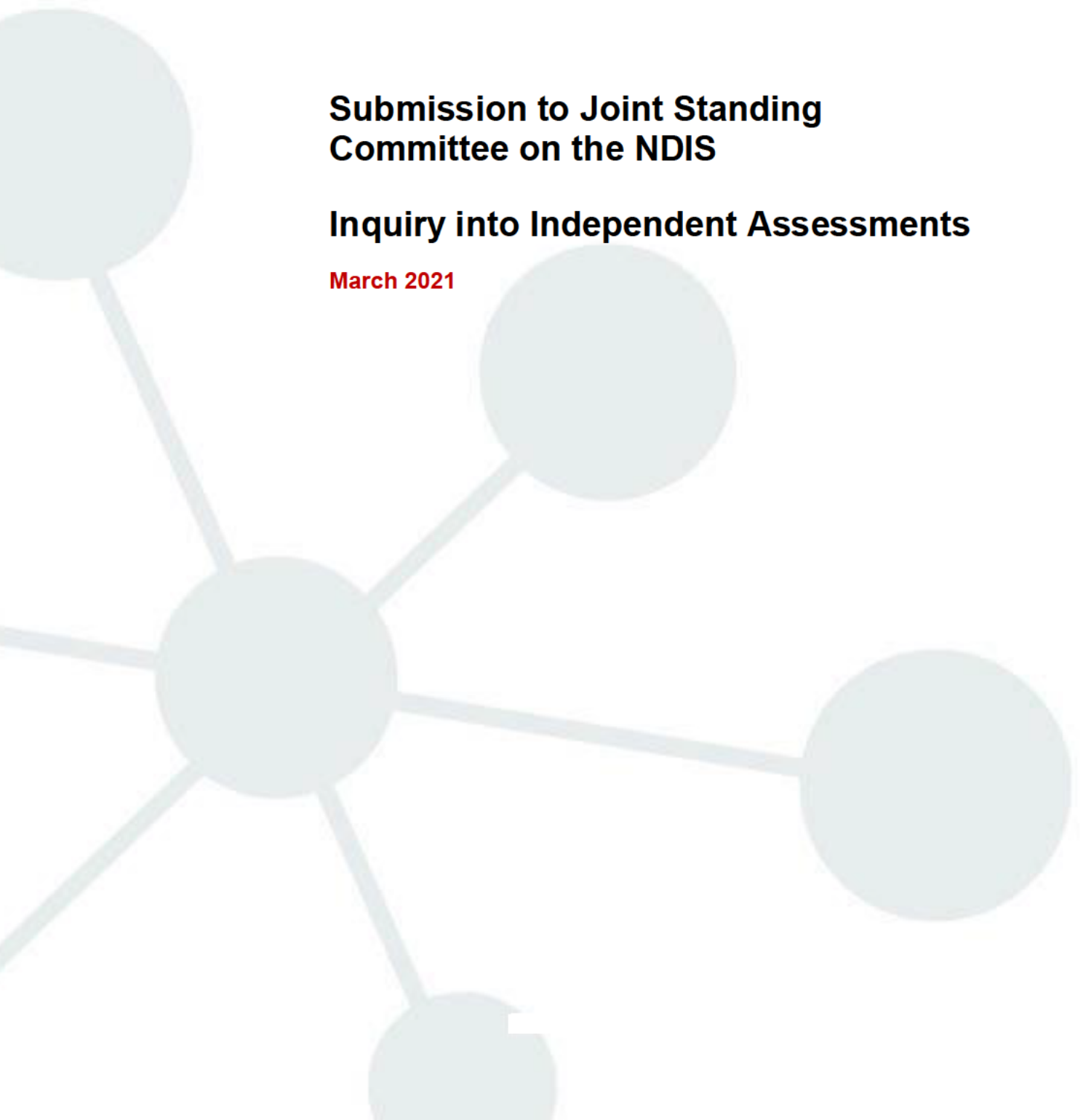


public interest
ADVOCACY CENTRE

Submission to Joint Standing Committee on the NDIS

Inquiry into Independent Assessments

March 2021



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
- 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.



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

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Recommendations

Recommendation 1 – Stop the rollout of mandatory independent assessments and co-design an assessments process with people with disability

The Government should immediate stop the rollout of mandatory independent assessments and changes to 'reasonable and necessary supports'. Instead, the NDIA should engage in meaningful consultations and co-design of the assessments process with people with disability, with the goal of improving the administration of the NDIS.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Joint Standing Committee's inquiry into independent assessments.

PIAC has lengthy experience in tackling barriers to justice and fairness experienced by people with disability. Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the NDIS for people with disability.

As part of our NDIS work, PIAC has been involved in a number of NDIS-related consultations, both privately and publicly, including in inquiries run by this Committee, the Australian National Audit Office, the Tune Review and the National Disability Insurance Agency (**NDIA**). In each of these contributions, PIAC has consistently raised concerns regarding the lack of transparency and accountability in the NDIS, and issues concerning consistency around decision-making.

While we are pleased to see the Government and NDIA acknowledge the issues raised concerning inconsistency in the NDIS, we are concerned by the introduction of mandatory independent assessments. These concerns again relate to transparency, accountability and decision-making in the proposed reforms.

In our view, the proposed reforms do not address these issues that have been repeatedly raised and which have been the subject of recommendations by various inquiry bodies. Instead, there is a real risk that these proposed reforms may introduce further transparency, accountability and governance issues.

Our submission addresses three matters:

- the proposed implementation of mandatory independent assessments without genuine consultation. On this matter we support and endorse the position taken by a large number of Australian disability organisations;
- the implications of independent assessments for NDIS planning, especially in relation to funding reasonable and necessary supports; and
- the lack of opportunities for review of independent assessment outcomes.

Our strong recommendation is for the rollout of mandatory independent assessments and changes to 'reasonable and necessary supports' to be stopped, and for the NDIA to properly consult and co-design a functional assessment process with people with disability. Our submission seeks to draw the Committee's attention to the serious deficits of the proposed reforms. We make no recommendations for fixing the current proposed reforms, as we do not believe they can be fixed in their current form.

2. Implementation of mandatory independent assessments

The overarching issue with the proposed reforms is that, while they seek to address the issue of inconsistent decision-making and inequitable access and planning decisions, the proposed solution of mandatory independent assessments will not resolve – and may entrench – those issues.

It is concerning that the Government and NDIA has not consulted adequately with the disability sector ahead of the implementation of independent assessments. While the NDIA points to the recently closed consultations in relation to independent assessments, the consultation questions did not ask *whether* independent assessments should be implemented or mandatory, but were directed only at *how* mandatory independent assessments should be implemented.

The NDIA's refusal to conduct genuine consultations is made more evident by the fact that three days after its independent assessment consultation closed on 23 February 2021, it announced the successful organisations who have been contracted to deliver independent assessments.¹

On 26 March 2021, the NDIA published its 'Post-consultation reports', noting the feedback provided in the consultation period.² While both reports acknowledged 'mixed' feedback to the proposed changes, the responses to the feedback was simply to provide 'further information' on the proposed changes. The CEO's introduction in both of these reports continue to refer to how 'critical' the rollout of the independent assessments is, notwithstanding the feedback provided about the independent assessments.

This lack of genuine consultation runs counter to the Tune Review Report. The NDIA and Government have stated on a number of occasions, including in the NDIA and DSS' joint submission to this inquiry,³ that the implementation of independent assessments was recommended by the Tune Review. But the Tune Review Report stated that this change would 'require extensive consultation with participants, the disability sector, service providers and the NDIA workforce.'⁴ The Tune Review Report noted that 'fundamentally', the success of these independent assessments will be largely dependent on the following:⁵

- a. the willingness of prospective participants and participants to work with NDIA approved functional assessors
- b. those assessors providing truly independent functional capacity assessments, so they are not perceived as agents of the NDIA or a tool designed to cut supports from participants.

The Tune Review Report also accepted the risks of disengagement of people with disability with NDIA independent assessors, especially for Aboriginal and Torres Strait Islander peoples, those from Culturally and Linguistically Diverse backgrounds, and people with psychosocial disability. For these reasons, Mr Tune's recommendation was for independent assessments to be *discretionary* powers to be exercised by the NDIA, including clear operational guidelines for the exercise of that discretion.⁶ The Government's proposed independent assessments is not the same as that recommended by the Tune Review.

¹ National Disability Insurance Agency, 'Independent assessment panel announced', media release, 26 February 2021, <<https://www.ndis.gov.au/news/6118-independent-assessment-panel-announced>>.

² National Disability Insurance Agency, *You said, we heard: access and eligibility policy with independent assessments*, 26 March 2021; National Disability Insurance Agency, *You said, we heard: planning policy for personalised budgets and plan flexibility*, 26 March 2021.

³ The Department of Social Services and National Disability Insurance Agency, *Joint Submission to the Joint Standing Committee on the National Disability Insurance Scheme's Inquiry Into Independent Assessments*, March 2022, Submission 13, 5-6. (**NDIA and DSS joint submission**).

⁴ David Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, December 2019 (**Tune Review Report**), [4.33].

⁵ Ibid.

⁶ Ibid, [4.39], Recommendation 7.

To this end, PIAC strongly supports and endorses the joint statement published on 11 March 2021 and now signed by over 100 organisations across the disability sector raising concerns about mandatory independent assessments.⁷ The joint statement addresses issues with the development and introduction of the independent assessments and the manner in which they are proposed to be carried out. We echo the requests made in the joint statement, being:

1. Immediately cease the rollout of compulsory assessments as currently planned.
2. Undertake a robust and transparent outcome evaluation of the current pilot of the new assessment process. This evaluation must be independent of the NDIA, led by experts and co-designed with people with disability, their families and the organisations that support them.
3. Undertake robust, independent and transparent trials of alternative approaches to improving consistency in access and planning – such as allowing a person’s existing health professionals to complete assessments using the same tools.
4. Once the trials and evaluations are complete, engage in a meaningful co-design process with people with disability, their families and the organisations that support them to ensure a fair and consistent approach to both access to the scheme and planning and to ensure people with disability receive the support they need.

PIAC also supports the joint submission lodged to the Committee by Roen Meijers on behalf of disability advocacy organisations.

The remainder of this submission seeks to draw the Committee’s attention to serious deficits in particular aspects of the proposed reform.

3. Reasonable and necessary supports: implications of independent assessments on NDIS planning

There are two aspects to the proposed reforms which will impact NDIS planning and the funding of reasonable and necessary supports.

First, the proposed reforms seek to shift from plans based on ‘reasonable and necessary supports’ to a ‘total reasonable and necessary level of funding for each participant’.⁸ That is, reasonable and necessary supports will no longer be the basis for participant support plans. This is a fundamental change to the way in which participants are provided supports.

Second, the introduction of independent assessments and the proposed use of these assessments for determining participant budgets will further reduce the ability of participants to exercise choice and control in their lives.

3.1 Total reasonable and necessary level of funding

The proposed shift to a ‘total reasonable and necessary level of funding’, which ‘will reflect the expected costs of providing a reasonable and necessary package of supports for a participant

⁷ The joint statement is available at <https://everyaustraliancounts.com.au/ndis-sector-statement/>

⁸ National Disability Insurance Agency, *Consultation paper: Planning Policy for Personalised Budgets and Plan Flexibility*, November 2010 (**Planning Paper**), 4.

with a similar level of functional capacity, support needs and environmental context⁹ marks a significant change from how the NDIS Act currently operates. Indeed, it will likely render existing judicial guidance on participant support plans irrelevant.

Currently, as part of the participant's plan, the CEO or his delegate is required to prepare and approve a statement of participant supports with the participant: s 33(2) of the NDIS Act. That statement must include reasonable and necessary supports, if any, that will be funded under the NDIS: s 33(2)(b). Section 34 then sets out the criteria for determining reasonable and necessary supports. The criteria include matters such as whether the supports will assist the participant to pursue their goals, to undertake activities and whether the supports are likely to be effective and beneficial to the participant – matters which take into account the individual person and their circumstances.

The proposed reform appears designed to remove the need to consider reasonable and necessary supports, and instead require the delegate to determine a single numeric figure for the amount of funding to be provided to a participant. It appears there is no link to the goals and objectives of a participant in determining the level of funding a person will receive: rather, goals and aspirations are relevant only in the decisions a person can make in determining how to allocate their personal budget.¹⁰

The NDIA's Planning Paper provides only limited and high-level information about what these changes mean from a practical and legal standpoint. In these circumstances, it is difficult to understand the full impact of this change and provide feedback on its substance.

While the NDIA frames this change as creating a more 'flexible plan budget' as it moves away from decisions about individual supports being 'reasonable' and 'necessary',¹¹ there is a danger that this shift will actually make it harder for participants to understand what they have been funded for, and raises at least the following issues:

- How will 'total reasonable and necessary level of funding' be determined? This is a significant question that goes to governance, accountability and transparency of the NDIS. There is no indication that the Government intends to create parameters or criteria that must be satisfied when a delegate determines the level of funding. The Full Federal Court has observed the difficulties of determining the contents or limits of the phrase 'reasonable and necessary supports',¹² as that term is currently used in s 34. This will be all the more so if funding is determined not by reference to specific supports, but at a global level. The Planning Paper explains that the level of funding will be determined as follows:

The funding provided in a personalised budget will be informed by the participant's individual circumstances, such as their age and where they live, and their functional capacity, including any relevant environmental factors, such as available informal supports. The outcomes of the participant's independent assessment will inform their personalised budget.¹³

⁹ NDIA and DSS joint submission, 7.

¹⁰ Planning Paper, 17.

¹¹ Submission 13, p 7.

¹² *National Disability Insurance Agency v WRMF* [2020] FCAFC 79, [252].

¹³ Planning Paper, 11.

This does not provide sufficient information to explain how exactly a person's reasonable and necessary level of funding will be determined. For instance, this could be used as backdoor to introducing means-testing to the NDIS, if the reference to a participant's 'individual circumstances' were to include their income as a factor.

- How will participants know whether their funding package is suitable – or 'reasonable and necessary' – for them? A participant would still have to identify each support they require, in order to ascertain whether the total amount will cover their needs. The determination of a single figure of funding, untied to any particular support, will make it harder for participants to understand whether their funding is sufficient for their needs. The Planning Paper states:

The personalised budget, informed by the independent assessment, will mean that planning will no longer need to focus on the negotiation and agreement of each individual support.¹⁴

The change from discussing and agreeing each individual support with the participant, to determining funding based on an independent assessment, shifts choice and control away from participants and gives it to the independent assessor. The independent assessor should not be used to determine the supports that a participant chooses for themselves.

- If there are no clear criteria enacted for the delegate to determine the 'reasonable and necessary level of funding', it will be near impossible for a participant to successfully challenge the amount of funding they have been granted. This is because there will be no reference point for how decisions are made by the NDIS delegate that can be used for the challenge.

If there are no clear criteria enacted to guide NDIS decision-making on the 'reasonable and necessary level of funding', the NDIA will wield enormous power in determining what each participant receives, with limited checks and balances through the reviews process (discussed further below).

3.2 Independent assessments and funding

The NDIA and DSS joint submission to the Committee states that:¹⁵

The outcomes of the participant's independent assessment will inform their personalised budget. This budget will reflect the expected costs of providing a reasonable and necessary package of supports for a participant with a similar level of functional capacity, support need and environmental context. This budget can be used by the participant to pursue their individual goals. *The budget is not derived from those goals*, though the budget will reflect the likely costs associated with important life stage transitions... [Emphasis added.]

It appears from this statement that the primary (and possibly the only) personalised factor for determining a participant's budget is their independent assessment. The remainder of the factors concern the 'expected costs' of providing supports to a participant in 'similar' circumstances.

¹⁴ Planning Paper, 14.

¹⁵ NDIA and DSS joint submission, 7.

These are not personalised to an individual, but rather comparative across other people with similar levels of functional capacity. Moreover, as observed above, an individual's goals are not relevant in determining the amount of funding. Goals are only relevant to the extent they can be pursued with the allocated budget.

This contrasts with the current approach, where an individual's goals are the first consideration in determining reasonable and necessary supports. Section 34(1) relevantly provides:

34 Reasonable and necessary supports

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

If independent assessments are to be the primary source of personalised information to be used to determine a participant's funding, the apparent manner in which independent assessments will be carried out is especially troubling. Having such assessments performed by private contractors who have never met the participant, using standardised tools, asking extremely personal and sensitive questions¹⁶ over three hours is highly inappropriate and unsuitable to determining the amount of funding for a participant.

Ultimately, the proposed changes would create a situation where a participant is given a lump sum amount of funding, based heavily on an independent assessment they may not agree with and cannot challenge, and which has been set without reference to their individual goals.

This is very far from the object of the NDIS, to 'enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports'.¹⁷

4. Review process

The NDIA has stated in its consultation papers that neither decisions on exemptions to independent assessments nor the independent assessments themselves are subject to review. The lack of review opportunities is a short-sighted attempt at reducing the number of reviews and appeals to the AAT, at the cost of delivering good outcomes to people with disability. There are a number of significant concerns with this approach.

4.1 Decisions on exemptions

In relation to exemptions to independent assessments, the refusal of an exemption is a significant decision, given that an applicant will be deemed to have withdrawn their access request if they do

¹⁶ See, for example, Dr George Taleporos describing his independent assessment and the extremely personal questions asked of him: <https://everyaustraliancounts.com.au/opinion/an-open-letter-to-minister-for-the-ndis-stuart-robert/>.

¹⁷ NDIS Act, s 3(1)(e).

not complete the independent assessment in the absence of an exemption.¹⁸ In effect, a refusal to grant an exemption may be the final decision that prevents access to the NDIS, if a person feels genuinely unable to undergo an independent assessment. In contrast to the position where a person can appeal a decision by the NDIA to refuse access to the Scheme, a person who has *in effect* been refused access because an exemption has not been granted will not have any legal appeal rights.

No explanation is provided as to why these decisions should not be reviewable. The NDIA's Access Paper acknowledges that circumstances which should give rise to exemptions are 'exceptional' in nature, and that individual circumstances need to be recognised.¹⁹ It also considers that exemptions may be granted where 'the process is likely to do more harm than benefit to the individual, and may pose a safety risk', or where there may be concerns about validity of the assessment.

In PIAC's view, the fact that exemptions will come down to individual circumstances and discretionary judgments about risk, safety and validity, combined with the significant impact of a refusal to grant an exemption, means it is important that these exemption decisions be subject to a review process. To do otherwise will lead to inconsistent decisions about exemptions that will differ depending on the exercise of discretion by individual delegates.

While we understand the NDIA may be seeking to limit reviews to reduce administrative burden and delays, reviews of exemption decisions must be available to ensure good public administration.

4.2 Review of independent assessment

The absence of a review process for independent assessments and the inability to request a second assessment (except in very limited circumstances)²⁰ is particularly troubling. The independent assessments are to be used to determine key criteria for a person's access to the NDIS, as well as for the purposes of determining their budget and plan. When it comes to access to the NDIS, independent assessments will, in practice, have a determinative impact on whether a person is able to access the NDIS. While it is the delegates who make access decisions, rather than assessors, it is not realistic that a participant with a negative independent assessment outcome would ever be granted access to the NDIS. When it comes to planning and funding decisions, as we have outlined above, independent assessments will play a significant role in the determination of the size of funding packages.

The significant impact of the independent assessment requires that a process for review be available.

We note the Tune Review came to the same conclusion, and recommended that participants should have a broad right to challenge independent assessment results if they are unsatisfied with the assessment 'for whatever reason'. Paragraph 4.34b of that Report states:

¹⁸ National Disability Insurance Agency, *Consultation paper: Access and Eligibility Policy with independent assessments*, November 2020 (**Access Paper**), 21.

¹⁹ Access Paper, 20-21.

²⁰ Access Paper, 23.

The NDIS Act should be amended to support the use of functional capacity assessments as proposed above. However, there are a number of key protections that need to be embedded as this approach rolls out, including:

...

b. participants having the right to challenge the results of the functional capacity assessment, including the ability to undertake a second assessment or seek some form of arbitration if, for whatever reason, they are unsatisfied with the assessment.

The AAT decision of *Ray and National Disability Insurance Agency*²¹ provides a practical example of the importance of allowing reviews of independent assessments.

That decision concerned whether Mrs Ray, who has autism spectrum disorder among other diagnoses, met the 'disability' criteria for access to the NDIS. The NDIA called an independent occupational therapist to assess Mrs Ray on one occasion for three hours to dispute the evidence provided by Mrs Ray's psychologist, who had seen her on 50 to 60 occasions, including out of the comfort and familiarity of her home.²²

In respect of the independent occupational therapist's evidence, the Tribunal considered that, not only were Mrs Ray's psychologist's observations 'more reliable', the occupational therapist's approach in determining access requirements under the NDIS was also not correct or appropriate.²³ Notably, the Tribunal criticised the occupational therapist's understanding of key events in Mrs Ray's life, including her schooling, employment and current state of mental health, and as a result, the Tribunal '[lost] confidence that Occupational Therapist X's opinions were based on an accurate understanding of Mrs Ray's background, past achievements and her current state of mental health.'²⁴

This demonstrates the need for independent assessments to be subject to review and to be challenged for accuracy. It is highly unlikely that a three hour session with a stranger is going to provide a full picture of a person's functional capacity. There are likely to be errors or misunderstandings by the independent assessor, as the *Ray* case highlights. The weight given to independent assessments means that they must be open to challenge.

The NDIA's response to concerns about the inability to seek review of independent assessments is to point to existing avenues for review, being the ability to seek review of access decisions and planning decisions, including on appeal to the AAT.

However, the combination of changes to the reasonable and necessary supports funding and the inability to seek review of independent assessments makes planning decisions extremely difficult to challenge.

We have already identified above the issues with the proposed changes to reasonable and necessary level of funding, being the lack of clear criteria for how decisions about funding will be made, and the reliance on independent assessments for those decisions. These funding decisions will be very difficult to appeal given funding decisions are essentially at the discretion of

²¹ [2020] AATA 3452.

²² Ibid, [78].

²³ Ibid, [132], [140].

²⁴ Ibid, [148].

the delegate, based on a person's independent assessment and how they compare to others in similar circumstances. If independent assessments – a key underlying basis for funding decisions – are not subject to review, then review of the ultimate funding decision will be of limited value.

4.3 Provision of independent assessment results

In order for participants to be able to challenge independent assessment results, they must also be provided with a full copy of their independent assessment. The NDIA's Access Paper indicates that only a 'summary of their independent assessment results and an explanation of the access decision' will be provided, along with guidance to help applicants understand the results.

It is not clear why an applicant should not be provided with their full independent assessment results. Provision of the full independent assessment would better fulfil the objects and general principles of the NDIS Act, including in enabling people with disability to exercise 'choice and control' in the pursuit of their goals, to ensure people with disability have the same rights to pursue any grievance, and to determine their own best interests in decisions that will affect their lives.

Provision of the full independent assessment empowers applicants in a number of ways, including by:

- allowing the applicant to ensure the assessor has understood and considered all relevant issues;
- ensuring the applicant has all relevant information if they wish to appeal a decision to refuse access;
- allowing the applicant to have the benefit of the functional capacity assessment that has been conducted, to use as they wish, for instance to provide to other health care providers, service providers, or employers; and
- most importantly, giving applicants information which is about them. This in itself should be sufficient reason for providing the applicant with the full assessment report.

The current proposal is for the full assessment results to only be provided upon request. We submit that full assessment results must be provided automatically upon completion of the assessment.

5. Conclusion

The proposed reforms do not address the existing transparency, accountability and governance issues that have been repeatedly raised and which have been the subject of recommendations by various inquiry bodies. Instead, the proposed introduction of mandatory independent assessments and changes to reasonable and necessary supports funding are being made without proper consultation, carry the risk of perpetuating existing public administration issues, and are a step backward for the NDIS.

PIAC joins the disability community in calling for an immediate stop to the rollout of mandatory independent assessments and changes to 'reasonable and necessary supports'. Instead, the NDIA should engage in meaningful co-design of the assessments process with people with disability, with the goal of *improving* the administration of the NDIS.