

SUMMER 4 PODCAST

- DG Hi, listeners, and welcome to reasonable and necessary, Australia's premier podcast series on everything you ever wanted to know related to the National Disability Insurance Scheme. I'm your host, Dr George, and today, we're talking about reviews and appeals of NDIS plans. So if you want to know what to do if you're not happy with your plan, stay tuned. So who better than Chris Thwaites, our resident legal eagle and Legal Advocacy Lead at the Summer Foundation, to help us understand a bit about reviews.
- CT Hi, George, g'day, listeners.
- DG How are you going?
- CT I'm all right, how are you doing?
- DG Good, good, so we've got our NDIS plan and we're not terribly happy with it, what can we do?
- CT Well, you can ask for a review, so back to my favourite act, the act sets out sort of the types of decisions that can be reviewed, not happy with your plan, that's one of the types of decisions that can be reviewed, there's a number of others, if you want to have a look at Section 99, but basically, you can ask for an internal review, so the first step, if you're not happy with the decision, is to ask for an internal review which means somebody else in the agency looks at that decision again.
- DG Okay, and do you need to do that in writing or do you just call up your planner and say, I want a review, is, what's the best way of doing that?
- CT Well, you can do it on the phone and you can do it in writing, I always think it's a good idea to do it on the phone first and follow up in writing, I think it's a good idea to have a paper trail for these things, so an email would be great.
- DG And what kind of things might make you reasonably unhappy with a plan?
- CT You might not get something that you thought you wanted in your plan that you talked about with the planner that you thought was reasonable and necessary with support, you might not get what you wanted in relation to that and that might be something that you might want to have reviewed.
- DG And in terms of your expectations, are there, is it appropriate to maybe talk to someone else and say, look, this is what I asked for, this is what I got, or do you just go ahead on your own? Do you have any advice?
- CT Look, there are lots of advocacy agencies out there and lots of agencies that can give advice, I'd get in contact with them, they're people who can, have been working in the system and working with a number of people around reviews, Victoria Legal Aid gives advice in this area as well, you can always call them as well, it's always a good

idea to get as much information as you can about the environment that you're asking people to make decisions in, so I talk to people as well as us, the agency.

DG So is there a risk that you might ask for a review and then you get the review and you end up with even less than what you had before?

CT Well, I'm a big fan of reviews, I think reviews help agencies make good decisions because it helps them reflect on the decision making processes that they undertake, but as we know or many people know, there is a risk that when you have the whole plan reviewed, they might start from scratch and start looking at each of the things that you've already been putting your plan, so there is that risk, that you're running, absolutely, I wouldn't recommend people back off from doing that because of that risk, but it is something that they need to take in to consideration.

DG Okay, so I want to discuss particularly about the process because there's a bit of a journey, isn't there, in the review process, so you start off by having, I think they call it a review of the decision-

CT Yeah, that's the internal review, so that's the first step, if you want your initial decision to be reviewed internally, that's the internal review that the agency will do.

DG And effectively, that will be someone at a higher level maybe than the person who you had off on your plan and that person would look at the decision in terms of the reasonable and necessary.

CT Absolutely, so it'll be a different person in the agency, so it won't be the agents, the person who made the decision, they're not going to review their own decision, it'll be somebody different in the end.

DG You have that, wouldn't you?

CT Yeah, different from us.

DG And this is a good decision.

CT It's a good decision.

DG Thank you.

CT Exactly, that's why they have somebody different to it.

DG Okay, and then what? What if your, how long do you need to wait and within what period of time should you ask for a review?

CT Well, you can ask for a review of a decision as soon as you get that decision, the review times around the internal review, there are no timelines in the legislation about how fast they have to do that, so I would recommend people stay in touch with the person who's doing the review to try and get some idea about the timelines that it might take, so you can get some expectations around what you might expect for the

review to be done, once you get an internal review decision made, that will be sent to you, so you'll get a letter saying this is what the decision is, and that letter will outline what that internal review decision is, and it will also outline your options after that.

DG Okay, and then that's not the end, is it? So if you're not happy with the review of the review of the decision, what do you do next?

CT Well, once you've had that internal review, if you're not happy with that decision, then you get an option to go to an outside agency, so a completely independent agency to have a look at that decision and that agency is called the administrative appeals tribunal or often referred to as the AAT.

DG And they're effectively a civil review body, so they look at not just NDIS, do they? They look at all kinds of government decisions?

CT Yeah, they do, so they're an administrative tribunal that looks at lots of different types of government decisions from different types of government agencies, they sit outside all of those agencies and say, that's an independent review mechanism, and they review decisions from the Department of Immigration, they review decisions from the Department of Social Security, they review decisions about visas, they review decisions about lots of different government decisions and bureaucratic decisions and one of the streams or they call it the list inside of the AAT is the NDIS list and that's the list that has the review's decisions from the agency and the internal review decision.

DG Okay, so we're going a bit out of maybe some people's comfort zones in terms of it's not a court, but it's sort of like a court, isn't it?

CT Yeah, it's getting a bit more court like, so the processes are starting to get a bit more court like, the whole idea of a tribunal is it's not a court, it's supposed to be a lot more user friendly, it's supposed to be a lot more efficient and a lot faster and less bureaucratic and less technical, but you are getting a bit more court like, so they will set down things like timelines for people to put their evidence or what they'd like the tribunal to consider in, they will have a compulsory conference to try and get the parties together to see whether they can come to an agreement before the matter needs to go before a member to be heard, but eventually, if there's no agreement, then the matter will go to a hearing, and at that point, it's nearly, it's again not court like, but it is sort of court like.

DG It sounds reasonable, too, that that process that you will go through, if you put in a complaint under the Human Rights Commission or the Disability Discrimination, that people who have been through that, is it similar to that?

CT Well, the conciliation sort of process is, the conciliation conference is, so that's a registrar of the administrative appeals tribunal gets the parties together to see whether there's anything that the parties can come to an agreement about, to see whether that will resolve the issue that's before the tribunal, that's a way of parties maintaining

some agency in relation to the decision making, but also a way the tribunal uses to stop people, everything going to a hearing if at some point, people can come to an agreement.

DG Okay, so I understand that there'd be an effort to find resolve?

CT Yeah.

DG So some kind of conciliation or what's the typical term for what they, how they describe their process?

CT Well, they do different.

DG I ask because I used to work there, so this is a test.

CT Well, they usually refer to it as a compulsory conference, and they try and use different techniques to see whether it will be something that could be resolved.

DG Okay, and if it's not resolved?

CT If it's not resolved, then the matter keeps heading towards a hearing, so there'll be dates set down for things like weakness statements and responses and then a hearing, so everything's put together in paperwork generally beforehand, so everybody knows what's going to be said, so the hearing day or the hearing days is very, very focused on the issue.

DG And I think that there'll be some listeners who will think, that just sounds like a lot of work and that sounds quite overwhelming, what would you say to them?

CT Well, it does sound like a lot of work, it's not supposed to be overwhelming, it's supposed to be a way where people can access a review without it being too technical, the tribunal is good in helping people understand what the requirements are, so there are lots of fact sheets about what to expect, there's lots of information on the website about how the process runs, so I'd encourage people to have a look at that.

DG And do you recommend it to get some legal advice or-?

CT Absolutely, and again, it's not supposed to be technically in a legal court like atmosphere, but they do have to turn their minds to what the act says and what the act requires, so if you can get some legal advice around that, about the environment you work in, that's always useful, and again, you can talk to the advocates who are in the sector or legal aid.

DG And I guess the NDIA would work with their legal team, wouldn't they?

CT It depends who's involved at the time and it depends on what the issue might be, but if in the end, you get to a hearing, then yes, there'll be lawyers involved.

- DG Okay, so that process at the AAT, how long does it take and what happens when they make a decision?
- CT Again, it's a little flexible around the timing of it, depending on the nature of the list and what's happening at the AAT and when they can get a hearing date and also when they can get those dates for compulsory conferences, they try and get the compulsory conferences quite early on in the process to see whether there's something that can be resolved early on, so not tie up the processes as long as possible, and then it's just a matter of how far back everybody's diary, basically, is in relation to when you'll get a hearing date.
- DG Okay, and that decision process, they effectively decide on whether or not the NDIA made the right decision and they effectively tell them what to do? Is that right?
- CT Well, yeah, they can either affirm the decisions, say if the NDIS decision was right or they can say no, we want to change the decision and they can vary the decision themselves.
- DG Okay, so when they vary the decision, does that mean that the NDIA needs to do what they tell them to do?
- CT Yeah.
- DG Okay, so I feel that we're now at the end, but there's more?
- CT There's more, there's always more, so if at the end of that process, you're not happy with the outcome, then you can always appeal the AAT's decision in to the Federal Court system, so that's the next level, and that's when, because it's a court system, it gets a bit more technical, it gets a bit more technical in relation to how the law has been applied to the fact situation, it becomes, there are a lot more lawyers involved, generally speaking, it becomes a lot more technical.
- DG How, or not how many, have there been some decisions that have gone to that level? I think there was the McGarrigle case went to there.
- CT Yep, there's a thing and I think probably half a dozen decisions that are floating around in the Federal court level in relation to decisions relating to the NDIA and the NDIS, so there are decisions that you can follow in the court on the court website, they publish all decisions that have been made, so you can follow them through the process as they go up and down and that's the court reflecting on what they think the act says and how that can be applied to certain circumstances.
- DG And you've gotten to Federal court, you're still not happy?
- CT I'm still not happy.
- DG Then what?

- CT Well, you keep chasing it up the ladder, the Federal court has a number of different levels, there's the Federal Circuit court and then there's the Federal court and then there's the full Federal court, all the way up to the High Court which is the top of all that, really, that's as high as you can go.
- DG Okay, and so far, how high have people been?
- CT Most of the decisions are coming out at the Federal Court at the moment, and their decisions generally speaking, the first lot of decisions were all around transport which won't surprise many people in relation to the rollout, so there are still a few, Victoria Legal Aid in Victoria runs a number of test cases and funds a number of test cases in relation to that, when you get to that level, it's good to explore whether you can have any funding or get any support from lawyers because it does get quite technical at that level.
- DG I can imagine, so are there any standout findings that you've come across?
- CT Look, there were a number of cases early on that talked about reasonable and necessary that are always good to have a look at, these ones coming out of the AAT as well, another good resource is the AAT's website, they list a number of their own decisions in relation to reasonable and necessary, so if you want to seek out like I do and have a soft of read of some good case law, then that's a great place to start.
- DG Can you tell us one that you preferred the most?
- CT Well, we were talking about one, we were talking about the differences in reasonable and necessary recently and one that I've been looking at most recently which is an AAT decision that came out in May this year is one in relation to gym fees.
- DG Okay.
- CT So this was one area that people have been sort of questioning about how those sorts of fees fit in to the system and whether you'd get them as reasonable and necessary supports and there's a case come out of the AAT this year that talks about it.
- DG Okay, and I've got a bit of a feeling that we're going to have our own little segment on gym membership on reasonable and necessary, so people can stay tuned to that.
- CT You have.
- DG Okay, and any sort of words of advice to people who are contemplating appealing and going ahead and maybe some advice for people at the early stages and maybe some slightly different advice maybe for people coming up to the top?
- CT I think it's a good idea to know that what your options are, so the review process is always an option and I think it's always a good idea to understand what those options are and what those processes might be, so get as much information about that as you can, so you start to feel a bit comfortable in relation to that, I'd recommend getting

some advice as early as possible around that and that means talking to some advocacy agencies or talking to legal aid on the phone in relation to your particular matter and what you might expect in relation to support, but also maybe what you might expect in relation to the decision makers and how the act is being applied in similar or different circumstances, so gather as much information as you can in relation to that and then make some decisions based on that information.

DG Yeah, and that's some typical advice that you go in to it informed, you need to make sure that you have an understanding of the decision because I, as much as we don't like bureaucrats, we imagine that in most cases, that a decision that they've been down would have some merit to it, so just double check if there's something that you're not understanding, maybe that you need and ask for is then funded by another part of government, look at those things, if it's a medical thing, make sure you've been to your doctor and ask for it that way and just go in there and know that you've made sure that you're across everything that you should be across before you go down that avenue of appealing.

CT Yeah, that's true, and the decision should be clear about why it's been made, but if it's not and sometimes it's not, then another thing that people can do to inform themselves about what's happened is always ask for a copy of their file from the agency, they can do that under the Freedom of Information act, so you can write to the agency and just say, I'd like a copy of my file under the Freedom of Information act, and that will hold all your information that the agency's been dealing with in relation to you, so that might give you some insights.

DG And they call it FOI to keep the bureaucrats shaking in their boots, and the other thing, I think is really good to end on is the fact that the NDIS is new, yeah?

CT Yep, very much so.

DG So we need to recognise that during these early years, there will be the need for the NDIS to be analysed at that court level against what the legislation says and against what the agency is actually doing on the ground, so this is one way that you can play a role in helping people who might come along after you.

CT Absolutely, it's a brand new jurisdiction, so there are whole green fields of case law to be made, so that's based on appeals.

DG Yeah, that excites you, doesn't it, Chris?

CT Yeah, can you tell?

DG All right, thanks very much for your time.

CT No worries, George, thanks, listeners.

DG That's all we have time for on today's podcast of reasonable and necessary, brought to you by the Summer Foundation. Follow us on Facebook at building better lives, to hear the next podcast as it's released.

You can also access a transcript and keep up to date with our latest info on the NDIS.

I'm Dr George, and until next time, stay well and reasonable.

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