Public Interest Advocacy Centre

Second submission to the Independent Review of the National Disability Insurance Scheme

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a 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 3 – Draft plans should be made available to participants prior to plan approval

The NDIA should provide draft plans to participants, carers and advocates prior plan approval.

Recommendation 4 – NDIA policies are developed and reviewed in consultation with people with disability

Policies, including Operational Guidelines, should be co-designed, developed and reviewed, in consultation with people with disability, peak bodies and other representative stakeholder groups.

Recommendation 5 – NDIA policies be reviewed to ensure they are consistent with the NDIS Act and Rules, and other relevant legislation. NDIA policies should not impose mandatory criteria that are not supported by the legal framework

The NDIA's policies be reviewed to ensure they do not impose mandatory criteria that are not supported by the NDIS Act or Rules, or other relevant legislation. A policy should be accompanied with an explanation as to how it is supported by the NDIS Act. The NDIA should not adopt policies, processes or make decisions which are contrary to the NDIS Act or its principles.

Recommendation 6 – The NDIS should publish Typical Support Packages to improve transparency

The NDIS legislative framework should require Typical Support Packages to be published, and make it clear that Typical Support Packages are guidelines only in the creation of plans that must be person-centred and tailored to an individual's goals.

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The NDIS legislative framework should require the NDIA to publicly disclose information about specialist panels it utilises, and the policies and procedures that they apply. This should include informing participants when panels are making decisions about them, to ensure participants can engage and/or provide information to the panel before a decision is made.

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Written guidelines on what evidence is accepted by the NDIA to inform planning decisions should be published by the NDIA. Groups representing relevant professionals and disability organisations should be consulted and/or co-design the guidelines. Guidelines and FAQs could be developed for different stakeholders including NDIS participants, Support Coordinators, Occupational Therapists and other allied health and health professionals.

Recommendation 9 – The NDIA publish guidelines regarding requests for an expert assessment of a participant, by an expert chosen by the NDIA

The guidelines should also set out the circumstances when the NDIA may request a participant to undergo an assessment by an expert engaged by the NDIA.

Recommendation 10 – The NDIA take steps to ensure it complies with model litigant obligations

The NDIA and its legal representatives should always comply with its model litigant obligations. To achieve this the NDIA should implement the 16 recommendations made in the National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal submission.[1]

Recommendation 11 – The NDIA provide the AAT with all documents required by the disclosure provisions of the AAT

The NDIA provide the AAT with all documents required by disclosure provisions of the Administrative Appeals Tribunal Act 1975 (Cth). It should monitor the performance of responsible staff against this metric.

Recommendation 12 – All levels of government should commit to delivering, co-designing and investing in Tier 2

All levels of government (local, state/territory and federal) and across all relevant portfolios must commit and coordinate on strategy and funding to deliver Tier 2. Tier 2 should be co-designed with people with disability and disability representative organisations.

Recommendation 13 – People with disability over 65 should have equitable access to NDIS supports

To comply with obligations under the Convention on the Rights of Persons with Disabilities, the Australian Government adopt, through legislation, an amendment to the NDIS Act to remove section 22 of the NDIS Act.

As an immediate step to address the support needs of people with disability over 65, the Australian Government should set up a harmonised national program to provide equitable access to assistive technology and home modifications for people with disability over 65 who are who are not eligible for the NDIS. The Government must meaningfully engage with older people with disability and representative organisations to co-design and deliver the new program.

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[1] Disability Advocacy NSW, Your Say Advocacy Tasmania and Villamanta Disability Rights and Legal Service Inc, *National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal* (3 June 2022).

Recommendation 14 – The NDIS (Supports for Participants) Rules be amended to ensure greater structure and detailed reasoning is provided to support NDIA decisions that a requested support does not represent 'value for money'

The NDIS (Supports for Participants) Rules be amended to provide greater structure to 'value for money' decisions, including by:

- *providing a clear method to assess and compare potential benefits and costs of a support;*
- *further defining concepts such as 'reasonable costs', and the nature of an 'alternative' or 'comparable' support; and*
- *requiring the NDIA to provide clear reasons as to how the 'value for money' criterion has been applied when it refuses funding for a support on this basis.*

Recommendation 15 – NDIS (Supports for Participants) Rules be amended to clarify the circumstances in which a support will be most appropriately funded by a system or service delivery other than the NDIS

The NDIS (Supports for Participants) Rules be amended to clarify that a support will only be 'more appropriately funded' by another system of service delivery for the purposes of s 34(1)(f) if the NDIA is satisfied the support is, or will be, provided by that other service. The Supports Rules be amended to require that where other systems can provide the support to the participant, the NDIA should, with the participant's agreement, facilitate direct engagement with the other system.

Recommendation 16 – Amend the NDIS Act to ensure reasonable and necessary supports can be funded for participants with multiple impairments beyond the impairment(s) that qualified access to the NDIS

The NDIS Act be amended to clarify the relationship between impairments relied upon by a participant to meet the NDIS access criteria, and the supports that can be funded in their NDIS plan(s). The amendment should protect against limiting reasonable and necessary supports to those that relate to the impairment(s) that qualified the participant's access to the NDIS.

Recommendation 17 – The NDIA provide full and detailed reasons for reviewable decisions

The NDIA adopt a policy of providing full and detailed reasons for reviewable decisions that comply with the requirements of section 28 of the Administrative Appeals Tribunal Act 1975 (Cth), to allow a participant to fully understand the NDIA's position and to evaluate how their case has been considered, as well as the prospects of any appeal.

Recommendation 18 – The NDIA should provide reasons, or further reasons, when requested by a person with disability

Where a person with disability requests reasons, or further reasons (including in accordance with the Administrative Appeals Tribunal Act 1975 (Cth)), for a decision that has been made about them, the NDIA should provide these reasons unless there is a strong reason not to do so (eg in rare cases where a request is vexatious).

Recommendation 19 – The NDIA agree to record reasons for settlements as notations in consent orders made by the AAT

Where the NDIA decides to settle a matter in the AAT, it should agree to record in the consent orders made by the AAT appropriate notations reflecting the facts that it has been satisfied of that have led to it agreeing to the settlement. Notations should be developed in consultation and by agreement with the applicant. Notations should be considered by the NDIA during future planning discussions with that participant.

Recommendation 20 – The NDIA should establish a settlement outcome register

The NDIA establish a settlement outcomes register in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability, and to improve consistency in decision-making. In determining the information to be published, the NDIA should consult with participants and advocates.

Recommendation 21 – The NDIA ensure its policy and operational guidelines are updated to be consistent with relevant settlement outcomes, and AAT and court decisions

The NDIA implement a transparent process to ensure its policy and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The AAT Appeals Branch should provide feedback to the NDIA to assist the NDIA to understand what policy and guideline changes are required. The NDIA should report on any updates in its quarterly reports to the Disability Ministers.

Recommendation 22 – The NDIA implement and use Decision Impact Statements setting out the implications of external review decisions from the AAT and Federal Court

The NDIA implement and use Decision Impact Statements setting out the implications of external review decisions from the AAT and Federal Court. The Decision Impact Statements should set out how it impacts future administrative decision-making and any changes required to current NDIA policies and practices.

Recommendation 23 – Amend the SDA Rules to include a rebuttable legal presumption that a person be funded for their requested SDA

The SDA Rules be amended to establish a presumption that a person who has very high support needs and/or extreme functional impairment be funded for the kind of SDA that they request. This would include:

- *setting out in law that a person's preferred kind of SDA represents 'value for money' unless it can be shown through clear evidence that another kind of SDA would achieve the same goals for the person and would be significantly cheaper; and*
- *establishing that a person should only be funded for a kind of SDA that is not their preference in exceptional circumstances.*

Recommendation 24 - NDIA staff to give greater weight to individual participant circumstances and preferences when making decisions about SDA funding

Ministerial and Agency leaders direct NDIA planners and those on the Home and Living Panel, when making decisions about SDA funding, to give greater weight to:

- *the importance of maintaining social connection and informal supports;*

- *the consequences of various SDA models for participant's health, wellbeing, lifetime care costs and social and economic participation, when making decisions about SDA funding for participants; and*
- *a participant's preferences, as described by the legislation.*

Recommendation 25 – NDIS Rules implementing the Participant Service Guarantee be amended to implement specific timeframes for decisions about SDA and Home and Living supports

The planned NDIS Rules implementing the Participant Service Guarantee be prepared and implemented as a matter of priority; and ensure the Guarantee operates effectively to:

- *set specific standards for Home and Living Panel/SDA and housing-related support decisions, distinct from other types of supports. These standards should require urgent decisions (eg, young people at risk of residential aged care, NDIS participants in hospital or living in precarious housing) to be made within 10 days of a participant's request, and all SDA and support decisions to be made in under 50 days;*
- *assess the total time taken from the time a request for support was made by a participant, until the time a binding decision on that support was made and communicated to the participant; and*
- *provide clear avenues for individual participants to report their experience to the Commonwealth Ombudsman charged with overseeing the implementation of the Guarantee.*

1. Introduction

Further to our submission to the Independent Review of the National Disability Insurance Scheme (**Review**) dated 15 December 2022, the Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this second submission.

PIAC has lengthy experience working with people with disability to tackle barriers to justice and fairness. Since July 2019, PIAC has worked on 'A Fairer NDIS', a project focused on delivering better outcomes under the National Disability Insurance Scheme (**NDIS** or **Scheme**) for people with disability. This work has been done in close consultation with disability rights organisations.

The Review's *What we have heard* report released on 30 June 2023 (**Interim Report**) outlined several topics and questions the Review is considering and seeking solutions on. This submission summarises PIAC's views and recommendations in response to the following 'Priority areas for improvement' in Part B of the Interim Report:

- Topic 1: Applying and getting a plan;
- Topic 2: A complete and joined up ecosystem of support;
- Topic 3: Defining reasonable and necessary; and
- Topic 9: Supported living and housing.

We have expressed many of these views in our previous publications, most important of which include:

- Submission to the Joint Standing Committee on the NDIS on *Current Scheme Implementation and Forecasting* (February 2022);
- *Housing Delayed and Denied: NDIA Decision-Making on Specialist Disability Accommodation Funding* (April 2022);
- Submission to the Joint Standing Committee on the NDIS on *Capability and Culture of the NDIA* (October 2022); and
- Submission to Attorney-General's Department *Administrative Review Reform Issues Paper* (May 2023).

2. Applying and getting a plan

Many of the concerns we have over the National Disability Insurance Agency's (**NDIA**) practices arise from a failure to put participants and people with disability at the centre of administering the NDIS. Instead, we believe the NDIA has, at times, prioritised ease of administration and cost-reduction over the preferences, needs and experiences of NDIS participants. Although there have been some incremental positive changes to process and culture over the last twelve months,[2] many concerns held by participants, and which have been identified in our previous submissions, remain.

In our view, to make access and planning simpler and less stressful for participants, the NDIA must:

- improve its engagement with participants during the planning process;

[2] This includes the NDIA publishing 'Model Litigant Guidelines'; reduced waiting times for Specialist Disability Accommodation decisions; a reduction in rates of inappropriate SDA funding decisions; and improved NDIA engagement and communication with disability advocates.

- ensure its policies are participant-centred;
- achieve greater transparency in its approach to the planning and evidence process; and
- adopt better practices in its approach to external review processes.

2.1 What would make access and planning simpler and less stressful?

2.1.1 Improve engagement with participants during the planning process

At [2.4.1] of our submission to the *Capability and Culture* inquiry, we explained problems associated with insufficient engagement by NDIA planners in their role to prepare plans with participants. These submissions remain relevant and should be considered as part of this review.

In addition, to ensure the NDIS is implemented as it was envisioned, planners must be appropriately qualified, trained and experienced. This includes ensuring planners are trained to work with people with complex needs.

The planning process would also be enhanced by making draft plans available to participants prior to the NDIA approving the plan. Draft plans would increase participant involvement in the planning process and reduce the likelihood of reviews and appeals after plans are put in place.[3]

Recommendation 1 – NDIA planning processes should be conducted in consultation with participants

NDIA planners be required to meaningfully consult and collaborate with participants and their supporters during plan development, variations and reassessments.

Recommendation 2 – NDIA staff performance standards should be enforced during planning

Performance standards be enforced for NDIA planning staff. The NDIA's performance standards should track specific measures including participant satisfaction with planning conversations, number of avoidable issues with evidence provided and accurate recording of participant views. Planners should have appropriate qualifications, training, and experience.

Recommendation 3 – Draft plans should be made available to participants prior to plan approval

The NDIA should provide draft plans to participants, carers and advocates prior plan approval.

2.1.2 Approach to designing, applying and reviewing NDIA policies

At [2.1]- [2.2] of our submission to the *Capability and Culture* inquiry, we set out concerns about the way in which the NDIA currently designs, applies, and reviews its policies (including Operational Guidelines). PIAC is concerned the NDIA's approach to designing policies overlooks the rights of people with disability. For example, we have also received feedback from stakeholders (peak bodies, disability advocacy groups, support providers, and health

[3] See for example, 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, [3.60]-[3.69], Recommendation 25c; Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020) Recommendation 1; Joint Standing Committee on the NDIS, *Capability and Culture of the NDIS Interim Report* (March 2023), [3.82]-[3.89].

professionals) that they have been inadequately consulted on the design of NDIA policies. Sufficient consultation is important because of the role policies play in providing guidance to decision-makers, and creating fair and consistent approaches, in the context of the relatively new NDIS legislative framework. As noted in our *Capability and Culture* submission, NDIA policies need to balance complex considerations involving evidence from health professionals, the costs, benefits and long-term sustainability of the Scheme and, most importantly, the individual views, rights and dignity of a wide range of participant. Reform to NDIA policies should involve start-to-finish consultation that is accessible and meaningful. A participant-centred approach involves regularly consulting with those affected by policy design. This would also increase public confidence in the NDIA's approach.

Recommendation 4 – NDIA policies are developed and reviewed in consultation with people with disability

Policies, including Operational Guidelines, should be co-designed, developed and reviewed, in consultation with people with disability, peak bodies and other representative stakeholder groups.

Recommendation 5 – NDIA policies be reviewed to ensure they are consistent with the NDIS Act and Rules, and other relevant legislation. NDIA policies should not impose mandatory criteria that are not supported by the legal framework

The NDIA's policies be reviewed to ensure they do not impose mandatory criteria that are not supported by the NDIS Act or Rules, or other relevant legislation. A policy should be accompanied with an explanation as to how it is supported by the NDIS Act. The NDIA should not adopt policies, processes or make decisions which are contrary to the NDIS Act or its principles.

2.1.3 Greater transparency about NDIA approaches to the planning and evidence process

At [3.2.2] of our submission to the *Current Scheme Implementation and Forecasting* inquiry, we explain the implications arising from a lack of transparency in the NDIA's decision-making about plans. PIAC is particularly concerned about the lack of transparency in relation to:

1. the use of Typical Support Packages (**TSP**) as a guide in planning decisions;
2. public information about specialist panels utilised by the NDIA; and
3. evidence the NDIA requires for planning decisions.

2.1.3.1 Publication of Typical Support Packages

Given the essential role of TSP in planning decisions, we previously set out why TSP should be published (see [3.2.2.1] of our submission to the *Current Scheme Implementation and Forecasting* inquiry). Transparency over the entire process of how NDIA planning decisions are formulated is crucial to establish a strong sense of confidence in the administration of the NDIS.

We reiterate our view that TSPs should only provide a *starting point* for *developing* a participant's plan/s. TSP's should be used as guidance only and applied flexibly to ensure plans address the individual circumstances, needs and goals of each participant.

Recommendation 6 – The NDIS should publish Typical Support Packages to improve transparency

The NDIS legislative framework should require Typical Support Packages to be published, and make it clear that Typical Support Packages are guidelines only in the creation of plans that must be person-centred and tailored to an individual's goals.

2.1.3.2 Transparency about specialist panels used by the NDIA

We raised concerns about the NDIA's operation of specialist decision-making panels at [3.2.2.2] of our submission on *Current Scheme Implementation and Forecasting* inquiry and at [3.4.2] of our submission to the *Capability and Culture* inquiry. There is no public information about the composition, operation, and existence of these panels. If participants do not know if or how a panel has been involved in a decision concerning them, it will not be clear who is responsible for making the decision, therefore what avenues for engaging and input are available. The secretive mode of operation of the panels erodes faith in the NDIA's decision-making. Since our previous submissions, we are not aware of any further information having been published about these panels.

Recommendation 7 – The NDIA be required to disclose information about specialist panels, and ensure participants can engage and/or provide information to the panel before a decision is made

The NDIS legislative framework should require the NDIA to publicly disclose information about specialist panels it utilises, and the policies and procedures that they apply. This should include informing participants when panels are making decisions about them, to ensure participants can engage and/or provide information to the panel before a decision is made.

2.1.3.3 Publication of guidance for NDIA evidentiary requirements

At [4.2.3] of our *Housing Delayed and Denied* report, we described the difficulties participants face in knowing what evidence the NDIA requires for planning decisions, and in ensuring planners will consider the reports they provide. We repeat our recommendation from that report that the NDIA should prepare and publish written guidelines for stakeholders (eg participants, carers, support co-ordinators and allied health professionals) as to the types, form, and relevant content of evidence sought for Specialist Disability Accommodation (**SDA**) planning decisions. We consider such written guidelines would be of broad value to all access and planning decisions.[4] Guidelines should be developed in consultation with relevant professional bodies (including peak bodies for health practitioners), and groups representing people with disability.

In some AAT matters the NDIA will request a participant undergo an assessment by an expert engaged by the NDIA. This may occur even when the participant has already provided an expert report on the same topic from their own treating professional. Many participants find such requests distressing (eg due to the potential for re-traumatising the participant where they are required to re-tell their background to someone who they are not familiar with). The guidance should set out the circumstances when the NDIA may request a participant to undergo such an÷≥ assessment.

[4] See similar recommendation made by the Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020), Recommendation 17.

Recommendation 8 – The NDIA publish guidelines on evidence requirements for planning decisions

Written guidelines on what evidence is accepted by the NDIA to inform planning decisions should be published by the NDIA. Groups representing relevant professionals and disability organisations should be consulted and/or co-design the guidelines. Guidelines and FAQs could be developed for different stakeholders including NDIS participants, Support Coordinators, Occupational Therapists and other allied health and health professionals.

Recommendation 9 – The NDIA publish guidelines regarding requests for an expert assessment of a participant, by an expert chosen by the NDIA

The guidelines should also set out the circumstances when the NDIA may request a participant to undergo an assessment by an expert engaged by the NDIA.

2.1.4 NDIA to adopt better practices in external review processes

At [2.4.2] of our submission to the *Capability and Culture* inquiry, we made recommendations addressing the NDIA's overly litigious approach to AAT appeals. In March 2023 the NDIA published its 'Model Litigant Guidelines', as well as publishing clear guidance for how people with disability and their representatives can complain if they think the NDIA has not been a model litigant in its case.

We recognise this has been an important step by the NDIA towards improving the way it conducts AAT cases. However, our experience in representing applicants in AAT disputes is that the NDIA continue to engage in AAT disputes in an unnecessarily protracted, adversarial and costly manner. Given the serious impact on participants' experience of review processes when the NDIA does take an adversarial stance, we reiterate our recommendations in the *Capability and Culture* inquiry, to further improve participants' experiences and outcomes.

Recommendation 10 – The NDIA take steps to ensure it complies with model litigant obligations

The NDIA and its legal representatives should always comply with its model litigant obligations. To achieve this the NDIA should implement the 16 recommendations made in the National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal submission.[5]

Recommendation 11 – The NDIA provide the AAT with all documents required by the disclosure provisions of the AAT

The NDIA provide the AAT with all documents required by disclosure provisions of the Administrative Appeals Tribunal Act 1975 (Cth). It should monitor the performance of responsible staff against this metric.

3. A complete and joined up ecosystem of support

PIAC agrees with the observations in *What we have heard* report, namely that 'there is not enough support for people with disability outside the NDIS' which is resulting in 'people falling

5 Disability Advocacy NSW, Your Say Advocacy Tasmania and Villamanta Disability Rights and Legal Service Inc, *National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal* (3 June 2022).

through the cracks and missing out on much needed support'.[6] From our work consulting with disability representative organisations, and our casework, we are particularly concerned about the following two areas in which supports for people with disability are lacking and inequitable:

- Tier 2 of the NDIS; and
- supports for people over the age of 65 who are not eligible for the NDIS.

We set out below our recommendations regarding the effective implementation of and investment in Tier 2 and how equitable access to supports for people with disability over 65 can be achieved.

3.1 What services and supports should be available to people with disability outside the NDIS and who should provide them?

Tier 2 was originally designed to operate as an important part of the broader NDIS framework that provides disability supports, by helping all Australians with disability, their families, and carers to connect with community and mainstream services and supports.[7] It was also intended to help communities become more welcoming and inclusive.[8] However, from our casework and our work consulting with disability representative organisations, we are aware there are growing numbers of people with disability not receiving the disability supports they need.[9]

Without the proper and effective delivery of Tier 2, people with disability – particularly those who do not receive individualised funding packages under the NDIS – have been left with insufficient support. The social and economic cost of insufficient support to people with disability has been well documented.[10]

Research reveals clear discrepancies and substantial gaps between what is said about the availability of Tier 2 services and supports, and the experience of people seeking access to services and supports.[11] In particular, there are discrepancies between the promoted availability and accessibility of support and services to people with disability who are not NDIS participants, and people's experiences of attempting to find and use them.[12] Further, the delivery of some Tier 2 supports through Information, Linkages and Capacity Building (**ILC**) grants has found investment in ILC to be inadequate and misdirected.[13] For the number of people Tier 2 is intended to support, investment in Tier 2 accounts for less than one per cent of overall investment in the NDIS.[14]

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6 NDIS Review, *What we have heard: moving from defining problems to designing solutions to build a better NDIS* (June 2023) 8.

7 Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs* (Study Report, October 2017) ('Costs Report') 30. Mainstream services include health, education, employment, transport, justice and housing.

8 Sue Olney, Amber Mills and Liam Fallon, 'The Tier 2 tipping point: access to support for working-age Australians with disability without individual NDIS funding' (Research Report, Melbourne Disability Institute, University of Melbourne, June 2022) ('MDI Report') 10.

9 MDI Report 8.

10 See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Economic cost of violence, abuse, neglect and exploitation of people with disability* (February 2023); and Productivity Commission, *Disability Care and Support* (July 2011).

11 MDI Report 65.

12 MDI Report 14.

13 Centre for Social Impact, *Overview of results – Informing Investment Design: ILC Research Activity* (Swinburne University of Technology, 26 November 2021); MDI Report 16.

14 Michael D'Rosario, *Not a One-Stop Shop: The NDIS in Australia's social infrastructure* (March 2023) 37.

The delivery of Tier 2 of the NDIS is of critical importance to the disability community. With the NDIS a priority in *Australia's Disability Strategy 2021-2031*, and Tier 2 central to the NDIS, there needs to be commitment and coordination by all levels of government (local, state/territory and federal) and across all relevant portfolios on strategy and funding to deliver the social change envisaged by Tier 2. Government should co-design with people with disability and disability representative organisations what services should be available in Tier 2 and the delivery of those services. If Tier 2 is to be implemented effectively, investment in Tier 2 needs to be drastically greater than what it has been to date.

Disability Advocacy Network Australia (**DANA**) has published a Discussion Paper recommending:[15]

1. A Disability Inclusion Agency be established to represent the interests of all Australians with disability – inside and outside the NDIS – in government decision making. This agency could incorporate the current Information, Linkages and Capacity Building program, the National Disability Data Asset (**NDDA**), the National Disability Research Program, and would have responsibility for actioning *Australia's Disability Strategy*.
2. A focused and increased investment in Tier 2, or ILC, proportionate to the amount spent on individualised funding packages through the NDIS, and at least ten times the current amount.
3. To strengthen the evidence base, citizen science models should be co-designed. This data would feed directly into the NDDA, rounding out aggregated government datasets.

We support DANA's recommendations and encourage the NDIS Review to engage further with the recommendations and the views of the disability community.

Recommendation 12 – All levels of government should commit to delivering, co-designing and investing in Tier 2

All levels of government (local, state/territory and federal) and across all relevant portfolios must commit and coordinate on strategy and funding to deliver Tier 2. Tier 2 should be co-designed with people with disability and disability representative organisations.

3.2 How can governments work better to deliver a joined-up system of inclusion and support for all Australians with disabilities (within and outside the NDIS)?

Section 22 of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) requires that a person must be under 65 years old at the time they apply for access to the NDIS (**age cap**). This means that a person who acquires their disability after 65 cannot access the NDIS. It also means that people with disability over 65 at the time the NDIS commenced have been unable to access the Scheme.

People with disability over 65 are therefore left to access supports through the aged care system, instead of the NDIS. However, there are clear differences and disparities between the two

[15] Disability Advocacy Network Australia (DANA), *NDIS Review: Mainstream and Tier 2 Rethinking 'Tier 2' of the NDIS: Investing in real inclusion of people with disability* (2023) 8-10.

systems, as observed by the Royal Commission into Aged Care Quality and Safety (**Royal Commission**):

> The disability services and aged care systems are different philosophically and operationally. Discrete Australian Government legislation governs each program separately. Each area has its own responsible Minister. Disability services and aged care are financed differently and each offers a different range of services. The National Disability Insurance Scheme is not means tested, while aged care services involve consumer contributions. Aged care services are rationed in the existing system, while support provided by the National Disability Insurance Scheme is not. There are strict statutory age requirements for the National Disability Insurance Scheme, but not for aged care.
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> …
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> We have received evidence and information about inconsistencies between the supports and services available under the National Disability Insurance Scheme and those available in the aged care system, including greater access in the National Disability Insurance Scheme to specialised care, aids, equipment and therapy. The schedule of supports available to participants in the National Disability Insurance Scheme is more comprehensive than is presently available in aged care. The average amount of funding available for supports is often greater in the National Disability Insurance Scheme than in the current aged care system. As at October 2020, the highest level of government funding available to an aged care resident was $81,446.10 plus supplements each year (if classified as 'High' for the Aged Care Funding Instrument) but, on average, an individual plan for a National Disability Insurance Scheme participant receiving Supported Independent Living care supports was about $325,000 a year without any user contribution.[16]

The Royal Commission concluded that it 'is apparent that older people with a disability do not have equitable access to disability services', and found the NDIS 'by design discriminates against older people'.[17] The Royal Commission recommended that by 1 July 2024 every person receiving aged care who is living with disability – regardless of when acquired – should receive the same level of support that a person with similar conditions would under the NDIS.[18]

In its response to this recommendation, the Australian Government said work to develop a new support at home program is to be completed by the end of 2022, and as part of that work, the Royal Commission's recommendation will be 'subject to further consideration'.[19] The inequality in the level of support provided under aged care for people with disability over 65, remains an issue. Minister for the NDIS, Bill Shorten has, on multiple occasions, also publicly acknowledged this inequity.[20]

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16 Royal Commission, *Final Report: Care, Dignity and Respect* (Volume 3A, 1 March 2021) [10.1] 345-346 (footnotes omitted).

17 Royal Commission, *Final Report: Care, Dignity and Respect* (Volume 2, 1 March 2021) [2.4.2] 82; Royal Commission, *Final Report: Summary and Recommendations* (Volume 1, 1 March 2021) [1.3.10] 120.

18 Royal Commission, *Final Report: Care, Dignity and Respect* (Volume 3A, 1 March 2021) [10.1] 345, Recommendation 72.

19 Department of Health, *Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety* (May 2021) 47.

20 See for example, NDIS Public Forum with Minister Hon. Bill Shorten (Zoe Daniel, Independent Federal Member for Goldstein, 31 January 2023).

The Parliamentary Joint Committee on Human Rights (**PJCHR**) expressed concern with this inequity as far back as 2012 before the NDIS Act was passed. Following several rounds of the PJCHR seeking further information from the Australian Government, the PJCHR said 'there may be substantial differences between the supports provided to individuals in the aged care system compared to those on the NDIS, which could result in the inequitable treatment of people over 65 years old'.

The Convention on the Rights of Persons with Disabilities (**Convention**) recognises the rights of all people with disability, regardless of age. Non-discrimination is a fundamental right under the Convention. The age cap, a distinction based on age, has the effect of denying the full enjoyment of Convention rights to all people with disability. In PIAC's view, it amounts to discrimination and a breach of Australia's obligations under the Convention. The age cap should be removed.

The impact of the age cap could also be ameliorated by provide targeted funding for assistive technology and home modifications.[21] The Assistive Technology for All (ATFA) Alliance and the National Assistive Technology Alliance have called for the Government to set up a national co-designed program to provide equitable access to assistive technology and home modifications for older people with disability who are not eligible for the NDIS. PIAC also directs the Review Panel to the submission of the Australian Federation of Disability Organisations (AFDO), which sets out how an assistive technology and home modifications program should be provided through Tier 2 of the NDIS.[22] PIAC encourages the Government to consult further with these representative groups on the co-design and delivery of a program to provide equitable access to disability supports for people with disability over 65.

Recommendation 13 – People with disability over 65 should have equitable access to NDIS supports

To comply with obligations under the Convention on the Rights of Persons with Disabilities, the Australian Government adopt, through legislation, an amendment to the NDIS Act to remove section 22 of the NDIS Act.

As an immediate step to address the support needs of people with disability over 65, the Australian Government should set up a harmonised national program to provide equitable access to assistive technology and home modifications for people with disability over 65 who are who are not eligible for the NDIS. The Government must meaningfully engage with older people with disability and representative organisations to co-design and deliver the new program.

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21 Assistive Technology for All, *Submission response to Assistive Technologies & Home Modifications for In-Home Aged Care* report (February 2023) < https://assistivetechforall.org.au/wp-content/uploads/2023/02/ATFA-Alliance-Submission-AT-HM-Scheme-for-In-Home-Aged-Care.pdf>; National Assistive Technology Alliance, *A submission responding to the Commonwealth Department of Health Report on a new Assistive technology and Home Modifications Program for in-home Care* (2023) <https://www.arata.org.au/public/33/files/Publications/NATA%20Submission%20to%20Dept%20of%20Health%20on%20AT-HM%20Feb%202023.pdf>.

22 Australian Federation of Disability Organisations (AFDO), *Improving Access to Services and Supports for Older people with Disability: Submission to the NDIS Independent Review Panel* (August 2023).

4. Defining 'reasonable and necessary'

4.1 How can 'reasonable and necessary' be more clearly defined so that there is a shared understanding between participants and the Agency and participants have certainty about future funding?

In PIAC's view, it is unnecessary to amend the NDIS Act to define the terms 'reasonable and necessary'. This is particularly so given that section 34 of the NDIS Act already establishes the criteria for what supports are considered 'reasonable and necessary' for the NDIS to fund. Further, defining 'reasonable and necessary' risks improperly impeding the ability of the NDIS to provide appropriate to supports to people with disability. Deciding what is reasonable and necessary must be assessed on a case-by-case basis, taking into consideration the specific circumstances of the individual participant.

PIAC's view is consistent with the view of the Full Federal Court, which has said it is not 'fruitful nor appropriate to attempt any exhaustive or authoritative judicial definition of [reasonable and necessary]'.[23]

In our view s 34(1) of the NDIS Act, containing the criteria to determine reasonable and necessary supports to be funded, is appropriate and does not require amendment. We agree with the Full Federal Court that the s 34(1) criteria are 'straightforward and pragmatic'.[24] Instead, issues arise in the application of the criteria by the NDIA. In particular, the interpretation and application of the 'value for money' criterion in s 34(1)(c), and determination of the service system to 'most appropriately fund' a support under s 34(1)(f), continue to cause confusion and poor decisions for participants. Below, we make specific recommendations to improve decision-making in relation to each of these criteria.

4.1.1 Interpreting 'value for money' (s 34(1)(c))

In our experience, it is not clear to participants what constitutes 'value for money', nor how costs and benefits of a support are evaluated by the NDIA. At [3.2.2.3] of our submission to the *Current Scheme Implementation and Forecasting* inquiry and [3.1] of our submission to the *Capability and Culture* inquiry, we said the NDIA's consideration of whether a support is 'value for money' lacks transparency. This remains the case.

Where participants are refused a support on the basis that it is not 'value for money', they should be able to understand how the decision was made. However, the methodology for applying the 'value for money' criteria is vague and uncertain. Although rule 3.1 of the *NDIS (Supports for Participants) Rules 2013* (Cth) (**Supports Rules**) provides a list of matters that can be considered in deciding whether a support represents 'value for money', it does not provide a process for weighing and comparing the costs and benefits of each support. Further, there is no clear definition of what amounts to 'reasonable costs', or what constitutes an 'alternative' or 'comparable' support.

Additionally, the NDIA is not required to provide details of how it has applied these criteria to a participant's case. Typically, participants refused funding for a support based on 'value for money'

23 *National Disability Insurance Agency v WRMF* [2020] FCAFC 79 [150].
24 Ibid [202].

considerations will not know how or whether the NDIA has weighed the various proposed benefits and costs of that support. In the vast majority, if not all the matters we have seen, this information is not included in the NDIA's reasons for decisions provided to participants.

The Supports Rules should be amended to set out an appropriate method to determine 'value for money', providing for a more structured decision-making exercise. The Supports Rules should also require the NDIA to explain how it has applied this structure whenever it refuses funding to a participant based on 'value for money'.

Recommendation 14 – The NDIS (Supports for Participants) Rules be amended to ensure greater structure and detailed reasoning is provided to support NDIA decisions that a requested support does not represent 'value for money'

The NDIS (Supports for Participants) Rules be amended to provide greater structure to 'value for money' decisions, including by:

- *providing a clear method to assess and compare potential benefits and costs of a support;*
- *further defining concepts such as 'reasonable costs', and the nature of an 'alternative' or 'comparable' support; and*
- *requiring the NDIA to provide clear reasons as to how the 'value for money' criterion has been applied when it refuses funding for a support on this basis.*

4.1.2 Interpreting 'the support is most appropriately funded' (s 34(1)(f))

As we explain at section 2 of our submission to the *Current Scheme Implementation and Forecasting* inquiry, there are significant gaps and confusion between what is provided by the NDIS and mainstream services. PIAC's experience is that participants regularly encounter areas where, due to this ambiguity, no service accepts responsibility for providing a support they need. This difficulty in understanding the boundaries is exemplified by the number of AAT appeals about section 34(1)(f) of the NDIS Act.[25]

In many instances, the lack of clarity of responsibility results in people with disability being denied supports they need or facing poorly coordinated services. One example arises in relation to supports for people who are detained within the criminal justice system. Governments have agreed the NDIS will fund supports for 'disability-related' needs of detainees, while other service systems will fund supports for 'criminogenic' needs to help the person to not reoffend. However, it is not clear that the services involved have a common understanding or shared definitions of these concepts and the boundaries between them. This leads to gaps, where all parties can agree that a person with disability should receive a type of support, but no program agrees to provide it to them. We have seen similar dynamics in the interfaces with housing, medical services and workers compensation, among others.

[25] See for example, *Young and National Disability Insurance Agency* [2014] AATA 401; *Fear by his mother Vanda Fear and National Disability Insurance Agency* [2015] AATA 706; *Burchell and National Disability Insurance Agency* [2019] AATA 1256; *WRMF and National Disability Insurance Agency* [2019] AATA 1771; *GBPR and National Disability Insurance Agency* [2022] AATA 451; *XNTW and National Disability Insurance Agency* [2023] AATA 759; *KLMN and National Disability Insurance Agency* [2017] AATA 1815; *Barling and National Disability Insurance Agency* [2021] AATA 4358.

To address this issue, the Supports Rules should be amended to clarify that s 34(1)(f) of the NDIS Act should only prevent the NDIS from funding a support if it is satisfied that it is, in fact, available to the participant from another source (such as a different government program – eligibility for which will usually be apparent from public guidelines). The Supports Rules should make it clear that the NDIS cannot decline to fund a support if a decision-maker simply *considers* that it would be 'more appropriate' for that source to provide the support. This reflects the approach of the AAT in *Burchell and NDIA* [2019] AATA 1256.

Additionally, where a person is potentially eligible for supports or services funded by the NDIS and another system, the NDIA should facilitate direct engagement with the other system to determine how best to coordinate the supports and services. Importantly, these coordinating conversations should involve the participant, and give priority to their goals, life circumstances and perspectives. In doing this, the stress and burden of coordinating services should not fall upon the person, and the person or the individuals supporting them should not have to act as a 'go-between' the NDIA and other agencies.

Recommendation 15 – NDIS (Supports for Participants) Rules be amended to clarify the circumstances in which a support will be most appropriately funded by a system or service delivery other than the NDIS

The NDIS (Supports for Participants) Rules be amended to clarify that a support will only be 'more appropriately funded' by another system of service delivery for the purposes of s 34(1)(f) if the NDIA is satisfied the support is, or will be, provided by that other service. The Supports Rules be amended to require that where other systems can provide the support to the participant, the NDIA should, with the participant's agreement, facilitate direct engagement with the other system.

4.2 What steps could the NDIA take to make decisions about reasonable and necessary which are more consistent and fair?

4.2.1 Funding supports for a participant with multiple impairments

Through our casework, and as illustrated in the case study below, we observed an approach increasingly applied by the NDIA to only fund supports which relate to an 'impairment' which the Agency considers meets the 'access criteria' under the NDIS Act.[26] For a 'reasonable and necessary' support to be funded, the NDIA stipulates that the support must be related to an impairment that met, or would meet, the access criteria. PIAC is also aware that this issue has been raised by our colleagues from legal services and disability advocacy organisations in a meeting with Kirsten Deane and Kevin Cocks on 2 March 2023 and by subsequent letter and briefing paper to the Review Panel.[27]

[26] NDIA, *Operational Guideline: What principles do we follow to create your plan?* (June 2022) 7.

[27] Letter from Queensland Advocacy for Inclusion, Villamanta Disability Rights Legal Service Inc, Rights Information and Advocacy Centre and Darwin Community Legal Service regarding 'Urgent clarification needed to distinguish NDIS Access and funding for reasonable and necessary supports as two distinct decision-making processes'.

Case study: Amir[28]

Amir is a participant from a non-English speaking background. Amir has diagnoses of Autism Spectrum Disorder (**ASD**), Attention Deficit Hyperactivity Disorder (**ADHD**) and Complex Post-Traumatic Stress Disorder (**CPTSD**). Amir sought access to the NDIS based on impairments arising from all three conditions (ASD, ADHD and CPTSD). When Amir was granted access to the NDIS he believed it was on the basis of all impairments he experiences from those three conditions.

Through the course of Amir's AAT appeal in which he seeks review of a planning decision, it became apparent Amir was granted access only on the basis of impairments arising from ASD. Evidence from Amir's treating psychiatrist clearly details the interrelationships between the impairments arising from Amir's ASD, ADHD and CPTSD, including how the impairments relating to one condition exacerbate the impairments of another condition. As Amir seeks supports which relate to impairments arising from all three conditions, the NDIA's position is that Amir would have to separately show that he would meet the access criteria in relation to the impairments arising from his ADHD and CPTSD.

The AAT has considered this issue in a series of decisions, which are set out at **Appendix A**. From these decisions three broad positions on the issue have emerged:

1. participants should only be funded for supports that relate to an impairment that met, or would meet, the NDIS access criteria (**Position 1**);
2. participants should be funded for supports that relate to any disability they have (**Position 2**); or
3. participants should be funded for supports that relate to the disability/disabilities (potentially arising from multiple intersecting impairments) connected to impairment(s) that met or would meet the NDIS access criteria (**Position 3**).

The disconnect between these positions has caused serious concerns for participants through both uncertainty over the correct approach, and the adoption by the NDIA of Position 1 which creates barriers to accessing supports through the NDIS. In our view, Position 1 is inappropriate for two main reasons.

First, Position 1 imposes artificial distinctions in the way a person with disability accesses supports and fails to account for a 'whole of person' approach. This is contrary to the NDIS Act's objects, principles and structure, which envisage an approach that considers a participant's support needs across their lifetime, their changing support needs and the interrelationship between a participant's multiple impairments.

Second, this interpretation imposes a restriction on funding, which is not present in the NDIS Act, and which conflates the concepts of 'impairment' and 'disability'. As set out in Appendix A to this

[28] *Name has been changed.*

submission, most AAT decisions on the subject have rejected Position 1 (being the NDIA's position). Most AAT decisions have adopted either Position 2 (see, for instance, the decisions in *McLaughlin* and *Spires*), or Position 3 (*HRZI* and *YBLR*).

We further note that a recent letter from the Department of Social Services written on behalf of Minister Shorten (**Appendix B**) appears to endorse either Position 2 or 3:[29]

> …the *National Disability Insurance Scheme Act 2013* (NDIS Act) acknowledges some people live with multiple impairments or disabilities, and the NDIS Act and rules do not distinguish between a primary or secondary disability for the purposes of planning. Rather, the planning process, as set out in Part 2 of Chapter 3 of the NDIS Act, provides that a holistic approach should be taken to planning. It does not matter how many disabilities a person may have, or which satisfied the access criteria, what matters is the impact of their disability – whether due to a single cause or multiple causes – on their capacity for communication, social interaction, learning, mobility, self-care or self-management. To this extent, the way your disability is recorded, either as a primary or secondary disability, is useful for understanding the characteristics of people who are supported through the NDIS, but should have no bearing on the setting of your plan budget.

PIAC strongly urges the Review Panel to address the uncertainty caused by this issue by recommending the NDIS Act be amended to clarify the correct approach. We further consider Position 1 is inconsistent with the structure and intention of the Scheme and should not be adopted; and the Review Panel should endorse and adopt either Position 2 or Position 3.

Recommendation 16 – Amend the NDIS Act to ensure reasonable and necessary supports can be funded for participants with multiple impairments beyond the impairment(s) that qualified access to the NDIS

The NDIS Act be amended to clarify the relationship between impairments relied upon by a participant to meet the NDIS access criteria, and the supports that can be funded in their NDIS plan(s). The amendment should protect against limiting reasonable and necessary supports to those that relate to the impairment(s) that qualified the participant's access to the NDIS.

4.2.2 Improving initial decision-making

Improving initial decision-making will improve the effectiveness and efficiency of NDIS decision-making and reduce the need for participants to utilise the external review process.

A number of changes to decision-making practices should be made to ensure more consistent and fair decisions about reasonable and necessary supports. This includes mechanisms to ensure external reviews processes (both decisions of the AAT and federal courts) lead to improvements in initial decision-making.

4.2.2.1 Providing reasons for decisions

At [3.2.2] of our submission to the *Capability and Culture* inquiry and [4.4.1] of our *Housing Delayed and Denied* report, we explain the inadequacies in the NDIA's current approach to

[29] Letter from Julie Yeend LVO (Branch Manager, Department of Social Services) to Mr Bradley dated 14 June 2023. Mr. Bradley has consented to PIAC using this letter to support our submission to the Review.

providing reasons for decisions (including as part of internal and external review processes), and the adverse impact this has on the administration of the NDIS.

Our recommendations from those submissions, and the bases for them, continue to be relevant, particularly considering a recent report of the Australian National Audit Office (**ANAO**). The ANAO found in 2021-22 where the NDIA declined to fund a requested support, in only 57% of cases did the NDIA document that it gave reasons to the participant for declining the support.[30] The ANAO observed this indicates a low level of compliance with the NDIA's requirement to document that reasons for decisions were communicated to participants.

Recommendation 17 – The NDIA provide full and detailed reasons for reviewable decisions

The NDIA adopt a policy of providing full and detailed reasons for reviewable decisions that comply with the requirements of section 28 of the Administrative Appeals Tribunal Act 1975 (Cth), to allow a participant to fully understand the NDIA's position and to evaluate how their case has been considered, as well as the prospects of any appeal.

Recommendation 18 – The NDIA should provide reasons, or further reasons, when requested by a person with disability

Where a person with disability requests reasons, or further reasons (including in accordance with the Administrative Appeals Tribunal Act 1975 (Cth)), for a decision that has been made about them, the NDIA should provide these reasons unless there is a strong reason not to do so (eg in rare cases where a request is vexatious).

4.2.2.2 Notations to settlement agreements

PIAC supports the development by the NDIA of a policy or principles for incorporating notations within settlement orders made under s 42C of the *Administrative Appeals Tribunal Act 1975* (Cth).

In PIAC's experience, including relevant and purposive notations assists participants to resolve disputes with the NDIA. During the settlement process our clients often express concern that matters canvassed in their dispute will need to be revisited unnecessarily when their next plan is prepared. This is because in resolving a dispute, there is often no record for the participant of why particular issues in dispute have resolved. In this context, appropriate notations provide participants with confidence that matters in dispute will not be unnecessarily revisited in future planning discussions.

The inclusion of helpful notations on AAT settlements should facilitate more efficient decision-making for future NDIS plans, particularly for supports in need of stable funding. For example, SDA necessitates funding continuity for participants to plan their lives. SDA decisions often also require consideration of a broad range of factors and evidence. For these cases, appropriate notations to record the parties' shared conclusions from the evidence available in the AAT can

[30] Australian National Audit Office, *Effectiveness of the National Disability Insurance Agency's Management of Assistance with Daily Life Supports* (Performance Audit Report, Auditor-General Report No. 43 of 2022-23, 28 June 2023) [2.62].

help to draw future planners' attention to the most significant features and provide a useful starting point for further enquiries.

By contrast, we have also seen unproductive or inconsistent approaches to notations, which can cause mistrust and frustration, and reduce participant's willingness to accept certain settlements.

Any policies or principles adopted by the NDIA should ensure lawyers acting for the NDIA do not request inappropriate notations from participants, particularly those who are self-represented. This would include ruling out notations that seek to have participants agree to future plan cuts, or make general statements about decision-making (ie, 'the NDIA requires evidence to support requests for funding') that could imply a higher threshold for future plans.

We are aware, in some instances, the AAT has declined to include notations in settlement orders. Once the NDIA has developed a consistent policy for agreeing to notations in settlements of AAT appeals, we consider it should also engage with the AAT to obtain agreement to include appropriate notations in settlement orders (which could be achieved by the President issuing a Practice Direction). If agreement on this matter cannot be reached with the AAT, the NDIA should consider other ways in which agreed facts underpinning a settlement can be recorded to assist future plan development.

Recommendation 19 – The NDIA agree to record reasons for settlements as notations in consent orders made by the AAT

Where the NDIA decides to settle a matter in the AAT, it should agree to record in the consent orders made by the AAT appropriate notations reflecting the facts that it has been satisfied of that have led to it agreeing to the settlement. Notations should be developed in consultation and by agreement with the applicant. Notations should be considered by the NDIA during future planning discussions with that participant.

4.2.2.3 Settlement outcomes register

One way in which the NDIA could make more consistent decisions about reasonable and necessary supports, is to set up a public database recording de-identified outcomes of individual NDIS appeals settled prior to an AAT hearing. With settlement being the predominant way NDIS disputes are resolved at the AAT, publication of details of settlements reached in individual matters is the only way for participants and the public to see how disputes are being resolved.

PIAC has made submissions to several inquiries regarding the importance of the NDIA publishing a 'settlement outcomes register' for AAT cases.[31]

This recommendation has been adopted by the Joint Standing Committee on the NDIS and the ANAO.[32]

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31 See eg PIAC, *Submission to Joint Standing Committee on the NDIS: Current Scheme Implementation and Forecasting for the NDIS* (February 2022) ('Submission on Current Scheme Implementation and Forecasting'); PIAC, *Submission to Joint Standing Committee on the NDIS; Capability and Culture of the NDIA* (12 October 2022) ('Submission on Capability and Culture').

32 Joint Standing Committee on the NDIS, *NDIS Planning Interim Report* (December 2019) [3.96], Recommendation 6; Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020) [2.81]- [2.84], [10.85]-[10.87], Recommendation 34; Australian National Audit Office, *Decision-making Controls for NDIS Participant Plans* (Report, 29 October 2020) [3.84], Recommendation 2.

PIAC has written to the NDIA outlining how such a register could be implemented and provided a sample model for the publication of settlement outcomes. In October 2022, we also provided a memorandum to the NDIA with our suggestions for the inclusion of records of evidence in a register. **Appendices C-E** contain our letter, sample model and memorandum.

Since then, we are aware the NDIA is proposing to publish a register with high-level aggregated settlement data (eg, stating total figures of settlement funding broken down by type of supports), but not including details of individual cases and settlements. The NDIA's proposed solution is akin to the publication of statistics and, would not achieve our intended goal to increase transparency about settlement outcomes and improve consistency in NDIA decision-making.

We acknowledge the NDIS provides individualised supports tailored to the needs of participants, which means decisions on funding supports, including in settlements, are context specific. Accordingly, we think this contextual detail should be included in the register in a de-identified way. In some cases the level of detail required to achieve this might risk a participant being identified. In such cases, this could be remedied by seeking the participant's informed consent, and where this is not forthcoming the NDIA would not publish that outcome.

We would be pleased to meet with the Review Panel to explain our proposal and how to address any concerns with our sample model.

Recommendation 20 – The NDIA should establish a settlement outcome register

The NDIA establish a settlement outcomes register in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability, and to improve consistency in decision-making. In determining the information to be published, the NDIA should consult with participants and advocates.

4.2.2.4 Changes to reflect AAT and court decisions

PIAC has raised concerns about the NDIA's failure to implement systemic changes to policies following AAT decisions at [3.2.3.2] of our submission to the *Current Scheme Implementation and Forecasting* inquiry and in our response to Question 4 of our submission to the *Administrative Review Reform: Issues Paper*. This also includes following settlements reached at the AAT.

In our practice we have seen many instances where the NDIA has not modified its approach to first-instance decision-making following AAT decisions. For example, in relation to SDA funding decisions, a series of AAT decisions in the past year have stressed the importance of funding a type of SDA that reflects a participant's specific needs and living situation. In these decisions, the AAT set aside and substituted several SDA funding decisions, particularly those recommending the applicant be provided with more generous SDA funding. The AAT's reasons included comments to the effect that the original decision ignored or gave insufficient weight to personal factors raised by the applicant (ie, lifestyle and mental health needs, the way housing would affect their personal relationships, independence and work, study, etc).[33] Of the six decisions in

[33] For examples of such commentary, see *LWVR and National Disability Insurance Agency* [2021] AATA 4822; *Boicovitis and National Disability Insurance Agency* [2022] AATA 204 at [29]-[38] and [58]-[72]; *Kennedy and*

which the AAT has considered the appropriate SDA 'building type' (ie, whether the home is a house, apartment, or villa/townhouse; and the number of residents and bedrooms that home should have), all six recommended the applicant be provided with more generous SDA funding.[34]

Cases such as these suggest a need for the NDIA to review and alter its internal processes and guidance for making SDA decisions. However, in PIAC's ongoing casework and review of first-instance SDA decisions made by the NDIA since these cases, we have not seen an appreciable trend towards giving greater weight to applicants' lifestyle factors; and can identify no consequential revisions to the NDIA's relevant Operational Guidelines to direct greater attention towards such factors.

Recently, the NDIA agreed to 'create a formal mechanism for the policy, legal and service delivery functions to *consider* the implications of any themes arising from federal court precedents, Independent Expert Review outcomes and persistent AAT themes'.[35] In our view, the NDIA should not only consider, but also *ensure it implements* such outcomes. This would support a culture of transparency and accountability, improve the quality of decisions, and build public confidence in the NDIA.

Decision Impact Statements

The Australian Tax Office (**ATO**) uses decision impact statement**s** (**DIS**) to advise taxpayers on the implications of a particular court or tribunal decision. DIS provide details of the case, a summary of the facts, the issues decided by the court or tribunal, the ATO's views on how the decision should be treated in administrative decision-making and the implications of the decision on current public rulings.

We suggest a similar methodology be adopted by the NDIA to improve its decision-making practices following AAT or Federal Court decisions. It would highlight for planners and policy-development staff areas where change is required. For example, where a tribunal or court finds a NDIS policy to be unlawful, a DIS would contribute to revisions to NDIA policies and practices. The publication of a DIS would also enable the public to hold the NDIA to account, by allowing them to refer to the DIS where they are faced with a persistent practice by the NDIA that contradicts the underlying court or tribunal ruling.

Recommendation 21 – The NDIA ensure its policy and operational guidelines are updated to be consistent with relevant settlement outcomes, and AAT and court decisions

The NDIA implement a transparent process to ensure its policy and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The AAT Appeals Branch should provide feedback to the NDIA to assist the NDIA to understand what policy and guideline changes are required. The NDIA should report on any updates in its quarterly reports to the Disability Ministers.

National Disability Insurance Agency [2022] AATA 265 at [121]-[127]; *Paterno and National Disability Insurance Agency* [2022] AATA 3908 at [46]-[87]; and *QKNJ and National Disability Insurance Agency* [2023] AATA 794 at [44]-[56].

34 Ibid.

35 Australian National Audit Office, *Effectiveness of the National Disability Insurance Agency's Management of Assistance with Daily Life Supports* (Performance Audit Report, Auditor-General Report No. 43 of 2022-23, 28 June 2023) [3.22], Recommendation 5 [emphasis added].

Recommendation 22 – The NDIA implement and use Decision Impact Statements setting out the implications of external review decisions from the AAT and Federal Court

The NDIA implement and use Decision Impact Statements setting out the implications of external review decisions from the AAT and Federal Court. The Decision Impact Statements should set out how it impacts future administrative decision-making and any changes required to current NDIA policies and practices.

4.2.3 Reform of external review processes

We understand this Review is not tasked with reforms to the structure of external reviews of NDIS decisions. However, in our submissions to various consultations and inquiries relating to the NDIS, PIAC has consistently raised concerns about the lack of transparency, including in the conduct of the NDIA, in AAT appeals.[36]

In particular, we wish to draw your attention to our recent submission to the Attorney-General's Department's Administrative Review Reform Issues Paper. In that submission we made recommendations for the new review body to be empowered to have a role in generating better first-instance decision-making and better government policies. For example, we recommend a power for the new review body to compel a government agency to review a policy found to be unlawful. This would be another way the NDIA could make more consistent and fairer decisions about reasonable and necessary supports, and reduce the number of external disputes.

We also raised several matters about the different ADR proposals for reviewing NDIA decisions, including a potential process similar to the Independent Expert Review (**IER**) Program.[37] As the Review Panel will be aware, between 4 October 2022 to 30 June 2023 the NDIA implemented the IER Program with the aim of resolving matters and reducing the backlog of cases at the AAT. The IER Program, like the Neutral Evaluation process currently available in the AAT, involves an independent expert reviewing the evidence and providing a non-binding recommendation on how the parties could resolve the dispute. As the Review Panel will be aware, between 4 October 2022 to 30 June 2023 the NDIA implemented the IER Program with the aim of resolving matters and reducing the backlog of cases at the AAT.

In addition to the matters raised for consideration in our submission to the Attorney-General's Department, we wish to make some further observations about the NDIA's conduct in the IER Program and the effectiveness of the Program, based on our casework, conferral with other lawyers and advocates and recent statistics.

Within the IER Program, the NDIA agreed to accept the independent expert's recommendation 'unless it has significant reasons for not doing so such as where the Recommendation does not comply with the law, there is a clear legal or factual error, or it is inconsistent with the Agency's Operational Guidelines'.[38] However, recent statistics provided to us by the NDIA reveal the NDIA rejected some or all of the IER's recommendations in at least 20% of matters. Considering the

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36 See eg, Submission on Current Scheme Implementation and Forecasting (n 30); Submission on Capability and Culture (n 30).

37 PIAC, Submission to Attorney-General's Department: Administrative Review Reform: Issues Paper (12 May 2023) 16-21.

38 This is the wording of a standard clause contained in the NDIA's IER agreement to be signed by participants and the NDIA.

stated purpose of the IER Program being to resolve NDIS matters in the AAT in a 'quicker, fairer and easier way' and to 'reduce the number of cases needing to go through to [a hearing]', this rejection rate is disappointingly high.[39]

Beyond the above clause from the IER agreement, we understand the NDIA did not issue any internal guidance as to when a recommendation can be rejected. Rejection of recommendations without a clear and consistent basis for doing so erodes participants' confidence and trust in the process, and renders the effort, time and resources invested futile. If the new federal administrative review body adopts a process based on neutral evaluation or the IER Program for NDIS matters, the NDIA should produce clear and consistent guidelines for any cases where it may not accept an outcome or recommendation of neutral evaluation (including where it may appeal it to a court or higher tier of merits review).

We raise these observations to encourage the Review Panel to engage with the Attorney-General's Department about proposed changes to the external review of NDIA decisions. For example, to inform the Review Panel's recommendations, it will be relevant to understand the NDIA's role and responsibilities in any proposed ADR model.

5. Supported living and housing

5.1 What are the features of living with people or living on your own that are important to you?

At [4.1.1] of our *Housing Delayed and Denied* report, we outlined the importance of the NDIA considering the needs of people who want to live on their own, or with their family. Reasons people need to live in single occupant SDA include:

- families with young children;
- immunocompromised people who are concerned that living with housemates would endanger their health;
- people who need space and privacy so they can participate in home-based rehabilitation and recreation that is critical to maintaining their health, wellbeing and level of function, or take part in their hobbies;
- people who work from home and would not have any space for a quiet workstation if they lived in a shared home; and
- people from Culturally and Linguistically Diverse (CALD) backgrounds, who cannot communicate with other residents and support staff in a shared residence because of language barriers, or for whom a shared residence is culturally inappropriate.

5.2 How should the NDIA make decisions about reasonable and necessary housing and living supports, so that decisions are fair and much less stressful?

Our concerns and recommendations set out above in section 4 (Defining reasonable and necessary) are particularly important in relation to home and living supports. NDIA decision-makers should give greater weight and consideration to the many ways in which appropriate

[39] NDIA, 'An improved approach to dispute resolution' (Web page) <https://www.ndis.gov.au/about-us/legal-matters/improved-approach-dispute-resolution#independent-expert-review-program-step-by-step-guide>.

housing can improve the lives and outcomes of participants. This would reflect the aim of the NDIS Act to give effect to Australia's obligations under Article 19 of the Convention on the Rights of Persons with Disabilities, to recognise the equal right of people with disability to live independently and be included in the community.

'Value for money' needs to be treated with particular care in relation to home and living supports At [4.1.1] above, we noted that it is not clear to participants what constitutes 'value for money', nor how costs and benefits of a support are evaluated by the NDIA. To reduce misunderstanding, the SDA Rules could be amended so that a decision-maker must start by considering the type of SDA a participant has requested, and only fund a different type of SDA if there are good reasons that clearly show that this is the more appropriate option. Focus should be on the benefits of SDA for the individual participant - namely independence, quality of life, wellbeing and community integration.

Time frames for decisions on Home and Living supports

At [4.2.1] of the *Housing Delayed and Denied* report, we explained that because of the particular importance of SDA and other Home and Living supports, the NDIA should be required to make decisions on these supports quicker than for other supports. Time standards for these decisions should also consider the total end-to-end waiting time for a person requesting Home and Living supports, and the Participant Service Guarantee should be framed accordingly. We maintain our recommendations from that report.

Recommendation 23 – Amend the SDA Rules to include a rebuttable legal presumption that a person be funded for their requested SDA

The SDA Rules be amended to establish a presumption that a person who has very high support needs and/or extreme functional impairment be funded for the kind of SDA that they request. This would include:

- *setting out in law that a person's preferred kind of SDA represents 'value for money' unless it can be shown through clear evidence that another kind of SDA would achieve the same goals for the person and would be significantly cheaper; and*
- *establishing that a person should only be funded for a kind of SDA that is not their preference in exceptional circumstances.*

Recommendation 24 - NDIA staff to give greater weight to individual participant circumstances and preferences when making decisions about SDA funding

Ministerial and Agency leaders direct NDIA planners and those on the Home and Living Panel, when making decisions about SDA funding, to give greater weight to:

- *the importance of maintaining social connection and informal supports;*
- *the consequences of various SDA models for participant's health, wellbeing, lifetime care costs and social and economic participation, when making decisions about SDA funding for participants; and*
- *a participant's preferences, as described by the legislation.*

Recommendation 25 – NDIS Rules implementing the Participant Service Guarantee be amended to implement specific timeframes for decisions about SDA and Home and Living supports

The planned NDIS Rules implementing the Participant Service Guarantee be prepared and implemented as a matter of priority; and ensure the Guarantee operates effectively to:

- *set specific standards for Home and Living Panel/SDA and housing-related support decisions, distinct from other types of supports. These standards should require urgent decisions (eg, young people at risk of residential aged care, NDIS participants in hospital or living in precarious housing) to be made within 10 days of a participant's request, and all SDA and support decisions to be made in under 50 days;*
- *assess the total time taken from the time a request for support was made by a participant, until the time a binding decision on that support was made and communicated to the participant; and*
- *provide clear avenues for individual participants to report their experience to the Commonwealth Ombudsman charged with overseeing the implementation of the Guarantee.*

Appendix A: AAT decisions regarding funding reasonable and necessary supports for participants with multiple impairments

- *McLaughlin and NDIA* [2021] AATA 496 at [46] and [61]:

> …If it were intended that subsequent decisions under the Act – including the question of reasonable and necessary supports under s 33 – were intended to be governed by the specific impairments that had been determined to meet the requirements of s 24 in the access decision, one would expect that to have been made clear in this Part by way of specific nomenclature that was then employed in subsequent areas of the Act.
>
> …
>
> …Accordingly, the Tribunal considers that the *disability* referred to in rule 5.1(b) of Supports Rules is not a reference to a disability by virtue of which Ms McLaughlin was granted access to the scheme in 2015, but rather to any disability with which she presently lives.

- *HRZI and NDIA* [2023] AATA 481 where the AAT said the NDIA's construction assumed a narrow meaning of disability, which is not consistent with the NDIS Act. The AAT found that 'once the person has passed through the gateway for access to the NDIS, as a participant the person would be able to obtain supports for their disability'.[23] The AAT continued at [154]:

> The key determinant which must steadily be kept in mind is the essential nexus between the support and the person's qualifying *disability*. If the support is established as sufficiently related to the person's *disability*, on which their status as a *participant* relies, the support may be provided or funded under the NDIS if all other essential criteria and Rules are met.

- *YBLR and NDIA* [2023] AATA 1472, where the AAT remarked that the AAT in HRZI had carefully and thoroughly considered this issue, before adopting the same reasoning at [129] and [132]:

> Part 2 of Chapter 3 of the NDIS Act provides a self-contained code for the preparation of participant's plans…Funded supports are to be reasonable and necessary, and Support Rule 5.1 makes clear that they are to be related to the person's 'disability'…It would have been a simple matter for legislative drafting to extend a further criteria to reasonable and necessary supports by stipulating that such supports must also be referable to the 'participant's impairment'…However, reference to those words, or words to that effect, are absent from Part 2 of Chapter 3. Support Rule 5.1 refers to the person's disability, but not the 'participant's impairment'. Had it been the statutory intent of this scheme that funded supports which were otherwise thought to be both necessary and reasonable also had to be related only to an impairment which had already been identified as satisfying the access criteria, or which would in any event so satisfy, this could have been simply reflected in Part 2 or in Support Rules. The fact that this language is not used in Part 2 of Chapter 3 is

consistent with the notion that, once the threshold question of access has been answered in the participant's favour, the determination of which supports are to be funded under s.33 is a separate process.

…

…the Tribunal in *HRZI* arrived at the inevitable conclusion that the concept of disability, used deliberately to qualify reasonable and necessary supports to be funded under the scheme in Part 2 of Chapter 3, is broader than the concept of (one or more) impairment to which the person's disability is attributable in Part 1 of Chapter 3…

- *Spires and NDIA* [2023] AATA 1230 at [23] and [26]:

  Therefore, once a person has been granted access to the scheme there is no statutory power available to the Agency to subsequently and unilaterally attach a condition or conditions to a grant of access, particularly a condition or condition which seek to limit or modify the nature and extent of the grant of access to the scheme…

  …

  I do not consider that the intention of this legislation was to require Ms Spires to satisfy the disability requirements under section 24 in respect of additional impairments which may co-exist or subsequently develop in the course of her lifetime. Such a requirement would create a regime requiring multiple applications to the Agency over her lifetime…

Appendix B: Letter from Department of Social Services

Australian Government
Department of Social Services

Ref: MC23-005424

[redacted]

Dear Mr Bradley

Thank you for your email of 12 May 2023 to the Minister for the National Disability Insurance Scheme and Minister for Government Services, the Hon Bill Shorten MP, concerning budgetary measures focused on uplifting and improving National Disability Insurance Agency (NDIA) capability, and systems to improve planning processes and potential outcomes for participants. I have been asked to reply on behalf of the Minister.

I am sorry to hear of the difficulties your family has faced and I understand your desire for additional support. I appreciate you sharing your story and thank you for your advocacy on behalf of all Australian's living with disability.

I wish to assure you the *National Disability Insurance Scheme Act 2013* (NDIS Act) acknowledges some people live with multiple impairments or disabilities, and the NDIS Act and rules do not distinguish between a primary or secondary disability for the purposes of planning. Rather, the planning process, as set out in Part 2 of Chapter 3 of the NDIS Act, provides that a holistic approach should be taken to planning. It does not matter how many disabilities a person may have, or which satisfied the access criteria, what matters is the impact of their disability - whether due to a single cause or multiple causes - on their capacity for communication, social interaction, learning, mobility, self-care or self-management. To this extent, the way your disability is recorded, either as a primary or secondary disability, is useful for understanding the characteristics of people who are supported through the NDIS, but should have no bearing on the setting of your plan budget.

In regards to planning, the decision about whether a support is reasonable and necessary sits with the NDIA. I acknowledge you have a decision currently under review at the Administrative Appeals Tribunal (AAT). For this reason I am unable to comment on any future outcome from that process. However, I can provide the following information about the planning process generally.

NDIS funds are approved to meet a participant's disability-specific needs. The supports must directly relate to the functional impacts of a participant's disability. NDIS plan funding decisions are determined based on supporting evidence provided and must align to the funding criteria outlined in the NDIS Act.

The NDIA provides training and guidance through a structured and tailored induction program. It provides ongoing training to support its staff, LAC and planners with reasonable and necessary

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Telephone 1300 653 227 • National Relay Service: TTY: 133 677 • Speak and listen: 1300 555 727
Internet relay: www.relayservice.com.au
www.dss.gov.au

decision making, and their communication with people with disability. In addition, the NDIA and their partners employ a diverse range of staff from different backgrounds including allied and specialist health professionals, and people living with disability. The NDIA has appointed Subject Matter Experts within the access, planning and advisory teams to strengthen decisions about participant supports.

In support of achieving improved outcomes for participants, the Australian Government continues to deliver on its commitment to getting the NDIS back on track and rebuilding trust with participants, their families and carers. The 2023-2024 Budget commits approximately $910 million over five years to improve the effectiveness and delivery of the NDIS for people with disability. A core component of this commitment, includes investment of $429.5 million on improving the NDIA's capability and systems, to improve planning processes and decisions. The Government is committed to ensuring that planner capability and expertise is appropriately matched with participants' lived experience of disability.

It is my understanding, NDIS records recognise you as having a primary disability of Autism Spectrum Disorder and Asperger Syndrome, and secondary disabilities of [redacted] and congenital conditions. Notwithstanding this information, if you believe there is an error in your personal record or that of your son, and you wish to have additional disabilities added to your records, I encourage you to provide supporting information to the NDIA for consideration.

Should you have any questions regarding your current AAT matter, you are encouraged to contact the NDIA AAT case manager at [redacted] Further, to ensure you continue to have the reasonable and necessary supports in your NDIS plan you are encouraged to continue working with your My NDIS contact, [redacted] Local Area Coordinator, especially if there is a change to your situation or disability support needs, or you would like to submit a request to recognise additional disabilities. [redacted]

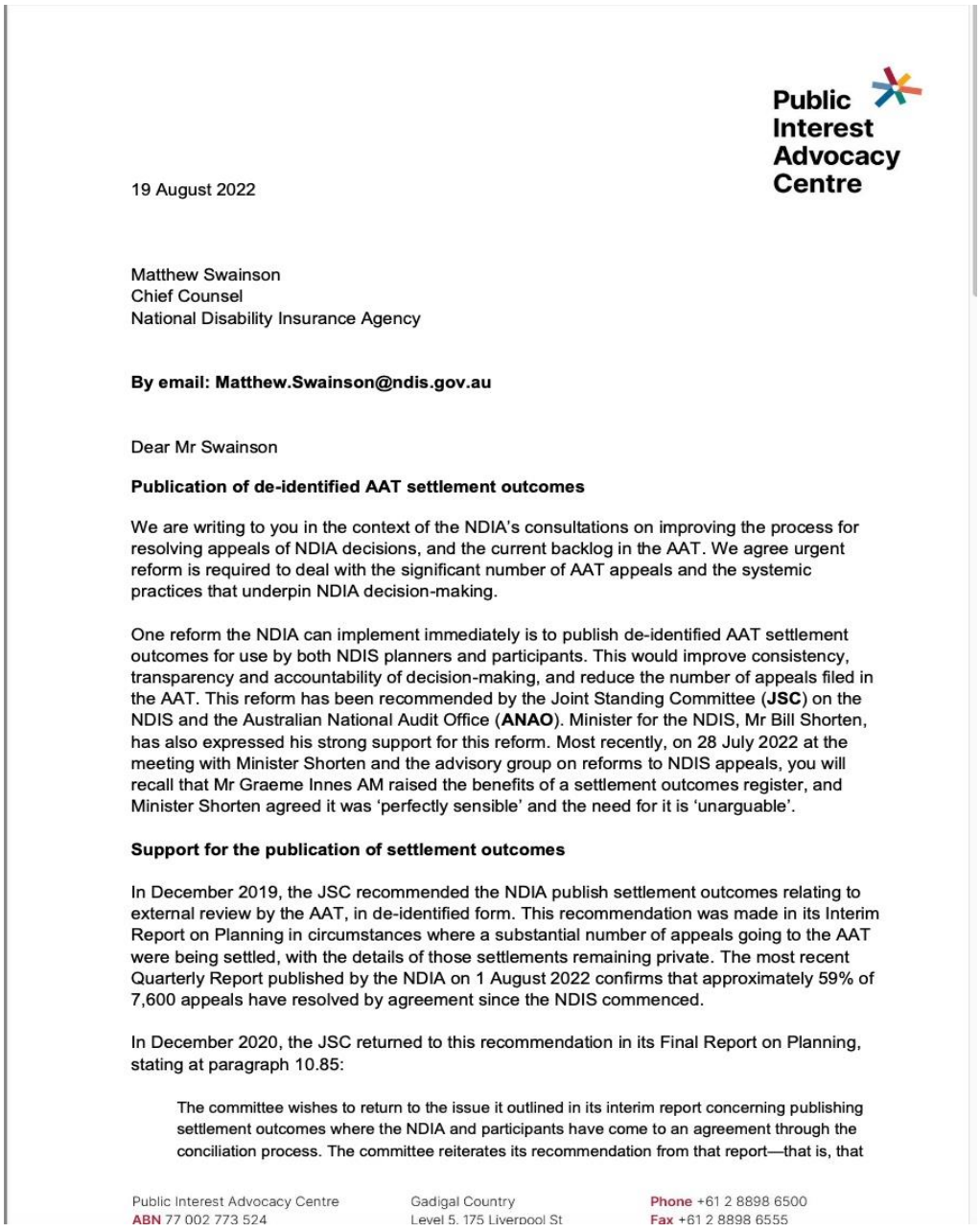
In relation to concerns you have raised regarding the level of funding approved for your son, if you do not agree with a decision the NDIA has made, you may be able to ask for an internal review of the decision. If you wish to have the decision reviewed, you will need to ask for a review within 3 months of the decision being made. Information about requesting an internal review is available on the NDIS website at (https://www.ndis.gov.au/participants/request-review-decision). I encourage you to contact the NDIA on 1800 800 110 or at enquiries@ndis.gov.au for any assistance to lodge an internal review request.

Thank you again for writing, I trust the information provided will be of assistance to you.

Yours sincerely

Julie Yeend LVO
Branch Manager
NDIS Governance
14 June 2023

Appendix C: Letter to NDIA regarding publication of de-identified AAT settlement outcomes



Public Interest Advocacy Centre

19 August 2022

Matthew Swainson
Chief Counsel
National Disability Insurance Agency

By email: Matthew.Swainson@ndis.gov.au

Dear Mr Swainson

Publication of de-identified AAT settlement outcomes

We are writing to you in the context of the NDIA's consultations on improving the process for resolving appeals of NDIA decisions, and the current backlog in the AAT. We agree urgent reform is required to deal with the significant number of AAT appeals and the systemic practices that underpin NDIA decision-making.

One reform the NDIA can implement immediately is to publish de-identified AAT settlement outcomes for use by both NDIS planners and participants. This would improve consistency, transparency and accountability of decision-making, and reduce the number of appeals filed in the AAT. This reform has been recommended by the Joint Standing Committee (**JSC**) on the NDIS and the Australian National Audit Office (**ANAO**). Minister for the NDIS, Mr Bill Shorten, has also expressed his strong support for this reform. Most recently, on 28 July 2022 at the meeting with Minister Shorten and the advisory group on reforms to NDIS appeals, you will recall that Mr Graeme Innes AM raised the benefits of a settlement outcomes register, and Minister Shorten agreed it was 'perfectly sensible' and the need for it is 'unarguable'.

Support for the publication of settlement outcomes

In December 2019, the JSC recommended the NDIA publish settlement outcomes relating to external review by the AAT, in de-identified form. This recommendation was made in its Interim Report on Planning in circumstances where a substantial number of appeals going to the AAT were being settled, with the details of those settlements remaining private. The most recent Quarterly Report published by the NDIA on 1 August 2022 confirms that approximately 59% of 7,600 appeals have resolved by agreement since the NDIS commenced.

In December 2020, the JSC returned to this recommendation in its Final Report on Planning, stating at paragraph 10.85:

> The committee wishes to return to the issue it outlined in its interim report concerning publishing settlement outcomes where the NDIA and participants have come to an agreement through the conciliation process. The committee reiterates its recommendation from that report—that is, that

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> the NDIA publish settlement outcomes from early resolutions in de-identified form. Publishing settlement outcomes would be in line with the NDIA's commitment to transparency and the intent behind its recent reforms, as noted in evidence to this inquiry, is also done by another government agency, the Australian Human Rights Commission its Conciliation Register, which provides summaries of a selection of complaints, albeit for a different purpose.

To address the Coalition Government's concerns at the time that de-identification of information may be difficult, the JSC stated it 'considers that summaries of key themes arising from settlement outcomes—including where settlements concern similar issues—may be an appropriate alternative approach.' The JSC's reasoning behind this recommendation is outlined at paragraph 10.87:

> Such an approach would not only improve transparency and public trust in the appeals process, but also help the NDIA to implement changes to policy and practice should the same themes be reappearing. The committee acknowledges that the AAT does not set precedents, but given the high number of cases settled by consent, and the money that the NDIA spends on legal fees (during the 2019-2020 financial year, $7,181,901), in some instances for cases with similar features, summaries of key themes and/or cases would be a useful exercise for all involved and show that this money is well-spent and leading to concrete outcomes beyond individual cases.

The JSC further expressed concerns in relation to the failure of the NDIA to consider and apply existing AAT decisions to future decision-making, beyond individual cases. As the JSC emphasised, 'multiple inquiries' have suggested the NDIA needs to do better in terms of how it uses AAT decisions to ensure consistency in decision-making.

As the NDIA is aware, these recommendations have been proposed by PIAC for some time, and we have consulted widely in the sector to understand how such information might best be presented. In July 2020, we wrote an open letter to the then Minister for the NDIS, Mr Stuart Robert, along with over 20 major organisations in the disability community calling on the NDIA to publish settlement outcomes.

What is a settlement outcomes register?

A settlement outcomes register is a database that records the outcomes of NDIS appeals that have been resolved by agreement prior to a substantive hearing in the AAT. The information is published to assist parties involved in appeals including to prepare for settlement negotiations. This is important given that 46% of applicants were not represented by a lawyer or advocate in the AAT in 2021.[1]

Settlement outcomes reached in individual matters are also relevant to other NDIS participants and NDIA decision-makers seeking to avoid or resolve disputes at the planning stage or on appeal in the AAT. This is particularly so where the settlement concerns the interpretation of NDIA policies or operational guidelines. In this way, the publication of settlement outcomes can improve consistency of decision-making and reduce the number of appeals being lodged.

---

1 Queensland Advocacy for Inclusion, *Analysis of NDIS Appeals* (Report, 30 June 2022) 17 reproducing information provided by Justice Fiona Meagher (AAT President) at LegalWise NDIS Law Conference on 23 February 2022.

A similar 'Conciliation Register' is used by the Australian Human Rights Commission where the Commission publishes summaries of discrimination complaints that have resolved through the conciliation process in a de-identified manner. PIAC appreciates there are distinct differences between the AHRC conciliation register and a model to be adopted by the NDIA. However, core elements of the AHRC register are important for the NDIA to consider. The AHRC register can be filtered by year, relevant anti-discrimination law, ground of discrimination and area of public activity, as well as by key word search. The AHRC register records outcome details and a short description of the facts of the complaint and how the complaint resolved.

Benefits of a settlement outcomes register

A NDIS settlement outcomes register will provide a much more accurate basis for decision-making by enabling both NDIS planners and participants to understand the types of supports available under the NDIS and the range of outcomes that have been reached. In particular:

- Decisions made by planners should be consistent with the NDIA's understanding of what the NDIS funds. The publication of this information will ensure planners have information on the range of outcomes that have been reached at the start of the planning process.

- Participants will be better placed to understand the types of supports that are funded under the NDIS and consider what types of supports they can reasonably seek.

Over time, having a register of settlement outcomes will reduce the number of appeals to the AAT. Participants will also better understand the types and amount of supports available, leading to a more efficient and streamlined appeals system.

Principles

We suggest the following principles should drive the development of a settlement outcomes register:

1. NDIS planners and participants should have access to settlement information to improve consistency, transparency and accountability of decision-making;
2. the application and interpretation of NDIS policies and guidelines should be consistent with the law and transparent;
3. a settlement outcomes register should be published as guidance only and is not intended to substitute the need for independent legal advice. Participants should be encouraged to seek, and advocates adequately funded to provide, independent legal advice in relation to individual circumstances.

Implementation of a settlement outcomes register

A settlement outcomes register can be implemented as follows:

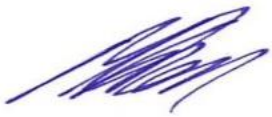
1. include all AAT matters where a settlement has been reached in the register;
2. data should be gathered by way of an electronic settlement survey or web-based form completed by NDIA lawyers as part of business-as-usual file closure procedures: it does not require gathering any additional information;

3. to the extent possible, the survey should contain dropdown answers for NDIA lawyers or case managers to select. Free text cells should be limited. This will promote quality-control, consistency and accessibility for the purpose of filtering the data;
4. information recorded in the register should be tailored to different categories of matters. Supports matters and scheme access matters will require different data to be published;
5. once completed, the NDIA should send a copy of the entry to the applicant to check for accuracy and privacy concerns (which can be resolved by a combination of de-identification and consent from individuals to have de-identified facts concerning the outcome of their case included in the settlement register). A register with limited free text will assist with de-identification. Advocates providing advice to participants will be able to assist the NDIA to resolve any issues relating to publication of the outcome on the settlement register;
    a. If the participant and the NDIA can agree on a brief and limited free-text narrative of the matter and settlement, this should be included in the register. If no agreement is reached, the settlement data should be included without any narrative;
6. filtering functionality should be applied to each category of data recorded in the register along with the option to search by key words;
7. the register should be accessible and user experience (UX) tested prior to being published.

We have **enclosed** a sample model for the publication of settlement outcomes that we believe should be implemented. In our view, this model identifies the minimum information required, would be straightforward to implement, and would improve the administration of the NDIS.

We would be pleased to work with the NDIA on the design and implementation of a settlement outcomes framework to assist the NDIA to improve transparency and restore public trust in the appeals process.

Yours sincerely



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Appendix D: Sample Register of NDIA Settlement Outcomes

Register of NDIA AAT Settlement Outcomes - Applications Regarding Plan Funding

State/ Territory	Rural/Regional/ Urban	Nature of participant's disability(ies)	How was the participant represented at the time of settlement?	Statutory provisions relied upon to refuse request at internal review	Supports in dispute initially sought by participant at outset of Tribunal matter	Supports funded in settlement	Days between AAT application and settlement/decision	When did settlement take place?	Did ADR occur?	De-identified narrative
(State/ Territory)	*(Rural/Regional/ Urban)*	*(Short description of disability(ies) as relevant)*	*(Select most applicable: Self-represented/ Informal support ie. relative or friend/ Lawyer/ Disability Advocate)*	*(E.g. s 34(1)(a)/(b)/(c) etc not met; no permanent impairment; financial sustainability issues, etc)*	*(List of all supports requested for funding that were not included in the participant's plan following internal review)*	*(List of all supports funded in settlement)*	*(No. of days)*	*(Q1-4, YYYY)*	*(Yes/No. If yes, select conciliation/case conferencing/mediation/expert review panel/Neutral Evaluation Process)*	*(Parties to agree short description of:* *• outcome initially requested* *• initial decision made* *• settlement outcome* *If parties cannot agree narrative, leave blank)*
SA	Urban	Guillain-Barre Syndrome	Lawyer	s 34(1)(c) - Value for Money *SDA Rules* 14(1) - SDA needs requirement *SDA Rules* 16(1) - SDA building type determination	SDA type - one-bedroom, one-resident apartment SDA SIL funding commensurate with one-bedroom, one-resident apartment SDA	SDA type - one-bedroom, one-resident apartment SDA SIL funding commensurate with one-bedroom, one-resident apartment SDA	295 days	Q2, 2022	Yes: Conciliation Case Conferencing	Participant requested one-bedroom, one-resident SDA funding to live alone. Planner and internal reviewer refused funding on the basis that it was not value for money and therefore not reasonable and necessary; instead funded participant for two-bedroom, two-resident apartment. After AAT review process, NDIA agreed to fund participant for one-bedroom, one-resident SDA with appropriate SIL.
VIC	Urban	Dissociative Identity Disorder, PTSD, depression; anxiety	Lawyer	s 34(1)(d) - whether the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice.	Funding and maintenance for an assistance animal	Funding and maintenance for an assistance animal; including a one off backpayment to contribute to maintenance costs already incurred	524 days	Q2, 2022	No	Applicant requested funding for an assistance animal and funding for training and maintenance. Funding was refused because the Applicant's chosen provider did not meet the s34(1)(d) criteria of 'best practice'. After the applicant lodged in the AAT, the NDIA reviewed the case. The NDIA decided that funding for an assistance animal was a resonable and necessary support for the applicant and met the requirements in s 34(1)(d). As such, the NDIA agreed to fund the assistance animal and provide funds for training and maintenance as well as a one-off back payment to contribute to maintenance costs already incurred by the applicant.

Applications re Plan Funding | Applications re Scheme Access

Appendix E: Memo to NDIA - Inclusion of records of evidence in settlement register

Memorandum

Public Interest Advocacy Centre

To: **Matthew Swainson and Andrew Ford, NDIA**

From: **PIAC**

Date: **25 October 2022**

Subject: **Inclusion of records of evidence in settlement register**

Following our letter dated 19 August 2022 on the design and maintenance of a settlement outcomes register by the NDIA, and our meeting of 6 September 2022, this memo highlights key issues and our further ideas about the inclusion of evidence in any settlement register.

In our previous proposal, we suggested a settlement register could be maintained by having Agency lawyers complete a brief electronic settlement survey as part of file-closing procedures. Similarly we think questions about evidence could be readily incorporated into such a survey, which could be a resource-efficient way of gathering this data.

We consider it is essential to describe the evidence in a relatively uniform way, in order to allow different matters to be compared and trends highlighted. We think it should be possible to describe in general terms the categories of lay and expert evidence that might be provided in most matters. An example list of each category of document is set out in Annexure A), which could be added to over time in an iterative process in order to capture any categories omitted from this initial design. However, any additions to the categories list should be limited to maintain uniformity and encourage diligence in coding. It may be appropriate to require authorisation for any additions by an appropriate person within the Agency.

Since both parties presumably base decisions to settle on all available evidence (including that provided at the planning and internal review stages, and that filed with the AAT), we consider the register will need to be able to capture significant evidence provided at each stage. Otherwise, the register would not properly display all the evidence required to settle the AAT application.

We note the Agency's concerns over resources and IT systems limitations, which might make it difficult to record *all* evidence provided throughout the matter. Instead, the Agency could simply select from the list of categories, the evidence it considered was particularly relevant to the ultimate decision to settle (ie, in a case of funding for supports, the evidence that demonstrated that a support met the "reasonable and necessary" criteria), and briefly explain how each piece of evidence was relevant. The wording for this could be crafted carefully, in order to avoid suggesting any inferences that other materials were completely disregarded. This would hopefully be easily implemented, as the relevance of each piece of evidence should already be apparent to the Agency lawyer with carriage of the matter as part of their settlement considerations.

We think this selective approach could serve to improve the relevance of the materials provided at the planning stage, and avoid participants needing to go to the AAT. However, such an approach would require a judicious approach from the Agency in order to be useful and appropriate – if an overly broad approach is taken to selecting documents, it could

create the impression that the Agency is imposing an unfair evidentiary burden on participants and/or is likely to be disregarded by Applicants as unhelpful. The Agency will need, therefore, to take some care to only select the evidence that really did, in the circumstances of the case, establish helpful facts to facilitate settlement.

We welcome your feedback on this proposed approach. Should you have any comments or concerns, please let us know as we are keen to develop solutions in partnership with you and to ensure the process is streamlined, efficient and workable for the Agency.

Annexure A

Expert evidence

- OT
- Physio
- GP
- medical specialist
- psychologist
- behavioural support practitioner
- support subject matter specialist (could include, say, builder (for home repairs), dog trainer, therapist for novel therapies, etc
- financial/actuarial evidence

Lay evidence

- Statement of lived experience
- Other statement from applicant
- Statement – caregiving family
- Statement – other immediate family
- Statement – friend(s)
- Statement – support worker