

28 November 2019

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

By email: ndis.sen@aph.gov.au

Dear Sir/Madam,

Thank you for the opportunity to present to the Committee on Thursday, 7 November 2019.

I have reviewed the draft transcript, and have identified no required adjustments.

From our reading of the transcript from that Public Hearing, we have determined that there is one question to which we committed to respond with additional information, being the provision of statistics on settlements on appeals processed by the AAT¹.

According to the AAT Annual Report 2018/2019²:

- 32% of cases were withdrawn
- In 2% of cases, the NDIS decision was affirmed by consent
- In 58% of cases, the NDIS decision set aside or varied by consent
- In 6% of cases, the AAT determined it had no jurisdiction, so the case was refused or dismissed
- In 1% of cases, the NDIS decision was changed through a determination by the AAT
- In 1% of cases, the NDIS decision was affirmed through a determination by the AAT.

The statistics provided by the AAT raise a number of issues which we believe would benefit from further investigation. For example:

¹ Refer Committee Hansard, p.41

² <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201819/AAT-Annual-Report-2018-19.pdf>; ref Table A4.3.2, p.142

- i. A very small proportion of cases end with the NDIA's decision being approved. (2% affirmed by consent, and 1% where the decision was affirmed at an actual hearing).

Issues raised by this statistic:

- What does it tell us about the quality of the planning and internal review process that so few decisions are affirmed?
- Is it satisfactory that such a low proportion of cases end with the NDIA's decision making being upheld?

- ii. In 59% of cases, the NDIA's decision is set aside or varied (58% by consent, 1% at AAT decision).

Issues raised by this statistic:

- The internal review process is broken if such a high proportion of decisions 'affirmed' in internal review are then overturned in the AAT process, particularly given that the vast majority are resolved by consent (i.e. the NDIS is conceding they got it wrong).
- The high success rate of appeals also suggests the planning process is flawed.
- Given the barriers to actually progressing a dispute to the AAT stage, Maurice Blackburn is concerned that there is a much larger cohort of participants with inappropriate plans who are unable to pursue the dispute to the AAT stage.
- The lack of transparency as to the outcomes of consent agreements means there is no oversight about whether the settlement was appropriate. The inequity of the AAT process, with participants rarely having legal representation, means there is an obvious risk of participants being scared into a settlement that may not be appropriate.
- The lack of transparency as to the outcomes of consent agreements also means that other participants do not get the benefit of knowing what the NDIS has agreed to. This is both inequitable and leads to higher administrative costs as a result of multiple similar disputes being pursued. Maurice Blackburn submits that greater transparency of these agreements would help narrow the scope and number of future disputes.
- Maurice Blackburn submits that this statistic would be drastically improved if there were consequences for the NDIA in terms of legal costs where participants were successful in the AAT stage because it would encourage better decision making at the internal review stage.

- iii. 32% of cases were withdrawn.

Issues raised by this statistic:

- Cases *withdrawn* by consent are different to cases where the decision is *affirmed* by consent. Only in the latter case is the participant actually agreeing that the NDIS' initial decision was correct. One explanation for such a high percentage simply being withdrawn is that the participants don't have the capacity, strength or resources to continue. A system that hypothetically results

in one in three complaints being withdrawn because the participant *cannot continue* does nothing to provide accountability or fairness.

Thank you again for the opportunity to participate in the Committee's valuable work.

If the Committee identifies any way that Maurice Blackburn might further assist, please do not hesitate in making contact.

Yours faithfully,

Tom Ballantyne
Principal Lawyer
Maurice Blackburn