

25 August 2021



Joint Standing Committee on the National Disability Insurance Scheme  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee

### **Submission letter to the Joint Standing Committee on the NDIS' General Issues Inquiry**

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

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, especially in relation to the reviews and appeals process.

We write in support of the joint submission to the Committee from disability advocates entitled 'Unreasonable and Unnecessary Harms' (**Joint Submission**).

In particular, we emphasise five points and recommendations made in that submission.

#### **1. Greater transparency and accountability is needed: publication of AAT settlement outcomes**

PIAC has previously made submissions to this Committee concerning the need for AAT settlement outcomes to be published in a de-identified manner. This recommendation has been adopted twice by the Committee in its previous inquiry into Planning.<sup>1</sup> The Australian National Audit Office (**ANAO**) has made similar findings of the need for the NDIA to improve decision-making by using outcomes data from AAT reviews and early resolution outcomes.<sup>2</sup>

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<sup>1</sup> Joint Standing Committee, Final report into NDIS Planning (December 2020); Joint Standing Committee, Interim Report into NDIS Planning (December 2019).

<sup>2</sup> Australian National Audit Office, Decision-making Controls for NDIS Participant Plans (Report, 2020), [3.84] (Recommendation 2).

We do not seek to repeat the reasons behind this submission, which the Committee has previously heard and well understands,<sup>3</sup> and which the Joint Submission succinctly summarises at pages 35-36.

However, in circumstances where AAT appeals continue to rise and settlements continue to be significant, the NDIA's refusal to implement this simple recommendation must be challenged.

The Joint Submission's analysis of the AAT and NDIA data shows that, in 2019-2020:<sup>4</sup>

- Out of 18 NDIS cases that were decided by the AAT, 13 resulted in a variation to the NDIA's decision. That is, 72% of cases were at least partially in favour of the applicant; and
- Out of 1,012 cases that were resolved by consent between the parties, 985 resulted in a variation to the NDIA's decision. That is, in 97% of cases that were resolved by consent, the NDIA itself agreed to change its original decision at least partially in favour of the applicant.

As the Joint Submission states:

These figures paint a bleak picture of the NDIA - they show that of the decisions appealed to the AAT, the NDIA got the vast majority wrong. The comparison with non-NDIS appeals shows that this level of poor decision-making is not seen in the AAT's review of any other government decision-making.<sup>5</sup>

We also understand there is a significant and growing backlog of appeals awaiting NDIA case management.

As we have previously submitted, the publication of AAT settlement outcomes would ensure more consistent and accountable decision-making by the NDIA and allow participants to better understand the kinds of supports that might be sought, leading to better NDIA decision-making and fewer appeals. We urge the Committee to consider this recommendation again and encourage the NDIA to implement it.

## **2. Effectiveness of the AAT as an oversight mechanism is undermined by the NDIA's failure to implement systemic changes**

We have previously made submissions to this Committee regarding our concerns that the NDIA is failing to implement systemic changes to policies following AAT decisions. In our submission to the Committee's General Issues inquiry of 2020, we stated:<sup>6</sup>

There are a number of instances where the NDIA has failed to implement, or unreasonably delayed implementation of, changes to policies and practices following settlement or decisions at the AAT or even at the Federal Court of Australia. This is a key issue, as 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 (and thereby unlawful) continue to be applied by the NDIA.

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<sup>3</sup> Joint Standing Committee, Final report into NDIS Planning (December 2020), [10.83]-[10.91].

<sup>4</sup> Joint Submission, 12-13.

<sup>5</sup> Joint Submission, 13.

<sup>6</sup> Public Interest Advocacy Centre, Submission to the Joint Standing Committee Inquiry into General Issues around the implementation and performance of the NDIS (13 July 2020), 9-10.

Again, we appreciate the Committee well understands this point.<sup>7</sup>

We are compelled to raise it again given that, as stated in the Joint Submission, this issue is persistent. NDIA policies and operational guidelines continue to be inconsistent with principles well-established by the AAT and Federal Court, including in respect of transport funding and gym memberships.<sup>8</sup>

In circumstances where the data demonstrates that appeals to the AAT are increasing and overwhelming NDIA resources, and where the vast majority are being settled in favour of applicants, the apparent refusal to establish a process for implementing systemic changes is particularly troubling. We encourage the Committee to explore why this continues to be the case.

To this end, we reiterate and emphasise recommendations 18 to 20 of the Joint Submission.

### **3. Guiding Principles on the Conduct of NDIS appeals**

We support the recommendations from the Joint Submission in respect of the need for Guiding Principles on the Conduct of NDIS Appeals to be co-designed between the NDIA and disability representatives.

The Joint Submission sets out clearly the issues faced by participants going through the appeals process, including concerns with the NDIA's approach to appeals and the power dynamic between the NDIA's legal team on one hand and non-legally represented applicants on the other. The creation of Guiding Principles, in partnership with disability representatives, would assist in making the process less adversarial, set clear expectations for the NDIA and participants, and assist in rebuilding trust in the NDIA.

The Guiding Principles would also be an appropriate accompaniment to the Participant Service Guarantee, which the NDIA has already started implementing. This approach is consistent with the recommendations of the Tune Review and, properly designed, would go some way to addressing the concerns of participants and advocates in appeals.

### **4. The appeals process needs to be fixed**

The Joint Submission raises concerns in relation to the jurisdictional complexities that arise in review and appeals process at pages 17 to 19. These process issues are well-known and have been raised by numerous AAT members (as quoted in the Joint Submission) and in the Tune Review report.<sup>9</sup>

The need to fix these jurisdictional issues urgently is best demonstrated through the April 2021 decision of *QDKH and NDIA* [2021] AATA 922 and the subsequent decisions handed down this year. In *QDKH*, the AAT held that it did not have jurisdiction to consider additional supports that were requested by the applicant during the dispute resolution process, but which were not initially raised at the internal review stage. The AAT only has jurisdiction in respect of supports which had been put before the reviewer.

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<sup>7</sup> Joint Standing Committee, Final report into NDIS Planning (December 2020), [10.87]-[10.89].

<sup>8</sup> Joint Submission, 37-38 and 42-43.

<sup>9</sup> David Tune AO PSM, Review of the National Disability Insurance Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee (December 2019), [9.23]-[9.32].

In the four months since *QDKH* (which is currently on appeal to the Federal Court), there have been no less than eight decisions of the AAT which have sought to address this issue, including:

- *Young and NDIA* [2021] AATA 1555, where the AAT considered itself bound by the decision in *QDKH*;
- *BWLK and NDIA* [2021] AATA 1631; *NDIA and Napper* [2021] AATA 2363 and *CRWR and NDIA* [2021] AATA 2514, where the AAT agreed with the principle in *QDKH*;
- *VXVL and NDIA* [2021] AATA 1709, where the AAT member came to a different view, determining that the Tribunal has jurisdiction to consider supports not identified before the primary decision-maker or internal reviewer 'so long as those supports *could* have formed part of the primary decision' (at [28], emphasis in original.). This decision was followed by the AAT in *Dunstan and NDIA* [2021] AATA 2406 and *Steley and NDIA* [2021] AATA 2539;
- Most recently, the August 2021 decision of *YLLJ and National Disability Insurance Agency* [2021] AATA 2780, which appeared to distinguish the approach in *QDKH*.

The issue raised by *QDKH* and subsequent cases is just one example of the jurisdictional issues that the NDIS Act has raised, but emblematic of the need for amendment to the NDIS Act to clarify the AAT's jurisdiction. The ongoing failure to do so ties up participants as well as AAT, NDIA, legal and advocacy resources in costly jurisdictional disputes that leave participants worse off.

#### **5. The Committee should initiate an inquiry into the NDIS internal and external review processes**

In light of the longstanding nature of the issues identified above and in the Joint Submission, and the fact that recommendations addressing these matters have been made repeatedly by various inquiries without Government implementation, we echo the Joint Submission's recommendation for an inquiry into the NDIS internal and external review process.

It is welcome that the NDIA is seeking to rebuild trust and co-design reforms with disability communities. It is timely for the Committee to examine how the review and appeals process can be improved to ensure it is less adversarial and leads to better administrative decision-making.

Yours sincerely,

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