



public interest
ADVOCACY CENTRE

Submission to the Australian National Audit Office

Decision-making controls for NDIS participant plans

March 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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Executive Summary

In July 2019, the Public Interest Advocacy Centre (**PIAC**) commenced a legal advocacy project to deliver better outcomes under the National Disability Insurance Scheme (**NDIS**) for people with disability. Our work focuses particularly on improving processes for decision-making and review as well as issues of transparency and accountability for the National Disability Insurance Agency (**NDIA**).

Our submission identifies key issues in relation to NDIA's policies and procedures on determining 'reasonable and necessary supports', and issues with the effectiveness of oversight mechanisms for ensuring decisions are properly made. We also make recommendations to address these issues.

1. Issues with decision-making policies and processes

a. Addressing inconsistency in decision-making

The experience of system users is that there is considerable inconsistency at various levels of decision-making by the NDIA, particularly at the planning stage when determining if a support is 'reasonable and necessary'. This has resulted in people with similar disabilities, in similar situations, seeking similar supports receiving considerably different levels of support and funding. It has also resulted in people receiving inconsistent support decisions year-to-year.

This inconsistency is exacerbated by a lack of transparency in the planning and decision-making process, particularly in two areas:

1. The failure to publish typical support guidelines or reference packages, which are used by the NDIA to determine the level of funding for a participant. Greater understanding of these guidelines and how they are used is important to ensure confidence in the administration of the NDIS.
2. The failure to publish Administrative Appeals Tribunal (**AAT**) settlement outcomes. Approximately 97% of AAT matters have been finalised through settlement. The lack of transparency around these outcomes exacerbates inconsistent decision-making in three ways. First, planners at the frontline do not have the benefit of understanding what the NDIA considers to be 'reasonable and necessary' at the end of the decision-making process, and cannot ensure that the decisions they are making are consistent with the NDIA's ultimate position. Second, it makes it difficult to hold the NDIA accountable in making decisions that are consistent with matters it has settled. Third, it prevents participants from understanding the types of supports that are funded and that they could seek.

b. Policies around financial sustainability and 'reasonable and necessary supports'

As an insurance scheme, the financial sustainability of the Scheme is an important underlying principle of the NDIS. However, there is uncertainty as to how the NDIA must 'have regard to' financial sustainability when it determines a person's reasonable and necessary supports.

There is no published guidance on how the NDIA factors in ‘financial sustainability’ when making decisions about individual participants’ plans. This is especially problematic in the context where the AAT and Federal Court have provided limited guidance on how financial sustainability fits in with the reasonable and necessary supports criteria under the legislation. In these circumstances, the failure to publish guidelines on how the NDIA, in practice, considers financial sustainability makes it difficult to understand whether the NDIA’s practice is appropriate and lawful.

c. Policies concerning the interface between the NDIS and mainstream support services

Under the NDIS Act, a support will not be considered ‘reasonable and necessary’ if the support is determined by the NDIA to be more appropriately funded through another system of service delivery. However, system users have identified and experienced multiple gaps in the interface between the NDIS and these mainstream support services. The burden should not fall on NDIS participants to navigate Commonwealth and State and Territory bureaucracies to determine where services might best be funded.

2. Effectiveness of oversight mechanisms

A key aspect of the oversight mechanism for ensuring participants are receiving ‘reasonable and necessary’ supports is the review and appeals mechanism under the NDIS Act. PIAC considers however, that the framework of this mechanism is inefficient, ineffective and ultimately defective for three reasons:

1. The significant delays in the internal review process. These delays create a number of problems for participants, including preventing people with disability from accessing the supports they need due to uncertainty over whether funding for those supports will be provided, disproportionate impact on people requiring early intervention support, and impact on the interface with other government departments.
2. The complexity of the review process. The review process is so complex that both the AAT and the Commonwealth Ombudsman have commented on the difficulty in navigating the process, both for participants and NDIA staff, who have confused requests for ‘plan reviews’ and ‘internal reviews’. This complexity further exacerbates delays in the process.
3. The NDIA has failed to implement AAT and Federal Court decisions and settlements at a systemic level, undermining the oversight mechanism of the appeals process. The lack of a transparent process to ensure NDIA consideration of whether each AAT or Court decision requires systemic policy changes, and if so, implement those changes, means the review and appeals oversight mechanism is defective.

PIAC’s recommendations to address these issues are summarised in the next section.

Recommendations

Recommendation 1: Publication of typical support guidelines

If typical support guidelines are used by the NDIA in determining whether a support is reasonable and necessary, these guidelines should be published and accessible to participants and planners. Guidelines should state clearly that they are guidelines only, and that decisions must reflect the individual's circumstances and statement of goals.

Recommendation 2: Publication of AAT settlement outcomes

The NDIA should publish information concerning AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates, and should have regard to the information published in the Australian Human Rights Commission's Conciliation Register.

Recommendation 3: Publication of NDIA Guidelines on Financial Sustainability

The NDIA should publish guidelines on the manner in which it considers financial sustainability of the Scheme is relevant to funding decisions, and the way in which financial sustainability is determined. The NDIA's guidelines should be informed by the following principles:

- the preparation and approval of a participant's plan must take place through a participant-centric decision-making approach;*
- the need to ensure the 'financial sustainability' of the Scheme is given effect through the application of the reasonable and necessary supports criteria under s 34, and is not a stand-alone consideration;*
- consideration of broader financial implications of funding a support in relation to other potential participants undermines the participant-centric approach and is not relevant to the assessment of 'reasonable and necessary' supports for an individual participant.*

Recommendation 4: Shift the burden of navigating NDIS and mainstream services gaps away from participants

The NDIA should amend the Operational Guidelines to ensure that where it determines that a support is more appropriately funded by some other system of service delivery, the NDIA must also be satisfied that the support is, or will be, in fact provided by that other service. In the absence of that support being provided by another service, the NDIA must not rely on s 34(1)(f) to determine that the support is not reasonable and necessary.

Recommendation 5: Reimbursement of a participant's expenditure on supports or economic loss

The NDIA should reimburse the participant, their family or their carer, as the case may be, for expenditure:

- (a) where a participant's statement of participant supports is varied or set aside and substituted on review or appeal, including during any settlement of a pending appeal, and*
- (b) the variation or substitution is to grant that participant funding for a requested support which was originally denied or only partially funded by the NDIA, and*

(c) during the course of the review or appeal process, the participant, their family or carer paid for the support with funding outside of the NDIA or otherwise suffered economic loss because of the denial of support by the NDIA.

Recommendation 6: Amend the NDIS Act to reduce the complexity of the review process

The Government should consider amendments to the NDIS Act to reduce the complexity between plan 'reassessments' under s 48 and internal 'reviews' under s 100. All requests under s 48 should be treated as both a request for 'reassessment' and internal 'review'.

Recommendation 7: Implement a process for considering and implementing systemic changes following appeals and decisions

The NDIA should implement a transparent and accountable process for ensuring that systemic changes to policies are made following settlement or decisions made in the AAT or Court. These changes should be reported in its Quarterly Report to ensure transparency and accountability.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Australian National Audit Office's (**ANAO**) performance audit of the National Disability Insurance Agency's (**NDIA**) decision-making controls for National Disability Insurance Scheme (**NDIS**) participant plans.

The NDIS has the potential to provide choice and control for people with disability as well as early intervention services for many Australians who have never received assistance before. However, those who should be benefitting from the Scheme have raised a range of concerns, particularly in relation to decision-making and appeal processes.

PIAC's project, *A Fairer NDIS*, aims to support and improve efficiency and effectiveness in the rollout of the Scheme, and to create sustained impact in the interests of empowering the choice and control of people with disability. The initial focus of our work is on improving transparency and consistency around decision-making, and making the appeals process less adversarial and more user-friendly. Much of our work has centred on the appropriateness and transparency of the NDIA's policies and processes, as well as the problems with oversight mechanisms in the NDIS framework.

This submission draws on our extensive consultations with people with disability, peak bodies, disability advocacy organisations, Legal Aid Commissions, academics and other stakeholders, as well as meetings with the NDIA and Department of Social Services, and our experience advocating for people with disability more generally.

In addressing the two criteria for the ANAO's audit, we raise concerns around the following issues in particular:

- issues regarding policies and processes:
 - inconsistencies in the application of NDIA policies by planners when making decisions about reasonable and necessary supports;
 - the failure to publish policies and guidelines on issues fundamental to the assessment of reasonable and necessary supports, including financial sustainability guidelines and typical support packages;
- oversight issues:
 - complexities and delays within the internal review system;
 - the need for reimbursements and back-payments to participants who are successful in their appeals; and
 - the failure to implement Administrative Appeals Tribunal (**AAT**) and Federal Court decisions at a systemic level.

2. Decision-making policies and processes

2.1 Addressing inconsistency in planning processes

An overarching issue facing the NDIA is the inconsistency at various levels of decision-making, especially at the planning stage when determining if a support is 'reasonable and necessary'.

When preparing the 'statement of participant supports' *with* the participant, and approving that statement under s 33 of the Act, system users have raised concerns that decisions made by the NDIA appear inconsistent and depend on:

- the ability of the participant and their medical professionals to articulate their goals and needs in the language of the NDIS, rather than in language that reflects their true needs;
- the participant's geographic location, with advocates stating that their experience shows inconsistent decisions made depending on the planner in different locations;
- the determination and endurance of the participant, their family and their advocates in pushing for the supports they consider necessary. This has a disproportionate effect on culturally and linguistically diverse (**CALD**) and Indigenous people with disabilities. Advocates advised that many such applicants found it difficult to advocate for themselves against government decision-makers;
- whether a person's local MP is involved and advocating on their behalf; and
- in some cases, even the profile of the participant. There is a concern held by some in the disability sector that participants with higher profiles may be more likely to get the supports they seek. Conversely, concerns have also been raised that people in marginalised and poorer communities receive lower levels of funding and support.

Throughout our consultations, PIAC has been given a considerable number of examples of a lack of consistency in decision-making. The types of inconsistencies include:

- inconsistency in the funding of support plans for people with similar disabilities in similar situations. Advocates have advised that the planning outcomes between people in similar situations vary considerably depending on the level of advocacy support received, the determination and endurance of the participants and their carers to press for what they consider is an appropriate level of funding, and the location of the participant (especially whether the participant is located in a regional or metropolitan area); and
- inconsistency in the funding of support plans for the same person at the next plan review following an AAT decision or settlement of their appeal. We have been informed that there have been many cases where a participant settles their dispute with the NDIA over funding for reasonable and necessary supports, only to face a cut in their level of funding at the next plan review, following which they are required to go through the appeals process again.

These inconsistencies are well-reported, including by the Joint Standing Committee on the NDIS.¹

2.1.1 Publication of typical support packages

Incorrect decision-making is exacerbated by the lack of transparency around how decisions are made. It is understood that the NDIA uses typical support guidelines or reference packages to identify the level of funding to be provided to people with certain impairments.² It appears that

¹ Joint Standing Committee on the National Disability Insurance Scheme, *Progress Report* (Report, March 2019) 20-21.

² The use of reference packages is also discussed in Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs* (Study Report, October 2017) 193-195.

these guidelines or packages are developed and applied using a computer program. PIAC understands that despite numerous organisations' efforts to access these guidelines, the NDIA has refused to publish them.

Greater understanding of typical support guidelines and how they are used is important to ensure confidence in the administration of the NDIS. On the one hand, their use may fail to give effect to the requirement that participants' plans be 'individualised'.³ On the other hand, despite their use, stakeholders are concerned about a lack of consistency in decision-making across people with apparently similar needs.

2.1.2 Publication of AAT appeal settlement outcomes

Likewise, the lack of transparency around settlement outcomes at the AAT impairs consistent decision-making, hampers effective oversight of government administration and makes it difficult for participants to understand the types of supports they could seek.

Based on the most recent Quarterly Report published by the NDIA, approximately 97% of all finalised cases before the AAT were finalised through settlement.⁴ The nature of settlements is such that they are private, confidential and non-binding on non-parties. Increasing transparency in settlement outcomes will assist with addressing inconsistencies in decision-making, as it will allow some level of public accountability in ensuring the NDIA makes decisions consistently with matters that it has settled.

The publication of this information will also improve the ability of participants to understand the types of supports that are funded, and assist participants to decide what types of supports they could seek. A survey conducted by the Tune Review found that, out of 985 respondents, only 41% of people had planners who 'clearly explain[ed] how the planning process would work and the sorts of things that might be included in [their] plan'.⁵

We have consulted extensively with systems users and experts in decision-making under the NDIS: people with disability, peak bodies, disability advocacy organisations, Legal Aid Commissions, academics and other stakeholders. Their consistent feedback has been that publication of settlement outcomes would be a valuable tool in:

- Assisting participants and advocates to understand what reasonable and necessary supports they can request;
- Providing guidance for participants and advocates as to the range of funding that might be available for different types of supports in a range of general circumstances;
- Supporting greater consistency in decision-making by planners;
- Assisting participants, advocates and legal representatives to assess whether there are reasonable grounds for seeking a review or appeal;
- Supporting greater transparency of NDIA decisions, including by identifying decision-making trends and inconsistencies.

³ NDIS Act s 31(a).

⁴ National Disability Insurance Agency, *COAG Disability Reform Council Quarterly Report* (Report, 31 December 2019) 127. The Report states that 2,254 cases out of 2,323 finalised cases had been resolved by settlement as at 31 December 2019.

⁵ David Tune, *Removing Red Tape and Implementing the NDIS Participant Service Guarantee: Review of the National Disability Insurance Scheme Act 2013* (Report, December 2019) 192.

This recommendation regarding the publication of settlement outcomes was made to the Parliamentary Joint Standing Committee on the NDIS's Planning inquiry. The Committee unanimously supported and adopted the recommendation.⁶ The Government responded on 3 March 2020, noting the recommendation and stating its concerns that:⁷

- publishing these outcomes would impose a 'significant administrative burden on resources';
- it would pose privacy issues, even if published in a de-identified form;
- all cases are considered on their individual merits; and
- publication could contribute to the misconception that the particular terms of agreement reached between the NDIA and an applicant could be generalised to other applicants with a similar disability.

We have discussed these concerns with the NDIA and do not accept that they constitute barriers to the publication of this information.

No significant burden

First, we do not accept that any administrative burden on resources would be either 'significant' in the context of the administration of the NDIS or, perhaps more relevantly, disproportionate to the benefits that publication of outcomes would produce.

We recognise that setting up a system for publication of outcomes would require resources. However, it is not apparent that these would be significant. PIAC has already developed a draft 'register' that identifies the information that systems users have said would be useful. The information that would be published is all already known to the NDIA. It is easily accessible – it is all contained in key documents recording the decision.

Collecting this information in a way that allows it to be made publicly available may require changes to existing databases. It is not clear, however, that this would be technically complicated.

Once any necessary database changes are made, the information would be collected as part of any standard 'file closure' procedures. It is hard to see that any additional data entry at this point would impose a significant burden on resources.

Privacy issues can be resolved

Second, where de-identification is insufficient to remove privacy concerns, participants could be asked to provide consent to the publication of their settlement outcomes. No privacy issue should arise where fully informed consent is provided by the participant.

⁶ Joint Standing Committee on the National Disability Insurance Scheme, *NDIS Planning Interim Report* (Report, December 2019) [vii].

⁷ Australian Government, *Australian Government response to the Joint Standing Committee on the National Disability Insurance Scheme: NDIS Planning Interim Report* (3 March 2020) 5.

It is important to recognise that the privacy obligations that apply to the NDIA exist to protect participants. In circumstances where participants have consented to sharing their information or where they are not identifiable, privacy arguments should not be used to prevent people from accessing information that would benefit them.

Providing consistent and accurate data will support better decisions

Third, we recognise that settlement terms for one individual cannot be generalised to other individuals. Systems users understand, perhaps better than anyone, the importance of individualised assessment.

However, the publication of settlement outcomes provides useful information to both planners and participants to understand the types of supports that are available under the Scheme. This will particularly be the case as the data sets produced grow and allow for useful identification and analysis of ranges and trends.

This is the same approach taken by the Australian Human Rights Commission to their Conciliation Register, where the Commission publishes information about discrimination conciliations in a de-identified manner. There is no suggestion that conciliations in the Commission's register could be generalised to other individuals. Moreover, any misconception could simply be addressed by a notice on the NDIA's website – again, in the same manner as the Commission's Conciliation Register.

It is also important to note that in the absence of a settlement register, systems users are inevitably relying on anecdotal information or their own more limited data sets (for example other clients assisted by a service or cases reported in the limited AAT decisions that have been published). Providing a larger, accurate and consistent set of data is far preferable, if the goal is to support good decision-making.

Understanding decisions in this context

Finally, it should be borne in mind that any settlements that the NDIA enters into reflects the provision of funding and supports that the NDIA believes it is empowered to make under the NDIS Act. That is, settlement outcomes provide examples of the proper exercise of the NDIA's function and powers under the NDIS Act. They are not examples of the NDIA being pushed outside the limits of the legislation, for example to reach a commercial settlement of a dispute as may happen in other legal contexts.

Planners and participants ought to have the benefit of understanding this exercise of the NDIA's powers. Participants are entitled to seek the support they require; it is the role of the NDIA to approve (including at settlement) only those that fall within the boundaries of its legislative framework.

Recommendation 1: Publication of typical support guidelines

If typical support guidelines are used by the NDIA in determining whether a support is reasonable and necessary, these guidelines should be published and accessible to participants and

planners. Guidelines should state clearly that they are guidelines only, and that decisions must reflect the individual's circumstances and statement of goals.

Recommendation 2: Publication of AAT settlement outcomes

The NDIA should publish information concerning AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates, and should have regard to the information published in the Australian Human Rights Commission's Conciliation Register.

2.2 Financial sustainability and 'reasonable and necessary supports'

The interaction between the requirement to have regard to 'the need to ensure the financial sustainability' of the NDIS and the 'reasonable and necessary supports' criteria under s 34 of the Act is vague and unclear. This is an issue that requires greater clarity and transparency from the NDIA to ensure participants understand how financial sustainability considerations may or may not relate to their individual support plans.

As an insurance scheme, ensuring the financial sustainability of the Scheme is an important underlying principle of the NDIS. This is clearly stated in the legislation and the rules. Section 3(3)(b) of the NDIS Act provides that, in giving effect to the objects of the Act, regard is to be had to 'the need to ensure the financial sustainability' of the NDIS. Section 4(17)(b) of the Act also specifies that it is the intention of Parliament that in performing functions and exercising powers under the NDIS Act, the NDIA CEO and Board (among others) must again have regard to 'the need to ensure the financial sustainability' of the NDIS. The *NDIS (Supports for Participants) Rules 2013* states at paragraph 2.5 that in administering the NDIS and in approving each NDIS plan, the CEO 'must have regard to objects and principles of the Act including the need to ensure the financial sustainability of the NDIS...'.

There is, however, a lack of clarity as to what it means in practice to 'have regard to' the financial sustainability of the Scheme. Importantly, s 34 of the Act, which sets out the considerations for determining 'reasonable and necessary supports', does not refer to financial sustainability.

There are two aspects to this problem. First, understanding how the NDIA is applying this consideration in practice, and second, identifying how, in fact, the financial sustainability of the Scheme *should* be taken into account in decision-making and the performance of the NDIA of its functions.

2.2.1 Financial sustainability in practice

PIAC understands the NDIA has refused to fund certain supports in participants' plans, on the ground that funding them would threaten the financial sustainability of the NDIS. But there is limited information on how the NDIA actually takes into account financial sustainability when determining a participant's plan. One stakeholder reported that some participants felt the onus was on them to prove that their support would not lead to financial unsustainability of the Scheme. It was reported to us that some participants, especially people with psychosocial disability, were so concerned about financial sustainability that they were worried about using the

funding they had been allocated because of the fear that they would be a burden on society. Another stakeholder also reported similar concerns raised by CALD people with disability.

The manner in which financial sustainability is raised by the NDIA appears to assume that all participants with the same disability in similar circumstances will seek the same supports when drafting their plans, which undermines the choice and control enjoyed by each individual. This approach is demonstrated by the NDIA's approach in *WRMF and NDIA* [2019] AATA 1771, where evidence from the Scheme Actuary was given to show the 'worst case scenario' where 'every person, male or female, married or unmarried, who suffered from multiple sclerosis, and certain other disabling diseases, sought a sex worker'.⁸ A similar broad-brush approach was taken by the NDIA in *McPherson and NDIA* [2018] AATA 4303, in relation to the cost of providing a motor vehicle 'for all participants with muscular dystrophy'.⁹

The ambiguity of the phrase 'have regard to... the need to ensure the financial sustainability of the NDIS' is reflected in the lack of authoritative decisions on the matter, whether at the AAT or at the Federal Court. In *McGarrigle*, the Court expressly declined to decide on the role of considerations of financial sustainability in the NDIS, noting that it 'is an important issue which should await determination in an appropriate case'.¹⁰

Decisions at the AAT on financial sustainability provide only limited guidance on the matter. More recent decisions tend to suggest that evidence from the Scheme Actuary would be required to raise financial sustainability as an issue before the Tribunal, and that the evidence must be specific and relevant.¹¹ Deputy President Humphries in *BIJD* reasoned that financial sustainability entails the making of value judgments balancing, on the one hand, the cost of widening the NDIS's scope, and on the other, the benefits conferred. Thus, if the benefits conferred by the requested support are significant, then a significant additional cost may be justified.¹² Given the need for value judgment, it is clear from this decision that actuarial analysis can only be an advisory tool to assist with determining the effect on costs to the Scheme, and not a determinative tool in deciding whether a person's supports should be funded.

This ambiguity and inconsistency – including from the AAT decisions – points to a strong need for the NDIA to publish guidelines on how it factors in financial sustainability considerations when determining reasonable and necessary supports. Where there is no authoritative legal decision on how the requirements should be interpreted, there must be guidance from the NDIA as to what happens in practice.

2.2.2 How should financial sustainability be taken into account?

In PIAC's view, the need to ensure the financial sustainability of the Scheme is not a stand-alone consideration for the assessment of whether a support is reasonable and necessary under s 34.

⁸ At [37].

⁹ At [42].

¹⁰ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [117].

¹¹ See, for example, *WRMF and NDIA* [2019] AATA 1771; *WKZQ and NDIA* [2019] AATA 1480 and *FRCT and NDIA* [2019] AATA 1478; *McPherson and NDIA* [2018] AATA 4303; *BIJD and NDIA* [2018] AATA 2971; *Mazy and NDIA* [2018] AATA 3099.

¹² *BIJD and NDIA* [2018] AATA 2971, [68].

Rather, certain criteria, such as s 34(1)(c) and (f) 'expressly incorporate' the financial sustainability consideration into the assessment of reasonable and necessary supports.¹³

That is, satisfaction of the 'reasonable and necessary support' criteria under s 34 in and of itself is sufficient to demonstrate that the support is reasonable and necessary. The need to consider financial sustainability of the Scheme and any associated actuarial evidence cannot be a 'trump card' overriding the express considerations under s 34.

The NDIS Act requires that the preparation and approval of a participant's plan take place through a *participant-centric* decision-making approach. The decision-maker must assess the matters relevant to a *particular* participant and a *specific* proposed support. This reflects the choice and control enjoyed by participants and emphasised in the Act. As s 31 of the Act provides, the principles applicable to the preparation, review and replacement of plans emphasise the need for plans to be individualised, tailored and to maximise participant choice and control. Evidence from the Scheme Actuary about broader financial implications of funding a support in relation to other potential participants undermines the participant-centric approach and is not probative to the assessment of 'reasonable and necessary' supports. The Scheme Actuary has no role in determining what supports are 'reasonable and necessary' for individual participants.

Instead, the need to ensure the 'financial sustainability' of the Scheme is given effect through the application of the reasonable and necessary supports criteria under s 34.

If, for instance, the evidence shows that a particular support sought by a participant is not proven to be effective in achieving desired outcomes, is expensive and could potentially jeopardise the financial sustainability of the Scheme if all participants in the same circumstances sought the same expensive support which, in each instance, was equally ineffective in achieving the outcomes desired, then actuarial evidence about financial sustainability may be relevant. This is because the actuarial evidence would relate to the participant's specific circumstances, and this evidence may be relevant to the assessment of s 34(1)(c) (regarding value for money and the benefits achieved) or (d) (regarding the effectiveness of the support).

In contrast, if the evidence showed that the support was effective in achieving the desired outcomes, was consistent with best practice, represented value for money and was not more appropriately funded through another system (that is, each of s 34(1)(c), (d) and (f) is met), then any actuarial evidence regarding the financial sustainability of providing this support to every person in that participant's circumstance is not relevant. To take such actuarial evidence into account in these circumstances would undermine the participant-centric approach required under the Act.

This interpretation is supported by the fact that Chapter 3, Part 2 of the NDIS Act provides a comprehensive and detailed framework for the making, approval and operation of a participant's plan, but does not directly mention the need to ensure the financial sustainability of the NDIS.

Therefore, in determining whether a particular support is reasonable and necessary under s 34(1), the decision-maker is not entitled to consider the 'ripple effect' on the financial

¹³ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [109].

sustainability of the NDIS of funding a particular support by reference to actuarial data where such data is not relevant or probative to an assessment of the individual participant's needs.

This interpretation continues to leave scope for the NDIA CEO or Scheme Actuary to raise broader financial sustainability concerns in relation to supports which have been deemed reasonable and necessary for a particular individual, but which could give rise to financial sustainability issues in future. For instance, the CEO or his delegate may raise concerns regarding financial sustainability issues arising from a reasonable and necessary support to the Scheme Actuary for advice, and for the purposes of the Scheme Actuary's duties under s 180B. If 'significant' actuarial advice or a report is received, the CEO must provide that report to the Board under s 159(7). If the Board considers it to be relevant actuarial analysis and advice under s 125A, it must have regard to that information, and it may determine objectives, strategies and policies for the NDIA to ensure that the need to ensure financial sustainability is met. The CEO can also act on the advice of the Scheme Actuary in connection with the performance of his duties under s 159(2), for example by bringing issues to the attention of government or other stakeholders.

PIAC recommends that the NDIA publish guidelines on the manner in which it considers financial sustainability of the Scheme is relevant to individual funding grants for reasonable and necessary supports, and the way in which financial sustainability is determined. PIAC proposes that these guidelines follow our interpretation of the legislative provisions above.

Recommendation 3: Publication of NDIA Guidelines on Financial Sustainability

The NDIA should publish guidelines on the manner in which it considers financial sustainability of the Scheme is relevant to funding decisions, and the way in which financial sustainability is determined. The NDIA's guidelines should be informed by the following principles:

- *the preparation and approval of a participant's plan must take place through a participant-centric decision-making approach;*
- *the need to ensure the 'financial sustainability' of the Scheme is given effect through the application of the reasonable and necessary supports criteria under s 34, and is not a stand-alone consideration;*
- *consideration of broader financial implications of funding a support in relation to other potential participants undermines the participant-centric approach and is not relevant to the assessment of 'reasonable and necessary' supports for an individual participant.*

2.3 Interface between NDIS and mainstream services

Another area of ambiguity within the NDIS Act is the interface between the NDIS and mainstream services. The Tune Review survey found that only 9% of respondents believed that the NDIS connected and coordinated with other services, including health, education and justice.¹⁴ This disconnect has led to participants falling in the gaps between the NDIS and other mainstream services provided by the Commonwealth and State and Territory governments.

¹⁴ David Tune, *Removing Red Tape and Implementing the NDIS Participant Service Guarantee: Review of the National Disability Insurance Scheme Act 2013* (Report, December 2019) 187.

Under the NDIS Act, one of the critical interface points between the NDIS and mainstream services is in relation to reasonable and necessary supports. Under s 34(1)(f), the NDIA must be satisfied that the support is most appropriately funded or provided through the NDIS, and:

is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

- (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.

In the AAT decision of *Burchell and National Disability Insurance Agency* [2019] AATA 1256, Deputy President Rayment considered that there are two 'limbs' of which the CEO of the NDIA must be satisfied. First, that the support is most appropriately funded or provided by the NDIS. Second, that it is not more appropriately funded by some other system of service delivery, such as a health department.

The cases show that there are gaps between services, where the NDIA refuses to fund a support on the basis that it considers that the support is more appropriately funded through other services, but where that other support service does not provide funding. Gaps commonly exist between the NDIS and:

- education services;
- health services;
- corrective services;
- justice services;
- housing services; and
- child protection and family support services.

In *Burchell*, Deputy President Rayment held that, for the NDIA to deny funding on the basis of the second limb – that is, that the support is more appropriately funded by some other system of service delivery – that support must in fact be provided by another health authority. It is not for the NDIA to evaluate what supports should be provided by other service providers. In other words, the NDIA cannot determine that another service provider should provide a support even if they do not.¹⁵

These interfacing issues require COAG to agree clearer boundaries as to the funding of services between the NDIS and other mainstream service providers. PIAC notes the recommendations made by the Productivity Commission in its January 2019 Review of the National Disability Agreement, concerning the need for a new National Disability Agreement (**NDA**) between the Australian, State and Territory Governments, and the need for the NDA to better clarify the responsibilities between each level of government and the relationship between the NDA, NDIS and the National Disability Strategy.

¹⁵ *Burchell and National Disability Insurance Agency* [2019] AATA 1256, [36].

However, until these boundaries are clarified, the burden should not fall to NDIS participants to determine where services might best be funded.

The NDIA should adopt the process set out by Deputy President Rayment in the *Burchell* decision. That is, where the NDIA determines that a support is more appropriately funded by some other system of service delivery, that support must in fact be provided by that other service. In the absence of that support being provided by another service, the NDIA must not rely on s 34(1)(f) to determine that the support is not reasonable and necessary.

Recommendation 4: Shift the burden of navigating NDIS and mainstream services gaps away from participants

The NDIA should amend the Operational Guidelines to ensure that where it determines that a support is more appropriately funded by some other system of service delivery, the NDIA must also be satisfied that the support is, or will be, in fact provided by that other service. In the absence of that support being provided by another service, the NDIA must not rely on s 34(1)(f) to determine that the support is not reasonable and necessary.

3. Oversight: review processes

A key aspect of the oversight mechanism for ensuring participant plans are ‘reasonable and necessary’ is the review and appeals mechanism under the NDIS Act. The framework of this mechanism however is inefficient and ineffective for three reasons:

- the significant delays in the internal review process;
- the complexity of the review process; and
- the failure by the NDIA to implement AAT and Court decisions. This failure is the most problematic aspect of the oversight mechanism as it effectively means there is no feedback loop between matters determined at the AAT and Court level (that is, at the very end of a ‘reasonable and necessary supports’ decision-making chain) and planners at the frontline making the first assessment of whether requested supports are ‘reasonable and necessary’.

3.1 Delays in internal review

Significant delays in the internal reviews process are well-known. The Commonwealth Ombudsman in its May 2018 report, *Administration of reviews under the National Disability Insurance Scheme Act 2013*, noted that the NDIA has acknowledged some reviews taking ‘up to nine months’ to be completed.¹⁶

Some advocates have told PIAC that in as many as 50% of the cases they worked on, internal reviews took so long that the participant’s plan would come up for its 12-month review before the internal review had been conducted. In these cases, the NDIA would suggest to the participant that they withdraw their request for internal review and resolve any issues through the plan review. However, if the plan review failed to address their concerns, the participant would then have to lodge another internal review, restarting the whole process.

¹⁶ Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013* (Report, May 2018) 3.

During these delays, there is limited information provided to individuals about the internal review process, adding to the uncertainty during the lengthy process.

These delays have a number of impacts on people with disability, including:

- preventing people with disability from accessing the supports that they need due to a lack of certainty in whether the funding for those supports will be provided;
- requiring people with disability to decide between spending the funding provided in the manner in which they need it, but risking that those funds are exhausted before the review takes place; or limiting their spending of the funding to ensure the funding lasts but not getting the full support that they need;
- impacts on the interface with other government departments. One advocate told PIAC about the difficulties a participant had between managing the interface between the NDIA and the NSW Department of Communities and Justice. The client was waiting for the NDIA to conduct its internal review of supports for her child, while at the same time being threatened with his removal by the State, unless she could receive support for his disability. In these situations, delays in internal review can impact the provision of supports by other government agencies. Media reporting has further highlighted this issue;¹⁷ and
- disproportionate impacts on people requiring early intervention supports.

There is also no financial pressure or disincentive for the NDIA to avoid delays in the internal review (or subsequent appeal process). Unlike with other forms of government administration, there is no clear basis for the back-payment or back-dating of funds for people who are successful at the internal review or appeals stage. Neither the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA**) nor the Act of Grace payment generally applies to the NDIA. There is no legislative basis to account for time without funding in the period before a decision or a settlement.

The recent Tune Review report recommends the adoption of a Participant Service Guarantee which includes prescribed timeframes for the conduct of reviews. PIAC supports the recommendation and proposed timeframes. These timeframes must be monitored closely to ensure they are being met.

The Tune Review however, recommended against the introduction of a financial penalty to the NDIA for failure to meet timeframes.¹⁸ PIAC submits that there must at least be *reimbursement* of a participant's expenditure on supports and *compensation* for any economic loss if the NDIA's refusal to fund that support is ultimately overturned at internal review or on appeal. This is not a financial penalty, but reflects only economic loss suffered by a participant owing to incorrect decision-making by the NDIA. This may create a financial disincentive for the NDIA to avoid delays, but more importantly, will ensure participants do not carry the burden of delayed reviews.

¹⁷ Rick Morton, 'Exclusive: 500 children forfeited to state in NDIS standoff', *Saturday Paper* (online, 12 October 2019), <<https://www.thesaturdaypaper.com.au/news/politics/2019/10/12/exclusive-500-children-forfeited-state-ndis-standoff/15707988008900>>.

¹⁸ David Tune, *Removing Red Tape and Implementing the NDIS Participant Service Guarantee: Review of the National Disability Insurance Scheme Act 2013* (Report, December 2019) 171, [10.60].

Recommendation 5: Reimbursement of a participant's expenditure on supports or economic loss

The NDIA should reimburse the participant, their family or their carer, as the case may be, for expenditure:

- (a) where a participant's statement of participant supports is varied or set aside and substituted on review or appeal, including during any settlement of a pending appeal, and*
- (b) the variation or substitution is to grant that participant funding for a requested support which was originally denied or only partially funded by the NDIA, and*
- (c) during the course of the review or appeal process, the participant, their family or carer paid for the support with funding outside of the NDIA or otherwise suffered economic loss because of the denial of support by the NDIA.*

3.2 Complexity in internal review process

Related to the issue of delays is the complexity in the internal review process as it is set out in the NDIS Act. Deputy President Forgie's comments in *LQTF and National Disability Insurance Agency* [2019] AATA 631 at [2]-[3] describe the complexities inherent in the process:

In giving these reasons, I have set out the steps that must be followed in seeking review of a statement of participant supports and review of a participant's plan. I have done so in order to illustrate the complexity of the review process provided for in the NDIS Act. It is a process that I respectfully suggest is often too complex for a participant to navigate with any ease, let alone with any confidence, and that is not conducive to the NDIA's being able to respond quickly to the needs of participants. It is a process that may leave both the participant the NDIA disagreeing about the proper characterisation of the decision that has been made.

It is important that the NDIA's decision be characterised for it is apparent from what I have said below that the review may take a very different course depending on whether a decision is characterised as, for example, a decision not to reassess a participant's plan, a decision to review a participant's plan or a decision to review a statement of supports. A request may be made for review of the first and the third but not of the second. Review of the third will address what are reasonable and necessary supports. Review of the first, however, will not for it is limited to whether or not the plan should be reassessed. It may consider whether the statement of participant supports is adequate but only in the limited context of deciding whether or not to reassess the plan. If the review leads to a decision setting aside the initial decision not to reassess a participant's plan, the practical result will be that the NDIA must review the plan. Only when the plan has been approved, will a participant be able to request review by a reviewer within the NDIA of the statement of supports that the Chief Executive Officer (CEO) of the NDIA has approved in making the plan. [Footnote omitted.]

In short, there is confusion between an internal review sought of 'a decision not to reassess a participant's plan' (that is, a decision made under s 48(2)) and an internal review sought of a decision not to approve a statement of supports (that is, a decision made under s 100(6), with regard to s 33(2)).

Under s 33(2) (combined with ss 99 and 100(6)), a participant can seek an internal review of a decision around the types of supports approved within three months of the decision being made. Where that internal review, made under s 100(6), confirms the original decision, the participant

can appeal the decision to the AAT under s 103. The AAT can then consider the reasonable and necessary supports being requested by the participant.

In contrast, under s 48, a participant can request a review of their plan at any time. This could be for a range of reasons, such as for changes in the participant's circumstances or if the plan is not working as envisaged for the participant. Section 48(2) only requires the CEO to decide whether or not to conduct a review of the plan. A decision to refuse to conduct a review of the plan must be automatically reviewed internally under s 100(5), however any appeal from that decision to the AAT relates only to the decision to refuse the review. It does not involve a review of the substance of the supports approved.

If the AAT decides that the participant's plan should have been reviewed, the plan will go back to the CEO to conduct that review under s 48. If the CEO approves a new plan which the participant does not agree with, the participant will have to go through the ss 33(2) and 99 process outlined above, and potentially end up in the AAT a second time.

As the Commonwealth Ombudsman described in its report, notwithstanding the guidance provided to NDIA staff, there are situations where participants who have requested a review of their statement of supports have instead been subjected to a plan review. The Ombudsman stated:

The inaccurate classification of review requests creates issues for participants—who are required to await the outcome of two processes (rather than one) before they can access their right to external merits review; and the NDIA—which unnecessarily expends time and staff resources on additional review processes. As highlighted in our submission to the Productivity Commission's inquiry into NDIS costs, 'double handling' of reviews will likely also drive additional complaints to the NDIA, which are a further drain on resources.¹⁹

There are also examples of the opposite situation – where a request for an unscheduled plan review under s 48 is misinterpreted by the NDIA as a request for review of the statement of participant supports. See, for instance, *LQTF* at [13].

Information on the NDIS website on how to navigate the review process for system users is confusing and does not mention section 48 requests and distinguish them from section 100 requests.²⁰ Indeed, the Tune Review's survey recently found that only 28% of 232 respondents found the review and appeals processes to be clear.²¹

The Ombudsman recommended that the NDIA update its Operational Guidelines and decision letter templates to clarify the distinction between an 'internal review' of a decision or a 'plan reassessment'. We agree with this recommendation as an interim measure.

¹⁹ Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013* (Report, May 2018), [3.14].

²⁰ National Disability Insurance Agency, 'How to review a planning decision', *National Disability Insurance Scheme* (Web Page, 5 November 2019) < <https://www.ndis.gov.au/participants/how-review-planning-decision>>.

²¹ David Tune, *Removing Red Tape and Implementing the NDIS Participant Service Guarantee: Review of the National Disability Insurance Scheme Act 2013* (Report, December 2019) 199.

However, we consider the proposed updated terminology remains apt to mislead. The semantic distinction between an ‘internal review’ of a participant’s plan and a ‘reassessment’ is not useful for people navigating the NDIS system.

Instead, we consider that amendments to the NDIS Act are required to reduce the complexity – and the bureaucratic red tape – in distinguishing between ‘internal reviews’ and ‘reassessments’. One manner in which this could be streamlined is to treat all s 48 requests as requests both for a ‘reassessment’ of the plan and for a review of the statement of participant supports.

Practically, there is no reason to separate internal reviews from reassessments – a decision refusing a reassessment is, in reality, a decision that the existing statement of supports is appropriate. A decision to reassess in turn, implicitly accepts that the existing statement of supports is either no longer appropriate, or was not appropriate from the start, and involves a decision to review the supports. Any decision in respect of an internal review from a decision under s 48 should enable the participant to appeal to the AAT to review the approved statement of participant supports.

There is unlikely to be any considerable increase in the number of AAT appeals, given that, first, internal review decisions following decisions made under s 48 can already be subject to appeal, and second, the AAT would still need to determine that a review of the plan is warranted under s 48, before deciding what the new plan should be. This legislative change would reduce the duplication of processes highlighted by the Ombudsman, simplify the appeal process, and eliminate appeals to the AAT raising jurisdictional issues regarding the distinction between ss 48 and 100.

Recommendation 6: Amend the NDIS Act to reduce complexity of the review process

The Government should consider amendments to the NDIS Act to reduce the complexity between plan ‘reassessments’ under s 48 and internal ‘reviews’ under s 100. All requests under s 48 should be treated as both a request for ‘reassessment’ and internal ‘review’.

3.3 Implementing systemic changes following appeals

There are a number of instances where the NDIA has failed to implement, or unreasonably delayed implementation of, changes following settlement or decisions at the AAT or even at the Federal Court of Australia. The key issue is that the failure to implement systemic changes following successful challenges results in inefficiencies in decision-making, and unfairness to people unwilling or unable to go through the appeals system.

It also means the oversight mechanism is ineffective, if policies which are deemed inconsistent with the NDIS Act continue to be applied by the NDIA.

First, PIAC has been made aware of cases where a participant settles their dispute with the NDIA over funding for reasonable and necessary supports, only to face a cut in their level of funding at the next plan review, following which they are required to go through the appeals process again. This is also the case for matters that have been determined by the AAT. As the AAT’s decisions in relation to plans generally last for only 12 months, once the plan comes up for review, the NDIA retains the discretion to alter the plan. Notably, even after a decision from the AAT, the

CEO also maintains discretionary power under s 48(4) of the Act to review a participant's plan at any time.

Second, it appears that the NDIA has not always implemented, in a timely way, systemic changes to its policies following settlements or decisions. For example, in the case of Mr Liam McGarrigle, the outcome of a Federal Court decision in 2017 was not reflected in the NDIA's policies until October 2019. This change was only made following representations by PIAC and other organisations to the NDIA.

This delay is unacceptable. Court decisions that directly contradict NDIA policies and practices are binding and must be implemented systemically at the first opportunity. The failure to implement decisions swiftly undermines the oversight mechanism of the appeals process, and wastes resources by resulting in confusion and reviews and/or appeals on issues that should be considered settled.

The box below describes Mr McGarrigle's case.

Textbox 2
McGarrigle v NDIA ²²

Liam McGarrigle, a 21 year old man with autism spectrum disorder and an intellectual disability, sought to have his travel expenses to go to and from his home to a disability group program, his work and the gym, funded through the NDIS. The total cost was \$15,850. The NDIA's guidelines on transport funding was based on a three tier system, in which the NDIA would fund up to \$6,000 per year only in exceptional circumstances.²³ The NDIA acknowledged that the travel expenses for Mr McGarrigle was a reasonable and necessary support, but decided that it would grant funding for 75% of these expenses (\$11,850). This decision was affirmed by the AAT. By only funding 75% of the travel expenses, it was implied that it was reasonable for Mr McGarrigle's family and informal support networks to contribute 25%.²⁴

The Court decided that the NDIA should fund all of Mr McGarrigle's travel expenses which were determined to be a 'reasonable and necessary support'. The Court held that if the NDIA found that a participant's support was a reasonable and necessary support, it would need to fully fund the total expense, even if it exceeded the levels set by NDIA guidelines. This decision was handed down in March 2017, and was upheld on appeal to the Full Federal Court in August 2017.

It was not until 10 October 2019 that the NDIA's Operational Guidelines on transport were updated to (partially) reflect this decision.²⁵ Up until that date, the Guidelines cited the AAT's overturned decision for the proposition that:

When considering transport as a funded support, if the criteria relevant to including supports in a participant's plan are satisfied, this does not mean that the full cost of the support should be funded as it

²² *McGarrigle v National Disability Insurance Agency* [2017] FCA 308.

²³ *Ibid* [118].

²⁴ *Ibid* [62].

²⁵ See National Disability Insurance Agency, 'Including Specific Types of Supports in Plans Operational Guideline – Transport', *National Disability Insurance Scheme* (Web Page, 10 October 2019) <<https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport#12>>.

may be reasonable for a participant's family members, carers, informal networks and/or the community to provide some of this support.²⁶

The Federal Court, however, made clear that the full cost of the support must be funded if the transport is determined to be a reasonable and necessary support. Consideration of supports by family members, carers, informal networks and/or the community are only relevant to the 'activity or assistance' that could be provided by those networks, and not to financial contributions.²⁷ The Guidelines were recently amended to delete this paragraph.

However, the newly amended Guidelines continue to maintain a three tiered system and emphasises that the NDIS 'will provide *up to*' a certain amount. The three tiers also continue to be linked to generic categories of whether a person is working, studying or attending day programs, rather than being based on an individual's goals and needs. The Guidelines state that the amount could be higher only in 'exceptional circumstances' where a participant needs that support 'for their participation in employment'. It still does not make clear that where a person's transport supports are determined to be reasonable and necessary, and they exceed the capped amount, the full amount of that transport support will (indeed, must) be funded.

In relation to AAT decisions, in discussions with PIAC, the NDIA has taken the position that AAT decisions provide non-binding interpretations of law and policy, and therefore do not necessarily need to be implemented by the NDIA. While this may be technically correct, this results in an ineffective oversight mechanism, especially where the AAT has consistently decided on a particular policy issue or issued guidance on the application of the law.

An example is gym membership. The AAT has consistently stated, since the 2018 decision of *Milburn and National Disability Insurance Agency* [2018] AATA 4928, that gym memberships can, in certain circumstances, be funded by the NDIS. The reasoning in that decision has been accepted in two subsequent AAT decisions,²⁸ and has been raised by the NDIA itself in one of those decisions.²⁹ Despite this, the NDIA continues to state categorically on its website (last updated on 7 February 2020) that the 'NDIS does not fund gym memberships'.³⁰

This failure to make appropriate systemic changes to NDIA Operational Guidelines following Court and AAT decisions means that participants will be forced to initiate appeals on similar grounds as previous cases, simply to achieve a similar successful outcome in the individual case.

The NDIA should be transparent and accountable in implementing systemic changes to policies. This should occur not only following AAT and Federal Court decisions, but also where settlement outcomes are identified to have a systemic impact beyond the individual case being settled. There may be a number of ways of implementing this, including:

²⁶ See National Disability Insurance Scheme, 'Including Specific Types of Supports in Plans Operational Guideline – Transport' (Web Page, 18 July 2019) <<https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport#12>> (last accessed 16 August 2019, not currently available on the website).

²⁷ *McGarrigle* [2017] FCA 308, [97].

²⁸ See *McKenzie and National Disability Insurance Agency* [2019] AATA 3275, [69]; *Hoolachan and National Disability Insurance Agency* [2019] AATA 4798, [56]-[57].

²⁹ *Hoolachan and National Disability Insurance Agency* [2019] AATA 4798, [56].

³⁰ National Disability Insurance Agency, 'Support budgets in your plan', *National Disability Insurance Scheme* (Web Page, 7 February 2020) <<https://www.ndis.gov.au/participants/using-your-plan/managing-your-plan/support-budgets-your-plan>>.

- the implementation of a feedback loop which ensures that following an AAT or Federal Court decision, or settlement, the NDIA's lawyers advise the relevant policy team of the consequences of the decision for existing policy, and the policy team be required to consider whether changes are required to the policy; and/or
- a Policy Advisory Committee is set up, including select advocates and lawyers, to advise the NDIA of policy changes required following AAT or Federal Court decisions.

Any decisions made in response to particular AAT or Federal Court decisions should be reported in the NDIA's Quarterly Report. It may be that not all AAT or Court decisions require changes to policies. But where they do, as in *McGarrigle*, it should not take over two years for the changes to be (partially) implemented.

Recommendation 7: Implement a process for considering and implementing systemic changes following appeals and decisions

The NDIA should implement a transparent and accountable process for ensuring that systemic changes to policies are made following settlement or decisions made in the AAT or Court. These changes should be reported in its Quarterly Report to ensure transparency and accountability.

4. Conclusions: Improving choice and control for all Australians

The NDIS is a major piece of social reform which has the potential to revolutionise the way in which people with disability are supported to participate fully in the Australian community. The rollout of the NDIS represents a major challenge, and the community is committed to ensuring the scheme works as it should: to improve choice and control for all Australians.

This submission has highlighted that there are many issues in relation to NDIA decision-making on reasonable and necessary supports, as well as issues around the oversight of those decision-making policies and processes. Creating systemic change to improve these processes will provide greater transparency, consistency, accountability and equity across the entire scheme.