the Federal Register of Legislation.

Consultation

The design of the Amending Act has been a collaborative exercise, relying heavily on substantial contributions made by the disability community through the NDIS Review.

The NDIS Review found that NDIS processes should be fair and clear and easier for people with disability and their families to understand. Participants should know and understand how decisions about budgets are made and NDIS funding should be set in a fair and transparent way. The Australian community should see the NDIS is fair and supports participants to achieve their goals, participate in the community and have similar opportunities as other Australians. Everyone should be confident that the NDIS is managed well.

From May to July 2024, the NDIA held iterative discussions on proposed changes to section 33 with members of:

- Independent Advisory Council
- Disability Representative and Carer Organisation Forum
- Participant Reference Group
- Industry Chief Executive Forum
- Participant First focus groups
- Provider focus groups
- Better Planning Reform for Outcomes co-design group.

Consultations continued throughout July and August and the main feedback from these engagements was the need to get plan funding right in the first place. People told the NDIA they need to ensure participants are not at risk of their supports and services ending when changes to section 33 are introduced. People want the NDIA to use clear language that avoids blame. The NDIA also heard they should consider the range of factors that lead to plan inflation, not just focus on overspending.

Many stakeholders, participants and supporters reported that plans are not right from the start, which impacts plan overutilisation and highlighted the need to:

- help participants understand the process of planning before planning meetings
- upskill staff and use more specialised planners, including planners who can provide culturally appropriate support
- hire more planners with disability
- invest in peer support so participants can support each other to understand and implement their plans
- partner with external organisations to ‘develop foundation supports such as basic financial literacy’

Role of plan intermediaries

Consultations suggested the NDIA should address shortfalls in the service provided by plan managers including:

- Clarifying roles and responsibilities for support coordinators and plan managers
- Providing greater training, possibly mandatory, for providers of support coordination and plan management services
- Placing emphasis on building participant capacity, helping participants get the most out of their plans and supports, not just financial management of plan budgets

- Addressing conflicts of interest between plan intermediary providers and providers of supports.

Funding periods

In consultations it was discussed that:

- the full amount of funding in the plan is available from plan approval.
- funding periods would allow participants to access part of their funding in a shorter period.
- funding periods aim to help participants manage their available funding over the duration of their plan.

While there was broad support for using funding periods in longer plans, there was some concern that funding periods may limit flexibility and may not always be suitable to meet participants' changing support needs.

Supporting participants

Consultations suggested the NDIA should invest in resources to build the capacity of participants and nominees to manage their funding and that those resources should be accessible, user-friendly and include visual examples, including resources that:

- track and plan funding use, such as calculators
- show funding available per month
- notify participants at risk of overutilisation
- identify when participants need additional funding
- build participant's ability to budget and understand their plans
- identify and challenge providers who overcharge
- make it easy to self-manage using the portal and other available tools.

It was noted that some participants may need more support with planning, such as people who are culturally and linguistically diverse (CALD) or people who have an intellectual disability.

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

All the feedback has formed a key part of the input into the Determination and how it will be implemented.

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 (Old Framework Plans) Determination 2024*.

Section 2 – Commencement

This instrument commences the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This instrument is made under subsection 33(2E) of the NDIS Act.

Section 4 – Definitions

The Determination provides a number of definitions for terms used in the Determination.

A note advises the reader that a number of expressions used in this instrument are defined in the NDIS Act Those expressions include the following:

- (a) Agency;
- (b) CEO;
- (c) funding component amount;
- (d) funding period;
- (e) old framework plan;
- (f) total funding amount.

Section 4 also provides the following key definitions for the purpose of the Determination.

price-limited: a support item is ***price-limited*** if the pricing document that specifies the support item provides that the support item is subject to price limits.

pricing document means any of the following documents published by the Agency, as existing from time to time:

- (a) the document titled *Pricing Arrangements and Price Limits*;
- (b) the document titled *Assistive Technology, Home Modifications and Consumables Code Guide*;
- (c) the document titled *Pricing Arrangements for Specialist Disability Accommodation*.

and a support item's pricing document is the document mentioned in paragraph (a), (b) or (c) that specifies the support item.

A note advises the reader that these documents could in 2024 be viewed on the Agency's website (www.ndis.gov.au). Specifically, the documents are all available at the following link: <https://www.ndis.gov.au/providers/pricing-arrangements#ndis-pricing-arrangements-and-price-limits>.

quotable: a support item is **quotable** if:

- (a) the pricing document that specifies the support item provides that the support item is subject to quotation or otherwise indicates that a quote is required for the support item; or
- (b) the support item is specified in the document titled *Pricing Arrangements for Specialist Disability Accommodation* (as existing from time to time).

support item means a support item specified in a pricing document.

Each of these definitions is necessary to identify reasonable and necessary supports that may be funded under a participant's plan and how the associated funding amount is to be calculated.

Part 2 – Requirements for statements of participant supports for old framework plans

Section 5 – Categorising reasonable and necessary supports into groups of supports

Section 5 relates to the requirement in paragraph 33(2A)(b) of the NDIS Act to categorise reasonable and necessary supports into groups.

Specifically, subsection 5(1) provides that a decision-maker must take into account the matters mentioned in subsection (2) in deciding for the purposes of paragraph 33(2A)(b) of the Act whether one or more reasonable and necessary supports (the **relevant supports**) should be categorised:

- (a) into a group with one or more other reasonable and necessary supports; or
- (b) as a separate group (which would make the support a group of its own).

Subsection (2) lists the matters to be taken into account, which are as follows:

- (a) the nature of the relevant supports;

For example, Capacity Building – Improved Relationships may include specialist behaviour support which is a particular type of support directed to behaviours of concern. It will only be included in a participant's plan where it is necessary and appropriate for this particular support to be provided and is generally funding that is

unable to be used for any other type of support. If this is included in participant's plan, it will be specified in its own group making it unsuitable for all capacity building supports to be grouped together.

- (b) the cost of the relevant supports (having regard to any quotes provided for the supports);

For example, a high-cost quotable support such as a custom wheelchair would likely be in its own group. This is because it will have been included in the participant's plan on the basis of an approved quote and the funding cannot be used for another purpose. On the other hand, it may be more appropriate to group assistive technology supports together if there are a number of smaller cost items for which funding can be used interchangeably to best meet the participant's needs.

- (c) any requirements relating to the provision of the relevant supports to the participant, including requirements relating to who may provide the supports;

For example, funding for specialist disability accommodation is something a participant requires access to over the full duration of their plan. There are also specific requirements around the type of support that can be provided and by whom. In this case, it would be appropriate for specialist disability accommodation to be included in its own group.

- (d) whether the relevant supports are necessary to address needs of the participant arising from an impairment in relation to which the participant meets the early intervention requirements;

For example, a child who has accessed the NDIS on the basis that they are likely to benefit from early intervention may have supports under the early childhood support item grouped into improved daily living skills. This funding would not be able to be spent on other kinds of capacity building supports.

- (e) whether categorising the relevant supports in a particular way would present a risk to the participant;

For example, funding for supported independent living is something a participant requires access to over the full duration of their plan. The participant may also have other core supports that do not relate to supported independent living. If funding for supported independent living is not grouped on its own, there may be a risk that the participant will unintentionally spend that funding on something else leaving them unable to receive their supported independent living supports. This would put the participant at risk of harm and without access to vital supports. In this instance, it would be appropriate for supported independent living to be grouped on its own but may be appropriate for all remaining core supports to be in a single group and used flexibly.

- (f) the proposed management of the funding for the relevant supports under the plan.

For example, a participant may wish to self-manage part of their plan, like consumables, but want funding for other core supports to be managed by the Agency or a plan manager.

- (g) whether section 46 of the Act has not been complied with in relation to any of the participant's plans.

For example, a participant who has previously spent funding under their plan in a way that is inconsistent with the plan or to purchase supports that are not NDIS supports may benefit from having multiple smaller groups of supports in their plan to ensure they understand what funding can be used for what supports. This will safeguard participants to ensure their funding remains available throughout the intended duration of the plan and is available to access the reasonable and necessary supports they require. It will also reduce the risk of the participant incurring a debt by spending funding inappropriately.

Subsection 5(3) provides that the decision-maker may also take into account any other matter the decision-maker considers relevant. This is to ensure any unique or specific factors that are relevant to a particular participant can be considered.

Subsection 5(4) provides that recurring transport supports must not be categorised into a group of supports with any support other than recurring transport supports. In effect, this means that recurring transport must always be in its own group for the purpose of the Determination.

This is necessary because recurring transport is a different type of support to other supports funded under a participant's plan. It is not covered by any of the pricing documents and so needs to have a different rule for calculating the amount that will be funded. Recurring transport is also paid differently to other supports, and is currently in its own section of the plan. This subsection will ensure there are minimal changes to the planning arrangements participants are familiar with.

Section 6 – working out the funding component amount for a group of supports

Section 6 sets out a method statement to work out the funding component amount for a group of reasonable and necessary supports, for the purposes of paragraph 33(2A)(c) of the Act.

General rule – supports other than recurring transport

Subsection 6(1) relates to all supports other than recurring transport.

Before applying the Determination, a decision-maker will have already considered and decided what supports are reasonable and necessary for the participant. Depending on what the support is, the decision-maker will have decided a range of matters in assessing what is reasonable and necessary for the participant including:

- the days of the week and times of day the support will be delivered (weekday daytime, weekday evening, Saturdays, Sundays, public holidays)

- the frequency of the support for each of these days of week (e.g. the number of hours per week)
- the ratio of supports (e.g. 1:1 or 1:3)
- the intensity of support needs (standard or higher needs)
- the duration of the support (e.g. for the whole plan or only for a shorter period)
- whether any adjustments to the above are required to take account of:
 - irregular periods (e.g. additional support hours during holidays),
 - other supports funded in the plan (e.g. the participant will not require in-home support while they are accessing an out-of-home support such as short term accommodation).

These are all relevant matters to assessing what is reasonable and necessary for the participant. They are not matters that are decided under the Determination, although they are relevant for applying it.

For example, if a decision-maker considers that a participant requires assistance with self-care activities that is only part of the decision about what is reasonable and necessary for the NDIS to fund in the participant's plan. For something to be decided as reasonable and necessary such that it can be funded under a participant's plan, it must have certainty around what the support actually is. Using the example of self-care activities, this might be a certain amount of hours per day/week/month/year, at certain days of the week or times of the day, and at a particular ratio.

Once the decision-maker has considered the participant's needs and decided exactly what supports are reasonable and necessary to be funded in their plan (and categorised them into groups), they will then apply the Determination to identify the funding component amount for the group of supports.

Subsection 6(1) provides that, for the purpose of paragraph 33(2A)(c) of the Act, the funding component amount for a group of reasonable and necessary supports (other than a group of recurring transport supports) is worked out using the method statement prescribed in that subsection.

The method statement is as follows:

- Step 1. Identify the supports in the group by reference to the support items that cover the supports and then follow steps 2 and 3 for each support item.

This step will require the decision-maker to identify the relevant pricing document and support item within it based on what they have decided is reasonable and necessary. For example, if the decision-maker has decided that the participant requires sleepover support 3 nights per week, this is a support item included in the *Pricing Arrangements and Price Limits*.

- Step 2. Identify the number of units of supports covered by the support item that the decision-maker is satisfied are reasonable and necessary for the participant for the period of the plan, according to the unit of measure specified for the support item in the relevant pricing document.

This step requires the decision-maker to confirm the unit of measure associated with the support item and how many of that unit would be reasonable and necessary to include in the participant's plan.

Using the above example of sleepover support, the *Pricing Arrangements and Price Limits* provides that this item has a unit of 'each' which means each night is a single unit. As the decision-maker was satisfied the participant requires 3 nights per week of sleepover support, this would equal 3 units per week. For a 12-month plan, assuming no adjustments are required, this would be 156 units (or nights).

Step 3. Multiply that number by:

- (a) for a price-limited support item—the amount specified in that pricing document for the delivery of supports covered by the support item at the participant's usual place of residence; or
- (b) for a quotable support item—the amount of the quote approved by the decision-maker for the purposes of the plan for supports covered by the support item; or
- (c) for any other support item—the amount, not exceeding \$15,000, that the decision-maker considers appropriate, taking into account only the matters in relation to which the decision-maker is required to be satisfied as mentioned in subsection 34(1) of the Act.

Price-limited support item and quotable support are both defined in the section 4 of the Determination.

In essence, a price-limited support item is one that has a maximum price specified in the relevant pricing document. If the support item is a price-limited support, this means the relevant pricing document specifies a dollar amount for each unit of the support. That amount is then multiplied by the number of units that are considered to be reasonable and necessary to reach a total amount. Using the above example of sleepover support, which is a price-limited support included in the *Pricing Arrangements and Price Limits*, the decision-maker would multiply the specified price limit for one unit (night) of sleepover support by the 156 nights found to be reasonable and necessary over a 12-month plan. That calculation will result in the total amount of funding for sleepover support.

A quotable item is one that is specified in the relevant pricing document as being either subject to quote, or quotable. An example of this is specialist disability accommodation, which is included in the *Pricing Arrangements for Specialist Disability*

Accommodation. The amount of funding available for a quotable support depends on a quote being received and approved by the decision-maker.

The pricing documents also contain supports that do not include a price limit and are not specified as requiring a quote. This captures all supports without a specified price limit that are not subject to quote, and the pricing documents may describe the cost of these supports in different ways. For example:

- These may include a 'notional amount' of \$1, such as Low Cost AT - Communication or Cognitive Support (which is specified in the *Assistive Technology, Home Modifications and Consumables Code Guide*) and provider travel – non-labour costs (which is specified in the *Pricing Arrangements and Price Limits*).
- These supports may also include a price of 'N/A', such as Community Social and Recreational Activities (which is specified in the *Pricing Arrangements and Price Limits*).
- The supports may simply not have any space for an amount to be recorded at all, such as Wheelchair Accessory - Powered Adjustment for Limbs or Recline or Elevate (which is specified in the *Assistive Technology, Home Modifications and Consumables Code Guide*).

For any support item captured by this category, that is an item without a maximum price limit and that is not subject to quote, the decision-maker will apply the amount they consider appropriate for the support on the basis of the criteria in section 34. However, the decision-maker cannot assign more than \$15,000 for these supports. This is in line with the NDIA's policy and the pricing documents generally, where a quote is required for a support that is likely to cost more than \$15,000.

Step 4. The funding component amount is the total of the amounts worked out in step 3 for support items for the group, with the total rounded to the nearest cent (rounding 0.5 cents upwards).

Under the previous steps, the decision-maker will have calculated the amount of funding to be provided for each individual reasonable and necessary support within a group. The final step in the method is to add these together to achieve a total funding amount for the group. This will then be the funding component amount associated with that group.

There might be some circumstances where applying the method leads to a number with more than 2 decimal places. Step 4 includes a rounding provision to ensure that where this occurs, the total will be rounded to the nearest cent.

Recurring transport supports

Subsection 6(2) provides the method to calculate funding component amount for recurring transport supports if this is included in a participant's plan. If recurring transport has been included in a participant's plan, it will always be in its own group because of subsection 5(4), discussed above.

Recurring transport is a support currently funded by the NDIS. It will only be available to a participant if the decision-maker has decided it is reasonable and necessary to provide the participant with funding for assistance with transport in relation to their disability.

Currently, the NDIA provides funding for recurring transport at 3 different levels that depend on the participant's particular circumstances. The levels that are currently available for transport funding, and circumstances in which they are generally considered reasonable and necessary, are as follows:

- **Level 1** - The NDIS may provide **\$1,784** per year for participants who are not working, studying or attending day programs but are seeking to enhance their community access.
- **Level 2** - The NDIS may provide **\$2,676** per year for participants who are currently working or studying part-time (up to 15 hours a week), participating in day programs and for other social, recreational or leisure activities.
- **Level 3** - The NDIS may provide **\$3,456** per year for participants who are currently working, looking for work, or studying, at least 15 hours a week, and are unable to use public transport because of their disability.

The Determination includes a specific process for calculating the amount of a recurring transport support to ensure participants continue to have access to this support when it has been assessed as reasonable and necessary for them.

Subsection 6(2) provides that for the purposes of paragraph 33(2A)(c) of the Act, the funding component amount for a group of reasonable and necessary supports consisting of recurring transport supports is the amount worked out by multiplying:

- (a) the number (which may be a decimal number) of units of the supports that the decision-maker is satisfied are reasonable and necessary for the participant for the period of the plan (where the unit of measure is 1 year); by
- (b) whichever of the following is applicable:
 - (i) unless subparagraph (ii) or (iii) applies—\$1,784;
 - (ii) if the participant is working or studying (or both) for less than 15 hours each week, is attending day programs, or requires the supports for social, recreational or leisure activities—\$2,676;
 - (iii) if the participant is working or studying (or both) for at least 15 hours each week—\$3,456.

This is subject to subsection (3), which is discussed below.

Paragraph (a) requires the decision-maker to identify the period of time that the participant's plan is in effect (unless the participant only has transport funding for part of their plan in which case that period must be identified). The rate of a recurring transport payment is an annual rate, so 1 year equals 1 unit. If a participant's plan is for 2 years that would be 2 units, whereas a 6 month plan would be 0.5 units.

Once the amount of units has been identified, paragraph (b) is used to identify the amount of recurring transport that will be funded by identifying the annual rate and multiplying it by the number of units.

Subparagraph (i) covers Level 1 transport. In effect, it provides that participants for whom recurring transport has been assessed as reasonable and necessary will receive funding for Level 1 unless they meet the criteria for Level 2 or Level 3. This covers participants who are not working, studying or attending day programs but are seeking to enhance their community access.

Subparagraph (ii) covers Level 2 transport. It applies if a participant is working or studying (or both) for less than 15 hours each week, is attending day programs, or requires the supports for social, recreational or leisure activities, unless they meet the criteria for Level 3 transport.

Subparagraph (iii) covers Level 3 transport. It applies if the participant is working or studying (or both) for at least 15 hours each week.

Subsection 6(3) provides that the amount is to be rounded to the nearest cent (rounding 0.5 cents upwards). This is included for circumstances where a participant might have a portion of a year, rather the entire year, as this may lead to an amount that has more than two decimal places.

Section 7 – Specifying funding periods

Section 7 relates to funding periods, which are dealt with in paragraph 33(2A)(d) and subsections 33(2C) and (2D) of the NDIS Act. Funding periods will be specified for reasonable and necessary supports as a whole (i.e. the total funding amount) or for groups of supports (i.e. funding component amounts). If funding periods are specified for groups of supports, these may be for different periods. The plan will also specify the proportion of funding that will be available during each funding period.

Matters to take into account in determining the length of funding periods

Subsection 7(1) provides that a decision-maker must take into account the matters mentioned in subsection (2) in specifying when funding periods are to start and end for the purpose of paragraph 33(2C)(b) of the NDIS Act.

Subsection 7(2) identifies the matters to be taken into account as follows:

- (a) whether section 46 of the Act is unlikely to be complied with in relation to the plan;

This is an important consideration to ensure that participants are protected from the risk of being subjected to financial exploitation, violence and abuse. It will also protect participants from potentially incurring a debt by spending funding on supports that are not NDIS supports or spending funding in a way that is not in line with their plan.

In considering whether section 46 is unlikely to be complied with, the CEO may consider matters such as the participant's past compliance with section 46 as well as their personal circumstances. This may include whether a participant has appropriate

decision-making supports to ensure they understand and can comply with section 46 in relation to their plan.

- (b) whether the participant is at risk of experiencing fraud or financial exploitation;

For example, a participant who is at risk of experiencing fraud or financial exploitation may benefit from having shorter funding periods in their plan, as any fraudulent or exploitative behaviour will likely cause the participant's funding to be exhausted before the end of the relevant funding period. In considering risk, the NDIA will take a proportionate approach to risk that upholds dignity of risk. Following identification of risks, consideration will be given to supports, capacity building and safeguards that could be applied to mitigate the risks identified. If the funding period is shorter, this will mean there is less funding available and a shorter period of time over which this fraudulent or exploitative behaviour can occur. This will minimise the risk of having all plan funds 'drained' at once. The NDIA will become aware of the fraudulent behaviour more quickly, meaning compliance and safeguarding actions can be initiated before the fraudulent or exploitative behaviour impacts the whole plan.

- (c) whether a funding period of a particular duration would likely result in the participant experiencing physical, mental or financial harm;

For example, if a participant requires support in irregular patterns due to the episodic nature of their impairment, shorter funding periods may not be appropriate as this will limit the amount of support they can access in a particular timeframe.

- (d) whether any of the following is an insolvent under administration:
 - (i) the participant;
 - (ii) the participant's nominee (if any);
 - (iii) if the participant is a child—a person who may do a thing in relation to the participant because of section 74 of the Act;

For example, if a participant or their representative is insolvent this may have occurred because they have poor skills with managing finances. If that is the case, they would benefit from shorter funding periods to support them in managing their available funding for the duration of the plan.

- (e) whether there is a risk of an event mentioned in paragraph 45(4)(c) of the Act occurring in relation to the plan;

Paragraph 45(4)(c) relates to payments being made above the amount of funding that is available during a funding period. It is important for the decision-maker to consider this in deciding the length of any funding periods, to ensure participants are not left in a situation where they do not have sufficient funding available to cover their required supports during their plan.

- (f) the total funding amount for the plan;

For example, a participant whose plan has a very high total value may benefit from shorter funding periods to assist them in managing their available funding over the duration of their plan and ensure they continue to have access to reasonable and necessary supports as required. On the other hand, a participant whose plan has a low total value may require less safeguards.

- (g) the nature and cost of the reasonable and necessary supports specified in the plan;

This will primarily be relevant to funding periods for funding component amounts. For example, different funding period lengths would be appropriate for a once-off purchase (a participant should have flexibility to purchase the support at any time during their plan) compared to a regular support (something that is provided to the participant over the duration of their plan with payments at regular intervals would be appropriate to have shorter funding periods to ensure the correct amount of funding is available at each required payment date).

- (h) any preference the participant has expressed as to the duration of the funding periods;

It is important for the participant's preferences and wishes to be considered. Some participants may have a preference for a longer period as this will provide them with greater flexibility to purchase supports at a rate and intensity of their choice. Other participants may prefer shorter funding periods as this will support them to manage their funding and ensure it continues to be available throughout the duration of their plan.

- (i) whether the participant has requested the CEO to vary or conduct a reassessment of any of the participant's plans on more than one occasion without giving the CEO information or documents demonstrating a change in the participant's circumstances;

For example, a participant who has previously exhausted all the funding in their plan on several occasions may have approached the CEO for variations or reassessments to replenish their funding. Where this has repeatedly occurred without any change to the participant's circumstances, this may suggest the participant is overspending the allocated funding with the expectation it will be replenished.

- (j) whether section 46 of the Act has not been complied with in relation to any of the participant's plans.

For example, a participant who has spent funding under their previous plan in a way that is inconsistent with the plan or to purchase supports that are not NDIS supports may benefit from shorter funding periods to prevent the same circumstances occurring under their new plan. There is some overlap between this consideration and the consideration at paragraph (a) above but they each have a slightly different focus. This is not intended to be used punitively and consideration will be given to

supports, capacity building and safeguards that could be provided to support compliance with section 46.

Working out the start of the first funding period

Subsection 7(3) is made for the purposes of subparagraphs 33(2D)(d)(i) and (e)(i) of the Act, which relate to when a funding period commences. Specifically, subsection 7(3) provides that the following periods must start on the day the plan comes into effect:

- (a) if funding periods are specified as mentioned in subparagraph 33(2C)(a)(i) of the Act (which is about a 'total funding amount') —the first funding period for all reasonable and necessary supports funded under the plan, taken as a whole;
- (b) if funding periods are specified as mentioned in subparagraph 33(2C)(a)(ii) of the Act (which deals with funding periods for 'funding component amounts') —the first funding period for a group of supports identified under paragraph 33(2A)(b) of the Act.

This means that any time a participant's plan is approved, that will be the start of the first funding period regardless of whether funding periods are specified for a total funding amount or funding component amounts.

Subsection 7(4) provides that subsection (3) does not apply if the period is specified in varying the plan. This ensures that a variation decision can make changes to the structure of a participant's plan, for example by including a new group of reasonable and necessary supports and associated funding period.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (Old Framework Plans) Determination 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 legislative instrument

The *National Disability Insurance Scheme (Old Framework Plans) Determination 2024* (the Determination) will operationalise key changes to section 33 of the *National Disability Insurance Scheme Act 2013* (NDIS Act) made by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Amending Act).

The changes to section 33 operationalised by the Determination require a participant's statement of participant supports to:

- specify a 'total funding amount' for all supports funded under the plan,
- categorise the participant's reasonable and necessary supports into one or more 'groups' of supports,
- specify a 'funding component amount' for each group of reasonable and necessary supports, and
- specify 'funding periods' during which funding will be available.

The Determination is made under subsection 33(2E) of the NDIS Act.

Human rights implications

The Determination engages the following human rights:

- Right of people with disability – Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16, 24 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR).
- Right for all people to self-determination and to freely pursue economic, social and cultural development – Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to equality and non-discrimination – Articles 3, 4, 5, 12 of the CRPD and Articles 2, 16, 24 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, 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.

These rights are reinforced by Article 2 of the ICCPR which states that all steps must be taken to respect and ensure that all individuals have their rights recognised free of distinction of any kind such as, race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. This is enforced further by Article 12 of the CRPD and Article 26 of the ICCPR, ensuring that all persons are equal before the law without discrimination.

The Determination ensures that participants have a clearly identifiable list of considerations that have been taken into account when supports in their plan are grouped in a particular way and a funding period has been determined. Assuring that this process is free from discrimination by applying the same considerations to all participants is paramount to the effective functioning of the NDIS.

Article 4 of the CRPD outlines the need for ensuring the full realisation of all human rights and fundamental freedoms for persons with disability, free of discrimination of any kind on the basis of disability. Article 5 of the CRPD supports Article 2 of the ICCPR by acknowledging all persons as equal under the law and entitled, without discrimination to equal benefit of the law. However, Article 5 of the CRPD recognises the inherent vulnerability of people with disability stating they must be free of discrimination on this basis.

Non-discrimination is an integral part of the principle of equality, it ensures that no one is denied their rights because of factors identified. It is important to acknowledge that the circumstances of some people in a scheme such as the NDIS can make it difficult for them to enjoy their full rights without support. The Determination is a key step in ensuring participants who require additional support to manage funding under their plan are provided with that support and can continue to access reasonable and necessary supports for the duration of their plan.

The Determination promotes the rights of participants by clarifying how and when NDIS funding can be used. This provides certainty and empowers participants to make informed choices about their available funding within allocated funding periods.

Right for all people to self-determination and to freely pursue economic, social and cultural development - Article 1 ICESCR

As provided for under Article 1 of the ICESCR, all people have the right to self-determination and to freely pursue their economic, social and cultural development. The Determination provides certainty and clarity surrounding the total funding amount and funding periods of participant plans, ensuring a comprehensive oversight of the amount to be utilised over the funding period.

The Determination promotes these rights by clearly setting out factors that a decision-maker must take into account when creating a statement of participant supports. When determining a funding period, a decision-maker must take into account matters including whether the participant is at risk of experiencing fraud or financial exploitation, whether section 46 of the NDIS Act is unlikely to be complied with and whether there is other risk associated. This promotes greater economic development,

by ensuring that broader factors surrounding a participant's circumstance are considered when specifying a funding period.

Further, a decision-maker must have regard to the nature and cost of the reasonable and necessary supports specified in an old framework plan. This provides assurance that a participant's individual supports have been taken into consideration, thus promoting the right to economic development and freedom.

To the extent that the Determination may be seen to limit the rights of people with disability by placing some controls around the way funding is able to be accessed under their plan, it is reasonable and appropriate to achieve a legitimate aim (to protect participants from exhausting NDIS funding thereby ensuring they continue to have access to funding throughout their plan, and also to ensure the long-term sustainability of the NDIS so it is available to support Australians with disability for many years to come).

Conclusion

This legislative instrument is compatible with human rights as it advances the protection of the rights of people with disability in Australia, consistent with the CRPD, ICESCR and ICCPR. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the NDIS, for the benefit of all persons with disability who have access to the NDIS.