



NDIS

2021 A Year
in Review

2021 has seen an extraordinary amount of activity around reform to the NDIS. In this end-of-year report, we take a step back and look at the key legal developments of the year and look ahead to another year of reform.

WHAT HAPPENED IN 2021?

Over the past 12 months, we have seen:

- A new Minister for the NDIS;
- Numerous consultations run by the National Disability Insurance Agency (**NDIA**) including consultations on access and eligibility, personalised budgets, young children and their families, supported decision-making, home and living, and interventions for autistic children;
- The final report on planning from the Commonwealth Parliament's Joint Standing Committee on the NDIS;
- The Joint Standing Committee's independent assessments inquiry;
- The announcement of a new Joint Standing Committee inquiry into scheme implementation and forecasting;
- The introduction of NDIS legislative amendments on the Participant Service Guarantee and Other Measures and associated Committee reports on the Bill; and
- Changes to the NDIS Quality and Safeguard Commission's powers.

We have seen countless media reports on problems with the NDIS, numerous parliamentary committee appearances by NDIA representatives and the Minister, leaked drafts of legislation and briefing materials, and a huge increase in the number of matters going to the Administrative Appeals Tribunal (**AAT**).

But remarkably, at the end of the year, the *National Disability Insurance Scheme Act 2013* remains in mostly the same form as when the year started.

This report has been produced by Chadwick Wong at Public Interest Advocacy Centre and Dr Darren O'Donovan at La Trobe University.

We acknowledge and pay our respects to the Gadigal as the Traditional Owners of the land on which our office stands. We recognise that sovereignty over Gadigal land was never ceded and stand with First Nations people in their struggle for justice.

WHAT DIDN'T HAPPEN?

Despite all the buzz of activity this year, nothing of substance has changed in the NDIS Act.

On the one hand, the failure of some Government proposals to proceed was welcome.

There was a significant push from the NDIA and Government to implement independent assessments and personalised budgets. But effective advocacy from the disability community against these policies led to the Government abandoning them.

Independent assessments and personalised budgets have **not** been implemented. There have also been no changes to the meaning of 'reasonable and necessary supports.'

This represented a major victory for the disability community, demonstrating the strength and unity of the community.

On the other hand, we also did not see progress on some of the positive recommendations made by the Joint Standing Committee in its Planning report.

The Joint Standing Committee made several recommendations which were based on submissions from the disability community.

These recommendations included:

- Requiring the NDIA to provide detailed draft plans to participants before their meeting with the planner
- Requiring NDIA planners to provide participants with personalised material about how to access supports that the NDIS will not fund, because it is funded under another support system (like health services)
- Changing the law to clarify that if the NDIA thinks a support should be funded by another support system, that other support system must actually provide that support
- Providing greater transparency around the administration of the NDIS – for example, around AAT settlement outcomes and the work of the Technical Advisory Branch
- Encouraging NDIS planners to develop specialisations in particular types of disabilities

Despite the unanimous support for the recommendations by the Committee – including its Government members – the Government either did not agree to, or did not implement, these recommendations.

What were the independent assessment and personalised budget proposals?

Independent assessments were 'functional capacity' assessments that the Government proposed to require all NDIS participants to undergo. No longer would participants be able to rely on reports from their own treating doctors and therapists to prove their functional capacity. They would need to undergo 3-hour assessments by 'independent' assessors unknown to them. These assessments would be paid for by the NDIA, and would have significant impacts on who could access the NDIA and how much funding they received.

The Government also proposed an approach of 'personalised budgets' to change the way supports were funded under the NDIS. Instead of working out funding for each individual person based on the 'reasonable and necessary' supports they needed, each participant would be compared against one (or more) of 400 'personas' or categories. They would then get a lump sum of funding based on the category they were assigned. That amount of funding might not take into account the specific supports they wanted. This would have created a less individualised model of funding supports.

WHAT IS HAPPENING NOW?

There are three notable reform processes happening right now.

1. The first is the **NDIS (Participant Service Guarantee and Other Measures) Bill**.

PIAC has summarised the key proposed changes on [our website](#). The Bill introduces some welcome improvements, including inserting timeframes and a 'service guarantee' for participants, but also some concerning changes – like allowing rules to be made by the Minister which could create new requirements for accessing the NDIS and broad powers for the NDIA CEO to change participant plans.

A number of disability representative organisations recommended, along with PIAC, that these concerning changes be fixed before the Bill is passed.

The Bill was introduced to the House of Representatives on 28 October 2021. But the passage of the Bill has stalled. It was not debated this year, and there will be a limited number of sitting days next year for it to be passed before the election.

2. The second is the **co-design process for reforming the NDIS**.

Following the failure of independent assessments, the Government agreed to a process of co-design by including disability and carer representative organisations in developing future reforms to the NDIS. A co-design advisory group has now been set up to drive this reform process.

3. The third is the **Joint Standing Committee's new inquiry into 'current scheme implementation and forecasting for the NDIS'**.

This inquiry has a broad scope and will look at things like:

- the interaction between the NDIS and non-NDIS services (like health, education and justice services);
- the reasons for inconsistencies in plan funding between NDIS participants with similar needs;
- how the NDIS is funded, including current and future funding sources; and
- financial sustainability issues for the NDIS.

The co-design process and the Joint Standing Committee's new inquiry are likely to raise significant matters for reform over the coming years.



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WHAT ABOUT THE AAT AND FEDERAL COURT?

Alongside this law reform, the AAT has seen a significant spike in the number of matters it has had to deal with.

Below is a summary of some of the major AAT and Court decisions this year, broken down into themes.

Decisions on what is 'reasonable and necessary'

A number of significant Tribunal decisions this year reflected on the line between a 'reasonable and necessary' disability related support and a 'day-to-day living cost'.

In *Barling and NDIA* [2021] AATA 4358, the applicant successfully argued that a modified vehicle could be funded as a 'reasonable and necessary' support. While NDIA policy states it generally will not fund a vehicle, the Tribunal was satisfied that there were 'specific, exceptional and compelling reasons for departure' in this case. There were no safe alternatives, access to a vehicle was imperative to delivering the applicant's plan and the situation was unique to the applicant's circumstances.

Similarly, in *Gelzinnis and NDIA* [2021] AATA 3970 the AAT decided to fund internet service fees on an exceptional basis where this was integral to avoiding acute episodes for a psychosocial participant. The Tribunal found the support was necessary, as it was essential to the coping strategies the participant adopts in times of distress. The AAT also relied on impacts of the pandemic and participant's disappointing experiences with support workers in the past. The applicant also had a separate personal use internet plan which covered standard day to day internet costs.

To illustrate, the AAT's statistics show that in the 12 months between July 2020 and June 2021,

2,160

new NDIS appeals were lodged.

But in the four months between July and November 2021, over

2,000

appeals have already been lodged.

These cases reflected earlier decisions of the Tribunal emphasising that decision-makers must analyse whether a support constitutes a disability related necessity rather than an ordinary cost of living expense. Whether the support is central to the delivery of other supports in the plan, and the importance of the benefits which accompany it, will also influence the outcome.

A case which fell on the other side of the line was *LZMX and NDIA* [2021] AATA 378. In this case, a family seeking to balance the interests of the participant and other members, decided to move home and undertake a joint living arrangement. The Tribunal found that the decision to move, while delivering benefits to the participant and the family, had increased the cost of the modifications compared to modifying the participant's previous accommodation. A request for a lift could not be funded as it reflected a choice of the participant rather

than a disability related support need. The decision underlines the importance of early conversations with the Agency regarding housing options.

The decision in *McLaughlin and NDIA* [2021] AATA 496 featured the most significant question of statutory interpretation to arise before the AAT this year. In it, the Tribunal stressed that alongside the 'reasonable and necessary' test in section 34, the NDIA also has a 'residual discretion' to deny support under section 33. Such an approach could arguably allow for a greater emphasis on the financial sustainability of the scheme in planning decisions.

The *McLaughlin* approach has not consistently featured in later Tribunal decisions and has not yet been put to the Federal Court. Advocates have continued to argue that if a support is determined to be 'reasonable and necessary', it must be fully funded.

Independent assessments in the Tribunal

As debates regarding independent assessments were raging, the Tribunal also had to consider requests from the Agency to require assessments as part of the AAT appeals. In *BKQQ and NDIA [2021] AATA 732*, the Tribunal refused an Agency request for neuropsychologist assessment of a participant. The applicant was a 12-year-old boy with intellectual disability. The Tribunal stressed that parties before it are 'not engaged in civil litigation but, rather, in a process of administrative review' and that requests to compel assessment will be evaluated for their utility and any risks to the participant. It found 'a real and not fanciful risk of harm' would accompany an assessment in this case and other evidence was readily available.

Where NDIA commissioned assessments are opposed, advocates must carefully consider whether the existing evidence is enough to satisfy the Tribunal that the requirements for access to the scheme or funding approval are met.

Access decisions

In matters relating to access, *FBJV and NDIA [2021] AATA 913* saw a broad approach taken to when medical interventions may be found 'likely to remedy' an impairment. The applicant in this case suffered from endometriosis, with her doctors describing her condition as 'chronic' and 'likely incurable'. The doctors did however, note that the applicant would 'benefit' from multidisciplinary management comprising rehabilitation, hydrotherapy and strengthening exercises.

The Tribunal stressed that, in its view, something which remedies an impairment may not necessarily constitute a 'cure'. It could be a course of treatment which substantially relieves the pain or daily impact of the condition. In such cases, the impairment would not meet the 'permanent' criterion.

In this case, the medical evidence did not sufficiently explain the potential benefits of the available management options. In part this was because the applicant's medical specialists were not available to give oral evidence at the hearing, so the Tribunal gave their evidence minimal weight.

The decision highlights the challenges of distinguishing health treatments to remedy an impairment from functional supports to manage an ongoing condition – as well as the practical difficulties applicants can face in getting their treating practitioners to give oral evidence.

This issue arose again later in the year in the draft NDIS Becoming a Participant Rules.

Carers

FFNR and NDIA [2021] AATA 3890 provided a welcome reiteration of the importance of carers to the scheme. The Tribunal approved 24-hour support for a family, where the mother, a registered nurse with two other kids, was suffering exhaustion from aiding the care team for her nine-year-old son. Section 34(1)(e) of the NDIS requires that 'the funding or provision of the support takes account of what it is reasonable to expect families...to provide'. The Tribunal emphasised that this operates '... not just as a factor to refuse to grant a reasonable and necessary support, but as a factor giving the respondent at least a prima facie preference to grant it, other things being equal'.



Credit: FG Trade



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Assistance dogs

A number of successful appeals this year saw funding granted for assistance dogs where the relevant evidential thresholds were met.

In *TYKL and NDIA* [2021] AATA 135, it was found that participants did not have to identify a specific dog when seeking funding.

The appeal saw funding granted to enable the identification, training and qualification of an appropriate assistance dog for the applicant.

A similar outcome was secured in *SCHW and NDIA* [2021] AATA 591, where it was found an applicant with complex post-traumatic stress disorder would benefit from an assistance dog when dissociating.

On the other hand, in *Hollis and NDIA* [2021] AATA 2888, the Tribunal decided that it was not reasonable and necessary to fund the applicant's assistance dog.

This was because the dog was not trained to a sufficiently high level, with regard to 'good practice', and that the tasks that the dog was

trained to do were not specific to the applicant's disability needs. The Tribunal considered that 'good practice' in relation to supports provided by assistance animals means at least establishing that:

- the animal can perform at least three tasks to mitigate the effects of a person's disability;
- for psychosocial disabilities, those tasks are specific to the needs of the person;
- for psychiatric assistance dogs, the dog is trained in accordance with the standards of Assistance Dogs International; and
- the animal has a high level of training that makes it appropriate for it to access public spaces.

Jurisdiction of the AAT

Finally, one very technical issue was raised this year, about the AAT's jurisdiction. Jurisdiction means the scope of the AAT's power to deal with the facts and issues in the case. In the case of *QDKH and NDIA*

[2021] AATA 922, the AAT said it did not have power to consider a participant's requests for supports if the participant had not first asked for it at internal review. This was a problem because participants would have to go back to the NDIA to ask for the supports again, have it refused, and then go back to the AAT a second time.

QDKH was appealed to the Full Federal Court. The Court decided that the Tribunal does have jurisdiction to consider supports which were not raised earlier on. This confirms that any supports requested by a participant will be able to be considered by the AAT, even if they raise it for the first time at the AAT.

WHAT WILL HAPPEN NEXT YEAR?

As 2022 is an election year, it is difficult to predict what will happen. Some of this will depend on the outcome of the election.

But we expect the following things to happen next year, regardless of who wins:

- The NDIS (*Participant Service Guarantee and Other Measures*) Bill may pass in some form, hopefully with the changes proposed by the disability community.
- If the Bill passes, we expect new or changed NDIS Rules to be made. These changes have already been foreshadowed by the Agency, and will include some changes to the access rules, changes to plan management rules, and a new plan administration rule around the variation of plans.
- There will be a continued focus on the financial sustainability of the NDIS. The Agency has been very vocal about the cost of the NDIS, and we don't expect that to change. The Joint Standing Committee's inquiry will hopefully moderate some of the discussion around this, and may bring to light the assumptions underpinning the forecasting.
- The co-design process will probably make recommendations on reforms to the NDIS, especially around how to improve the assessment of participants and the planning process.
- The NDIA's use of 'typical support packages' (**TSP**) will likely be revisited. TSP are essentially 'standard' support packages that NDIA planners use to guide their decisions. The NDIA has consistently refused to provide any information about how the TSP work. This year, it had wanted to introduce 'personalised budgets' and the 400 'personas' system to overhaul

the TSP process. While that was unsuccessful, it is likely that the Agency will want to come up with an alternative to the TSP process.

- More changes to the NDIA's Operational Guidelines – hopefully for the better. We have already seen some changes coming through, but we are expecting further changes, for example on the funding of transport and assistance animals. The NDIA will need to respond to the huge backlog of AAT cases – hopefully it will do this by fixing some of its operational guidelines to reflect existing AAT decisions, so that the number of appeals will reduce.
- Possible changes to the funding of Specialist Disability Accommodation (**SDA**). The funding criteria and decision-making on SDA is extremely complex and opaque. SDA cases have so far not been subject to any AAT decisions – but over the next few months, we expect the first few SDA decisions to be handed down in the AAT. That will likely draw attention to SDA issues, including the SDA Rules.

Significant changes to the NDIS assessment and 'reasonable and necessary supports' model probably will not be made next year, given the election midway through the year. But we expect there will be more consultation processes around these reforms in the last quarter of the year, once the co-design process has made its recommendations and the Joint Standing Committee has made theirs.

The release of *Australia's Disability Strategy 2021-2031*, developed with and supported by the national peak disability representative organisations, will hopefully frame future consultation and reform processes around the NDIS.

A stylized illustration of a man with a beard and a yellow sash, set against a blue background. The man has a black beard and mustache, and his face is rendered in shades of orange and yellow. He is wearing a red and white plaid shirt and a yellow sash that runs diagonally across his chest. The background is a solid blue color.

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WHAT DO WE WANT TO HAPPEN?

From a potentially long list of improvements, here are some high-level developments we would like to see.

Strong recommendations from the co-design process on reforms to the NDIS, which stay true to the original intentions of the NDIS – as a social insurance scheme to fund high quality support for people with disability.

Implementation of recommendations from the Joint Standing Committee, Australian National Audit Office and other inquiries. There have been many inquiries into the NDIS, with strong recommendations being made again and again. Many of these have been ignored over the past year in favour of untested reform proposals, like independent assessments. We hope these recommendations will be brought back into the conversation next year.

Improved transparency in decision-making by the NDIA. The past year has demonstrated that people with disability are highly engaged and want more information from the NDIA.

We hope transparency will improve in at least the following ways:

- AAT settlement outcomes should be published in de-identified form. The very high rate of settlement at the AAT, combined with the increasing number of appeals, means it is high time for the NDIA to provide more information on the appeals it settles, as recommended by the Joint Standing Committee.
- More information should be published about financial sustainability issues. That includes more information about financial assumptions, but also information about how the NDIA makes decisions about things like ‘value for money’, when it decides not to fund expensive but effective supports.
- Information about proposed reforms should be published in a clear, accessible way, with plenty of time for consultation. The Department’s recent consultation on reforms to the NDIS was an example of what should be avoided. That consisted of a 4-week consultation over 16 very technical documents.

Whatever happens next year, we expect more NDIS reforms to be coming and more significant reforms to be a little further down the road. We look forward to continuing our work with the disability community in 2022.



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