

15 July 2021

Our ref: BT-H&D/DAN

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

By email [REDACTED]

Dear Committee Secretary

### **Inquiry into Independent Assessments – Supplementary Submission**

Thank you for the opportunity to appear at the Joint Standing Committee on the National Disability Insurance Scheme's (**Committee**) public hearing for the Inquiry into Independent Assessments under the National Disability Insurance Scheme (**NDIS**).

The Queensland Law Society (**QLS**) provides the following remarks in response to the two questions taken on notice:

1. Is there any case law on whether the Administrative Appeals Tribunal (**Tribunal**) would have open to it the independent assessment as part of the review process?
2. Is there any case law on the Tribunal failing to consider relevant material that formed a part of that administrative decision?

### **Is there any case law on whether the Tribunal would have open to it the independent assessment as part of the review process?**

The Committee asked if there is any case law on whether, if a review occurred in the Tribunal on the basis of a participant's plan, the Tribunal would have open to it the independent assessment as part of that review process. QLS notes that at present, there does not appear to be any case law that considers this point. This is likely because mandatory independent assessments have not yet been introduced. However, it is probable that the Tribunal would be able to consider the independent assessment as part of the review process, because it considers all the information before it and in some cases, can look at new information that was not available to the original decision-maker.<sup>1</sup>

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<sup>1</sup> <https://www.aat.gov.au/about-the-aat/learn-more/what-type-of-decisions-can-the-aat-make>

**Is there any case law on the Tribunal failing to consider relevant material that formed a part of that administrative decision?**

There does not appear to be any case law on the Tribunal failing to consider relevant material that formed part of an administrative decision in the NDIS context.

There is, however, some case law that deals with this issue in the migration context, where the failure to consider relevant material in a way that affects the exercise of a power is an established ground of jurisdictional error.<sup>2</sup> However, not every failure to consider relevant material will amount to jurisdictional error.<sup>3</sup>

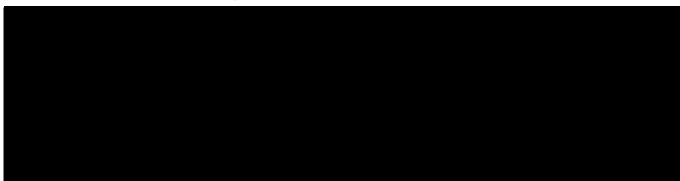
*Minister for Immigration and Multicultural Affairs v Yusuf*<sup>4</sup> makes it clear that if a decision-maker ignores relevant material in a way that leads a decision-maker to make an erroneous finding or reach a mistaken conclusion, then the decision-maker does not have the authority (or jurisdiction) to make the decision that was made.<sup>5</sup>

Similarly, the case of *CUH20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*<sup>6</sup> required the Federal Circuit Court of Australia to consider whether Tribunal had fallen into jurisdictional error in failing to consider material. The applicant in that case had made submissions to the Tribunal, which went to the issue of whether the applicant faced a real chance of harm or real risk of harm in Uganda. The Federal Circuit Court considered that '[a]t the very least, the Tribunal was required to consider the applicant's submissions in this regard. ... The applicant's evidence was directly and unequivocally on point. If the Tribunal chose to reject the applicant's evidence, that was its prerogative. But it needed to say why it did so.'<sup>7</sup> Accordingly, the Court found that the Tribunal had fallen into jurisdictional error and the matter was remitted for reconsideration.

Although it has recently been announced that mandatory independent assessments will not be introduced, QLS hopes these comments are helpful to the Committee.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer  
**President**

<sup>2</sup> *Craig v South Australia* (1995) 184 CLR 163, 179.

<sup>3</sup> *Ibid*; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 [82]; *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 [97].

<sup>4</sup> [2001] HCA 30.

<sup>5</sup> *Ibid* [82].

<sup>6</sup> [2021] FCA 1309

<sup>7</sup> *Ibid* [109].