

# **Capability and Culture of the NDIA**

Submission to the NDIS Joint Standing Committee

## Joint Submission

The authors listed below of this submission are DSS funded NDIS Appeals Advocacy organisations with direct experience of the issues arising in the NDIS appeals process, and the issues experienced by participants prior to appeals arising. We have collectively received feedback from participants, who tell us about their experience with the NDIA, from the first contact, through planning, implementation of their plans, internal reviews, the external appeals process, and what happens subsequently.

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## INTRODUCTION

The authors welcome the opportunity to provide the Joint Standing Committee (JSC) with this submission related to the capability and culture of the NDIA. We also invite the committee to call upon the authors to provide evidence.

In previous submissions<sup>12</sup> we have discussed at length issues pertaining to the internal and external reviews processes (see appendix 1 & 2 for recommendations from these submissions). While it could be expected that some of those observations are now dated, we have not seen significant change. We also note the progress of previous recommendations made about the NDIA and NDIS, which is tracked by the Public Interest Advocacy Centre [here](#). This submission is a summary of points previously made, and our observations about current issues that address the terms of reference of this inquiry.

From our experiences, the NDIA's culture is focused on cost-saving over the well-being of participants. The high record volume of matters at the AAT is reflective of unfair decisions driven by cost-saving rather than being person-centred. We see this as the NDIA largely failing to give effect to Australia's obligations to the *Convention on the Rights of Persons with Disabilities (CRPD)*, enshrined in the *NDIS Act 2013*.

In the context of rhetoric suggesting that the NDIS is too costly, we see numerous complaints made about access requests denied, inadequately funded plans and plans being unfairly slashed. This ultimately leads to people with disability having to fight for reasonable and necessary supports and services through the internal and external reviews processes.

As we have stated previously, this fight is an unfair battle, as legally unrepresented people with disability are confronted with adversarial behaviours from the agency and their legal representatives. The NDIA disproportionately holds the power, the resources, and is under no time pressure. In contrast, the individual often has necessary disability supports withheld from them and little or no capacity to negotiate.

The culture and capacity of the NDIA appears driven to minimise spending on participant plans. This seems to shape their practices and procedures, and workforce culture. The impacts of this are profound - many people with disability are withdrawing their access requests or reviews. Consequently, they are left without adequate support, therefore impacting the health and wellbeing of the individual, and broken trust with the NDIA.

We address these issues in relation to the terms of reference for this inquiry.

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<sup>1</sup> [Unnecessary and unreasonable harms: Joint submission regarding the NDIS internal review and external appeals processes](#)

<sup>2</sup> [NDIS appeals at the AAT joint submission](#)

## The NDIA's capability

### Operational processes procedure and the nature of staff employment

The NDIA's culture and capability are intertwined. We see the agency's focus on 'cost saving' as restrictive on the agency's capacity to deliver a quality service. The consequences of poor service delivery are that it can create stress among the participants, it places demand on advocacy services, and can result in matters at the AAT. We identify four problematic capabilities that require investment to improve the NDIA's service delivery:

#### INACCESSIBLE COMMUNICATIONS AND ENGAGEMENT

- There is reliance on call centres, without other alternatives for PWD to contact [the NDIA](#). This reflects a broader issue of the NDIA's failure to ensure participants contact preferences are complied with.
- NDIA staff are not resourced to develop adequate rapport and trust with participants. This results in the agency tending to rely on communicating only with appointed nominees instead of understanding and respecting the participant's wishes and communication preferences. This weakens participant's choice and control.

#### IT SYSTEMS THAT FREQUENTLY FAIL

- Materials submitted to the NDIA are regularly unavailable, incorrect, and sent to the wrong people. This means that those making decisions about the participant are based on incomplete information, which leads to incorrect decisions.

#### UNTRACEABLE COMPLAINTS PROCESSES

- The complaints mechanism lacks transparency, and it does not allow tracking of complaints after they have been forwarded to 'relevant divisions'. It is common to not receive a response for months or sometimes at all. This leads to a lack of accountability for the NDIA, in turn, eroding trust among participants.

#### A TIME PRESSURED AND CASUALISED NDIS WORKFORCE

- The NDIA has high staff turnover, leading to a loss of organisational knowledge and inexperienced staff who run the risk of making inaccurate and misinformed decisions. Overall, there is the general issue of staff not having relevant expertise for their roles.
- Support coordinators working within the constraints of billable hours lack time to develop appropriate knowledge, which can lead to misinformation given to participants about what they are entitled to and how they can access services and supports.
- Without time or resources to develop skills, the importance of trauma informed work is overlooked. Many PWD have experienced institutionalised forms of trauma and interacting with the NDIA can be triggering.
- A focus on KPIs impairs the quality of decision-making. We refer to [the QAI report](#) (p. 8-10) which highlights the significant increase in upholding the NDIA's decisions at internal review once the 60-day turnaround for internal review decisions to align with the Participant Service Guarantee was implemented.

## The NDIA's Culture

We see cultural issues within the decision-making process of the NDIA, underpinned by a lack of transparency, and a focus on the NDIA's short-term cost saving rather than human rights and the participant.

### AN ALGORITHMIC CENTRED CULTURE

It appears that the NDIA is using an algorithmic process to create Typical Support Package plans. This removes the focus from person-centered engagement, and lacks collaboration and meaningful involvement of participants. Plans created often bear no relationship to the planning discussion. Input from the participant and their health professionals are often partially ignored.

### LACK OF HUMAN RIGHTS AWARENESS IN DECISION MAKING

In practice we do not see evidence that delegates carefully consider human rights impacts in their decision-making processes. This is reflected in the NDIA's regular practice of removing and reducing supports previously funded and relied upon by participants, without appropriate reasons and notice. The consequences of such decisions significantly impact the lives and human rights of persons with disabilities.

### MINIMAL PARTICIPATION OF PEOPLE WITH DISABILITY

The NDIA fails to implement true co-design principles<sup>3</sup>, despite it being a legislative requirement. Instead, the agency continues to operate from a consultation model<sup>4</sup>. It tends to implement new programs/initiatives and then seeks feedback from persons with disabilities and the wider sector as they are implementing programs. This appears tokenistic because decisions are often already made without input from people with disability at the initial stages of planning. A recent example is the pilot of an Independent Expert Review process to reduce the backlog of external reviews at the AAT. The pilot of this program has been made without true co-design principles, which involves people with disability at *all stages of development*.

### SILO CULTURE

The NDIA's divisions operate in silos where there is a lack of communication between departments. The NDIA's planning division regularly fail to communicate with the AAT division, resulting in increased advocacy work to resolve issues. Matters repeatedly return to internal review and AAT proceedings. Overall, there appears to be an absence of learning within the NDIA, as there is a failure to improve and communicate planning and internal review decisions based on AAT settlements and consistent decisions from AAT hearings.

### THE BLACKBOX OF DECISION-MAKING

There is a distinct shift in the way in which funding decisions are being made, with a marked decrease in transparent decisions:

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<sup>3</sup> Co-design requires persons impacted by programs to be involved in all stages, including the design, implementation and evaluation

<sup>4</sup> The recent amendment to the NDIS Act included s.4(9A) "People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity".

- The identities, qualifications, and experience of the ‘technical advisory’ staff - who inform decision making - is unknown to the public, and their advice not provided to the participant. There is no evidence of previous AAT decisions informing their advice.
- The ‘primary disability’ recorded by the NDIA is crucial to the funding allocated. If this field changes, so does the funding in the plan, and often quite significantly. Participants have no control over what the NDIA has recorded, and often are unaware of what their ‘primary disability’ is listed as. When they attempt to engage with the NDIA about rectifying the data recorded, there are multiple barriers. One significant barrier is the NDIA’s policy that they are required to meet the s.24 access criteria when including another disability to receive related supports.
- No definitions around evidentiary requirements at decision points. A requirement for updated evidence from therapists is inconsistent, and unclear. Reports that are provided are subsequently stated to be insufficient, despite there being no information provided as to what information is actually required. Participants are left to guess how much of their funding they should be using to provide reports to the NDIA, and will often have to use funding from the next plan to prepare for internal review.
- Lack of transparency surrounding settlement outcomes leads to inconsistent decision-making (see p. 35 of [Unreasonably and Unnecessary Harms](#)).
- Misinformation on the NDIS website regarding what they will and will not fund (see examples in [DSC article](#)).

## Impacts of NDIA Capability & Culture

### DISADVANTAGING THE MOST DISADVANTAGED

- Inaccessible and unreliable systems, a lack of transparency, minimal participation and the NDIA’s unfair decision-making instils mistrust and erodes confidence among people with disability. Not only does this decrease meaningful engagement between the NDIA and people with disability, it can also mean that people simply choose to not pursue what they are entitled to under the scheme, leaving them without adequate supports and services.
- The processes and procedures of the NDIS are unduly complex, requiring participants to have significant capacity to understand. Those without capacity are at risk of not being able to navigate the NDIS, particularly if they do not have informal supports that can provide assistance or do not comprehend the landscape of services<sup>5</sup>.
- Requesting reviews of decisions requires material and cognitive resources that are not evenly distributed among the disability community. This means that the most resourced participants often have more favourable outcomes with NDIA as they better understand how to navigate and work with the system.
- Advocacy support services are overrun with NDIS matters with many having to ‘close their books’. This means that people with disability are left with few options but to self-advocate in an intimidating process, particularly when facing the NDIA’s external lawyers. More concerning many people are deterred from exercising their right to appeal decisions because the process is largely inaccessible and support is unavailable.

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<sup>5</sup> [NDIS Joint Standing Committee’s Inquiry into NDIS’ Implementation and Performance](#) (submission number 79).

## Recommendations

We refer to recommendations made in previous submissions (see appendix 1 and 2).

While we can make recommendations to address the NDIA's operational processes, procedures, and staffing, these are futile without concerted efforts to shift the agency's culture. Culture – that is, the guiding principles and values - ultimately governs workplace practices. Therefore, we stress that this must start with the NDIA's leadership both valuing and operating from a human rights-based approach.

Such values that start with strong leadership can filter down to support and encourage workers to deliver a high-quality service that has the person with disability and their goals at its core. NDIA staff must be required and empowered to work from a human rights framework.

### ADOPT A HUMAN RIGHTS BASED FRAMEWORK

- An independent investigation should be undertaken to understand the current level of human rights competency in the NDIA.
- The NDIA implements a plan to embed a human rights culture throughout the NDIA to ensure the *CRPD* underpins all decisions and actions. This must include co-designed training and ongoing monitoring of human rights competency.

### DEVELOP A PERSON-CENTRED CULTURE

- More persons with disabilities and diversities to be attracted and retained in senior leadership positions. It is worth noting that only 5.7% of NDIA Senior Executive Services positions are held by people with disability.
- Ensure that the NDIA's leaders have a strong commitment to person-centred engagement and that measures are put in place to hold them accountable. This may include ongoing and frequent consultations with people with disability who report back on the NDIS's performance.
- Ensure the NDIA is appropriately resourced to fulfill a person-centred culture. As noted above this means that NDIA's leadership are held accountable for operationalising a human rights and person-centred framework into their practices and procedures.

### RETURN TO A FOCUS ON THE PARTICIPANT

- Ensure the planning and internal review processes are collaborative and not perfunctory. Require planners and internal reviewers to seek additional information if it is required. Make better decisions, not rushed ones.
- Improve safeguards to ensure people are appropriately supported to navigate the NDIS. I.e. decision making support, support Coordination, advocacy, culturally appropriate supports.

### OPEN THE BLACK BOX

- External scrutiny of the adequacy and appropriateness of the NDIA's process to make funding decisions. In particular, how the NDIA's Typical Support Packages account for individual circumstances.
- Ongoing transparency regarding the NDIA's processes to make funding decisions.
- Provide a policy about the requirement for evidence and make it publicly available. Explain what evidence is required, and why.
- Publish settlement outcomes from AAT matters.

#### OPEN THE DOOR

- Facilitate in person-communication and better engagement. Open NDIS offices in 'hard to reach' communities.

#### DEVELOP ROBUST ACCOUNTABILITY SYSTEMS

- Take complaints seriously, and where staff have acted inappropriately towards participants and their families, ensure this is not allowed to continue.
- The NDIA is held to its model litigation provisions as per recommendations in previous submission (see Appendix 1).



## Appendices

### **Appendix 1: The National Disability Insurance Scheme Appeals at the Administrative Appeals Tribunal joint submission recommendations (see page 35 – 37):**

#### **Get the initial decision right**

##### RECOMMENDATION 1

The NDIA invests in resources and training to provide clearer evidence guidelines to professionals preparing evidence for NDIS participants.

##### RECOMMENDATION 2

The NDIA ensures plan preparation is carried out by a skilled and knowledgeable planner, and is not determined solely by reference to demographic data about the participant, ensuring sufficient staffing and documentation of reasons for decisions at all stages.

##### RECOMMENDATION 3

The NDIA ensure the statement of reasons for a decision includes findings on material questions of fact, reference to the evidence on which those findings were based, and giving the reasons for the decision.

RECOMMENDATION 4 The NDIA ensure sufficient resourcing for the internal review process to be conducted with the participant, and with the reviewer advising participants of further information which may assist before finalising the review.

#### **Commit to being a model litigant**

##### RECOMMENDATION 5

The NDIA co-design a document which stipulates the way AAT Appeals will be conducted, and what participants can expect from the Agency irrespective of who is acting on their behalf, including timeframes, standards, conduct and approach.

##### RECOMMENDATION 6

The NDIA apply minimum standards for anybody acting on their behalf at the AAT, including understanding model litigant obligations, training on disability rights and awareness, and training on communicating with people with cognitive impairment, and from CALD and First Nations backgrounds.

##### RECOMMENDATION 7

The NDIA ensure adequate staffing and resourcing to comply with stipulated timeframes, and ensure a decision maker is available for all stages at the AAT.

#### **Address the power imbalance**

##### RECOMMENDATION 8

Both the NDIA and the AAT reconsider the approach where the Agency is legally represented against a disabled person who is not.

RECOMMENDATION 9 The government rectify the disparity of resources applied to the parties at the AAT.

RECOMMENDATION 10

The AAT seek participant feedback about the experience of conferencing so that they can understand and address the issue of registry staff being perceived as “being on the side of” the Agency.

RECOMMENDATION 11

The AAT takes a more active role in educating participants about their processes and what they can expect.

**Ensure safeguards exist**

RECOMMENDATION 12

The NDIA publish the required standards of conduct for their representatives at the AAT, in order that participants have clarity on what they should expect.

RECOMMENDATION 13

Parliament require the NDIA to report on model litigant complaints, including timeframes for responses, and the nature of complaints.

RECOMMENDATION 14

The Commonwealth Ombudsman is authorised to take and handle model litigant complaints about the NDIA, as an external and objective body

RECOMMENDATION 15

The government determine the most appropriate mechanism for the AAT being authorised to sanction unacceptable conduct, including but not limited to costs orders and enforcement powers.

RECOMMENDATION 16

The Disability Royal Commission, the Joint Select Committee on the NDIS and the NDIA commission an independent report using a co-design strategy to investigate how the reviews and appeals system can be improved to be more efficient, effective and promote the rights of persons with disabilities, in particular to address the deficiencies of the NDIA as a model litigant.

## **Appendix 2: Unreasonable and unnecessary harms: Joint submission regarding the NDIS internal review and external appeals processes**

### **RECOMMENDATION 1:**

The Joint Standing Committee to initiate a specific inquiry into the NDIS internal and external review processes to understand the issues discussed herein and the level of participant distress, distrust and anxiety being experienced as a result. An inquiry will enable the Committee to understand the different barriers and impacts experienced by the diversity of NDIS participants and prospective participants which prevent access to justice.

### **RECOMMENDATION 2:**

DSS and the NDIA to commission an independent report using a co-design strategy to investigate how the reviews and appeals system can be improved to be more efficient, effective and promote the rights of persons with disabilities.

### **RECOMMENDATION 3:**

The NDIA to co-design a 'Guiding Principles on the Conduct of NDIS Appeals' document. This is necessary for the NDIA's accountability during the NDIS appeals process and to build trust with persons with disabilities and the disability community. Such a document should include, but not be limited to, principles concerning: timeframes, reporting obligations, applicant feedback surveys, the conduct of internal and external lawyers and case managers, training requirements on disability rights and awareness, approach to evidence, addressing equality of representation, approach to settlement offers and approach to diverse groups such as Culturally and Linguistically Diverse and First Nations applicants.

### **RECOMMENDATION 4:**

Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to ensure the NDIA addresses equality of representation at the AAT. The NDIA must provide equal legal representation when it chooses to be legally represented. In addition, there must be sufficient resources for advocacy support where this is requested to ensure applicants have effective access to justice.

### **RECOMMENDATION 5:**

The NDIA to co-design amendments to the NDIS Act to reduce complexity and simplify processes in the AAT process by clarifying the AAT's jurisdiction.

RECOMMENDATION 6: a. The NDIA to co-design improvements to the accessibility of the AAT process with an emphasis on information and communications improvements, including through the use of plain and simple English and communication through a variety of means. b. Following from 6a, the NDIA to co-design improvements to the accessibility of the AAT process to be inclusive of all disabilities, diversities, languages and cultural backgrounds etc.

RECOMMENDATION 7: Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to establish measurable timeframes to address delays of the AAT process and hold the NDIA accountable to Model Litigant Obligations.

RECOMMENDATION 8:

- a. The NDIA to invest sufficient resources into the Early Resolutions team to enable a greater opportunity for resolution at the internal review stage or early stages of the AAT process. This can improve the efficiency and accessibility of the AAT process for persons with disabilities and reduce the requirement for legal representation.
- b. The function and expectations of the Early Resolutions team to be set out in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).
- c. The NDIA to also establish measurable timeframes for contact from the Early Resolutions team with reported outcomes.

RECOMMENDATION 9:

- a. The NDIA to provide additional funding when evidence is required from the applicant's treating professionals for the purpose of the AAT. This will reduce delays and minimise distress for applicants.
- b. The NDIA to co-design criteria for circumstances where it is appropriate for the NDIA to use an independent assessor and the conduct regarding this process to be included in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).

RECOMMENDATION 10:

The 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3) to adopt principles that ensure settlement offers are made as early as possible. This ensures more efficient use of resources.

RECOMMENDATION 11:

- a. DSS and the NDIA to consult with persons with disabilities and the disability advocacy sector to accurately measure demand for support to review and appeal NDIA decisions.
- b. Once the demand is measured accurately - DSS and the NDIA to implement 'Recommendation 33' from the Joint Standing Committee Planning Final Report to ensure appropriate funding is allocated to ensure persons with disabilities have support to exercise their right to access justice.

RECOMMENDATION 12:

DSS to fund longer-term contracts for the NDIS Appeals Program to enhance the sustainability of organisations in the advocacy sector.

RECOMMENDATION 13:

The NDIA to provide applicants with a contact list for advocacy organisations with all reviewable decisions, and internal review decisions in a variety of accessible formats and in a way preferable to the individual.

RECOMMENDATION 14:

- a. Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to include guidelines regarding the conduct of external lawyers and to ensure NDIA Instructors/case managers are present at conferences in preference to lawyers to engage in a meaningful and respectful discussion about progressing matters as efficiently as possible.
- b. All external lawyers conducting NDIS AAT matters to undergo training regarding disability rights and awareness.

RECOMMENDATION 15:

The NDIA to publish transparent data regarding their expenses on external legal representation for AAT matters in the Quarterly Reports.

RECOMMENDATION 16:

The NDIA to implement Recommendations 34 and 35 of the Joint Standing Committee's NDIS Planning Final Report (December 2020) relating to transparency of AAT settlements.

RECOMMENDATION 17:

- a. Transparency from the NDIA regarding procedures it has in place to ensure continuous improvement of administrative decision making. This will ensure decisions are scrutinised that are varied in the process of internal review, AAT early resolutions, AAT settlements or final hearings and improve the quality of decision making for future decisions and improve the trust from persons with disabilities and disability sector of the NDIA.
- b. The NDIS to publish statistics each year regarding the performance of original decision-makers to reflect where improvement is required. Statistics to include:
  - Number and percentage increase of plans varied by internal review.
  - Number and percentage increase in plans settled in the AAT prior to a hearing.

RECOMMENDATION 18:

The NDIA to develop a transparent and accountable system for implementing systemic changes to policies in response to Federal Court and AAT decisions. This can include: - the implementation of a feedback loop which ensures that following an AAT or Federal Court decision, the NDIA's lawyers advise the relevant policy team of the consequences of the decision for the existing policy, and the policy team be required to consider whether changes are required to the policy; and/or - a Policy Advisory Committee is set up, including lawyers and advocates, to advise the NDIA of policy changes required following AAT or Federal Court decisions.

RECOMMENDATION 19:

Policy changes made following AAT and Federal Court decisions to be reported in the NDIA's Quarterly Report to ensure transparency and accountability.

RECOMMENDATION 20:

The current Transport Operational Guidelines to be immediately withdrawn and rewritten in the light of the criticisms expressed by the Federal Court and AAT.

RECOMMENDATION 21:

The NDIA to separate the forms for seeking internal reviews of access decisions and reasonable and necessary supports decisions. These forms must meet accessibility guidelines and specifically refer to the relevant legislative criteria in easy English.

RECOMMENDATION 22:

The NDIA to implement a practice to ensure participants have appropriate notice before any meetings to discuss an internal review occurs. To improve transparency, if the meeting is conducted over the phone, the content should also be confirmed in writing and provided to the participant.

RECOMMENDATION 23:

The NDIA to revise public statements regarding what they will and will not fund that do not accurately reflect the NDIS legislation. In particular, statements on the 'would we fund it' section of the NDIS website should be revised to ensure legal accuracy.

RECOMMENDATION 24:

All primary and internal review decisions should be required to reference all internal NDIA policies that are applied in reaching the decision.

RECOMMENDATION 25:

All internal policies that are used by delegates in making decisions should be included in T documents prepared for the AAT.

RECOMMENDATION 26:

All planning and Internal Review Decisions to be required to reference all internal NDIA advice that is determinative in reaching the decision.

RECOMMENDATION 27:

All internal advice that is used by delegates in making decisions should be included in T documents prepared for the AAT.

RECOMMENDATION 28:

- a. The NDIA to automatically provide an accessible statement of reasons for the following decisions:
  - Rejection of a request to access the NDIS
  - The first NDIS plan
  - A new NDIS plan that substantially lowers a participant's supports in any category
  - A new NDIS plan following a change of circumstances
  - All internal review decisions, even where the decision results in a new NDIS Plan.
- b. The statement of reasons from above should include: - findings on material questions of fact, refer to the evidence which those findings were based on, and give the reasons for the decision. - guidance on what sort of evidence would be required for the applicant to meet the relevant statutory criteria.
- c. Time limits on appeals should not commence until a valid written statement of reasons is received.
- d. All NDIA delegates should receive training in the preparation of statements of reasons that meet statutory requirements.