

Decision Reviews
National Disability Insurance Agency
GPO Box 700
Canberra ACT 2601

... June 2018

Dear Sir or Ma'am,

Application for an internal review under section 100, *National Disability Insurance Scheme Act 2013*, of a decision made under subsection 33(2) and dated 5 April 2018 denying a participant's requested support.

On behalf of my wife, J, I am writing to seek an internal review of the abovementioned decision (the Decision). The Delegate's letter included an appendix entitled 'the Reviewable Decision Form' and suggested options to choose from as to why a participant might feel an internal review is warranted. The most appropriate seems to be: '(d) to [not] approve the statement of participant supports in a participant's plan'.

Please note that, while the Decision was made following an annual review of J's NDIS Plan, the Decision also directly affects my supports.

Please note also we have had to set aside our privacy, and dignity, to justify why the NDIS should fund our conjugal support. I sincerely hope that this does not turn into an annual choir.

Introduction

If unchallenged, this Decision will have significant negative effects on our 27-year marriage and dramatically reduce our quality of life. It will force us to choose between a life of poverty with sex – i.e., in subsection 4(1) terms, J would not be realising her 'social and emotional potential' – and having sufficient funds to social and economic participate in our community, but without sex.

The Decision seems to disregard s.31 of the NDIS Act in that it fails: to be individualised; to be directed by J; and to consider and respect her husband's role (see also ss.4(12)). It also fails to facilitate a tailored and flexible response to J's goals and needs. Under par.(g), J's NDIS plan should 'be underpinned by the right of the participant to exercise control over ... her own life'.

In addition to respecting J's autonomy (see pars.3(1)(a) and (e), ss.4(1) and 4(8)), under ss.4(1) J's NDIS plan should also include support to assist J to 'realise [her] potential for physical, social, emotional and intellectual development.'

Subsection 4(1) reads:

People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.

Subsection 4(1) is echoed in par.14(a)(i), which is one of the matters that should be included in J's NDIS plan. Par.(i) provides:

- The Agency may provide assistance in the form of funding for persons or entities:
- (a) for the purposes of enabling those persons or entities to assist people with disability to:
 - (i) realise their potential for physical, social, emotional and intellectual development;

Both 4(1) and 14(a)(i) focus, among other things, on the participant's realisation of her social and emotional potential. As I will explore later, Parliament obviously intended the Scheme to be broader than merely focused on social and economic participation.

I also briefly note that Parliament clearly intends that participants should have certainty of continuing support throughout our lives. (J's last three NDIS plans, and her prior ACT Government funding, have included funding for 'conjugal support'.) For instance, one of the matters that must be included in a participant's plan is subsection 4(3):

'People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.'

As the Decision is largely based on subsection 34(1) of the *National Disability Insurance Scheme Act 2018* (NDIA Act), I will follow the structure of the subsection after a brief discussion of what I mean by 'conjugal support' and the nature of J's requested support. I will copy the Delegate's reasons for ease of reference.

While the initial Delegate found that J's request satisfied criteria (a) and (e), I will provide justification for completeness and to inform the reviewing delegate.

Terminology: why 'conjugal support'?

The Delegate sought to clarify the meaning of 'conjugal support'. On reflection, 'consortium support' may have been a more appropriate term. I started using this term when we first apply for funding from the ACT Government in 2010. The term seemed less confronting than 'sex' or 'sex worker' and is used to refer to 'conjugal rights' and 'conjugal visits' between spouses. The online dictionary defines 'conjugal rights' as:

'the rights, especially to sexual relations, regarded as exercisable in law by each partner in a marriage.'

The term 'loss of consortium' is a legal term referring to companionship, domestic services, and sex. Wikipedia notes:

'Loss of consortium' is a term used in the law of torts that refers to the deprivation of the benefits of a family relationship due to injuries caused by a tortfeasor. Loss of consortium arising from personal injuries was recognized under the English common law. For example, in *Baker v Bolton* (1808) 1 Camp 493, a man was permitted to recover for his loss of consortium while his wife languished after a carriage accident.

Online: https://en.wikipedia.org/wiki/Loss_of_consortium

Rolls discusses loss of consortium in Australian tort law and suggests that the term refers to three aspects of the spousal relationship. One of which is the right of spouses to enjoy sex with one another.

Rolls, J, 'Loss of Consortium Claims', Plaintiff, October 1997.
Online: <http://www5.austlii.edu.au/au/journals/PlaintiffJIAUPLA/1997/103.pdf>

An alternative term suggested by Dr Linda Mona is 'personal assistance services (PAS)' from the World Institute on Disability as:

'involving a person assisting someone with a disability to perform tasks aimed at maintaining well-being, personal appearance, comfort, safety, and interaction with the community and society as a whole'.

Mona, L.R., (2003), 'Sexual Options for People with Disabilities', *Women & Therapy*, 26:3-4, 211-221, DOI: 10.1300/J015v26n03_03.

While I like 'PAS', it seems less obvious concerned with sex. 'Consortium' has the legal connection to rights in relation to sex, but also includes companionship and servitude. I prefer the term 'conjugal support' as it infers rights and emphasises the important objective of the support, which is to build, maintain and strengthen J's and my relationship as husband and wife (i.e. the realisation of J's social and emotional potential).

What is J's Support?

The Delegate sought to define my term 'conjugal support', or variations, as:

'the payment of services for a sex worker to physically stimulate a person for sexual pleasure'.

The Delegate's definition has four aspects: the payment of services; a sex worker; physically stimulation; and for pleasure. I will briefly discuss each.

Does J's Support include payment?

Mortimer J's, in *McGarrigle v National Disability Insurance Scheme* [2017] FCA 308, did not identify Mr. McGarrigle's support as 'the payment of services of a taxi to physically transport a person for employment'.

... the Tribunal defines the "support" as transport. That is a correct characterisation, and the Tribunal was correct to reject the Agency's submission that a "contribution to funding" could be the "support" for the purposes of the scheme. [86]

Her Honour was very clear that the definition did not include 'the payment of services':

The word "support" must be given a broad construction in this context ... the point to be made is that it is a practical description of the means by which a person with disability is assisted. It is not intended ... to encompass funding, especially because what s 14 contemplates is that the Agency will "fund" a support. The Agency cannot "fund" funding. [88]

Does J's Support necessarily involve a sex worker?

In the same way that Mr. McGarrigle's support relied upon the use of taxis but taxis were not in the definition of his support, so to with J's Support. J's Support would probably be provided by a sex worker, but a sex worker is not an intrinsic element. It is conceivable that J's Support could be provided by someone other than person who does not self-identify as a sex worker.

Dr Mona suggests that there is a theoretical possibility that a personal assistant could be engaged for the specific purpose of facilitating and/or participating in the sexual activity.

J and I have explored this option and found that, while it has practical issues, J's Support can be provided by someone other than a person who identifies as a sex worker. Given the social and legal restrictions on who we can engage to provide conjugal support, however, by a process of elimination, sex workers would seem the only sector of the community who are both willing and physical/legally able to provide the support.

From a broader public policy perspective, as well, it is unadvisable to blur the scope of support staff's roles and responsibilities. The well documented high level of sexual and physical abuse within the disability sector in Australia (and the world's) history speak directly to blurred boundaries and a lack of accountability in peoples' roles supporting people with disability.

Does J's Support necessarily involve (and only) physical stimulation?

Certainly, J's conjugal support involves a range of sexualised touching and physical stimulation, especially to, and around, the genitals and erotic zones. J's (and my) hand functions are so severely limited by our cerebral palsy that neither of us can stimulate ourselves to fulfilment.

Physical stimulation of J's erotic zones is not the sole element. While J may, on occasions, request sex when her husband is not at home, J's sex also involves ensuring that she is a wife to her husband. This very much means the conjugal support is to be a facilitator rather than a participant. When the sex worker is assisting J, the sex worker is being her husband's substitute hands and vice versa when the sex worker is assisting her husband.

I discuss later the benefits to J's health and well-being. However, I note that this formulation of J's conjugal support is consistent with her section 33 goals regarding health, wellbeing and maintaining her family (i.e. living in her home with her husband):

To maintain my health and well-being, using carers who respect my right to choose and manage my own life and activities in a way that is comfortable and safe for me.

To maintain my daily living equipment in safe and functional states so that I can be as independent as possible in personal care and community access and remain living in my own home with my husband.

Does J's Support necessarily involve pleasure?

As with any support, J has the right to consent, withhold consent or to withdraw her consent. If J does not like engaging in sex or does not find it pleasurable, she need not choose to involve conjugal support in her NDIS plan.

J is also aware that there are other reasons, besides pleasure, for having sex. These include: physical and mental health; well-being, and the maintenance of her marriage. While pleasure might not be 'necessary': consent is.

So, how should J's Support be characterised?

J's Support should be facilitated sexual activities that promotes good health, wellbeing, and personal relationships (i.e. marriages). Since the law uses the term, I suggest 'conjugal support' is appropriated

Criteria (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;

The Delegate notes:

With regard to "conjugal support" and its assessment against section 34, I am satisfied that criteria a) and e) have been met.

It is great that the Delegate is satisfied that J's conjugal support will assist her to pursue her goals, objectives and aspirations included her statement of goals and aspirations. Nevertheless, I take this opportunity to set out my reasoning as to why a new decision-maker should be satisfied that criterion (a) has been met.

J's goals as articulated in her NDIS plan

J's relevant goals have health, wellbeing and maintaining her family (i.e. living in her home with her husband) as key themes. Two of J's goals are:

To maintain my health and well-being, using carers who respect my right to choose and manage my own life and activities in a way that is comfortable and safe for me.
To maintain my daily living equipment in safe and functional states so that I can be as independent as possible in personal care and community access and remain living in my own home with my husband.

Health:

The World Health Organization (WHO, 2006) has described sexuality as "a central part of being human". Elsewhere, the WHO defines sexual health as:

'...a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.'

Online: http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/

Who Health Organization, (2006), 'Defining Sexual Health: Report of a Technical Consultation on Sexual Health', 28-31 January 2002. Geneva: Who Health Organization; 2006.

The WHO's definition is important as it clarifies our understanding of what constitutes good health: not just the absence of disease.

Paragraph 3(1)(a) holds that an object of the NDIS Act is to, in conjunction with other laws, give effect to Australia's obligations under the CRPD. Article 25 commits State Parties to taking '... all appropriate measures to ensure access for persons with disabilities to health services ...'.

Article 25 (Health):

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take

all appropriate measures to ensure access for persons with disabilities to health services ...
b) Provide those health services needed by persons with disabilities specifically because of their disabilities ... and services designed to minimize and prevent further disabilities,

While the means by which Australia meets its obligation under Art.25 are not limited to the NDIS Act, Rule 7.4, under the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (the Rules), states that the:

... NDIS will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living ...

The second part of this sentence starts with 'including', which indicates that r.7.4 is intended to be inclusive rather than restrictive. Rule 7.4 reads:

Health (excluding mental health)

7.4 The NDIS will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living, **including** maintenance supports delivered or supervised by clinically trained or qualified health practitioners where these are directly related to a functional impairment and integrally linked to the care and support a person requires to live in the community and participate in education and employment.

(Emphasis add)

Rule 7.5 further clarifies the nature of the supports that will not be funded or provide through the NDIS. Broadly speaking, these out of scope supports are of the type that would be expected to be provided by a medical practitioner, the health system, or a short course of treatment to address an injury or illness.

7.5 The NDIS will not be responsible for:

- (a) the diagnosis and clinical treatment of health conditions, including ongoing or chronic health conditions; or
- (b) other activities that aim to improve the health status of Australians, including general practitioner services, medical specialist services, dental care, nursing, allied health services (including acute and post-acute services), preventive health, care in public and private hospitals and pharmaceuticals or other universal entitlements; or
- (c) funding time-limited, goal-oriented services and therapies:
 - (i) where the predominant purpose is treatment directly related to the person's health status; or
 - (ii) provided after a recent medical or surgical event, with the aim of improving the person's functional status, including rehabilitation or post-acute care; or
- (d) palliative care.

Mindful of the WHO's statement on sexual health and rule 7.4 stating the NDIS's inclusive natured responsibility, I suggest that J's conjugal support, arguably, is covered by rule 7.4 and not excluded by rule 7.5.

Wellbeing

J's goals include well-being, it states: 'To maintain my health and well-being...'. As the NDIS Act does not define 'well-being', I note that online define 'well-being' as:

'The state of being comfortable, healthy, or happy.'

Online: <https://en.oxforddictionaries.com/definition/well-being>

'a good or satisfactory condition of existence; a state characterized by health, happiness, and prosperity; welfare:

Online: <http://www.dictionary.com/browse/well-being?s=t>

While the term ‘well-being’ includes notions of health and prosperity, here the context of this conversation is access to conjugal support and, so, happiness and self-esteem will be the main focus here.

My access to electronic, full text textbooks and journal articles is limited because I no longer enjoy an association with a university or government department. Nevertheless, it is not too difficult to find creditable articles linking sex with well-being. In relation to the general population, for instance, Bodenmann, Ledermann & Bradbury’s study compared the internal daily stresses of marriages with the external or event stresses. In reviewing previous research notes:

Research addressing relationship quality and sexual functioning is beginning to shed light on the interplay between stress and marital functioning. Thus, several studies show a significant association between higher levels of stress and lower levels of relationship satisfaction ... however, it seems that marital satisfaction is linked more closely to daily hassles than to critical life events (see Williams, 1995).

Williams, L. M. (1995). Associations of stressful life events and marital quality. *Psychological Reports*, 76, 1115–1122.

In discussing their results, Bodenmann, Ledermann & Bradbury find that:

‘...relationship satisfaction, sexual satisfaction, and sexual activity intercorrelate reliably’. And that ‘...higher levels of marital satisfaction do covary with lower levels of internal daily stress ($r=-.35$ for men; $r=-.45$ for women).’

In their ‘Discussion’ they find that:

... spouses experiencing more stress as arising within the relationship tended to have lower levels of marital satisfaction, sexual satisfaction, and sexual activity, and higher levels of sexual dysfunction, and they tended to have partners with lower levels of marital satisfaction ...

Bodenmann, Ledermann & Bradbury suggests, in passing, that:

Understanding whether the burden of absorbing the partner’s stress and providing better support than they receive is detrimental for the long-term health of women (e.g., in the form of depression) is beyond the scope of this study ...

Bodenmann, G, Ledermann, T, & Bradbury, T, (2007), ‘Stress, sex, and satisfaction in marriage’, *Personal Relationships*, <https://doi.org/10.1111/j.1475-6811.2007.00171.x>
Online: <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1475-6811.2007.00171.x>

In J’s (and my) situation the need to pay for someone to assist J to masturbate or to have sex will likely be a daily internal stress. Unlike Bodenmann, Ledermann & Bradbury’s research subjects, who use sex as a stress release, the lack of free sex is very likely to become a significant source of daily stress.

McCabe and Taleporos’s research subjects were a mixed of people with and without disabilities. This study was designed to compare the two groups as well as to examine how the severity of people’s physical disabilities affected their sexuality and well-being. In reviewing the available literature, they observed:

Despite some conflicting findings, the weight of evidence indicates that it is likely that the sexual behavior, sexual esteem, and sexual satisfaction of people with physical disability will be limited.

The authors found:

The current study found that people with more severe physical impairments had lower levels of sexual esteem and sexual satisfaction and higher levels of sexual depression than people who experienced mild impairments or the able-bodied population. The study also found that people with a severe physical disability engaged in mutual sexual activity less frequently. (pp.366-7)

Marita P. McCabe, M.P., and Taleporos, 'Sexual Esteem, Sexual Satisfaction, and Sexual Behavior Among People with Physical Disability', Archives of Sexual Behavior, Vol. 32, No. 4, August 2003, pp. 359–369. Online: <http://www.touchingbase.org/wp-content/2011/07/03-McCabe-Taleporos.pdf>

While this later research is closer aligned with J's situation, our marital status and my own hand function limitations means that she is less able to look for informal sexual partners. Though I would not object to J seeking a more able sexual partner, potential partners are likely to be cautious of getting involved with a married woman.

Noting par.3(1)(a) – that an object of the NDIS Act is to give effect to Australia's obligations under the CRPD – I would suggest the following articles of the Convention have particular relevance. The four Preamble paragraphs emphasises: the need to take particular care of those of us with more intensive care needs (which J has); J's autonomy, independence and freedom of choice; as a woman, J is of higher risk of domestic violence; and she is most likely to be at risk of poverty. Articles 3, 6 and 17 could also lend weight to these general themes of autonomy, enjoyment of human rights, and protect of physical and mental integrity.

Preamble

10. Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

14. Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

17. Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

20. Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

Article 3 – General principles

The principles of the present Convention shall be:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons

Article 6 – Women with disabilities

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 17 – Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Family and independent living

J's NDIS goals include key concepts of independence, living in her own home, and retaining her relationship with her husband. I would suggest that a further important concept for J is, in Social Role Valorization (SRV) terms, the value-adding status of being a wife, spouse and partner. SRV predicts that J's life chances and quality of life will be strongly correlated to her socially valued roles.

... so that I can be as independent as possible ... and remain living in my own home with my husband.
(One of J's goals.)

Paragraphs 3(1)(c), 31(g) & (i) and Art.19(a) emphasise J's right to autonomy, to control over her life, and 'the opportunity to choose their place of residence and where and with whom they live on an equal basis with others'.

Paragraph 31(c) requires that J's plan be prepared and the funds managed in a way, so far as reasonably practicable, that 'respect the role of family, carers and other persons who are significant in the life of the participant'.

Art.23(1)(a) is concerned with the elimination of discrimination in relation to people with disabilities' human rights in regards to having marriages. While J has been married since 1 December 1990, I submit that the right to marry necessarily infers an option to have sexual relations.

Arguably, the words 'shall take effective and appropriate measures to eliminate discrimination' in Art.23(1)(a) could be read to mean the removal of legal restrictions. Art.1 (Purpose), however, states that:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights.

This sentence continues to talk about freedoms, which link into discrimination. But, the first key notion is the '... ensure the full and equal enjoyment of all human rights'.

The National Disability Insurance Scheme Act (2013) (the NDIS Act):

s.3(1) The objects of this Act are to:

- (a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities ...
- (c) support the independence and social and economic participation of people with disability;

s.31 Principles relating to plans

The preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

- (c) where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant;
- (g) be underpinned by the right of the participant to exercise control over his or her own life;
- (i) maximise the choice and independence of the participant;
- (j) facilitate tailored and flexible responses to the individual goals and needs of the participant;

The Convention on the Rights of Persons with Disabilities:

Preamble

24. Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

Article 1 – Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Article 19 (Living independently and being included in the community):

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others ...
- b) Persons with disabilities have access to a range of in-home ... services, including personal assistance necessary to support living ...

Article 23 (Respect for home and the family):

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage ... and relationships, on an equal basis with others, so as to ensure that:

- a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

Does J meet criterion (a)?

The Delegate had no argument with J needing the Support.

In this discussion, I have built three agreements as to why the Delegate may have found that J has satisfied criterion (a) 'the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations.' These were based on maintaining good health, well-being, and respect for her independence, choice of living arrangements and family.

Criterion (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation

The Delegate wrote:

The reason the support does not meet (b) criteria is because the support relates to a private activity, not involving social or economic participation.

The Delegate found two grounds on which J's situation fails to satisfy criterion (b): J's conjugal support relates to a private activity; and, it not involving social and economic participation. I will address these in turn.

J's conjugal support relates to a private activity

The first point to note is that criterion (b) does not state anything about private, or public, activities.

I am also unable to locate anything within the NDIS Act that draws a distinguish between the public and the private save the concept of day-to-day living costs in r.5 of the *National*

Disability Insurance Scheme (Supports for Participants) Rules 2013. Under r.5.1(d) reference is made ‘day-to-day living costs’. While I do not want to make the NDIA’s argument, there is a possible argument that J’s conjugal support is of a private nature in the same sense that one’s groceries, or recreational activities, are private costs. The second half of par.(d) – ‘are not attributable to a participant’s disability support needs’ – however, would undermine this argument because J would not need the conjugal support but for her physical disability: see Rule 5.2(a).

Part 5 General criteria for supports, and supports that will not be funded or provided
General criteria for supports

5.1 A support will not be provided or funded under the NDIS if:

...

(d) it relates to day-to-day living costs (for example, rent, groceries and utility fees) that are not attributable to a participant’s disability support needs.

5.2 The day-to-day living costs referred to in paragraph 5.1(d) do not include the following (which may be funded under the NDIS if they relate to reasonable and necessary supports):

(a) additional living costs that are incurred by a participant solely and directly as a result of their disability support needs;

(b) costs that are ancillary to another support that is funded or provided under the participant’s plan, and which the participant would not otherwise incur.

I submit, therefore, that the Delegate erred by considering matters beyond the scope of criterion (b).

‘Private’ meaning Parliament doesn’t legislate for sex?

In case I am mistaken and J’s conjugal support is a private activity, the question is then whether it is private: meaning that the Australian Parliament does not legislate regarding ‘private’ activities, or that ‘private’ activities are not to be funded under the NDIS Act.

Prior to the Edwardian era, a man’s home was indeed his castle and, short of killing, he could virtually do as he pleased to his family and household staff. Post the Australian 1975 family law reforms, the notion that the bedroom is off-limits to law-makers is a popular myth. Aside from engaging in a business or a profession, sex is probably the most highly regulated activity. Any number of civil and criminal laws regulate people’s sexual activities. These include: the criminal laws require the parties to be consenting adults; tort laws ascribe duties of care; public health laws require reporting of some diseases; contract laws may determine sexual parties’ rights; social security laws determine welfare entitlements based on whom one sleeps / lives with; and so on. This is, of course, increases in J’s situation where support staff have employment related laws, contracts and anti-discrimination and anti-sexual harassment laws, as well as working with vulnerable persons legislation.

‘Private’ meaning that certain tasks are beyond the support staff’s duties?

The Delegate may have meant that support that involves ‘physically stimulate a person for sexual pleasure’ is a private activity.

This is an awkward argument to run in a realm where support staff are employed to, among other tasks: wipe our bums; insert and remove tampons; wash under fore-skins; apply condom-like continence aids; and scratch our itching backs.

Already there is a delineation between support staff's roles within the sector. A potential staff member may choose to work with people with, say, intellectual disabilities where there is less of a need to undertake person care.

While it would be unreasonable to expect all support staff to assist with all types of support needs, the personal preferences of support staff should not determine the limits and nature of J's supports. A support staff's dislike for, say, alcohol should not mean that J would be expected to go without an alcoholic drink if she requested one.

Subsection 4(15) requires, and as Dr Mona suggests, innovative solutions should be considered. One such solution is the engagement of support staff especially selected to provide J's conjugal support. I acknowledge that there are limitations on special disability service providers from employing staff for this purpose and that generalist support staff are legally limited.

Mona suggest that people with disabilities could advertise and engage support staff, who may not identify as a 'sex worker', to provide them with 'personal assistance'. Under this approach, however, J's conjugal support would be very less certain. Consistency and reliability were Mortimer J's concerns for allowing the NDIS to partial fund Mr. McGarrigle's travel costs:

... if the other person were unable or unwilling to make that contribution, the participant could be deprived of the support in its entirety...

McGarrigle v National Disability Insurance Scheme [2017] FCA 308, [96].

During the last eight years, we have been fortunate to retain a regular sex worker. However, we have found it difficult to find a second regular sex worker who feels comfortable working with people with disabilities. I would suspect the search to find a non 'sex worker' may prove to be much more difficult.

I note too that, given the stigma surrounding sex work and most people's attitudes that sex is private, the engagement of sex workers rather than willing special support staff, may prove more successful. Sex workers are encouraged to undertake disability training from organisations such as www.touchingbase.org and many other sex workers come from other occupations, like nursing, disability care, teaching, and numerous medical fields. This enables them draw from their knowledge and lived experience when providing services to clients with disability. Sex workers also provide a safe and supportive environment where they are happy to learn from their clients and take direction so that they best meet the individual needs of their client.

'Private' meaning that J's Support does involve social or economic participation?

A third interpretation would be that the first part of the sentence – 'the support relates to a private activity' – was meant to merely add emphasis to the point that: J's conjugal support does not involve social or economic participation.

It is a cruel irony. The one person whom all of society would agree that J is morally permitted to have sex with, is the one person she is physically unable to enjoy sex with. Her husband.

This cruelty is then magnified by the expectation that she should choose between enjoying the many benefits of sex and enduring the social, health and economic disadvantages inherent in a life of poverty.

Relevant facts / history:

J, from the age of four to approximately thirty-two, lived at the Cerebral Palsy Alliance's (CPA) nursing home at [REDACTED]. After completing her year ten certificate, J attended the CPA's sheltered workshop when her poor health permitted.

I also resided in the same nursing home from the age of five and transitioned to the sheltered workshop when I turned seventeen. However, I was able to use computers to complete tertiary courses and I moved onto the University of New England's campus in 1989 to undertake my Bachelor of Arts Degree. Married in December 1990, we been living in public housing in [REDACTED] for twenty-five years.

While I managed to have a short public service career between 2000 and 2011, for most of it I worked only part-time and we continued receiving our Disability Support Pensions (DSP). While I am paid a sitting fee for attending the board meetings of two Brisbane-based charities, our main source of income remains the DSP, which are approximately \$674 per fortnight each.

The NDIS Act:

Section 3 of the NDIS Act acknowledges and codifies many of the human rights articulated in the main human rights conventions. The more relevant objects to J's situation are:

Subsection 3(1) The objects of this Act are to:

- (a) give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities ...; and
- (c) support the independence and social and economic participation of people with disability; and
- (g) promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community;

Par.3(1)(a) is interesting in that Parliament chosen to specifically state that an object of this Act is to give effect to Australia's obligations under the Convention. It would have been political safer for Parliament to have cherry-picked articles from the relevant human rights treaties to draft into the Act. This would have enable amendments to change the Act to suit the political and economic times. Parliament, instead, chose to purposely link the legislation to the Convention.

Given the importance that Parliament has placed on the CRPD, I think it is necessary to note a few points about the Convention.

I note first that the countries who have ratified this treaty, have done so acknowledging that most people with disabilities live in poverty and that they have a role to play in addressing this issue.

Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities (Preamble, par.20).

The second point to note about the Convention is that Art.28(a) states that:

State Parties ... shall take appropriate steps to safeguard and promote the realization of this right, including measures ... to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs ...

I would strongly suggest that J's conjugal support would qualify as 'other assistance for disability-related needs'.

Article 28 – Adequate standard of living and social protection

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

...

Paragraph 34(1)(b) reads:

(1) For the purposes of specifying, in a 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 all of the following in relation to the funding or provision of each such support:

...

(b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation

Paragraph 34(1)(b), I would suggest, is a difficult provision to understand. Its importance demands a careful reading and an explanation of its main features. I note also that her Honour, Justice Mortimer in *McGarrigle v National Disability Insurance Scheme* [2017] FCA 308, [89-90], was very clear about interpreting the provisions properly. She quoted French CJ:

It is a long-established rule of interpretation that "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

Plaintiff M47/2012 v Director-General of Security and Ors [2012] HCA 46; 251 CLR 1.

Mindful of the need to pay close attention to the provision's words and phrasing, I suggest that there are at least four key features to par.34(1)(b).

The first requires that the support *will* assist the participant to undertake activities. The use of the word 'will', rather than 'may' or 'might', implies a high level of certainty and a clear causal connection. The choice of 'assist', rather than 'enable', may also indicate that the support, while contributing to, need not be the sole, or even the main, resource engaged.

Second, the phrase 'so as to facilitate' infers a purposeful causal connection between J's assisted activities and her social and economic participation. J's activity needs to be undertaken *so as to* (or in order to) facilitate social and economic participation.

Thirdly, the paragraph uses the social and economic 'participation' instead of 'activities' or some term that means a more certain and positive action. The Oxford Dictionary defines 'participate' as:

be involved; take part. As in: "thousands participated in a nationwide strike".
Online: <https://en.oxforddictionaries.com/definition/participate>

I note too that the term 'participant' is used by the NDIS Act to refer to a person who has been found to have met the entitlement criteria. Under s.28, the applicant becomes a participant on the day that the CEO is satisfied she meets the criteria in Part 1. Therefore, the participant is participating in the scheme before do anything other than applying to be a participant.

A person becomes a participant in the National Disability Insurance Scheme launch on the day the CEO decides that the person meets the access criteria. (ss.28(1))

"participant" means a person who is a participant in the National Disability Insurance Scheme launch (s.9)

I would suggest, therefore, that social and economic participation is not a particularly onerous test to satisfy.

Fourthly, I suggest the word 'and' in the phrase 'social and economic participation' functions more like an 'or' in that the participation can be social, economic, or both. Par.(b) concerns both social and economic participation, but it does not require each of J's activities to be both social and economic.

If par.(b) did require both elements, this would leave many of the NDIS participants' activities lacking either the social or economic requirement. Attending the cinema, for instance, might lack the economic requirement. Whereas, undertaking a paper-run might lack the social requirement.

I suggest that, given par.3(1)(a), the Convention is a strong influence in interpreting par.34(1)(b). The Convention decouples social from economic participation. Article 27 addresses issues relating work and employment and Article 28 addresses the need for an adequate standard of living and social protection. While the treaty mentions 'social' and 'economic' within a couple articles, they are addressed, more directly, as two human rights issues.

While the McClure Report had a different context (a focus on welfare reforms rather than an insurance type of support), it echoes par.3 of the CRPD's Preamble. The Report notes:

It is not possible, and probably not desirable, to draw a clear line between those activities that could be classed as economic participation and those that constitute social participation. Paid work has social value and unpaid work has clear economic value. All activities that build relationships with others have both economic and social dimensions and should be encouraged and supported. (McClure, 2000)

Of less value here, but worth noting:

The Reference Group [on Welfare Reform] considers that a broad concept of economic and social participation can provide a positive underpinning for the Participation Support System. This broad concept extends beyond the traditional focus on financial self-support and labour force status (employed, unemployed or not in the labour force) to recognise the value of the many other ways people can participate in society. (McClure, 2000)

McClure, P. (Chair) (2000), Participation Support for a More Equitable Society: Final Report of the Reference Group on Welfare Reform, [the McClure Report], Department of Family and Community Services, Canberra.

I suggest, therefore, that the phrase ‘social and economic participation’ is referring to ‘social’ and ‘economic’ as two interrelated but independent concepts.

J’s conjugal support, therefore, needs not be both social and economic: or, more correctly, J’s conjugal support needs to assist her to do activities that facilitate her social and/or economic participation.

If I may make an observation about a passage in the Delegate’s decision, which I will discuss later. The Delegate wrote:

I do acknowledge that personal care funding for a support worker to ‘position’ J’s, or support access to a sex worker, could be a valid use of NDIS funded supports.

Let me analyse this concession through the prism of par.34(1)(b).

First: will the support assist the participant to undertake activities? Yes. J’s support would be the positioning J for sex and the activity would be the sexual acts.

Second: is there a purposeful causal connection between J’s assisted activities (i.e. sex) and the end goal? Yes. The positioning of J is to facilitate her having sex.

Third: will J be participating in something? Yes. J will be actively participating in an experience, activity, event, task, etc, which is consistent with her goal.

And, fourth: could J’s experience, activity, event, task, etc, have a social and economic aspect? If it did not, the Delegate would not had suggested the assistance as ‘a valid use of NDIS funded support’.

If I am mistaken and the participation needs to consist of both social and economic aspects, I would suggest that very few of J’s activities would lack either a social or economic aspect.

Would J’s conjugal support contribute to her social and economic participation?

Above, I have shown that the conjugal support need not be assisting J to participate both socially and economically. I have argued that the degree of assistance and the degree to which J has to participate need not be significant. I also, if somewhat flippantly, suggested that even the Delegate implied that the conjugal support facilitates J’s social and economic participation by suggesting that J could use NDIS funds to have her support staff position her ready to see a sex worker.

I now turn to show how J’s conjugal support facilitates her social and economic participation. I suggest three main ways: savings to J’s personal finances so she can use her discretionary funds to attend social events; boost her morale and reduce the risk of depression; and enables her marriage and family accommodation to be maintained.

J’s conjugal support will free up her discretionary funds enabling her to attend social events

I have already noted above that Mortimer J [96] expressed concern that the cost of contributing to the participant's support is unlikely to result in the support not being consistently provided. The applicant's legal representatives also raise the issue that the NDIS Act does not intend the scheme to be means tested [24, 62]. Her Honour answered this:

Parliament did not intend the decision-maker to ask, in forming a state of satisfaction, whether the community could or should make a financial contribution to the funding of a support found by the decision-maker to be reasonable and necessary in order for the participant to work towards the goals, objectives and aspirations set out in the participant's plan. [95]

The obvious consequence would be that, if the other person were unable or unwilling to make that contribution, the participant could be deprived of the support in its entirety. Contrary to the Tribunal's reasoning, this problem is not confined to 'supports which, by their nature, are rendered of little or no benefit if only partly funded' or 'supports which, by their nature, cannot be provided or supplemented by families or other informal supports'. [96]

I suggest that requiring J and/or myself to contribute to the funding of J's conjugal support is included in Her Honour's reasoning.

As I mentioned at the top of my discussion of criterion (b), J (and I) face a cruel choice between paying to have her basic human rights realised and remaining sexless but less in poverty. J receives a part Disability Support Pension and has done so since she first qualified for the (then) Invalide Pension at the age of sixteen (I worked full-time briefly in about 2009 at which time both our DSPs were suspended). This shows that our combined DSPs equate to approximately \$1,350 pf. Minus full rent at \$850pf, groceries at \$400pf, pharmacy medications at \$150pf, and other incidentals, the cost of a sex worker is a large proportion from our pensions.

The only way J could manage the regular costs of her conjugal support would be to compromise on groceries and social activities.

J's conjugal support will assist in boosting her morale and reducing her risk of depression

McCabe and Taleporos's research subjects were a mixed of people with and without disabilities. The authors found that people with significant physical disabilities were more likely the experience depression and lower levels of self-esteem from sexual inactivity.

It is my suggestion that J is more likely to want to go out and socially participant in her community if she has high morale and is not depressed.

The conjugal support will enable J's marriage and family accommodation to be maintained.

As I discussed in my consideration of criterion (a), Bodenmann, Ledermann & Bradbury found that day-to-day stresses, such as financial concerns, are more damaging to a marriage than most adverse events external to the home.

Continuous worry about how we will afford to have the conjugal support provided is highly likely to add to our intra-marital stresses. Involuntary sexual abstinence is also highly likely to stress the marriage.

While we have been totally committed to one another for nearly thirty years, the following academic authors explain the need humans have for physically sex. (Both publications are excellent, though challenging, reading.)

If we are “above” nature, it’s only in the sense that a shaky-legged surfer is “above” the ocean. Even if we never slip (and we all do), our inner nature can pull us under at any moment. Those of us raised in the West have been assured that we humans are special, unique among living things, above and beyond the world around us, exempt from the humiliations and humiliations that pervade and define animal life. The natural world lies below and beneath us, a cause for shame, disgust, or alarm, something smelly and messy to be hidden behind closed doors, drawn curtains, and minty freshness. Or we overcompensate and imagine nature floating angelically in soft focus up above, innocent, noble, balanced, and wise.

Like bonobos and chimps, we are the randy descendents of hypersexual ancestors. At first blush, this may seem an overstatement, but it’s a truth that should have become common knowledge long ago. Conventional notions of monogamous, til-death-do-us-part marriage strain under the dead weight of a false narrative that insists we’re something else. ... (p.10)

Ryan, C., & Jetha, C., (2012), *Sex at Dawn, Why We Mate, Why We Stray, and What It Means for Modern Relationships*, HarperCollins.

Online: https://docs.google.com/file/d/0B35CHq__bQh7aUYtM0xrdW5oYzA/edit

Our culture positively worships self-denial – those who unapologetically satisfy their desires, whether they be for food, recreation or sex, are vilified as immature, disgusting, even sinful. While we’ll leave it to other authors to speak against anorexia and workaholism, we can certainly say that we see the path of sex-negativism and living in sexual deprivation as a harmful one. Self-loathing, hatred of one’s own body and sexuality, fear and guilt over one’s own sexual urges are the outcome.

We see ourselves surrounded by the “walking wounded” by people who have been deeply, if not irrevocably, injured by fear, shame and hatred of their own sexual selves. We believe that happy connected sex is the cure for these wounds, that it is important, possibly even essential, to most people’s sense of self-worth, to their belief that life is good. We have never met anyone who had low self-esteem at the moment of orgasm. (p.19)

Easton, D., & Hardy, J.W., (1997), *The Ethical Slut A Practical Guide To Polyamory, Open Relationships & Other Adventures*, Greenery Press.

My point is that we, like 99 percent of other adult humans, are sexual. We have a drive to satisfy ourselves of the good feeling hormones, which are released during sex. Sooner or later we will start to feel resentful of each other and ponder possible futures in which we are both single and free to pursue non-remunerated sex.

A failure of our marriage would result in major consequences for J’s social and economic participation. The late Dr Thomas J. Stanley, quoting from his book, *The Millionaire Mind*, reflecting on twenty years of studying financially successful individuals, teaching that a marriage breakdown generally has serious negative effect of both spouses’ wealth.

... consistent participation in marriage results in significantly higher wealth. Conversely those people who are not married continuously over time have a propensity to accumulate lower levels of wealth during their adult life cycle.

Stanley, T.J., (2012), *Don’t Criticize the 1%; Emulate Them*,

Online: <http://www.thomasjstanley.com/2012/05/dont-criticize-the-1-emulate-them/>

I would suggest, this would be far worse for J (and myself) as well as increasing both of our care needs (i.e. J would need over-night personal care if not full 24/7 care). It would be extremely negative on J’s ability to realise her goals and to social and economic participate. For instance, J or I would be homeless. While my name is on our house title, a near

The price range of \$300 to \$500 is based upon our personal experience. While our current regular sex worker charges us \$300 per hour, which we split equally for thirty minutes and each pay \$150, we have had once-off sex workers who have charged \$400 per hour plus a \$50 call out fee.

Criterion (c) requires the decision-maker to decide whether J's conjugal support represents value for money. That is, is a) the cost of the conjugal support reasonable given: b) the benefits achieved; and c) cost of alternative support.

In this section, I will address each of these three elements and then argue that J's conjugal support is reasonable and value for money.

a) The cost of the conjugal support

While it has been our experience that sex workers' costs vary, most charge between \$300 and \$400 per hour, I wrote to Touching Base Inc. (TB) to enquiry as to the average that we might expect to pay. While TB advised that it does not keep such information, it suggested that prices varied from worker to worker and that geography has an influence.

In regards to your request for an estimated price range, Touching Base has always avoided advising on any aspect of costs. They are too variable to keep track of: between workers/brothels; towns, cities and regional areas; vary depending on the services sought; and length of appointment. This is something we have always left to the client and worker to sort out between themselves and so we have no information at hand regarding prices.

TB continued on to suggest an approach for gathering evidence from which an educated guess could be made on the likely costs over the duration of J's NDIS Plan.

I wonder if doing some of your own research by looking up 5 or so different escorts in your area that advertise couples bookings could produce evidence for the NDIS showing what the variations are for a one hour booking for a couple? This would be consistent with applying for funding for other professional services which would also have variations of costs attached to each business or individual. (Touching Base Inc, 9-May-2018 at 3:28pm, email.)

On TB's advice, I looked through the listings on Friday, 11-May, and found the following advertisements for both [REDACTED] (our current home) and [REDACTED] (our new home from October). (I have substituted the workers' name to add an extra layer of privacy.)

Business name	Rate p/h
[REDACTED]	
AB	\$300
CD	\$650
EF	\$500
GH	\$320
IJ	\$600
KL	\$185
MN	\$250
OP	\$300
QR	\$600
ST	\$300
UV	\$270

Q-AB	\$300
Q-CD	\$200
Q-EF	\$250
Q-GH	\$350
Q-IJ	\$150
Q-KL	\$200
Q-MN	\$200
Q-OP	\$200
Q-QR	\$200
Q-ST	\$200
Q-UV	\$200
Q-WX	\$350
Q-YZ	\$180

There are a number of limitations with this type of superficial Google search. These results do not indicate whether the sex worker is prepared, or even able, to work with people with significant physical disabilities. It doesn't always indicate whether she will work with both males and females. Nor does it indicate whether they are prepared to visit us and, if so, how much this will cost.

To answer these questions, I engaged a research assistant under section 42(1)(a) of the NDIS Act to contact at least five potential sex workers.

I gave the researcher the following background:

- Husband and wife, both with profound cerebral palsy that affects their physical, not intellectually.
- Moving to [REDACTED] in Oct/Nov.
- Looking for a weekly visit at about 3:40pm for an hour.
- Routine is pretty set (I provided a detailed description, but not copied here.)
- Their current sex worker is also a registered nurse and so is trained to use hoists. So, she can put the wife over the pan. But, we can't expect this from every sex worker.
- Their care staff will bath or shower them before the visit and clear up after.
- The timing of the visits is design so the care staff don't meet the sex worker. This is to protect the sex workers' privacy.
- The couple have speech impairments. But, both are able to say what they like and dislike.
- Since the couple are in wheelchair and the wife needs a hoist to move between her chair and bed, they need a home visit.

Suggested questions included:

- Would you feel comfortable working with a married disabled couple on a regular basis?
- How much per hour would you charge?
- Do you charge a call out fee?

I also asked the researcher to note whether the sex workers indicated that they had any training or experience with disability.

The researcher was able to contact fourteen sex workers who operated in the [REDACTED] area. She reported the following:

Q-AB SMS only, sees only men, minimum 2 hours \$600.

Q-CD Charges \$250 per hour for a couples visit.

Q-EF Out-calls \$350

This information is a summary of my researcher's findings and she contacted a number of other workers but they did not meet the criteria we specified. The findings are also very much theoretical because we were not negotiating an actual visit. For instance, websites require sex workers to cite their lowest rates. When we are in our new [REDACTED] home and we're negotiating a visit, we will need to be mindful that most sex workers charge more for home visits and to see couples.

Given the results of my Google search and the researcher's findings, I suggest that \$500ph is a reasonable rate to expect to pay.

While the frequency at which couples engage in sexual activities that result in orgasms and sexual satisfaction varies perhaps from twice daily to twice year, J's requested frequency of half an hour each week is reasonable.

At half an hour for each J and myself, this is \$250 per week for 50 weeks of the year, totals \$12,500 for each of our NDIS budgets.

While the NDIS Act requires each Participant's needs to be assessed on their merits, the AAT Tribunal, in *KLMN and National Disability Insurance Agency*, reasoned that the cost of the requested support was small compared to KLMN's overall budget.

'The scale of the spending on the prism lenses, in this individual case, is minor next to the cost of the other reasonable and necessary supports provided in KLMN's plan. The Tribunal is satisfied that s 34(1)(f) of the Act is met in this particular case.'

KLMN and National Disability Insurance Agency [2017] AATA 1815, [50].

J's approved NDIS plan and budget commencing 5 April 2018, excluding the requested Support, is approximately \$230,976 (my is approximately \$177,706). Using the Tribunal's reasoning, I submit that, even at \$500 for an hour per week at \$25,000pa, this is minor cost next to the cost of J's other reasonable and necessary supports.

b) the benefits achieved

On 6-May, I asked J to write a paragraph on how she feels after not having had any sex for five weeks. These are her words:

After five weeks of not having any form human tender touch excepting [REDACTED] shaking hands, I am very sexually frustrated. I am unable to touch my own genitals and masturbate, which is making me feel ... I am feeling very frustrated and my movements are getting worse than usual. This is making it difficult for the carers to assist me in daily personal care. One of my goals is to live with my husband independently for as long as possible. Living with my husband includes having a physical relationship. It's unfortunate that it has to involve a third person contributed to my goal. To make me feel whole yet it has been taken away from us by the NDIA. (J, 6-May-2018, in an email)

Above, in my discussion on criteria (a) and (b), I noted research findings from two lots of researchers: Bodenmann, Ledermann & Bradbury; and McCabe and Taleporos. Both sets of research findings dealt with low sexual esteem and (lower case 'd') depression. The reader will recall that Bodenmann, Ledermann & Bradbury discussed stresses originating from within the household being more damaging to the relationship than more major, but external, stressful events. McCabe and Taleporos, on the other hand, found that people with significant physical disabilities were more likely to experience a poor quality of life.

Bodenmann, Ledermann & Bradbury also noted that couples frequently use sex as a de-stressing exercise and as a way to marshal each other's emotional support.

In addition to being fun, support her autonomy, protecting against depression and low esteem, J's passage above illustrates that she (as do I) use sex to self-medicate. It reduces spasms, helps with sleep and lifts her mood.

In the popular entertainment arena, the 2010 film *Love & Other Drugs* is centred on a young woman with Parkinson's disease who uses sex as a form of self-medication. J is obvious not the first person to use the body's naturally producing hormones as an anti-depressant and to reduce her spasms.

c) cost of alternative support

It is difficult to identify possible alternative supports that are both dignified and affective. There are perhaps four main alternatives.

- **The engagement of support staff specific to provide J' conjugal support.**

As discussed above in the conversation on terminology, Dr Linda Mona suggested that specialist support staff could be engaged specifically to provide people with physical disabilities this type of support. Such staff would need not otherwise work in the sex industry. While this arrangement would meet the NDIS Act's objective of finding innovative solutions, the recruiting process, along with the ethical and legal barriers, would be challenging and unlikely to provide a reliable service.

- **Sex toys.**

There are moves afoot to develop sex toys that are disability friendly: see for incident, <https://www.northcottinnovation.com.au/disability-and-sexuality>. As this webpage notes, however, 'Most sex toys are not designed inclusively. For example, they can have small buttons that are difficult to manipulate for those with reduced fine motor skills.' Positioning of the sex toy would also prove difficult for J and myself. In these YouTube films you can see the level of difficult we have with our hand function: <https://www.youtube.com/watch?v=UBnOAxaxdII&t=8s> <https://www.youtube.com/watch?v=eMAJHmoj9zs&t=13s> (SBS's Insight program)

I would also observe that, for most adults, toys spice up a sexual experience rather than replace the human touch.

- **Counselling.**

Where the engagement of special support staff and sex toys are options for facilitating sexual activity, counselling and chemical assistance would be to assist J to live without the conjugal support. Essentially, the weekly counselling sessions would

enable her to talk through her feelings and to find activities and interests to occupy her mind.

While J may find counselling of limited use in managing possible depression and relationship stresses, this option would not progress her goal of living with her husband and may prove to be just as expensive with counsellors' fees.

- **Chemical assistance.**

Used independently, or in conjunction with counselling, chemical and dietary assistance might be able to be used to lower J's libido.

This possible solution was raised in the [SBS's Insight](#) program in relation to a young man with an intellectual disability who was getting into trouble with the police for inappropriate sexual behaviour in public. A medical general practitioner, in the studio audience, advised that involuntarily reducing the man's libido with medication would be unethical. I would suggest that it would be equally unethical to offer J this as her only option for managing her libido.

This option, I would strongly argue, would be a breach of the CRPD. [Article 17](#) (Protecting the integrity of the person) states that: 'Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.'

Is the cost of the conjugal support reasonable?

Weekly half hour visits by a sex worker, at the rate of \$250 per visit, will assist J to achieve her NDIS Plan's goal of living in her home with her husband. As outlined, there is no practical, more economic, alternative to the engagement of a sex worker.

Given J and my hand function limitation, the ethical and legal restrictions on support staff, and the reluctance of the majority of sex workers to work with people with disabilities, I suggest the cost of the support, i.e. \$500ph, is reasonable.

It is also reasonable when considered against the costs of supporting J and I in different living arrangement if our marriage failed. As I can give J limited support during the night, she does not need over-night care. Were we to split in the hope of finding other sexual partners, J would need over-night care, which would cost the NDIS substantially more than the cost of the conjugal support being requested.

(d) The support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice

The Delegate wrote:

'The reason the support does not meet (d) criteria is because there was insufficient evidence provided to demonstrate the support is likely to be beneficial, having regard to good practice.'

As her submission to the New South Wales Government's Inquiry into The Regulation of Brothels (18-8-2015, [Submission 53](#)), Ms. Carolyn Dearing, solicitor, Watershed Legal, asked:

... the Select Committee to consider the attached journal article, "The right to say yes: upholding the dignity of sex workers and their clients with a disability", International Bar Association Newsletter of the Human Rights Law Working Group, Vol 1, Issue 2, Pt 2, September 2014, page 25.

This research was commissioned by the Human Rights Law Working Group of the International Bar Association (IBA) as part of the IBA's preparation for a panel discussion at its 2014 Annual Conference in Tokyo, Japan, concerning the global regulation of sexual behavior using criminal law. The journal in which the article was first published was also distributed to 55,000 legal professionals from over 170 jurisdictions around the world.

The work analyses legal standards for the protection of the rights of sex workers and their clients with a disability and draws upon a range of case law and research from Australia, New Zealand, Canada, the UK and more broadly that is directly relevant to the Select Committee's inquiry.

Dearing and Isbister's widely distributed article discusses a broad range of issues associated with sex workers working with people with disabilities, including: the law surrounding dignity; the decriminalisation of sex work; dignity of risk; duty of care; and issues of consent.

In discussing why people with disabilities engage sex workers, the article observes:

Interviews with male clients with disability in the United Kingdom show that for many 'the shame, guilt or embarrassment in seeking out commercial sex is rebuffed by the positive influences on quality of life, self-esteem and confidence that result from fulfilment of a range of emotional, psychological, sexual and social needs.' (footnotes omitted, p.27)

... for some people with significant mobility and dexterity impairments, paying sex workers may be their only way to achieve masturbation. [REDACTED]

In concluding, the authors write:

'...blunt legislative instruments such as the Swedish Model, which criminalise all clients of sex workers, fail to consider the majority of freely consenting sex workers are not victims, and disregard clients' wideranging and deeply human motivations to have their emotional, psychological, sexual and social needs met by sex workers.' (p.29)

The Australian film, [Scarlet Road](#), follows the extraordinary work of Australian sex worker, Rachel Wotton. Impassioned about freedom of sexual expression and the rights of sex workers, she specializes in a long over-looked clientele – people with disability.

As mentioned above, the [SBS's Insight](#) program, episode 'Disability and Sex' aired April 2016, discusses various aspects of the intersection of disability and sex. In the first quarter, the presenter, Ms. Jenny Brockie, engages the studio audience in the question of people with disabilities being assisted by sex workers. There was acknowledgement and first hand testimonials.

I also note that various jurisdictions have acknowledged and have funded access to sex workers. These include Denmark (see Yau & Novak below) and the A.C.T. (J's personal experience).

As Matthew Yau, a practicing sex therapist and supervisor, James Cook University, writes: 'In Denmark, for example, public funds can be used for a disabled person to access a sex worker at least once a month.'

Yau, M, 'Why the NDIS should cover the services of sex workers', The Conversation, 14-March-2013. Online: <https://theconversation.com/why-the-ndis-should-cover-the-services-of-sex-workers-12718>

See also Rachel Wotten's work: <https://ses.library.usyd.edu.au/handle/2123/16875>

In discussing terminology, I mentioned the legal concept of 'consortium'. Here a spouse can sue the wrongful person for, among other things, the loss of sexual enjoyment. As Dearing and Isbister note:

In a recent Australian development, funds to support people with disability accessing sex workers after receiving catastrophic injuries in motor vehicle accidents were awarded by a court with the relevant insurer agreeing to fund a sex worker's services to address this person's ongoing needs for safe sexual expression.

In the conclusion, the judge states that: 'As the respondent has undertaken to meet the costs of the present accommodation and care services, and has indicated a willingness to fund and facilitate the provision of services from a sex worker... (par.40)

Rogers v Suncorp Metway Insurance Limited [2013] QSC 230 5 September 2013.

Online: <https://archive.sclqld.org.au/qjudgment/2013/QSC13-230.pdf>

Will the conjugal support be, or likely to be, effective and beneficial for J, having regard to current good practice?

The CRPD's Preamble par.5 states:

... disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

If disability is an evolving concept, then so to must the nature of our supports evolve. This is not to say that sex has not been a human right until a particular point in history. Rather, with Australia's developments and advancements comes people with disabilities' heightened levels of support.

In discussing criteria (a) and (b), I have thoroughly explored the various ways in which J's conjugal support will effectively benefit her (and myself).

The second half of this criterion is 'having regard to current good practice'. Above, I have cited journal articles, media articles, submissions to government inquiries, and court cases, to show that there is a growing acceptance that people with significant disabilities are using sex workers as a way of meeting their human rights.

I, therefore, submit that the Support is consistent with current good practice and will be beneficial to J.

(e) The funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide

The Delegate was satisfied that J met criterion (e). I would like to briefly set out some reasoning as to why the Delegate should be satisfied.

I note that Mortimer J stated:

Section 34(1)(e) does not authorise the CEO (or the delegate or Tribunal) to be satisfied that a support which has otherwise been concluded to be “reasonable and necessary” should be only partially funded because others can make up the funding difference. Rather, the function of s 34(1)(e), as with the remainder of s 34(1) is to assist the CEO (or the delegate or Tribunal) in forming a state of satisfaction about whether a support is reasonable and necessary. Once that satisfaction is formed, one way or the other, on the basis of probative evidence and material, the support must be fully funded. That is what the words “will be funded” in s 33(2)(b) should be taken to require. (*McGarrigle v National Disability Insurance Scheme* [2017] FCA 308, par.100)

I understand Her Honour to be saying that criterion (e) is to be read narrowly. An instance where the family would be expected to provide for a child with a disability would likely be in driving him/her to school in the same way any other parent might drive a child who does not have a disability. Similarly, a band performing in country towns might car-pool and they might be expected to include a vision impaired band member.

Using this reasoning, if I (as J’s husband) was not, myself, profoundly physically disabled, criterion (e) would expect me to provide J’s conjugal support. In this rare, but not unique, situation, both J and I require conjugal support and we are unable to provide the conjugal support to ourselves.

The question then is, is the conjugal support of a nature that would usually be provided through friends, family or a community service? Aside from the remote possibility of an extramarital relationship, the answer is obviously ‘no’.

One possible argument would be that mostly men, and some women, pay to enjoy sex with sex workers. And, it is true. Some men and women pay to eat at restaurants, and to be driven around in taxi. That does not mean they do not do their own cooking and driving most of the time. For J, engaging a sex worker is not motivated by a need to be pampered or made a fuss of. As she wrote in her paragraph above, J (and I) would prefer to be able to enjoy sex without needing to engage a sex worker.

Furthermore, if J is left to choose between paying for sex and not having sex, her financial circumstances will dictate the frequency of her enjoying sex. This is precisely Mortimer J’s warning in [96].

Criterion (f) the support is most appropriately funded or provided through the NDIS

Criterion (f) reads:

- (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.

Before addressing the Delegate's comments, here I am going to first examine par.34(1)(f): noting her Honour's, Mortimer J, point regarding statutory interpretation. She quoted French J in *Plaintiff M47/2012 v Director-General of Security and Ors* [2012] HCA 46; 251 CLR 1, where French CJ said (at [41]):

It is a long-established rule of interpretation that "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

The first clause reads: 'the support is most appropriately funded or provided through the National Disability Insurance Scheme'.

- The 'support' in this situation is referring J's conjugal support. I discuss this near the top of this letter.
- The phrase 'most appropriately' is asking for a comparison to be made between two or more choices or options. Is A more appropriate than B. The word 'most' seems to qualify the 'appropriate'. In this case, I would suggest that 'most' is used to imply a summing up of points in favour of the various options and accepting the option with the most points.
- The words 'funded' and 'provided' refers to support being provided by the NDIA. In this case, J's Support would be funded.
- And, the final phrase 'through the National Disability Insurance Scheme' just identifies the NDIA as the main option being considered.

The second clause reads: '... and is not more appropriately funded or provided through other general systems of service delivery or support services'.

- Again, the word 'appropriately' is with the word 'more'. This seems to be referring to the same comparison.
- Again, the rephrasing includes 'funded or provided'.
- And then there is the phrase 'through other general systems of service delivery or support services'. By 'system', I would suggest, Parliament meant something other than the arbitrary allocation of resources. The word 'general' seems to mean applying to a demographic who's members lack any specific characteristic that determines their entitlement to the resource, unlike the NDIS where one must have a disability. An example would be state subsidy of prescription corrective glasses or oxygen tanks. And then there is 'service delivery or support services'. I am unsure of the difference between 'service delivery' and 'support services', but it may be Parliament's intention that all general systems be considered irrespective of how they are described.

- And finally, there is 'by a person, agency or body'. By 'agency' I would assumed it means a government entity. 'Body' would probably refer to government funded entities or organisations that perform government type of functions. The word 'person' could normally refer to a natural people or a corporation. I would suggest, however, that 'person', in this context – and given the subject of par.(e) - is mostly likely be referring to non-natural persons, that is entities that have other legal status: such as incorporations.

Third clause reads: '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. Both of these, 'universal service obligation' and 'reasonable adjustments', relate to anti-discrimination laws.

Pulling this together, I suggest that criterion (f) can be applied by answering the following questions:

Q1: What is the Support?

As discussed, J's Support is conjugal support.

Q2: Are there general systems of service delivery or support services offered by a person, agency or body who could provide J's Support?

I am unaware of any such government scheme, other than the NDIS. So, no.

Q3: Could J's Support be provided or funded through an anti-discrimination or work place reasonable adjustment measure?

No. As noted earlier, sex toys are still not a viable option as our hand function is too limited. In short, the broader context of J's Support is not of a discriminatory nature.

Q4: Is J's Support most appropriately funded or provided through the NDIS?

J is not ill and requiring medical treatment from the public, or private, health care system. I am unaware of any A.C.T. Government schemes or subsidises that would provide for J's conjugal support. And, I would submit the most government funded community services would not be in a position to alienate their donors by being seen to be providing Support of this nature.

After stepping through the elements of criterion (f), I have shown that J's (and my) conjugal support is most appropriately funded through the National Disability Insurance Scheme.

The Delegate's additional reasons

The Delegate gave additional reasons for rejecting J's conjugal support. In most it is unclear which section of the NDIS Act the reason relates and, therefore, it appears that the reasons are irrelevant. Nevertheless, I will now respond to each reason.

The first additional reason

The reason the support does not meet (f) criteria is because it is not considered personal care, as outlined in the NDIA's Operational Guidelines for Personal care supports.

The guideline explains:

“Personal care supports relate to assistance with daily personal activities including assistance with, or supervision of, personal tasks of daily life.”

Criterion (f) does imply that the decision-maker should examine the nature of the support being requested to determine whether the requested support is of a nature that would be ‘most appropriately’ provided or funded by the NDIA or by some other entity.

The Delegate assumes that I am arguing that J's Support is a form of personal care and suggests that sex is not a daily personal activity.

The [Operational Guidelines for Personal care support](#) states that “Personal care supports relate to assistance with daily personal activities’ and continues to read: ‘For example:

- personal hygiene, including showering, bathing, oral hygiene, dressing and grooming;
- toileting, bladder and bowel management and menstrual care;
- eating and drinking;
- attending appointments;
- use of aids and appliances, hearing and communication devices;
- mobility and transferring, for example moving in and out of bed and on or off the toilet; or application of splints, basic first aid due to injuries sustained as a result of a participant's disability.’

The Guidelines continue on to echo the NDIS Act's objects that J's Support is to further her NDIS plan's goals.

Before including any personal care support in a participant's plan, the NDIA must, amongst other matters, be satisfied that the support will assist the participant to pursue their goals, objectives and aspirations (section 34(1)(a)).

The critical aspects of these Guidelines are the terms ‘for example’ and ‘including’. Parliament did not intend this list of person care supports to be exhaustive. It did, however, intended the Support to ‘assist the participant to pursue their goals, objectives and aspirations’.

Before leaving the subject of personal care, I dispute the characterisation of sex not being a daily personal activity. Among the list of activities that the Guidelines gives as examples of daily personal activities are menstrual care and bowel care. Clearly, the definition does not mean ‘daily’ as in activities that occur each and every day. Rather, ‘daily activities’ must mean activities that do not require the same level of planning and, perhaps, financing as, say, a holiday, a birthday celebration, or a move to another home. It is, I submit, disingenuous to

characterise sex as something other than a ‘daily activity’ when most couples can decide to have sex with very little planning or expense.

My main suggestion here, however, is to say that, irrespective as to whether J’s conjugal support is ‘personal care support’, it directly relates to her physical disability and her physical inability to sexually satisfy herself (most importantly) and to sexually satisfy her husband.

As mentioned above in my discussion on ‘What is J’s conjugal support?’, Mortimer J’s held:

... the Tribunal defines the “support” as transport. That is a correct characterisation, and the Tribunal was correct to reject the Agency’s submission that a “contribution to funding” could be the “support” for the purposes of the scheme. [86]

For Mr. McGarrigle, in *McGarrigle v National Disability Insurance Scheme* [2017] FCA 308, the support in question was transport. He needed to be driven from his home to his place of employment five days per week. In the AAT case of *KLMN and National Disability Insurance Agency* [2017] AATA 1815 was prism lenses. Neither KLMN’s glasses or Mr. McGarrigle’s transport were listed in the Guidelines’ list of daily personal activities do not specifically included transport or glasses. The list is a guide.

The Delegate concluded: ‘Based on this, I have found that “conjugal supports” would not be considered personal care and, therefore, it is not appropriately funded by the NDIS.’

Respectfully, the legislation is not entailed ‘The Personal Care Act 2013’ or a variation thereof.

While I am, reluctantly, prepared to accept that, notwithstanding Dr. Linda Mona’s advice, there may be good policy reasons to not to label J’s conjugal support as ‘personal care’, this should not disqualify this human right as a legitimate subject for the NDIS.

I suspect that this decision is based on two public policy considerations: the social stigma attached to public funds being used to fund sex workers; and the fear of opening the flood-gates. The latter is baseless because each participant’s needs are to be assessed on its merits. And, the former is reinforcing the myth that people with significant disabilities are asexual.

Neither of these policy considerations appear in the NDIS Act and, therefore, if they are the basis of this decision, then the Delegate has erred in making this decision.

Administrative Decisions (Judicial Review) Act 1977

Section 6.(1) and 6.(2), which in part read:

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following grounds:

(b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;

(e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

- (d) an exercise of a discretionary power in bad faith;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

For instance, par.6(1)(e) and (2)(a), of the AD(JR) Act (shown above) provide grounds for appeal based of irrelevant consideration having been taken into account.

Paragraph 6(1)(b) provides further grounds when read with ss.33(1) of the NDIS Act that requires NDIS plan to include 'a statement (the participant's statement of goals and aspirations) prepared by the participant'. While J attended a fact-finding interview with a third party, FEROS, J did not prepare the statement. Nor did she have an opportunity to approve a draft of a statement. Where else would someone be expected to consent to contract worth more than \$200,000 without seeing the contract? And, not have the details of what can and cannot be purchased included?

In relation to par.6(2)(d), I would suggest that the FEROS interviewer's attitude towards J's conjugal support, together with the dismissive tones of the Delegate's letter, is indicative of bad faith. For instance, the claim that sexual activity is not a daily activity is just incorrect. While priests, nuns and the very young and the very old may not have need for masturbation, if not partnered sex, the overwhelming majority enjoy some kind of sexual experience.

Given that the majority of NDIS participants are highly vulnerable and media reports of review waiting times estimated to be approximately nine months in the ACT, I would have expected that the Delegate would have sent the draft NDIS plan back to the FEROS planner (or to a more experienced planner) for more information: see par.6(2)(f).

Paragraph 6(2)(f) is relevant as the Delegate refers to the [Operational Guidelines for Personal care support](#) (i.e. a rule or policy) without regard to the merits of the particular case. That is, 'sex work' is not on the 'for example' list or listed in the 'including' items, therefore, the Delegate used her discretion to refuse J's conjugal support without applying the NDIS Act's objects or those of the Convention.

I would, therefore, strongly argue that J's conjugal support needs not be considered 'personal care' for it to be appropriately funded by the NDIS.

'I do acknowledge that personal care funding for a support worker to 'position' J, or support access to a sex worker, could be a valid use of NDIS funded supports.'

I have addressed this elsewhere and have no dispute with support staff positioning J in whichever position she requests.

The Delegate's concession, however, seems to infer that the positioning of J marks the end of the NDIS's responsibilities. I think that I have comprehensively shown that J is physically incapable of masturbating or having sex with her husband. Furthermore, the Delegate indicated in her decision that she was satisfied that J met criterion (a).

I have also argued, with reference to Dr. Linda Mona's work, that 'person care' could include J's conjugal support, but for the availability of willing support staff and the legal restrictions associated with vulnerable peoples' protective legislation. Sex workers should be seen as

highly specialised support staff. This thinking is not too dissimilar to the hiring registered nurses for catheter care or bowel care, or engaging podiatrists to file toe nails.

'I am aware the provision of "conjugal support" was previously delivered through self-managed funds. I would like to remind you about the requirements of self-management and that the funds can only be used in accordance with section 34 of the NDIS Act.'

In paragraph 33(5)(f), the NDIS Act states that:

ss.33(5) Matters that must be included in a participant's plan

(5) In deciding whether or not to approve a statement of participant supports under subsection (2), the CEO must:

(f) have regard to the operation and effectiveness of any previous plans of the participant.

In the NDIA's appeal of *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, their Honours, Kenny, Robertson And Kerr JJ, state:

We do not consider that her Honour was departing from the statutory language in s 33(2)(b) of the *National Disability Insurance Scheme Act 2013* ... that a "participant's plan must include a statement... approved by the CEO" specifying "the reasonable and necessary supports ... that will be funded under the National Disability Insurance Scheme".

(*National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132.

And, s.33(2)(b) states that supports, which are identified in the approved plans, will be funded.

the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme

The following passages summaries the history of J's conjugal support.

J's (and my) government funding for regular sex worker visits commenced in 2010 with the ACT Government agreeing to allow us to use a modest proportion of our Individual Support Packages (ISP) to pay for a shared sex worker.

J's first NDIS Plan commenced on 9 December 2015. Under 'People in my life who support me' J wrote:

My conjugal support worker is also critical for good mental health and wellbeing.

As 'My first goal is:' J had:

To maintain a lifestyle of health and wellbeing, while staying in my own home with my husband for as long as possible.

As 'During this plan I want:' J had:

Having supports to sustain our care from Hartley Lifecare, DUO support staff and conjugal supports.

And then, under 'Improved daily living skills', her budget included:

Therapeutic supports of 20 speech therapy, 40 OT, physiotherapy 30, massage supports and 20 **conjugal sessions** to be self-managed with flexibility of support and receipts for services to be collated

in case of auditing for assessment of equipment and vehicle modifications as required.
(Emphasis added)

J's second plan mentions 'conjugal services' in the budget. Her third plan is less specific. In it she has the goal of:

To maintain my daily living equipment in safe and functional states so I can be as independent as possible in personal care and community access and remain living in my own home with my husband.

And then, under 'Improve health and wellbeing', her budget included:

This category is funded for assistance from appropriately qualified professionals to improve a participant's health and wellbeing as outlined in the goals within this NDIS plan.

Out of fear for setting off alarm bells, each NDIS plan planner showed increasing reluctance to include 'conjugal' support within J's plan. The third planner chose to link this budget item to J's goal of living with her husband.

J's current, the fourth, plan includes the same long-term goal to '...remain living in my own home with my husband', but does not include a general budget item to progress J's goals as identified in her plan.

Within the 'core supports' budget item it reads:

Flexible supports to enable maximum independence in personal activities of daily living. These supports can be provided in a range of environments, including but not limited to, J's own home.

But for the Delegate's decision, this 'core supports' budget item is inclusive enough to allow for J's conjugal support. Her allied health professionals, support coordination, and continence supplies, are provided for in other budget items. This leaves 'personal care'. Why state 'flexible supports' just for personal care? Obviously, the planner intended to allow for supports that would progress J's goals. For instance, conjugal support.

The Delegate is correct to say that funds can only be used in accordance with section 34. Mortimer J states:

Payments made in accordance with a participant plan are called "NDIS amounts" in the scheme. There is a requirement that funds received by a participant (or a person on behalf of a participant) must be spent "in accordance with the participant's plan": s 46(1). The monies received are otherwise inalienable.

(McGarrigle v National Disability Insurance Scheme [2017] FCA 308, par.31)

The NDIS Act is, however, more than subsection 34(1). For instance, her Honour also stated:

Section 17A enshrines and gives prominence in the legislative scheme to principles of autonomy and self-determination for people with disability.

(McGarrigle v National Disability Insurance Scheme [2017] FCA 308, par.29)

Her Honour noted that, for Mr. McGarrigle, 'independence is important for Mr McGarrigle, so having others transport him may not pursue that goal.' (*McGarrigle v National Disability Insurance Scheme [2017] FCA 308, par.103*) As with Mr. McGarrigle's independence and his need to have the NDIS fund his transport, J's marriage and sexuality is important to her and so is the funding of her Support.

Therefore, considering the evidence and information available to me, I have decided to the requested "conjugal supports."

It is true that the FEROS planner may not had researched this matter as thoroughly as I have here. This letter has taken me the best part of eight weeks and, unlike a busy planner, I am motioned by a personal interest and a love for J. I hope, however, armed with the information here within the reviewing officer will be overwhelming convinced to approve funding for J's human right / her conjugal support.

Respectfully, I request an internal review of the Decision.

Yours sincerely