



public interest
ADVOCACY CENTRE

Submission to the Joint Standing Committee on the NDIS

Planning Inquiry

6 September 2019

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 and communication.

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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Introduction and context

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to submit brief recommendations to the Committee on its consideration of NDIS Planning.

PIAC has lengthy experience in tackling barriers to justice and fairness experienced by people with disability. As part of this work, in July 2019, PIAC commenced a legal advocacy project to deliver better outcomes under the National Disability Insurance Scheme (NDIS) for people with disability.

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 reported a range of concerns, particularly in relation to application 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.

This submission draws on our consultations with people with disability, peak bodies, disability advocacy organisations, Legal Aid Commissions, academics and other stakeholders, in the context of our NDIS project. In line with the scope of our project, the submission is limited to paragraph (i) of the terms of reference, namely the appeals process, and recommendations to reduce the number of appeals.

1. Incidence of appeals

PIAC recognises the importance of having an effective, efficient and user-friendly appeals system for people with disability to challenge NDIA decisions, and to ensure that the voices of people with disability are being heard. However, appeals are necessarily time-consuming, stressful and burdensome on people with disability and their carers and advocates, as well as on the limited resources of the NDIA. Appeals to the AAT – and beyond – would ideally be an uncommon occurrence if the planning process is working well.

Unfortunately, the figures suggest otherwise. The latest Quarterly Report published by the NDIA in June 2019 indicates that there have been 2,233 appeal applications lodged in the AAT since rollout, and that the number of AAT appeals lodged has been trending upwards.¹ Indeed, the AAT reports that its NDIS Division has the second largest caseload of all divisions.

Through our consultations with key stakeholders, we have identified a number of reasons behind the high incidence of appeals to the AAT. These include:

- poor understanding of participants' needs by planners and insufficient consultation of participants in the preparation of their plans, which results in a mismatch between the needs

¹ National Disability Insurance Agency, *COAG Disability Reform Council Quarterly Report* (Report, 30 June 2019) 96.

- of the participant and approved plans. This is a key driver of appeals, and to that end, we support the submissions of People with Disability Australia on this issue;
- lack of transparency around typical support guidelines or standard packages being funded; and
 - lack of transparency around AAT settlement outcomes.

This submission focuses on the lack of transparency around AAT settlement outcomes.

Based on the most recent Quarterly Report, approximately 96% of all finalised cases before the AAT were finalised through settlement.² The nature of settlements are private, confidential and non-binding on non-parties to the settlements.

PIAC supports early resolution of disputes and agrees with the need to maintain confidentiality and privacy over what are intrinsically private matters relating to a person's disability and support needs. However, we consider that the lack of transparency around these outcomes creates two factors which drive up the number of appeals to the AAT.

First, it leads to a lack of accountability in the NDIA in ensuring that its decisions around funding are made consistently, which contributes to poor planning and decision-making.

Secondly, it hinders the ability of NDIS participants to understand the types of supports and level of funding which are being provided to others in similar situations. It also means that potential appeal applicants do not have information as to the realistic outcomes of appeals.

There are mechanisms by which transparency around settlement outcomes can be improved, while still balancing confidentiality and privacy concerns for individuals. We address these below.

1.1 Lack of accountability in decision-making

The lack of transparency in settlement outcomes means that it is difficult to hold the NDIA accountable for lack of consistency in decision-making. Throughout our consultations, PIAC has been given a considerable number of examples of a lack of consistency in decision-making, which is affected by the lack of transparency in settlement outcomes. The types of inconsistency include:

- inconsistency in the funding of support plans for people with similar disabilities and in similar situations. The most prominent example of inconsistency raised with us is for children and young people with autism, where 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). The level of funding provided in support plans should not be dependent on the capacity of participants to advocate for themselves, rather it should reflect the actual needs and goals of participants; and
- inconsistency in the funding of support plans for the same person at the next plan review following a settlement. We have been informed that there have been many cases where a

² Ibid. The Report states that 1,522 cases out of 1,576 finalised cases had been resolved by settlement as at 30 June 2019.

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.

The Committee has previously noted these inconsistencies in its March 2019 report.³

Increasing the transparency in settlement outcomes will assist with addressing these inconsistencies, as it will allow some level of public accountability in ensuring the NDIA makes decisions consistently with matters that it has settled. We consider that this will go some way to reducing the amount of appeals on the basis that NDIA decisions will be more consistently made.

1.2 Improving the ability of participants to understand decisions and outcomes

From the perspective of participants, the lack of transparency impairs the ability of participants, their carers and their advocates to understand the types and level of supports which the NDIA is willing to provide following an appeal, as well as realistic outcomes of appeals, and the time taken to achieve settlement. This exacerbates the lack of transparency around typical support guidelines which the NDIA uses to guide its decisions on reasonable and necessary supports.

Participants have limited ways of understanding the types of supports they can ask for and the amount of funding that could be provided. We consider that this uncertainty plays a role in increasing the incidence of appeals, as participants are aware only that many other participants' support plans are increased when they go through the appeals process. Providing settlement outcomes will provide participants, their carers and their advocates with more information around what participants can request and what they might expect from their plans, and assist in tempering expectations around realistic outcomes. This will assist participants in determining whether their plans are reasonable, and whether they wish to appeal to the AAT.

Combined with better and more consistent decision-making from NDIA planners, we consider that this will have the effect of reducing the number of appeals to the AAT, in a way which improves outcomes for participants and efficiency for the administration of the NDIA.

2. Presentation of settlement outcomes

The release of information around settlement outcomes would not be an approach unique to the NDIA. The Australian Human Rights Commission, for example, keeps a Conciliation Register, which provides summaries of a selection of complaints which have been settled under the Commission's conciliation process.⁴ The Register provides information on:

- the grounds on which the discrimination was alleged;
- the area in which the discrimination was alleged, for instance in education or workplace;
- brief details on the outcome obtained;
- the settlement amount;
- the year of settlement; and

³ Joint Standing Committee on the National Disability Insurance Scheme, *Progress Report* (Report, March 2019) 20-21

⁴ The Register is available at <https://www.humanrights.gov.au/complaints/conciliation-register> (last accessed 5 September 2019).

- a de-identified narrative detailing the nature of the allegation, the respondent's position, and the nature of the settlement.

We recommend that the NDIA publish and maintain a similar register of settlement outcomes. The detail provided in the register should be de-identified, but should otherwise be as fulsome as possible, to best increase transparency, improve accountability, and assist participants in determining whether or not they should pursue an appeal. The register should contain at least the following information:

- the nature of the participant's disability;
- whether the participant was represented by an advocate or lawyer throughout the appeals process;
- the number of days taken for the determination of the internal review;
- the number of days taken between the AAT application being lodged and the settlement being finalised; and
- a de-identified narrative detailing:
 - the supports being requested by the participant;
 - the approved plan as compared to the supports requested; and
 - the settlement outcome.

The NDIA should consult with participants and advocates to identify what further details would be useful.

3. Recommendations

Recommendation

The NDIA should publish information around 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.