

Submission to Joint Standing Committee on the National Disability Insurance Scheme: Current Scheme Implementation and Forecasting for the NDIS

February 2022

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- 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 First Nations people
- Access to sustainable and 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)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendation 1: Supports more appropriately funded by a non-NDIS service system must in fact be funded by that system

The NDIA should amend the NDIS Act to ensure that where it determines a support is more appropriately funded by another system of service delivery, the NDIA must also be satisfied the support is, or will 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 the support is not reasonable and necessary.

Recommendation 2: Publishing typical support packages to improve transparency in the NDIA

If typical support packages are to be used by the NDIA as guidance in creating participant plans, the NDIS legislative framework should require their publication and recognise that any guidelines published are guidelines only in the creation of plans that are person-centred and tailored to an individual's goals.

Recommendation 3: The NDIA should disclose information about any specialist panels it utilises

The NDIA should be instructed to proactively disclose information about any specialist panels it utilises, and the policies and procedures that they apply, to the public. Where panels are making decisions about a particular participant, the participant should be informed of this in advance and given greater opportunity to engage with the panel.

Recommendation 4: Decisions that a requested support does not represent 'value for money' should set out the NDIA's evaluative assessment

A decision that a requested support does not represent 'value for money' should be the product of serious consideration by the NDIA of the costs involved in funding the support, the benefits (or lack thereof) the NDIA considers the support would provide, and an explanation for why the latter does not justify the former. At a minimum, NDIA decisions that rely on s 34(1)(c) to refuse funding should set out these matters.

Recommendation 5: Publication of AAT settlement outcomes

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 Commissioner's Conciliation Register.

Recommendation 6: Implementing systemic changes to reflect AAT and court decisions

The NDIA should implement a transparent and accountable process to ensure the NDIA's advice and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The NDIA should report on any updates in its quarterly reports to the COAG Disability Reform Council.

Recommendation 7: Publication of historical and future AFSRs

The NDIA should publish each AFSR (current and historical) in full on its website to ensure transparency of data and information about the financial sustainability of the NDIS.

Recommendation 8: 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 9: Personalised budgets should comply with the Committee's approach to policy development

Any new policy proposal to introduce personalised budgets should be subject to a co-design process and involve extensive consultation.

Recommendation 10: Budgets should not be populated using rigid profiles

Personalised budgets should not be populated using profiles designed to group participants together with 'similar' functional capacity. Profiling and categorisation do not account for participants' diversity, independence or choice and control in the planning of their supports.

Recommendation 11: There must be clear and transparent criteria to determine budgets

The level of funding in a budget cannot be a discretionary determination based on modelling and assumptions. There must be clear and transparent criteria or parameters for the NDIA to satisfy in determining a participant's level of funding, including 'financial sustainability' considerations and the weight to be given to each criterion. This will ensure proper governance, accountability and transparency of the NDIS. This will also ensure participants have a proper ability to challenge the determination of a personalised budget through internal and external review processes.

Recommendation 12: Goals and aspirations must be considered in determining budgets

Matching a participant to profiles with similar functional capacity does not mean those profiles will have the same goals and support needs of the participant. There must be consideration of an individual's goals and aspirations in determining the budget amount. It is not enough that goals and aspirations are relevant only in determining how to allocate a budget.

Recommendation 13: Individual support needs must be considered in determining budgets

A participant would still have to identify each support they require to ascertain whether the budget amount will cover their needs. Therefore, the budget amount must be developed with regard to individual support needs.

Recommendation 14: There must be a process to finalise draft budgets with participants

Participants should be given an opportunity to discuss their draft budgets and plans with the delegate, to ensure the final budget and plan is suitable and appropriate. There must be a process to finalise draft budgets with participants.

Recommendation 15: The Committee should initiate an inquiry into the NDIS internal and external review process

Implement Recommendation 1 as outlined in the Joint Submission.

Recommendation 16: NDIA to co-design 'Guiding Principles on the Conduct of NDIS Appeals'

Implement Recommendations 3, 4, 7, 8(b), 9, 10, 14 as outlined in the Joint Submission.

Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Joint Standing Committee on the National Disability Insurance Scheme's (**NDIS**) inquiry into *Current Scheme Implementation and Forecasting for the NDIS*.

PIAC has lengthy experience in working with people with disability to tackle barriers to justice and fairness. Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the NDIS for people with disability. This work has been done in close consultation with key peak disability organisations.

We welcome the Committee's decision to consider broader questions on the implementation of the NDIS to date, and projections as to its future.

We strongly support the NDIS and consider it is supported by robust foundations.

Our submission focuses on legal and governance aspects of the NDIS and its implementation, rather than operational and financial aspects, consistent with PIAC's legal and policy expertise.

Our submission addresses:

- the interface between NDIS service provision with other non-NDIS services (paragraph (b) of the Terms of Reference);
- the reasons for variations in plan funding between NDIS participants, including inconsistent decision-making by the National Disability Insurance Agency (**NDIA**) and measures to address such inconsistencies (paragraph (c));
- governance, oversight and administrative measures to ensure financial sustainability of the NDIS, including the statutory role of the Scheme Actuary vis-à-vis the Minister, the NDIA Board and the CEO, and issues around transparency of data (paragraph (f));
- planning policy for personalised budgets and plan flexibility (paragraph (g)(ii)); and
- the need for improvements to the reviews and appeals process (paragraph (h)).

We begin our submission by considering the original intentions of the NDIS, as set out in the 2011 Productivity Commission report, drawing on themes and key principles that must underpin NDIS reforms.

1. The Productivity Commission's original intentions for the NDIS – fundamental principles

The foundations of the design of the NDIS are contained in the 2011 Productivity Commission (PC) report.¹

The NDIS was born from the idea that Australians with significant and permanent disability should have greater choice and control over their own lives. Its purpose is to support those individuals to be more independent, and engage more socially and economically, while building genuinely connected and engaged communities and stakeholders.

Choice and control of people with disability over their own lives was a paramount feature of the original framing of the NDIS. This can be seen in the PC's recommendation that a consumer choice model be used to determine what supports are required by an individual rather than outsourcing control to providers and standard assessment procedures.² As the PC noted:

This scheme is for people with disability, not for service providers. Not for governments, not for empires or private agendas. This scheme is for people who are as individual as their fingerprints.³

The NDIS was significant for the very reason that it built flexibility into choices, and incorporated empathy and responsiveness into its processes. The PC proposed an 'individual choice' model, in which participants could choose how much control they wished to exercise in relation to their services and plans.⁴ The avoidance of paternalistic prescriptions recognises the principles of choice and latitude are important for people with disabilities and their quality of life.⁵

The NDIS must balance ensuring it is properly calibrated to enhance the participation and independence of people with disabilities with its sustainability. Full independence can only be achieved by recognising that 'people have different, complex and changing preferences about their lives'.⁶ This axiom made it essential for the NDIS to maintain the ability to consider individual aspirations and outcomes, and produce individualised support packages. One way of balancing sustainability and the NDIS objectives was through the 'reasonable and necessary' supports threshold.⁷ This threshold was designed to ensure that participants have a sufficient standard of living which would enable engagement in education, employment and the community on their own terms.⁸ The threshold was also intended to be flexible — to 'change over time, to take account, among other things, of changes in technology and community norms'.⁹

Restrictive assessment tools, such as typical support packages (TSP) and rigid profiles, risk grouping participants together without factoring in diversity, choice and control and individual

¹ See generally Productivity Commission, *Disability Care and Support* (Inquiry Report, 31 July 2011) (PC Report).

² Ibid Recommendation 8.1 and Recommendation 10.1.

³ Ibid 30. Note the PC here is quoting a participant however it agrees that a new scheme should reflect this goal.

⁴ Ibid.

⁵ Ibid 6, 151.

⁶ Ibid 355.

⁷ Ibid 258-260, Recommendation 5.1; Productivity Commission, *NDIS Costs* (Study Report, October 2017) 9 (PC Costs Report) 3.

⁸ PC Costs Report, above n 7, 3; PC Report, above n 1, 258-260.

⁹ PC Report, above n 1, 258.

goals and aspirations, principles which are at the heart of the NDIS. Such tools are also unlikely to be 'good tools' if they are not valid, reliable, rigorous, and cost-effective, and may create uncertainties about future disability funding for participants.¹⁰ The PC warned that this lack of certainty imposes significant costs on people.¹¹ Ensuring the sustainability of the NDIS should not create more uncertainty or reallocate costs and burdens onto people with disabilities.

2. Interface issues (paragraph (b))

The Tune Review heard that there is a lack of clarity at an operational level about the lines of responsibility between the NDIS and mainstream service systems. The result is 'boundary issues and funding disputes, service gaps and confusion for NDIS participants, poor quality planning and inconsistent decisions about when a support is reasonable and necessary.'¹² These gaps between the NDIA and mainstream service systems create situations where people with disability are either unable to get the support they need from the appropriate system, or unable to navigate the process to determine which system ought to provide the support.

The gaps have commonly existed between the NDIS and education services, health services, corrective services, justice services, housing services and child protection and family support services.

Under the *National Disability Insurance Scheme Act 2013 (NDIS Act)*, these gaps arise in two instances. The first is in relation to eligibility. Under section 21 of the NDIS Act a person meets the criteria for access to the NDIS if they satisfy the age requirements, residence requirements, and either the disability or early intervention requirements. However, under section 25(3) of the NDIS Act, even if a person would otherwise satisfy the early intervention requirement, they would not be able to access the NDIS if the support is 'not most appropriately funded or provided' through the NDIS.

The second instance is in relation to reasonable and necessary supports in a participant's plan. Before approving such a support, the NDIA must be satisfied of the reasonable and necessary criteria in section 34(1) including that the support is most appropriately funded or provided through the NDIS and is not more appropriately funded or provided through other service systems (section 34(1)(f)).

In *Burchell and NDIA* [2019] AATA 1256, the Administrative Appeals Tribunal (**AAT**) held that for the NDIA to deny funding on the basis that the support is more appropriately funded by some other service delivery system, the support must in fact be provided by that other system. 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.

After the decision in *Burchell* was handed down, the COAG Disability Reform Council (**DRC**) provided further clarity on the interaction between key interface areas, particularly in health services, housing and child protection.

¹⁰ PC Report, above n 1, 19, 315-319.

¹¹ PC Report, above n 1, 645.

¹² David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee*, 2 December 2019 (**Tune Review Report**), [6.26].

The principle established in *Burchell* does not appear to have been adopted by the NDIA more broadly. The Final Report of the Joint Standing Committee's inquiry into NDIS Planning recommended that the NDIS Act be amended 'to clarify that where the CEO of the [NDIA] (or their delegate) considers that a support would be more appropriately funded or provided through another system of service delivery or support services, the CEO must be satisfied that this support is in fact available to the participant and that they are likely to be eligible and able to access it'.¹³ In its response, the Australian Government noted, but did not support, the Committee's recommendation. Instead, the Australian Government intended to amend the Act 'to confirm that the NDIS is not the default provider when other systems do not meet their responsibilities to provide supports for people'.¹⁴

The Interim Report for the current inquiry confirms the boundary issues, gaps and confusion still exist. In particular, the report identifies concerns about cross-sector coordination of these interfaces, and a lack of clarity and consistency regarding responsibilities for service provision.¹⁵ While the boundaries between the NDIS and other service systems continue to be clarified, the responsibility must not fall on NDIS participants to navigate the gaps between the NDIS and mainstream services and ending up worse off or without the support they need. As the PC acknowledged '[t]he lack of certainty about future disability funding imposes significant costs on people',¹⁶ and those costs and burdens should not be reallocated to people with disability.

Where the NDIA determines that a support is more appropriately funded by another service system, it must in fact be funded by that system. In the absence of the support being funded by another service, the NDIA must not rely on section 34(1)(f) to determine that the support is not reasonable and necessary. To address this issue, as recommended by this Committee, the NDIA should amend the NDIS Act to ensure decisions are consistent with the approach in *Burchell*. Amending the NDIS Act will lead to a system that assists participants in getting the support they need, rather than a system that serves to decline supports.

Recommendation 1: Supports more appropriately funded by a non-NDIS service system must in fact be funded by that system

The NDIA should amend the NDIS Act to ensure that where it determines a support is more appropriately funded by another system of service delivery, the NDIA must also be satisfied the support is, or will 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 the support is not reasonable and necessary.

¹³ Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020) (**Planning Final Report**), Recommendation 12.

¹⁴ Australian Government, *Australian Government response to the Joint Standing Committee on the NDIS Final Report: Inquiry into NDIS Planning* (February 2021), 8.

¹⁵ Joint Standing Committee on the NDIS, *General Issues 2021 (General Issues 2021)*, Interim report, [5.15]-[5.16].

¹⁶ PC Report, paragraph 1, 645.

3. Addressing variations in plan funding (paragraph (c))

3.1 The drivers of inequity between NDIS participants living in different parts of Australia

PIAC understands that NDIS funding and access to services between electorates varies, including between metropolitan, regional and remote areas. For example, the PC anticipated that accessibility of services would need to be improved to provide disability support to First Nations people, particularly in remote areas.¹⁷

We consider that the variances across different regions – the different cost of services, level of demand and supply or the cost of travel to services – should be accounted for in participants' plans. For example, participants in some areas may have a higher need for taxis due to a lack of local accessible transport infrastructure.

3.2 Inconsistent decision-making by the NDIA and measures for redress

An overarching issue facing the NDIA is inconsistency in decision-making. PIAC has identified the following three drivers of inconsistency at various levels of decision-making:

- inconsistency in planning outcomes;
- lack of transparency around how decisions are made; and
- failure by the NDIA to use AAT settlement outcomes and AAT decisions to improve decision-making processes.

3.2.1 Inconsistency in planning outcomes

NDIS participants, carers and advocates have raised concerns that issues in the planning process are leading to inconsistent outcomes. These issues include:

- 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 decision-maker in different locations (revealing poor training practices within the NDIA);
- 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 and First Nations people with disabilities. Advocates advised that many participants found it difficult to advocate for themselves against government decision-makers. An obvious concern being that participants without advocates are worse off;
- whether a person's local MP is involved and advocating on a participant's 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.

It is apparent that inconsistent decision-making at the plan variation stage may also be symptomatic of inconsistent decision-making during the planning process.

¹⁷ PC Report, above n 1, 554-558.

These issues not only manifest in inconsistent plans between different participants,¹⁸ but also for the *same* participant at the next plan review following an AAT decision or settlement of their appeal. For example, 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.

The Joint Standing Committee on the NDIS has acknowledged some of these issues.¹⁹ For example, the Committee accepted that a lack of skills and expertise of planners impacts on consistency of decision-making.²⁰

3.2.2 Lack of transparent decision-making

A central purpose of the NDIS is to ‘enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports’.²¹ Transparency must be a cornerstone in the administration of the NDIS to ensure that the rights of people with disability are promoted by empowering participants to exercise informed choice and control in the planning and delivery of their supports.

A lack of transparency impairs the ability of participants, carers and advocates to understand the types and level of supports a participant can seek, the amount of funding that could be provided and the reasons for decisions made in relation to support needs. It also impairs the ability of the community to hold the NDIA to account, to ensure that decision-making under the NDIS Act is consistent, accountable and in accordance with the law. It is practically very difficult for participants to challenge decisions made by the NDIA, when they are largely unaware of the basis on which the decision was made.

This issue was recognised in the Tune Review, which found that a lack of transparency ‘is driving a lack of trust and confidence in the NDIA’ and concluded that transparency and public accountability are likely to be ‘the most effective tool to drive improved participant outcomes’.²²

PIAC is particularly concerned about the lack of transparency in relation to:

1. the use of TSP as a guide in planning decisions;
2. publication of information about specialist panels utilised by the NDIA;
3. how ‘value for money’ is considered in assessing reasonable and necessary supports; and
4. how the financial sustainability of the NDIS is considered in decision-making.

3.2.2.1 Publication of TSP

Poor decision-making is exacerbated by the lack of transparency around how decisions are made.

In response to questions on notice during estimates hearings in March 2020, the NDIA described TSP as the ‘baseline amount of funding based on the participant’s disability, individual support

¹⁸ See *Kennedy and National Disability Insurance Agency* [2022] AATA 265, for example at [48]-[51], [80], [84]-[85].

¹⁹ Joint Standing Committee on the NDIS, *Progress Report* (Report, March 2019) 20-21.

²⁰ *Ibid* [2.32].

²¹ NDIS Act s 3(1)(e).

²² Tune Review Report, above n 12, [10.61].

needs and characteristics', which are used by NDIS planners 'to understand if a participant's funded supports are within the expected range and to make sure they are using an evidence based and nationally consistent approach to planning.'²³ The NDIA said that there are around 15,000 TSP considering all the combinations of disability, age, level of function and other adjustment factors. It said that these serve as a 'guide for planners' when making decisions about the funded supports to include in a participant's plan and a 'monitoring tool' for management to 'understand differences from expected'.

However, despite TSP being used as an essential tool in decisions as to whether certain supports will be funded, the NDIA has refused to publish details of TSP, examples of such packages, or to make them available in individual planning processes. On one hand, this raises concerns that they may be applied contrary to the requirement that plans be individualised²⁴ and with the result that participants receive inadequate or insufficiently tailored supports under their plan. On the other hand, despite their use, participants have complained about a lack of consistency in decision-making across people with apparently similar needs.

Given the role of TSP in determining support amounts, they should be published, and planners should clearly explain to participants how they are used. The NDIA has previously stated that it does not publish TSP as part of its publication of operational information²⁵ because 'releasing the data could risk manipulation of responses to questions on participant circumstances in order to receive higher funding amounts'.²⁶ However, people with disability should be empowered to seek the support they require, and it is the role of the NDIA to approve the supports to which they are entitled in accordance with the legislative framework.

Greater understanding of TSP and how they are used is important to ensure confidence in the administration of the NDIS.

3.2.2.2 Publication of information about specialist panels utilised by the NDIA

The NDIA utilises a number of specialist panels for making decisions about whether certain kinds of supports should be funded. These include the Home and Living Panel, which makes determinations regarding the funding of various home and living supports (including funding for Supported Independent Living and Specialist Disability Accommodation), and panels relating to specialised kinds of participant circumstances and disability. While there may be value in having specialised and senior decision-makers within the NDIA assigned to make determinations about complex and high-value supports, no information about the composition, operation and even existence of these panels is made available to the public. The entirety of PIAC's knowledge of these panels has been obtained via requests under the *Freedom of Information Act 1982* (Cth). No information is distributed to participants regarding how the panels consider matters, how often

²³ Senate Community Affairs Legislation on Committee, *Additional Estimates – 5 March 2020 Answer to Question on Notice to the National Disability Insurance Agency* Question reference number: NDIA SQ20-000146.

²⁴ NDIS Act s 31(a).

²⁵ Under section 8(2) of the *Freedom of Information Act 1982*, the NDIA must publish its operational information, defined in section 8A as information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). Example: The agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.

²⁶ Senate Community Affairs Legislation on Committee, *Additional Estimates – 5 March 2020 Answer to Question on Notice to the National Disability Insurance Agency* Question reference number: NDIA SQ20-000146.

they meet, or how the panel will work with other NDIA staff such as the planner responsible for the participant's NDIS Plan.

This secretive mode of operation of the panels erodes faith in the NDIA's decision-making. PIAC has had several participants and stakeholders voice concerns that decisions made by these panels had disregarded relevant information and reports provided by participants, made decisions in a piecemeal and slipshod manner, or applied irrelevant and unlawful criteria and policies to make decisions to deny participant funding requests. It is impossible to verify whether these concerns are well-founded or not, due to the lack of transparency regarding the composition and operation of the panels.

Even if such panels are operating in an entirely lawful and fair manner, the lack of available information fosters suspicion and erodes public faith in the NDIA's administration of the NDIS. And, if the panels are in fact engaged in concerning approaches to decision-making, it is all the more vital that they be exposed to scrutiny and oversight. We suggest the NDIA be instructed to proactively disclose information about any such specialist panels it utilises, and the policies and procedures that they apply, to the public. In particular, PIAC considers it vital that where panels are making decisions about a particular participant, the participant should be informed of this in advance and given greater opportunity to engage with the panel.

3.2.2.3 Consideration of 'value for money'

The assessment of 'value for money' by the NDIA is, unfortunately, shrouded in mystery. While providing legal advice or representation, PIAC has encountered numerous instances of the NDIA refusing to fund or provide a support by reference to section 34(1)(c) without providing a proper explanation on how the decision was made. In many decisions pursuant to section 100 internal review processes seen by PIAC, decisions have simply recited section 34(1)(c), and declared that the criterion is not met, while providing only one or two sentences of explanation for why this is the case.

This lack of explanation prevents participants from understanding why the NDIA has made the decision that it has and, further, can encourage the impression that these decisions have been made on an arbitrary and/or unfair basis. It also restricts the ability of participants to challenge decisions.

A decision that a requested support does not represent 'value for money' should not be made lightly. It should be the product of serious consideration by the NDIA of the costs involved in funding the support, the benefits (or lack thereof) the NDIA considers the support would provide, and an explanation for why the latter does not justify the former. PIAC considers that, at a minimum, NDIA decisions that rely on section 34(1)(c) to refuse funding should set out these matters.

3.2.2.4 Consideration of 'financial sustainability'

Financial sustainability of the NDIS is another area in which decision-making by the NDIA remains opaque and vague. In particular, it is unclear how the requirement to have regard to 'the need to ensure the financial sustainability' of the NDIS interacts with the 'reasonable and necessary supports' criteria under section 34 of the NDIS Act.

As an insurance scheme, ensuring the financial sustainability of the NDIS 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 NDIS Act also specifies that 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...’. However, there is a lack of clarity as to what it means in practice ‘to have regard to’ the financial sustainability of the NDIS. Importantly, section 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 NDIS *should* be taken into account in decision-making and the performance of the NDIA of its functions. The latter is considered below in section 4.2 of these submissions.

Financial sustainability in practice

PIAC has reviewed decisions where 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.²⁷ 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 NDIS. 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.

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. This approach undermines the choice and control enjoyed by each individual. The NDIA’s approach to financial sustainability is evidenced in the AAT decision of *WRMF and NDIA* [2019] AATA 1771 (*WRMF*). In *WRMF* evidence from the Scheme Actuary was provided 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’.²⁸ 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’.²⁹

The ambiguity of the phrase ‘have regard to... the need to ensure 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 v NDIA* [2017] FCA 308, the Court expressly declined to decide on

²⁷ See, eg, *WRMF and NDIA* [2019] AATA 1771; *LWVR and National Disability Insurance Agency* [2021] AATA 4822, [11].

²⁸ At [37].

²⁹ At [42].

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’.³⁰

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 AAT, and that the evidence must be specific and relevant.³¹ Deputy President Humphries in *BIJD and NDIA* [2018] AATA 2971 reasoned that financial sustainability entails the making of value judgments balancing, on one hand, the cost of widening the NDIS’s scope, and on the other, the benefits conferred. If the benefits conferred by the requested support are significant, then a significant additional cost may be justified.³² 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 NDIS, and not a determinative tool in deciding whether a person’s supports should be funded.

The ambiguity has also led to the consideration of financial sustainability in relation to eligibility and access to the NDIS. In *YPRM and NDIA* [2016] AATA 1023, the NDIA argued that the financial sustainability of the NDIS was relevant in determining whether a child was eligible to be a participant under the early intervention pathway. PIAC considers it is difficult to see how the financial sustainability of the NDIS should be relevant to determining whether a person meets the eligibility criteria set out in the legislation.

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. See section 4.2 of these submissions for PIAC’s recommendation to address this issue.

Recommendation 2: Publishing typical support packages to improve transparency in the NDIA

If typical support packages are to be used by the NDIA as guidance in creating participant plans, the NDIS legislative framework should require their publication and recognise that any guidelines published are guidelines only in the creation of plans that are person-centred and tailored to an individual’s goals.

Recommendation 3: The NDIA should disclose information about any specialist panels it utilises

The NDIA should be instructed to proactively disclose information about any specialist panels it utilises, and the policies and procedures that they apply, to the public. Where panels are making decisions about a particular participant, the participant should be informed of this in advance and given greater opportunity to engage with the panel.

³⁰ At [117].

³¹ 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.

³² At [68].

Recommendation 4: Decisions that a requested support does not represent ‘value for money’ should set out the NDIA’s evaluative assessment

A decision that a requested support does not represent ‘value for money’ should be the product of serious consideration by the NDIA of the costs involved in funding the support, the benefits (or lack thereof) the NDIA considers the support would provide, and an explanation for why the latter does not justify the former. At a minimum, NDIA decisions that rely on s 34(1)(c) to refuse funding should set out these matters.

3.2.3 Failure to use AAT settlement outcomes and AAT decisions to improve decision-making processes

3.2.3.1 AAT settlement outcomes

PIAC has previously made recommendations to this Committee on 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.³³ The Australian National Audit Office 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.³⁴ We do not seek to repeat the reasons behind this submission, which the Committee well understands.³⁵

Based on the most recent Quarterly Report published by the NDIA, approximately 64% of all finalised cases before the AAT were finalised by settlement.³⁶ In circumstances where AAT appeals continue to rise³⁷ and the proportion of settlements continue to be significant, the NDIA’s refusal to implement this simple recommendation must be challenged.

We have also previously stated that we do not agree with the Australian Government’s concerns in relation to this recommendation.³⁸ PIAC continues to call for the publication of this information to improve consistency and fairness in decision-making.

There continues to be a strong desire from the disability sector for this information to be made publicly available. The Joint Standing Committee will recall an open letter to the Minister from over 20 disability organisations expressing support for the recommendation.³⁹

We reiterate that the publication of AAT settlement outcomes would ensure more consistent and accountable decision-making by the NDIA. We urge the Committee to confirm its support of this recommendation and encourage the NDIA to implement it.

³³ Joint Standing Committee on NDIS, *NDIS Planning Interim Report* (December 2019), [3.96], Recommendation 6; Planning Final Report, above n 13, [2.81]-[2.84], [10.85]-[10.87], Recommendation 34.

³⁴ Australian National Audit Office, *Decision-making Controls for NDIS Participant Plans* (Report, 29 October 2020), [3.84], Recommendation 2.

³⁵ Planning Final Report, above n 13, [10.83]-[10.91].

³⁶ NDIA, *NDIS Quarterly Report to disability ministers* (Report, 31 December 2021) 62.

³⁷ See section 6.1 below.

³⁸ Australian Government, *Australian Government response to the Joint Standing Committee on the NDIS: NDIS Planning Interim Report* (3 March 2020), 5.

³⁹ Letter from disability sector to The Hon Stuart Robert MP, Minister for National Disability Insurance Scheme, Minister for Government Services, 6 July 2020 < <https://pac.asn.au/wp-content/uploads/2020/07/20.07.06-Letter-to-Minister-for-NDIS-contact-details-redacted.pdf> >.

3.2.3.2 Decisions of the AAT or Court

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. This is a key issue, as the failure to do so results in inefficiencies in decision-making, and unfairness to people unwilling or unable to go through the appeals system. If policies deemed to be inconsistent with the NDIS Act (and thereby unlawful) continue to be applied by the NDIA, it also means the AAT appeals process is an ineffective oversight mechanism.

We appreciate the Committee well understands this point. This Committee has also observed that multiple inquiries, including the Committee itself, have now suggested the NDIA needs to do better in terms of how it uses AAT decisions to ensure consistency in its decision-making. Notably, the Committee said ‘[i]f multiple reviews are proposing the same solution, this would suggest that the solution itself is necessary, reasonable and clear’.⁴⁰

Recently, PIAC has been informed that the NDIA’s Administrative Appeals Branch meets monthly with their internal policy counterparts to discuss AAT trends and necessary updates to the NDIA’s operational guidelines. As a result of this new process, we understand that updates to several operational guidelines to reflect longstanding AAT decisions are forthcoming including changes to transport funding. This is a recognition by the NDIA that it cannot continue to ignore the systemic aspects of AAT decisions.

However, given the delay associated with the NDIA making these systemic changes and, that some policies and operational guidelines continue to be inconsistent (for example, gym memberships),⁴¹ our concern remains. Any continued application by the NDIA of policies which are deemed inconsistent with the NDIS Act by the AAT amounts to an administrative failure.

The financial consequence of the NDIA’s refusal to publish AAT settlement outcomes or to implement systemic changes (and in a timely manner) to policies following AAT decisions, is a waste of taxpayer resources.

Recommendation 5: Publication of AAT settlement outcomes

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 Commissioner’s Conciliation Register.

Recommendation 6: Implementing systemic changes to reflect AAT and court decisions

The NDIA should implement a transparent and accountable process to ensure the NDIA’s advice and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The NDIA should report on any updates in its quarterly reports to the COAG Disability Reform Council.

⁴⁰ Pannong Fina Report, above n 13, [10.88]-[10.89].

⁴¹ See, eg, *King and National Disability Insurance Agency* [2017] AATA 643; NDIS, Would we fund it: Improved health and wellbeing: Gym membership (Web Page) < <https://ourguide.nes.ndis.gov.au/would-we-fund-it/improved-health-and-wellbeing/gym-membership> > (accessed 25 February 2021).

4. Governance, oversight and administrative measures to ensure financial sustainability (paragraph (f))

4.1 Annual financial sustainability reports and transparency

The NDIS Act contains specific provisions relating to the functions of the Scheme Actuary including their duties relating to financial sustainability. Each time an annual report is being prepared, the Scheme Actuary must assess the financial sustainability of the NDIS, risks to that sustainability and any trends in provision of supports, consider the causes of those risks and trends and make estimates of future expenditure, to prepare:

1. an Annual Financial Sustainability Report (**AFSR**); and
2. a summary of that AFSR including their estimates of future expenditure.⁴²

The summary of the AFSR must be included in the annual report which is publicly available on the NDIS website and the Government's Transparency Portal. However, there is no legislative obligation on the NDIA to publish the AFSR in full and the NDIA has previously refused to publish AFSRs despite consistent calls through parliamentary processes for their release.⁴³

On 8 October 2021, the NDIA publicly released the 2021 AFSR in full on its website. The NDIA's AFSR webpage states: '*The release of the Annual Financial Sustainability Report is part of the Agency's ongoing commitment to NDIS participants, the disability sector and other stakeholders for greater transparency.*'⁴⁴ The accompanying media release also confirms that the full AFSR has been published '*so participants, their families and carers and the wider disability sector have a comprehensive picture in relation to the NDIS's projected financial evolution.*'⁴⁵

PIAC welcomes the decision by the NDIA to release the full AFSR for 2020-21. However, it is concerning that the NDIA has not released the full AFSRs for each financial year between 2013 and 2021, particularly in circumstances where over the past year:

- the Minister has repeatedly and publicly asserted that the NDIS faces serious financial sustainability concerns, in the absence of releasing actual data;
- the NDIA has published numerous media releases and reports alluding to financial sustainability concerns, in the absence of releasing actual data;
- there has been significant public debate concerning the financial sustainability of the NDIS and reforms to address the issue of sustainability, in the absence of releasing actual data;
- the Government has committed to co-designing future reforms to the NDIS with the disability community; and

⁴² NDIS Act, s 180B.

⁴³ See, eg, Senate Community Affairs Legislation on Committee, *Additional Estimates – 3 May 2021 Answer to Question on Notice to the National Disability Insurance Agency*, Question Reference number: NDIA SQ21-000073.

⁴⁴ NDIS, *Annual Financial Sustainability Reports (Web Page)* <<https://www.ndis.gov.au/about-us/publications/annual-financial-sustainability-reports>>.

⁴⁵ NDIS, *Media Release, NDIA Board releases Annual Financial Sustainability Report (Web Page, 8 October 2021)* <<https://www.ndis.gov.au/news/6931-ndia-board-releases-annual-financial-sustainability-report>>.

- the Parliamentary Joint Standing Committee on the NDIS is conducting this ‘inquiry into current scheme implementation and forecasting for the NDIS, with a focus on how the NDIS is implemented and funded.’⁴⁶

In light of the above, PIAC has requested access to each historical AFSR through Freedom of Information legislation. This request was initially refused by the NDIA however following an application for internal review PIAC has been granted access to edited and heavily redacted historical AFSRs. This release is listed on the NDIS FOI Disclosure Log.

The financial sustainability of the NDIS is a matter of significant public importance and publication of historical and future AFSRs in full would improve transparency and public confidence in government administration and promote effective oversight of public expenditure. The AFSRs would also assist in providing a more accurate context for the public to understand the financial sustainability of the NDIS, the basis for any proposed future reforms, and support effective participation in consultation processes between the NDIA and the community. It is difficult for the public to participate in this process when documents as straightforward as historical AFSRs are not published and measures should be introduced to ensure transparency of this information.

Likewise, for the reasons set out earlier in this submission, information about how TSP work, about specialist panels utilised by the NDIA and how financial sustainability is considered in relation to individual supports, should also be published.

4.2 Financial sustainability

4.2.1 Assessing reasonable and necessary supports: financial sustainability considerations

In PIAC’s view, the need to ensure the financial sustainability of the NDIS is not a stand-alone consideration for the assessment of whether a support is reasonable and necessary under section 34. Certain criteria, such as section 34(1)(c) and (f) ‘expressly incorporate’ consideration of financial sustainability into the assessment of reasonable and necessary supports.⁴⁷ The need to consider financial sustainability of the NDIS and any associated actuarial evidence cannot be a ‘trump card’ overriding the express considerations under section 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 NDIS Act. As section 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

⁴⁶ Parliament of Australia, *Current Scheme Implementation and Forecasting for the NDIS* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/ImplementationandForecast>.

⁴⁷ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [109].

has no role in determining what supports are ‘reasonable and necessary’ for individual participants.⁴⁸

Instead, the need to ensure the ‘financial sustainability’ of the NDIS is given effect *through* the application of the reasonable and necessary supports criteria under section 34.

For instance, actuarial evidence that a support could potentially jeopardise the financial sustainability of the NDIS may be relevant if:

- the evidence shows a particular support is not proven to be effective in achieving desired outcomes;
- is expensive; and
- all participants in the same circumstances sought the same expensive support, which was equally ineffective in achieving the outcomes desired for each of those participants.

This is because the actuarial evidence would relate to the participant’s specific circumstances, and this evidence may be relevant to the assessment of section 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 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 sections 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.

Therefore, in determining whether a particular support is reasonable and necessary under section 34(1), the decision-maker is not entitled to consider the ‘ripple effect’ on the financial 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 is supported by Chapter 3, Part 2 of the NDIS Act which provides a comprehensive framework for the making, approval and operation of a participant’s plan, but does not directly mention the need to consider the financial sustainability of the NDIS.

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 section 180B. If ‘significant’ actuarial advice or a report is received, the CEO must provide that report to the Board under section 159(7). If the Board considers it to be relevant actuarial analysis and advice under section 125A, it must have regard to that information, and it may determine objectives, strategies and policies for the NDIA to ensure the need for financial sustainability is met. The CEO can also act on the advice of the Scheme Actuary in connection with the performance of their duties under section 159(2), for example by bringing issues to the attention of government or other stakeholders.

⁴⁸ None of the provisions in the NDIS Act concerning the Scheme Actuary’s duties refer to any role relating to the preparation, review or approval of a participant’s plan under Part 2 of Chapter 3 of the NDIS Act.

4.2.2 Sustainability of the NDIS

The NDIS Act contains specific provisions regarding the role and functions of particular people or bodies to administer the financial sustainability of the NDIS. Those provisions set out that the financial sustainability of the NDIS is intended to be administered by Ministers and executives at a Scheme level. However, as illustrated above, in practice financial sustainability is being administered and applied by the NDIA at an individual participant level to deny reasonable and necessary supports.

In the event that concerns about financial sustainability are raised, the CEO or their delegate must consider the need to ensure the financial sustainability of the NDIS, *following* the approval of the statement of participant supports. This is a role which, as per section 4(17)(b), may involve the Ministerial Council, the Minister, the NDIA Board, the CEO, the Commissioner of the NDIS Quality and Safeguards Commission and ‘any other person or body’.

Despite section 4(17)(b), decisions about whether a support is reasonable and necessary have been used by the NDIA as a shortcut way of dealing with financial sustainability issues (see for example *WRMF* referred to above in section 3.2.2.4).

Therefore, instead of financial sustainability issues being administered at a broader level by Ministers and executives, actuarial modelling from the Scheme Actuary is being used in individual cases to determine that a support is not reasonable and necessary. The impact of financial sustainability issues is being borne at the individual level, rather than at a Scheme level. The consequence of the NDIA’s approach is that individuals are denied supports that would otherwise be reasonable and necessary. Further, modelling assumptions about what would happen if everyone requested the same support defeats the individual choice and control objective of the NDIS.

PIAC recommends the NDIA publish guidelines on how it considers financial sustainability to be relevant to individual funding grants for reasonable and necessary supports, and the way in which financial sustainability is determined. Such guidance should clarify that ‘the need to ensure the financial sustainability of the NDIS’ is given effect through the application of the reasonable and necessary supports criteria under section 34, and is not an additional criterion on the basis of which the NDIA has a residual discretion to refuse to fund a support. Any guidance should be regularly reviewed and updated to incorporate developments in case law and to ensure consistency with the legislative criteria.

Recommendation 7: Publication of historical and future AFSRs

The NDIA should publish each AFSR (current and historical) in full on its website to ensure transparency of data and information about the financial sustainability of the NDIS.

Recommendation 8: 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.*

5. Personalised budgets and plan flexibility (paragraph (g)(ii))

The concept of personalised budgets as introduced in 2021 was subsequently abandoned by the Government at the same time as independent assessments. A new model for the concept of personalised budgets has not been proposed. PIAC’s recommendations in this submission on planning policy for personalised budgets and plan flexibility are informed by the proposal introduced in mid-2021.

Under the proposal introduced in mid-2021, instead of determining funding for an individual based on ‘reasonable and necessary’ supports, each participant would be allocated a level of funding or budget.⁴⁹ The budget would be determined by comparing an individual against one (or more) of 400 personas or profiles with a similar level of functional capacity and environmental context. Each profile would have a budget associated with it.

The introduction of personalised budgets as previously proposed would significantly change the way supports are funded under the NDIS. If such a proposal was to be considered again, it should be based on considered and rigorous policy development processes, and a strong evidence base supporting the needs for such a fundamental change. As this Committee has previously stated ‘[g]ood policy processes’ require a policy design to be subject to ‘extensive consultation, trials and pilots [to] iron out the flaws in a policy proposal’.⁵⁰ At the outset, PIAC submits that any policy proposal should comply with the Committee’s approach to policy development, and should be subject to a co-design process. It may also be prudent for any implementation of such a policy to be done in a staged way.

5.1 Budgets should not be populated using rigid profiles

PIAC’s view is that personalised budgets should be as its name indicates, *personalised*. Therefore, personalised budgets cannot be based on profiles designed to group participants together with ‘similar’ functional capacity. The use of standardised profiles are not personalised to an individual, but rather comparative across other people. Categorisation of individuals does not account for diversity. While consistency is an important objective of the NDIS Act, the foundations of the design of the NDIS must be remembered. Profiling and categorisation with generalised assessment tools would defeat the NDIS’ original goals of promoting participants’ independence and choice and control in the planning of their supports.

Moreover, there is nothing to suggest that the profiles have been transparently developed, rigorously tested, evaluated and published, for participants to have confidence.

⁴⁹ We note the proposal intended to exclude specified types of support or groups of participants for which a personalised budget cannot be readily determined.

⁵⁰ Joint Standing Committee on the NDIS, *Independent Assessments* (October 2021) [9.22].

Noting the Disability Ministers' decision not to proceed with introducing independent assessments, and the disability sectors strong opposition to the introduction of such assessments, PIAC submits that personalised budgets should likewise not be based on independent assessments.

5.2 There must be clear and transparent criteria to determine budgets

It is not clear how levels of funding in a budget would be determined. If the level of funding is not determined by reference to specific supports, then the budget would be determined at a global level. Of the two models proposed by the PC, self-directed funding envisaged an individual managing an individualised budget by allocating it to specific supports they assemble themselves.⁵¹

However, the global budget amount cannot be a discretionary determination based on modelling and assumptions. There must be transparent criteria and/or parameters for the NDIA to satisfy in determining a participant's level of funding, including the weight to be given to such criteria. Otherwise, this raises significant questions about governance, accountability and transparency at the heart of the NDIS.

The criteria or parameters should also set out clearly the weight to be attributed to 'financial sustainability' considerations when determining budgets. That being said, a familiar tension arises: financial sustainability is a broader policy-level issue and should not adversely impact the support needs of individuals.⁵²

If there are no clear criteria enacted for the NDIA to determine the budget amount, 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, to challenge the legal correctness of the decision. Not only must there be a right to review and appeal the determination of a personalised budget, but a proper ability for a participant to do so. Ultimately, the NDIS would wield enormous power in determining what each participant receives, with limited checks and balances through the review process.

5.3 Goals and aspirations must be considered in determining budgets

It appears there is no link to the goals and aspirations of a participant in determining the budget amount; rather goals and aspirations are relevant only in the decisions a person can make in determining how to allocate their budget.

Goals ensure the participant names their outcomes, including their social and economic participation. For example, choice and control over what activities the participant would like to partake in. The planner then assesses the benefits and outcomes of supports in line with those goals.

Therefore, an individual's goals and aspirations must be considered in determining the budget amount. In the context of standardised profiles, it does not follow that participants with similar functional capacity will have the same goals and support needs. As the current NDIS Act requires

⁵¹ PC Report, above n 1, 19, 31.

⁵² See further, sect on 4.2.2 above.

'goals and aspirations' to be considered in determining reasonable and necessary supports, the process of developing personalised budgets should also expressly reference a participant's goals and aspirations.

5.4 Individual support needs must be considered in determining budgets

A 'budget' model is in line with the PC's recommended 'self-directed funding' and a participant-centric approach. However, personalised budgets appear designed to remove the need to consider specific supports, and instead requires the delegate to determine a single numeric figure for funding to be provided to a participant.⁵³ One of the objectives of the NDIS was to give individuals greater flexibility, including in the way supports are funded.⁵⁴ The Tune Review propounded that '[f]lexibility is key to positive participant experiences'.⁵⁵

While we understand the value of plan flexibility, in our view the budget amount must be developed with regard to individual support needs. The determination of a single figure of funding untied to any particular support, removes participant involvement and will make it harder for participants to understand whether their funding is sufficient. It is also difficult to see how a funding figure can be arrived at without reference to what the funding is intended to cover. We submit that a participant would still have to identify each support they require to ascertain whether the budget amount will cover their needs. Plan flexibility is meaningless if the budget amount is insufficient.

Moreover, it is unclear how a 'budget' model will interact with the criteria at section 34 of the NDIS Act. The PC envisaged that the 'reasonable and necessary' threshold would ensure that participants were sufficiently supported. PIAC submits that in a rights-based scheme, a budget should still be based on 'reasonable and necessary supports' a person needs to achieve their goals.

There are two further overall points to be made about any shift away from discussing and agreeing each individual support with the participant. On one hand this may create a less individualised model of funding supports and take choice and control away from the participant. On the other, it may reduce overarching bureaucracy as plans will be longer and there will be reduced pressure on participants to discuss supports line-by-line each year.

The driving force behind any new budget model should be to deliver flexibility for participants not to undercut their current funding supports. And any new reforms or policy regarding personalised budgets must strike the balance between plan flexibility, promoting choice and control and ensuring participants receive sufficient funding to meet their needs and pursue their goals.

5.5 There must be a process to finalise draft budgets with participants

Participants should be given an opportunity to discuss their draft budgets and plans with the delegate, to ensure the final budget and plan is suitable and appropriate. This will help ensure the participant is being provided the right level of funding, and that both the participant and the NDIA

⁵³ A though the NDIA proposed that the profiles would be based on participant data, there needs to be transparency around how the profiles are created.

⁵⁴ PC report, above n 1, 343.

⁵⁵ Tune Review Report, above n 12, 10.

are satisfied with the plan. Therefore, before a draft budget is finalised, there must be a process for the participant to be consulted.

Getting the plan right at this stage will reduce the number of internal reviews and appeals to the AAT, and ultimately lead to a more efficiently administered NDIS.

Recommendation 9: Personalised budgets should comply with the Committee’s approach to policy development

Any new policy proposal to introduce personalised budgets should be subject to a co-design process and involve extensive consultation.

Recommendation 10: Budgets should not be populated using rigid profiles

Personalised budgets should not be populated using profiles designed to group participants together with ‘similar’ functional capacity. Profiling and categorisation do not account for participants’ diversity, independence or choice and control in the planning of their supports.

Recommendation 11: There must be clear and transparent criteria to determine budgets

The level of funding in a budget cannot be a discretionary determination based on modelling and assumptions. There must be clear and transparent criteria or parameters for the NDIA to satisfy in determining a participant’s level of funding, including ‘financial sustainability’ considerations and the weight to be given to each criterion. This will ensure proper governance, accountability and transparency of the NDIS. This will also ensure participants have a proper ability to challenge the determination of a personalised budget through internal and external review processes.

Recommendation 12: Goals and aspirations must be considered in determining budgets

Matching a participant to profiles with similar functional capacity, does not mean those profiles will have the same goals and support needs of the participant. There must be consideration of an individual’s goals and aspirations in determining the budget amount. It is not enough that goals and aspirations are relevant only in determining how to allocate a budget.

Recommendation 13: Individual support needs must be considered in determining budgets

A participant would still have to identify each support they require to ascertain whether the budget amount will cover their needs. Therefore, the budget amount must be developed with regard to individual support needs.

Recommendation 14: There must be a process to finalise draft budgets with participants

Participants should be given an opportunity to discuss their draft budgets and plans with the delegate, to ensure the final budget and plan is suitable and appropriate. There must be a process to finalise draft budgets with participants.

6. Improvements to reviews and appeals process (paragraph (h))

6.1 Implications of a multiplying AAT caseload

Analysis of the AAT's NDIS Division shows that between 1 July 2020 to 30 June 2021, there were 2,160 new cases lodged at the AAT with 1,631 cases on hand at the end of that period.⁵⁶ In contrast, in the 7 months between 1 July 2021 and 31 January 2022, there were 3,583 lodgements with 3,651 cases on hand at the end of this period.⁵⁷ There have been more appeals lodged in the first 7 months of the current financial year than the entire financial year commencing 1 July 2020. Expressed another way, in about half the amount of time, the number of NDIS appeals on hand have more than doubled in the AAT. The number of appeals lodged each month since July 2020 has been steadily increasing.⁵⁸

Compared with the 12-month period from 1 July 2020 to 30 June 2021, in the 6-month period between 1 July 2021 and 31 December 2021, there was a 400% increase in cases going to the AAT in relation to NDIS plans and a 58% increase in cases relating to access to the NDIS.⁵⁹

Legal costs from 1 July 2020 to 30 June 2021 were \$17.3 million. From 1 July 2021 to 31 December 2021, legal costs were \$19.1 million. There was more money spent on legal costs in that 6-month period than in the entirety of the previous financial year.⁶⁰

First, and as stated above, where data demonstrates that appeals to the AAT are increasing, the publication of AAT settlement outcomes would support transparency and allow participants to better understand the kinds of supports that might be sought, leading to better NDIA decision-making and fewer appeals. The data also exemplifies the need to establish a process for implementing systemic changes following successful challenges to the AAT or Federal Court to avoid wasting resources of reviews and/or appeals on issues that should be considered settled.

Second, in circumstances where AAT appeals continue to rise and at a significant rate, PIAC considers the present inquiry regarding the implementation and performance of the NDIS must examine the internal review and external appeals process. This is so, not only to address concerns with the internal and external review processes, but also because those concerns are symptomatic of more significant issues within the NDIS.

PIAC has previously stated it supports the joint submission to the Committee from disability advocates entitled 'Unreasonable and Unnecessary Harms' (**Joint Submission**)⁶¹, which raised concerns regarding the NDIS internal and external review processes.

⁵⁶ AAT Case load Report, For the period 1 July 2020 to 30 June 2021, [https://www.aat.gov.au/AAT/med a/AAT/F es/Stat st cs/AAT-Who e-of-Tr buna -Stat st cs-2020-21.pdf](https://www.aat.gov.au/AAT/med%20a/AAT/F%20es/Stat%20st%20cs/AAT-Who%20e-of-Tr%20buna-Stat%20st%20cs-2020-21.pdf).

⁵⁷ AAT Case load Report, For the period 1 July 2021 to 31 January 2022, [https://www.aat.gov.au/AAT/med a/AAT/F es/Stat st cs/AAT-Who e-of-Tr buna -Stat st cs-2021-22.pdf](https://www.aat.gov.au/AAT/med%20a/AAT/F%20es/Stat%20st%20cs/AAT-Who%20e-of-Tr%20buna-Stat%20st%20cs-2021-22.pdf).

⁵⁸ Luke Henriques-Gomes, 'Legal challenges against NDIA decisions more than triple in five months', *Guardian Australia*, 11 December 2021 <<https://www.theguardian.com/australia-news/2021/dec/11/legal-challenges-against-nda-decisions-more-than-triple-in-five-months>>.

⁵⁹ Proof Committee Hansard, Senate, *Legal and Constitutional Affairs Legislation Committee* (15 February 2022), 66.

⁶⁰ Proof Committee Hansard, Senate, *Community Affairs Legislation Committee* (17 February 2022), 79.

⁶¹ Joint submission to the Joint Standing Committee on the NDIS from 20 disability advocacy organisations, *Unreasonable and Unnecessary Harms* (August 2021).

We note the longstanding nature of the issues identified in these submissions and in Joint Submission, and the fact that recommendations addressing these matters have been made repeatedly by various inquiries without Government implementation. In the General Issues 2021 Report, this Committee stated that as these matters continue to cause concern for stakeholders, it proposed 'to maintain a watching brief' and if further evidence indicates these matters continue to be of concern, the Committee may consider these in more detail in the future.⁶²

PIAC submits that the statistics demonstrate a worsening of these longstanding issues. Therefore, we maintain the recommendation made in the Joint Submission that this Committee should conduct an inquiry into the NDIS internal and external review process. Such an inquiry can recommend how the review and appeals process can be improved to ensure it is less adversarial and leads to better administrative decision-making.

One such measure to achieve a less adversarial approach to the external review process would be to implement the recommendation from the Joint Submission for Guiding Principles on the Conduct of NDIS Appeals to be co-designed between the NDIA and disability representatives. Further, the creation of Guiding Principles, in partnership with disability representatives, would assist to 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.

Recommendation 15: The Committee should initiate an inquiry into the NDIS internal and external review process

Implement Recommendation 1 as outlined in the Joint Submission.

Recommendation 16: NDIA to co-design 'Guiding Principles on the Conduct of NDIS Appeals'

Implement Recommendations 3, 4, 7, 8(b), 9, 10, 14 as outlined in the Joint Submission.

6.2 The NDIA's internal review process and the potential for jurisdictional issues before the AAT

In a large proportion of the cases seen by PIAC involving internal reviews by the NDIA, troubling practices have been identified on the part of the NDIA. The effect of these practices is to make internal review processes complex and intimidating for participants to navigate, and create jurisdictional issues that deny participants the right to have their matter reviewed externally by the AAT.

One particularly troubling issue we have seen repeatedly is the provision of incorrect and harmful legal and procedural advice by NDIA employees and planners to participants, including written or verbal advice about a participant's review rights. This has included issues such as incorrectly representing the period within which a person can request a section 100 internal review; informing a person that they had a right to apply to the AAT when they did not; or telling participants that they needed to take certain steps that were, in fact, unnecessary and potentially even detrimental to the participant.

⁶² General Issues 2021, above n 15, [4.71]-[4.74].

For instance, in one matter seen by PIAC, a participant was told (incorrectly) and encouraged by the NDIA that it would only be able to consider funding a requested support if the participant withdrew their ongoing section 100 internal review request. The participant agreed to verbally withdraw the request, resulting in the review being discontinued. The withdrawal of the section 100 internal review would have denied the participant significant procedural rights to seek external review by the AAT.

PIAC has also seen other matters involving serious administrative errors on the part of the NDIA. This has included incorrectly processing a 'change of circumstances' form as a request for a section 48 review (despite the person deliberately declining to tick the box indicating that they wished to commence a section 48 review); treating a request for a section 100 internal review as a request for a section 48 plan review instead; and failure to pass on evidence provided by a participant to the relevant decision-maker. One particularly egregious form of administrative oversight that we have seen in multiple instances has included a failure to even notify participants that a decision had been made on their internal review request – meaning that they did not know about the outcome for months, with some even needing to approach their local MP for assistance in obtaining the decision. These types of errors are often very difficult for participants to identify, and can take many months to rectify. This adds significant time and stress for participants, and PIAC has heard many describe themselves as having lost faith in the NDIS as a result.

For a participant to apply for review to the AAT, they must first have applied for a section 100 internal review of a reviewable decision within a prescribed timeframe, received a decision on that internal review decision, and then applied to the AAT within 28 days of receiving that decision. If any of these steps is missed (as exemplified by the forms of mishandling by the NDIA above), the participant will not be able to access merits review by the AAT. Indeed, a review of published AAT decisions shows that a large proportion are concerned with whether the AAT has jurisdiction. Such faults in the internal review process represent significant legal costs, and frustration and confusion on the part of the participant. It also emphasises the need for an inquiry into the NDIA's internal review process.

7. Conclusion

The NDIS has the potential to revolutionise the way in which people with disability are supported to participate fully in the Australian community.

Our submission highlights there are longstanding issues with both the implementation and administration of the NDIS, many of which arise from a lack of transparency. Transparency must be a paramount feature of the NDIS to empower participants to exercise informed choice and control. Improved transparency will lead to better planning outcomes, more consistent decision-making and restore confidence in the NDIS. It will also assist in providing a more accurate context for the public to understand the financial sustainability of the NDIS and its administration.

The reforms we have recommended would contribute to much needed increased transparency and improve the performance of the NDIA to deliver fair and just outcomes for people with disability.