

*WRMF and National Disability Insurance Agency [2019] AATA 1771
(8 July 2019)*

Facts and background

The applicant was a woman in her late forties who had multiple sclerosis ('MS') and other related conditions. She walked with difficulty and with the assistance of strong MS drugs, and her main source of income was the disability support pension. She identified as lesbian and had no partner. The applicant attributed her inability to find a partner to her disability. She had sexual needs, and the MS and related conditions meant that the prospect of her obtaining sexual release without the intervention of a sexual therapist was unlikely.

The applicant was a participant in the National Disability Insurance Scheme ('the Scheme') and she sought funding from the Scheme for the services of a sexual therapist, specially trained in treating people with a disability.

Under the Scheme, the *National Disability Insurance Scheme Act 2013* (Cth) ('the Act') provided for 'general supports', meaning services provided by the National Disability Insurance Agency (the Agency), and 'reasonable and necessary supports', which were funded by the Agency. The Agency argued that the funding claimed by the applicant was not for a support, nor a 'reasonable and necessary support'. The matter was heard in the Administrative Appeals Tribunal ('the Tribunal'), where Deputy President Rayment identified the key issue as whether the support claimed by the applicant—the services of a specially trained sexual therapist—was reasonable and necessary, as that phrase was used in the Act.¹

Reasoning

Was the applicant's claim for a 'reasonable and necessary support'?

The Deputy President addressed two preliminary matters before he turned to the key issue. First, he noted that out of respect for the applicant, part of the reasons for the decision were made confidential due to the discussion of very personal details surrounding the impact of the applicant's disability upon her sexual life. Such an approach was considered consistent with a general principle guiding actions under the Act, that people with a disability should have their privacy and dignity respected.

Second, the Deputy President emphasised that the case did not involve the question of whether the services of a sex worker should be funded by the Scheme. An important difference was noted between a sex worker, and the specially trained sex therapist that the applicant claimed funding for. Additionally, an avenue existed under the Act for the State and Commonwealth governments, rather than the Tribunal, to address the broader question of whether a sex worker could be considered 'reasonable and necessary support'.

¹ The Deputy President briefly disposed of the argument that the funding claimed by the applicant was not for a 'support', finding that 'support' meant the same as 'assistance' and was satisfied in the circumstances.

On the question of ‘reasonable and necessary supports’, the Deputy President noted that as the phrase was not defined in the Act, it was necessary to gather its meaning from its statutory context, taking account of a number of provisions of the Act.

Objects and guiding principles

The Deputy President first considered the objects of the Act,² and the guiding principles directing actions under the Act.³

In relation to the objects of the Act, the Deputy President noted that subsections 3(1)(a), (c), (e), (g) and (i) may be of particular assistance in determining the meaning of ‘reasonable and necessary supports’. Two of those subsections referred to Australia’s obligations under international treaties, including the *Convention on the Rights of Persons with Disabilities*.⁴ While recognising the emphasis in that treaty on the human rights and fundamental freedoms of persons with a disability, the Deputy President rejected the notion that sexual rights were human rights, and did not reach a firm view on whether a ‘fundamental freedom’ was involved in the circumstances of the case.

In considering the general principles set out in section 4 of the Act, the Deputy President noted that the principle in subsection 4(1) appears to aim to bring about, to the extent practicable, equality between people with a disability and others in society regarding matters of physical, social, emotional or intellectual development. Another general principle referred to people with a disability having certainty that they will receive the care and support that they need. In the Deputy President’s view, ‘need’ had its ordinary English meaning, and suggested that ‘reasonable and necessary supports’ should also have its ordinary English meaning. That is, the question was: does the support fulfil a *need* of the participant? Subsection 4(11) was also considered important, as it stated that ‘reasonable and necessary supports’ for people with a disability should support such people to: pursue their goals and maximise their independence; live independently and to be included in the community as fully participating citizens; and to undertake activities that enable them to participate in the community and in employment.

The Deputy President identified a number of themes from the objects and guiding principles of the Act, including freedom of choice, seeking to place people with a disability in a situation where they are not disadvantaged compared to those without a disability, supporting people with a disability to participate in and contribute to social and economic life, and maximising the independence of people with a disability and their ability to make choices. Those themes leaned in favour of the applicant’s claim coming within the phrase ‘reasonable and necessary supports’, subject to the Deputy President’s later discussion of s34 of the Act.⁵ That is, the applicant chose to have the services of a sexual therapist, those services in a sense put her on par as far as possible with others regarding sexual release, and the support would help her realise her potential for social and economic development, and to participate in social life.

The purposes of funding by the Agency

The Deputy President also discussed section 14 of the Act, which stated that the Agency may provide funding to persons or entities, for the purposes of enabling those persons or entities to assist people with a disability to realise their potential for physical, social, emotional, economic and intellectual

² The Act s 3(1)

³ The Act s 4

⁴ opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁵ *WRMF and National Disability Insurance Agency* [2019] AATA 1771, [36].

development, and participate in social and economic life. In the Deputy President's view, although section 14 did not expressly refer to 'reasonable and necessary supports', it seemed to be about such supports because it empowered the Agency to give funding and the Agency provided funding for reasonable and necessary supports.⁶ The section supported the view that the applicant was claiming 'reasonable and necessary support', as the sexual release that she achieved in response to the sexual therapy was accepted to be good for her mental wellbeing, her emotional wellbeing and her physical wellbeing.

The financial sustainability of the Scheme

The Agency provided evidence of their position if every person with MS, and other disabling diseases, sought a sex worker under the Scheme. While the Deputy President noted that the financial sustainability of the scheme was referred to in a number of sections of the Act, he did not view such evidence as relevant to the applicant's unique circumstances and her need for a specially qualified and trained sex therapist. Further, her claim for support did not threaten the financial sustainability of the Scheme.

Satisfaction of the Chief Executive Officer

The Deputy President then turned to consider section 34(1) of the Act, which set out a number of factors in relation to the funding of reasonable and necessary supports that the Chief Executive Officer must be satisfied of. These included that: (a) the support assisted the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations; (b) the support would assist the participant to undertake activities to facilitate the participant's social and economic participation; (c) the support represented value for money; (d) the support would be or would likely to be effective and beneficial, having regard to current good practice; (e) the funding took account of what it was reasonable to expect family, carers, and the community to provide; and (f) the support was most appropriately funded by the Scheme.

All of the requirements of s 34(1) were found to be satisfied in the applicant's case. The Deputy President accepted that sexual release assisted the applicant's wellbeing. Additionally, if she had a brighter mood and sense of wellbeing she was better able to socialise and more ready to take on the world. The support of the sex therapist was also found to be effective, beneficial and consistent with good practice. It was incapable of being provided otherwise, and was appropriately funded by the Scheme. The assertion that it should be funded by the applicant's disability support pension was rejected, as was the view that s34(1)(b) required the participant to be in gainful employment.

Ultimately the Deputy President concluded that the support claimed, at the level claimed, was a reasonable and necessary support as that phrase was used in the Act.

⁶ *WRMF and National Disability Insurance Agency* [2019] AATA 1771, [33].