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## SUBMISSION

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### Improving the NDIS Experience: *Establishing a Participant Service Guarantee and removing legislative red tape*

October 2019

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Independent Advocacy in the Tropics Inc.  
Office 2, 179 – 181 Ross River Rd Mundingburra Qld 4812  
PO Box 3065 Hermit Park Qld 4812  
Phone: 61+ 7 4725 2505  
FreeCall: 1800 887 688  
Fax: 61+ 7 4725 6106  
Email: [reception@ianq.org.au](mailto:reception@ianq.org.au)  
Website: [www.ianq.org.au](http://www.ianq.org.au)

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## List of Abbreviations

|                    |   |
|--------------------|---|
| AAT                | Administrative Appeals Tribunal   |
| AAT Act            | Administrative Appeals Tribunal Act 1975                                    |
| AD(JR) Act         | Administrative Decisions (Judicial Review) Act 1977                         |
| ARF                | NDIS Access Request Form  |
| DSQ                | Disability Services Queensland  |
| EPOA               | Enduring Power of Attorney  |
| ERT                | NDIA Early Resolution Team  |
| FOI Act            | Freedom of Information Act 1982   |
| IATI               | Independent Advocacy in the Tropics Inc                                     |
| IPS                | Information Publication Scheme  |
| LAC                | Local Area Co-ordinator   |
| NDAP               | National Disability Advocacy Program  |
| NDIA               | National Disability Insurance Agency  |
| NDIS               | National Disability Insurance Scheme  |
| NDIS Access Rules  | National Disability Insurance Scheme (Becoming a Participant) Rules 2016    |
| NDIS Support Rules | National Disability Insurance Scheme (Supports for Participants) Rules 2013 |
| NDIS Act           | National Disability Insurance Scheme Act 2013                               |
| PBSP               | Positive Behaviour Support Plan   |
| PSG                | Participant Service Guarantee   |
| RACF               | Residential Aged Care Facility  |
| SDA                | Specialised Disability Accommodation  |
| SIL                | Supported Independent Living  |
| TAT                | NDIA Technical Advice Team  |
| YPRAC              | Young Person in Residential Aged Care                                       |

## Introduction

Independent Advocacy in the Tropics Inc (IATI) is an accredited disability advocacy organization holding accreditation under the National Standards for Disability Services for both Individual and Systemic Advocacy. IATI is funded by the Commonwealth Department of Social Services, the Queensland Department of Communities, Child Safety and Disability Service and Queensland Health. IATI was formed in 1989 and incorporated in 1991 and it conducts business under its duly registered Business Names, Independent Advocacy Townsville and Independent Advocacy NQ.

Since 2016, IATI has received funding from the Department of Social Services under the National Disability Insurance Scheme (NDIS) Appeals Advocacy program to support clients who are seeking review of decisions made by the National Disability Insurance Agency (NDIA). These decisions are about either access to the NDIS or the reasonable and necessary supports available to a participant in their participant plan. Since that time (to September 2019), we have supported 50 clients specifically with NDIS Appeal matters.

In addition to this NDIS specific role, IATI is also funded to provide general advocacy to people with a disability under the National Disability Advocacy Program (NDAP). Many of our NDAP clients have an NDIS package, so IATI has acquired considerable experience in dealing with the NDIA with clients with a wide range of disabilities, capacities and vulnerabilities.

In the 2018/19 financial year, our advocacy work in relation to the NDIS issues comprised 83% of our advocacy work with the following statistics:

|                       |     |
|-----------------------|-----|
| NDIS Appeals          | 12% |
| NDIS Internal Reviews | 37% |
| NDIS Issues           | 34% |

NDIS Issues are further broken down to record the following issue categories:

|                      |     |
|----------------------|-----|
| NDIA Complaint       | 3%  |
| Service Complaints   | 6%  |
| Assistive Technology | 7%  |
| Home Modifications   | 7%  |
| Inadequate Funding   | 11% |
| Funding Reduction    | 26% |
| Planning/Services    | 40% |

Interestingly for the 2017/18 financial year, NDIS work related to only 52% of advocacy issues.

IATI's NDAP service area covers approximately 194,000km<sup>2</sup>. For NDIS Appeals, our service area also includes the greater Mackay Region (Mackay, Isaac and Whitsunday) and extends to 284,000km<sup>2</sup>.

## Key Themes

One of the triggers for the current review has been consistent complaints about unreasonable delays in NDIS decision making processes.<sup>1</sup> The underspend by the NDIA of over 4 billion dollars has also been widely publicised, reported and criticised.<sup>2</sup> As we will illustrate in this submission, we believe that the NDIA currently places unreasonable barriers to accessing the scheme and then seeks to minimise the supports available to those that are participants. It is therefore of no surprise to disability advocates that the NDIA has significantly underspent compared to the projected expenditure.

This submission follows the broad format of the Discussion Paper; however, rather than answering specific questions, this submission discusses the issues IATI's clients have experienced under the subheadings provided in the Discussion Paper. We have identified many problems and recommendations for improvements, but two key themes are consistent throughout this submission: inadequate staffing levels and the culture of the NDIA.

### Staffing Cap

IATI believes that the Federal Government's current cap on NDIA staffing is unrealistic and is one of the principal causes of both delays in decision making and poor-quality decision making. In our experience some participants are still waiting for an internal review to be conducted when their plan comes up for an annual review. It is also unfair to expect potential participants and participants whose status has been revoked to wait up to 2 years for the AAT to hear their matter.

The absolute cap on permanent staffing has also led to a significant increase by the NDIA in spending on consultants, lawyers, and short term contractors. In the 2018/19 financial year:

- \$13.6 million was spent on contracted legal services. This had increased from \$2.1 million in 2017/18.
- \$148.9 million on temporary staff/contractors. This had increased from \$51.3 million in 2017/18<sup>3</sup>

IATI believes that it is not realistic to expect staff employed on short term contracts (sometimes as short as 3 months) from private sector recruitment/temporary staffing agencies to get up to speed immediately and make appropriate, quality, decisions in such a complex environment. IATI believes that this leads to temporary staff simply following NDIA policy without question rather than examining the merits of the case, a matter that is discussed in more detail in Part 1F of this submission.

The NDIA has stated that the increased expenditure on legal services was in part due to the costs of "supporting applicants in appeals to the AAT, in line with the NDIA's commitment to be a model litigant"<sup>4</sup>. As we will demonstrate in Part 2D of this submission, the NDIA's use of lawyers in the AAT could hardly be characterised as "supporting" AAT applicants but has in some cases unnecessarily extended AAT matters in direct breach of the NDIA's obligations as a model litigant.

### NDIA Culture

The NDIS was sold to the Australian public as an "insurance scheme" on the basis that rather than a welfare approach, plans would be "frontloaded" to build capacity and the costs of providing these supports would be shared amongst all Australians.

An insurance model takes a lifetime approach to supporting people with disability. This means that – unlike the welfare approach to disability support that the NDIS is replacing which traditionally takes a short-term view in supporting an individual and funds supports accordingly – the NDIS invest in people in the short-term to maximise opportunities over a lifetime and reduce long-term costs.

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<sup>1</sup> See, for example the May 2018 report by the Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013*, [http://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0029/83981/NDIS-NDIA-Final-report-on-administration-of-reviews-under-the-Act.pdf](http://www.ombudsman.gov.au/_data/assets/pdf_file/0029/83981/NDIS-NDIA-Final-report-on-administration-of-reviews-under-the-Act.pdf)

<sup>2</sup> See, for example "Australia's budget effectively in balance after 4.6bn underspend on NDIS, The Guardian, <https://www.theguardian.com/australia-news/2019/sep/19/australias-budget-effectively-in-balance-after-46bn-underspend-on-ndis>"

<sup>3</sup> NDIA Statement in response to requirement under Senate Order 13, 31 August 2019

<sup>4</sup> National Disability Insurance Agency Statement – NDIS Expenditure 30/9/19.

That means the best possible outcomes for people with disability at the most efficient possible cost for taxpayers.<sup>5</sup>

Unfortunately, some NDIA planners appear to have adopted the approach of commercial insurance assessors see themselves as gatekeepers whose job is to minimise the amount paid out to participants by the Scheme. Furthermore, once a matter has reached the Administrative Appeals Tribunal (AAT) the NDIA's lawyers have insisted on obtaining their own medico-legal specialist opinions at great expense rather than accepting the evidence of the applicant's own specialist team. These approaches bear more resemblance to a commercial insurance company minimising payouts than to a publicly funded scheme intended to improve the lives of people with a disability.

The principle of "choice and control" has also been lost in red tape and unnecessarily bureaucratic administrative processes, so much so that the Discussion Paper does not even propose that the concept of choice and control be included as part of the NDIS Participant Guarantee. This has been compounded in Queensland by the transfer of a number of staff who were previously employed by Disability Services Queensland (DSQ) into permanent positions as senior planners and in other key roles. Unfortunately, some of these staff appear to have brought their unconscious biases and a somewhat paternalistic approach to disability services with them from DSQ to the NDIA and to the planning process, where they often override the wishes of the participants and the advice of the participant's treating team despite having no specialist qualifications of their own. This is discussed in Part 1C below.

### Advocates see the tip of the iceberg

This submission includes numerous examples to illustrate IATI's concerns with the NDIA's current processes and the underlying culture of NDIS planners. In many of these cases, the desired outcome was eventually achieved; however, a number of the cases discussed in this submission remain unresolved.

IATI advocates participate in monthly telephone hook-ups of NDIS Appeals Support Advocates at both the State and National levels. The problems identified in this submission are not unique to IATI's service area but are echoed by disability advocates across the country. While we recognise that the implementation of a scheme as ambitious as the NDIS is bound to have teething problems, it is particularly unfortunate that, as the scheme has rolled out, the same problems have been recurring across the country. The NDIA does not seem to have learned from the common problems identified in early rollouts.

IATI is also concerned that there are many participants and potential participants who, for whatever reason, do not access advocacy services or seek advice when they are faced with an NDIA decision that they disagree with. For every incorrect decision that advocates help overturn we fear that there are many others where the decision goes unchallenged and justice is not served. These people may be going without much needed supports that they are in fact entitled to receive.

Funding shortages for advocacy organisations across the country have also led many advocacy organisations, including IATI, to stop accepting new referrals for periods of time or to limiting assistance to providing self-advocacy support to all but the most vulnerable people. Funding for Legal Aid Assistance is also extremely limited. If an appeal does go all the way to hearing in the AAT either an advocate or an unrepresented participant or their family find themselves in a situation that resembles a court room in both appearance and procedure, where the NDIA is being defended by both a solicitor and a barrister.

IATI recognises that our clients largely represent those who have had poor experiences with the NDIA, as this is often the reason why they are seeking advocacy assistance in the first place. We recognise that for many educated participants with "straightforward" disabilities the experience of the NDIA has been life changing in a positive way. However, the NDIA's success cannot be judged solely by the easy cases. IATI believes that if the NDIA is to truly fulfil its promise, its effectiveness should be judged on how the difficult, complex cases are handled. Advocates represent those with a disability who are most vulnerable and least

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<sup>5</sup> NDIS Insurance Principles and Financial Sustainability Manual, Version 5, November 2016, p2

able to speak up for themselves, and it is important that the NDIS is as fair and accessible for them as it is for the majority of largely satisfied participants.

IATI hopes that by bringing systemic problems to light, and including recommendations for improvements, this submission can be part of a process whereby the NDIA is truly able to fulfil the ambitious promise made by Prime Minister Gillard in the Bill's Second Reading Speech:

*The scheme to be established by this bill will transform the lives of people with a disability, their families and carers. For the first time they will have their needs met in a way that truly supports them to live with choice and dignity. It will bring an end to the tragedy of services denied or delayed and instead offer people with a disability the care and support they need over their lifetimes<sup>6</sup>*

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<sup>6</sup> National Disability Insurance Scheme Bill 2012, Second reading Speech by Prime Minister Gillard, 29 November 2012. (Hansard p13877)



# Part 1: The Participant Service Guarantee

## 1A: Timely

The problems caused by the fact that the NDIS Act does not presently set any timeframes for a variety of decisions have been well documented.<sup>7</sup> IATI strongly supports additional time limits be placed on the NDIA's decision making powers. Without specific time limits there is no incentive for the NDIA to make decisions in a timelier manner and the NDIA will continue to take an inordinate amount of time at each stage of the process, leaving many participants and potential participants significantly disadvantaged and without appropriate supports for extended periods.

IATI clients have experienced unreasonable delays at all stages of the decision making process, many of which are discussed in more detail in Part 2 of this submission. Internal reviews seem to take a minimum of six months and in our experience simply replicate the original decision despite additional and often compelling evidence being provided by the participant/prospective participant. Initial planning meetings can take months to be set up.

NDIA staff do not regularly check NDIA emails, so participants and or their advocates can send information and or queries to the NDIA, and the email is simply not downloaded for a matter of weeks. One IATI advocate was advised that the NDIA 'receives the information' when it is downloaded and not when it is sent to the NDIA. This caused a delay in the material being read by the NDIA and acted upon.

There are also many participants whose evidence becomes out of date due to the long wait times on decisions. Timely consideration of evidence by the NDIA is also important to remove the need for participants to provide updated reports to the NDIA. The costs of providing updated reports comes out of the participant's package, the individual's own pocket or is paid for by the Health System. They represent a waste of time, money and resources which could be avoided if the NDIA made internal review decisions in a timely manner. The majority of NDIA applicants or participants are recipients of the Disability Support Pension and can't afford to pay for multiple reports.

The NDIA cannot make timely decisions if it does not have enough qualified, experienced staff to make those decisions. As already noted, IATI believes that the current staffing cap is unreasonably low and is at least in part responsible for the unreasonable delays in decision making experienced by participants and prospective participants. It has also resulted in the explosion in the number of temporary contractors, many of whom have little or no background or experience in the disability sector. Inexperienced staff can do little more follow internal policies without question and without regard to the circumstances of the person they are considering.

### Example

- The NDIA decided to conduct an "informal review of participant status" of a client after his parents questioned the level of funding in his NDIS Plan. Detailed reports amounting to over 50 pages of expert evidence were provided to the NDIA in March 2019. The client is still waiting to be informed of the outcome of this review and have his participant status confirmed seven months later. The stress and uncertainty have significantly damaged the client's mental health to the extent that he has been recently admitted to a private psychiatric hospital.

### Recommendations

1. The following time limits should be imposed in legislation:
  - a. Acting on requests for Access Request Forms: 3 days
  - b. Decisions on access requests: 21 days
  - c. Time between access decision and planning meeting: 14 days
  - d. First Plan approval: within 7 days of planning meeting

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<sup>7</sup> See, for example the May 2018 report by the Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013*

- e. Approval of subsequent plans: within 7 days of planning meeting
  - f. Requests for unscheduled plan reviews (change of circumstances): 14 days
  - g. Internal Reviews (Note: this time frame should be for a decision, NOT just for “contact made” as is suggested in Attachment A to the Discussion Paper.): 3 months
  - h. Decisions on AT Requests: 30 days
  - i. Decisions on SDA: 30 days
  - j. Decisions on Home modifications: 30 days
  - k. Implementation of AAT Decisions: 14 days
2. The NDIA should be required to publish statistics on outcomes in relation to the above time limits. The Government should agree to remove the current staffing cap at the NDIA and employ enough staff with appropriate expertise to meet these deadlines.

## 1B: Engaged

IATI notes that the description of this Principle in the draft PSG states that the NDIA should be engaged with stakeholders during the development of operating procedures and processes. By contrast, the proposed Service Standard merely requires the NDIA to ensure that processes are designed to be understood by people with different abilities and needs. While this is an important issue, IATI believes that not only the comprehensibility of policies and procedures, but also their substance, should be part of the engagement process. The current Service Standard seems to only require the NDIA to explain its policies and procedures, but does not require them to be fair, or to take the needs of people with a disability into account.

Many of the NDIA’s policies are not transparent to participants and prospective participants. The NDIA publishes several “Fact Sheets” but currently does not publish internal policies beyond the Operational Guidelines. Yet it is clear from the consistent wording in NDIA decisions and in statements made to participants by NDIS staff other internal documents guide statutory decision makers in relation to decisions on a range of supports.<sup>8</sup>

Under the Information Publication Scheme (IPS) in the FOI Act, each Commonwealth Agency is required to publish a range of information, including information about what the agency does and the way it does it, as well as information dealt with or used in the course of its operations. Section 8(2)(j) of the FOI Act includes “operational information” in the list of information required to be published.

Section 8A of the FOI Act provides that an agency’s **operational information** is information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). “The agency’s rules, guidelines, practices and precedents relating to those decisions and recommendations” are listed as examples of operational information.

IATI believes that NDIA decision makers use a range of internal policies and guidance as part of their decision making processes that the NDIA has not included in its entry for the IPS. IATI believes that in this instance the NDIA may be failing to fulfil its statutory duty under the FOI Act by excluding this information from the IPS.

We similarly note that these policies are not included in the T documents prepared by the NDIA for Administrative Appeals Tribunal matters even though they are clearly the basis of decisions. We discuss this in more detail in Part 2D of this submission.

## Recommendations

- 3. The NDIA should engage in meaningful consultation with participants, their families and carers and other stakeholders from the disability sector on all policies and policy amendments affecting access and planning decisions

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<sup>8</sup>. Some key areas where IATI believes that the NDIA is basing its decisions on unpublished internal policies that are inconsistent with the NDIS Act and Rules are discussed in more detail in Part 1F of this submission.

4. All internal policies and guidelines that guide NDIA decisions surrounding access and reasonable and necessary supports should be made public under the IPS.

## 1C: Expert

It is critical for participants and prospective participants that decisions are made by people with an appropriate understanding of the disabilities involved, their impact on a person's daily life and of the most appropriate supports for people who have differing disabilities.

Unfortunately, IATI's experience is that many decisions are made by staff with limited expertise. IATI understands that many NDIA staff are on short term contracts (3-6 months) and are employed through temporary staffing agencies. These temporary staff sometimes have little experience, and those Contractors who are seen by the disability sector to be good at their jobs will often be poached from the NDIA by service providers in response to offers of more stable employment.

The problems of lack of expertise is compounded by the fact that many key NDIA staff who have permanent positions in the Townsville Office are staff who were transferred to the NDIA from DSQ via an intergovernmental agreement. Unfortunately, IATI'S experience is that it is these staff who display the least expertise and the most unconscious bias against our clients. They continue to apply an "command and control" mentality and sometimes consider that their own opinion is more valuable than that of the participant's treating team. It is also the permanent staff who set the tone for an office, meaning that temporary planners who display an attitude more in line with the NDIA's professed philosophy find themselves out of step with the attitudes of permanent staff and less likely to have their contracts renewed.

While incorrect decisions can be overturned at the AAT, it can take anything up to two years for a client to go through the full process, during which time they either have inadequate supports or in some cases no supports whatsoever. Many people will also choose to not continue to fight the decision through the AAT, either due to lack of supports or due to lack of emotional strength to continue the battle. While the AAT is a relatively informal process, there are still many elements of the process that closely resemble a trial and the thought of going through this process can be too much for people who are already overwhelmed by circumstances.

### Examples

- A client's participant status was revoked after she made a request for funding for assistive technology. All services were ceased with 5 days' notice. During the next six months the client received only cleaning assistance through Queensland Community Care and could not afford to continue with allied health supports such as hydrotherapy, exercise physiotherapy, and physiotherapy. The client's physical condition deteriorated significantly during this time and she fell multiple times in her home and in the community. The internal review decision confirmed the revocation and IATI filed a request for review in the AAT on her behalf. Before the first Case Conference and without any additional evidence being filed on our client's behalf the NDIA conceded that both the initial decision and internal review decision was wrong, and that the internal reviewer had "not understood" the client's disability. When IATI attended a subsequent planning meeting with the client, it was discovered that the NDIA planners who made these decisions had incorrectly classified her Autonomic and Sensory Neuropathy as a physical disability instead of a neurological disability.
- A client in a Mental Health Unit had been declared by his psychiatrist to have capacity to participate in a planning meeting to develop a plan for his release from the Unit. This decision was unilaterally overridden by the Senior Planner, who declared that she was not going ahead with the planning meeting as she did not agree that the client had capacity. The client could not be released from the Mental Health Unit without an NDIS plan. The Planner was eventually forced to accept the psychiatrist's assessment after the Unit approached IATI for advocacy assistance.
- An adolescent client with Tourette's syndrome was an NDIS "List C" participant. The NDIA decided to conduct a review of the client's participant status and called his parents into the office for a meeting. At that meeting the client's parents were handed a "diagram of therapies". An NDIA

Planner with no medical qualifications told the client's parents that their son's participant status would be revoked as he required help from the health system, not the NDIS. The Diagram of Therapies recommended (among other therapies) Deep Brain Stimulation<sup>9</sup> as an alternative to NDIS supports.

There also seems to be a lack of accountability among permanent staff for their decisions. IATI has encountered the names of the same Planners on internal reviews that are routinely overturned by the AAT. Unless staff are made aware of their errors and provided with additional training to correct deficiencies in their knowledge there will not be a change in the quality of decision making. IATI understands that the NDIA has decided that all internal review decisions will now be made offsite from the original decision rather than by a different planner in the same office. We welcome this development but note that unless the offsite decision makers have enough expertise then changing the location of the decision making will not affect its quality.

### *Recommendations*

5. NDIA should employ staff with appropriate expertise and provide additional training to all staff holding decision making delegations.
6. NDIA staff should accept the expert opinions of specialists and not seek to override them.
7. The Service Standard on expertise should state that NDIA assessors will respect the opinions of the participant's treating team
8. Where a decision is overruled or altered on appeal or by the NDIA ERT the original decision maker should be provided with written feedback about what they need to consider improving the quality of decision making for future decisions.
9. The NDIA should publish the following statistics each year:
  - a. Number and percentage of decisions overturned/alterd by ERT without additional evidence being provided by the applicant;
  - b. Number and percentage of decisions overturned/alterd after the NDIA agreed to pay for additional reports
  - c. Number and percentage of decisions overturned/alterd at conciliation

## **1D: Connected**

While the NDIA Engagement Team and Feros Care does its best to make community and intergovernmental connections, the Senior Planners who make decisions about reasonable and necessary supports refuse to engage with other stakeholders, even when the participant is experiencing a crisis that requires co-ordinated response. NDIA Planners routinely refuse to participate in multiagency stakeholder meetings even when the level of supports in a participant's NDIA plan is crucial to stakeholder discussions. Rather than working co-operatively, IATI's experience is that the first instinct of an NDIA planner is to argue that whatever additional service is needed is the responsibility of a Queensland Government agency.

The NDIA regularly refuses to provide funds for activities that it claims are the responsibility of the state government under the Intergovernmental Agreement. IATI is grateful that recent meetings of the Disability Reform Council have led to agreements between the Commonwealth and States/Territories that the NDIA will fund a range of supports that it has previously refused to fund.<sup>10</sup>

Nevertheless, there remain areas where the responsibilities of state and agencies and the NDIA are unclear. IATI believes that there remain areas where a reading of the Intergovernmental Agreement shows that the NDIA is regularly misrepresenting the relative responsibilities of various levels of government as an excuse for not funding certain supports.

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<sup>9</sup> Deep brain stimulation (DBS) is a neurosurgical procedure involving the placement of a medical device called a neurostimulator (sometimes referred to as a 'brain pacemaker'), which sends electrical impulses, through implanted electrodes, to specific targets in the brain (brain nuclei) for the treatment of movement disorders, including Parkinson's disease, essential tremor, and dystonia. DBT has only been used experimentally in treating Tourette's and there is no conclusive evidence that it is of benefit at all.

<sup>10</sup> See Communique from Meeting of the COAG Disability Reform Council dates 28 June 2019

### Example

- Child Safety: in IATI's experience, when parents try to relinquish custody of their disabled child to the State, it is usually all about insufficient supports, particularly NDIS funding. In IATI's experience and NDIS Planner has never attended a stakeholder meeting even though having an appropriate NDIS package can be crucial to enabling parents to keep a severely disabled child in the family home. There have been documented instances of parents relinquishing custody in the fact of inadequate NDIS funding<sup>11</sup>. While IATI notes that an agreement has now been reached that the NDIS will fund disability supports for disabled minors in state care, this does not change the situation for parents who have not relinquished custody, who continue to struggle. (The issue of reasonable and necessary supports for participants who are under 18 is further discussed in Part 1F of this submission).

### Recommendations

10. NDIA Planners should participate in stakeholder meetings for participants with complex interagency issues.
11. The NDIA should develop specialist expertise and linkages in areas of overlap between state and commonwealth services to ensure that clients they are refusing actually do have access to state supports.

## 1E: Valued

IATI strongly supports the introduction of a service guarantee in this area. The experiences of many of IATI's clients in dealing with the NDIA has been that they have not felt valued, or that their lived experience was ignored or minimised in discussions with NDIA planners.

As detailed in Part 2B of this submission IATI has had generally positive experiences with LAC planners employed by Feros Care in recent times. Unfortunately, IATI's experiences with Senior Planners employed by the NDIA has been less positive. Ex DSQ planners continue to display a paternalistic philosophy to planning meetings rather than allowing participants choice and control. Our clients experience is not one of feeling valued, but rather of being disbelieved and of having the recommendations of their treating team and their support wishes overridden by planners.

Senior Planners attitudes can be especially negative towards family of children with a disability, making them feel lazy and negligent. We understand from discussions with other advocates that NDIA planners across Australia consistently tell parents that "it is a parent's job to look after their child" and refuse to provide any additional supports beyond allied health therapies. IATI believes that this platitude does not account for the additional stresses and responsibilities that parents of disabled children are faced with. It also does not take into account the NDIS Support Rules, which states that the NDIA can provide additional supports where the child's care needs are substantially greater than those of other children of a similar age.

### Examples

- A Senior NDIA planner was overheard by a participant to say, "participants lie and it's my job to give them what they really need, not what they say they need". When IATI formally complained to the planner's Team Leader, the reply was that the planner had actually said that participants "don't tell the whole truth". IATI does not consider this explanation to be any less denigrating to participants than the initial comment.
- A client was seeking additional supports for overnight care to commence transition of their 17-year-old son who had just finished school to independent living in accordance with a transition plan designed by his Clinical Psychologist. The NDIA not only refused to provide additional funds but a senior NDIA officer reported the family to Child Safety for allegedly "abandoning" their son. Child Safety did not find any grounds to take action, but the NDIA officer then went on to tell the family's

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<sup>11</sup> Morton, Rick *500 children forfeited to state in NDIS standoff*, The Saturday Paper, 12 October 2019  
<https://www.thesaturdaypaper.com.au/news/politics/2019/10/12/exclusive-500-children-forfeited-state-ndis-standoff/15707988008900>

local MP (who was at the time agitating on their behalf) that Child Safety was investigating the family for neglecting their son.

- A Client with specialist support needs requested the NDIA to allow him to use core funds for his support worker to travel with him. The client was aware that he could not get these specialist supports on an ad hoc, short term basis when he was away from home as he had tried to do so many times in the past. For two years the NDIA insisted that such support was available. Eventually in the AAT the NDIA was asked to prove that these supports were available as they had asserted. When the matter reached a Conciliation Conference the NDIA conceded that the client had been correct all along and provided funding for support worker travel.

In terms of the content of the proposed Principle, IATI again notes that there is a difference between the Description of the Principle and the proposed Service Standard. While the Description requires the NDIA to seek to ensure that participants feel valued and know where to get assistance, the Service Standard only requires that the NDIA ensure that the broader community “understands the purpose of the NDIS”. IATI believes that the Service Standard needs to be expanded to better reflect the Principle.

### **Recommendations**

12. The draft Service standard should be broadened to include a requirement that the NDIA treats all participants, prospective participants and their carers and families with respect and recognises their lived experience.

## **1F: Decisions made on Merit**

IATI accepts that delegated decision making requires the development of internal policies to ensure fairness and consistency in decision making. However, proper administrative decision making requires the decision maker to exercise a genuine discretion in making the decision. Under the AD(JR)Act, an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case is an improper exercise of power by the decision maker concerned and liable to be overturned.

A case that is known to all administrative decision makers is the “Drake Case”<sup>12</sup>. In essence, the case held that the AAT should follow an agency’s internal policies unless there are reasons in the circumstances of the case that mean that the policy should not be applied.

In IATI’s experience, NDIS decision makers apply NDIS Operational Guidelines inflexibly in every case. Original decision makers follow Operational Guidelines and internal policies without question, and internal review decisions do the same. IATI advocates have never seen a decision letter that indicates that the decision maker has gone beyond internal policy and considered the participant’s individual circumstances. This means that many of decisions could potentially be overturned in the Federal Court as an improper exercise of power under section 5(2)(f) of the ADJR Act.

There are four specific areas where IATI has concerns that the NDIA’s inflexible application of policies that are not consistent with the NDIS Act or Support Rules are causing significant injustices to large numbers of participants and their families.

### **Supports for Young People in Residential Aged Care**

Approximately 1.7% of NDIS participants are people with a disability who are under 65 and living in Residential Aged Care Facility (RACF). Given that the NDIS was intended to ensure that younger disabled people were no longer forced to live in such inappropriate accommodation it is disappointing to IATI that this figure remains so high.

YPRAC NDIS Plans include a line item for payment for services to the relevant RACF (currently approximately \$81,000). This is intended to cover the services that are included in a person’s RAC Agreement. The NDIS

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<sup>12</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409



is supposed to continue to fund allied health support, community access, and other supports that would normally be funded but are not covered by the RAC Agreement.

The NDIA has developed a policy that goes further than this distinction and have determined that no support worker can provide any supports inside a RACF, even when the support they are providing does not duplicate supports that are being paid for under a RAC Agreement. IATI clients have recently had their NDIS Plan significantly reduced to reflect this policy. Support providers have been told that payments would be withheld if it was discovered that any support worker provided support to a participant while still inside the walls of the RACF.

The NDIA has a standard “spiel” on this issue that purports to rely on various documents, including the “Principles to determine the responsibilities of the NDIS and other Service Systems” as supporting the NDIA’s policy. IATI has examined all the documents that the NDIA has relied on and does not believe that they say that no NDIS support worker can provide supports inside a RACF. The NDIA’s position is not based on any legal compulsion, it is simply an internal policy that is presented by the NDIA as “the law”.

IATI accepts that support workers cannot provide services that duplicate the services that are provided by the RACF under the client’s RAC Agreement. However, we believe that there are a number of services that are provided by the NDIS support workers that are not within the bailiwick of RACFs and not required to be provided under the RAC Agreement.

In these circumstances, IATI does not understand why the NDIA insists that these distinct services cannot be provided within the walls of a RACF. The NDIA allows allied health professionals to provide services inside RACFs, presumably because it recognises that the services they provide are not duplicating services provided under the RAC Agreement. We are at a loss as to why the same principle does not apply to other NDIS supports that also do not duplicate supports that the RACF is required to provide. It seems absurd and inequitable that the same activity is NDIS fundable when it takes place outside an RACF and not NDIS fundable when it takes place inside an RACF when the activity is not a duplication of services.

### *Example*

Client is paralysed from the neck down due to advanced MS and resides in a RACF. The client has always enjoyed painting and making jewellery, cards and other small gifts for her friends she is no longer physically able to do this but is still able to design these items and then instruct her support workers to physically put them together for her. She also enjoys keeping in touch with friends via letter, and she often dictates letters for support workers to physically write. She is unable to deal with personal administrative matters such as paying bills and dealing with correspondence without assistance from her support workers. None of these activities are required to be provided by under the RAC Agreement. Due to the NDIA policy that no services can be provided inside a RACF, her support workers must pack up all of craft gear and leave the RACF when she wishes to undertake this activity, or wheel her outside the grounds of the RACF if she wishes to write a letter or deal with other personal administrative matters.

Given the client’s level of incapacity it takes a big effort for her to be moved from her bed to her wheelchair and leave the RACF, and some days she simply does not feel up to leaving Villa Vincent. On these days she is currently told that her support workers cannot remain with her in the RACF and assist her to undertake the activity that they would have done outside the RACF, and the support workers must immediately leave. This effectively amounts to a cancellation and according to the NDIS Price Guide the client will be charged up to 90% of the fee and receive no service.

If this client was living in SIL accommodation, there would be no issue with the location at which a support is provided, so it seems the Client is being discriminated against because she is living in a RACF instead of SIL and is receiving a significantly inferior level of supports when compared to other participants who live in SIL accommodation.

## Supports in Mental Health Units

The NDIA has developed a similar policy in relation to support workers entering Secure Mental Health Units. Rule 7.24 (b) (ii) provides that NDIA is responsible for transition supports for a person currently residing in a secure mental health unit. Rule 7.23 defines transition supports as:

supports to facilitate the person's transition from the custodial setting to the community that:

- (a) are reasonable and necessary; and
- (b) are required specifically as a result of the person's functional impairment.

Activities undertaken during transition plans can include providing instruction and assistance with activities of daily living to prepare participants for independent living. These are not functions that MHUs undertake as part of treatment, but NDIS will not allow NDIS support workers to enter MHU. Again, this means that if, for whatever reason a participant cannot attend day release with his support workers the shift must be cancelled, often at short notice, and the participant's NDIS plan will be charged.

This has again been presented to IATI by senior local NDIS Officers as "law" and non-negotiable, but in reality, it is not reflected in the Intergovernmental Agreement or NDIS Act or Rules, it is no more than NDIS policy. Transitioning out of a mental health unit is not a simple or easy process for people with serious psychosocial disabilities, and it is made more difficult by inflexible policies.

## Supports for participants who are under 18

IATI suspects that the most common phrase heard by the parent of an NDIS participant is that "it is a parent's responsibility to look after their children". This phrase is used to deny a range of supports to families, including overnight supports, respite, transport and assistance with ADLs.

Support Rule 3.4(a)(i) does state that that it is normal for parents to provide substantial care and support for children, and IATI accepts that this is the case. However, Rule 3.4(a) goes on to discuss other factors relevant to the provision of supports for children:

- whether, because of the child's disability, the child's care needs are substantially greater than those of other children of a similar age;
- the extent of any risks to the wellbeing of the participant's family members or carer or carers; and
- whether the funding or provision of the support for a family would improve the child's capacity or future capacity or would reduce any risk to the child's wellbeing.

The Operational Guideline on reasonable and necessary supports reinforces this:

Personal care supports for children are not intended to replace the usual care and supervision provided, or paid for, by a parent...However, the NDIA may fund personal care supports for children with complex needs where the level of support needed is beyond the level usually required for children of the same age.<sup>13</sup>

IATI notes that the NDIA also uses the "parents take care of children" argument indiscriminately irrespective of the age of the participant. In relation to teenagers in particular there is little or no recognition that a teenager without a disability will in many respects be able to act independently of their parents, while a severely disabled teenager will require considerably more support and attention.

As already noted in Part 1C, parents all over Australia are being denied additional support on the basis that it is their responsibility to look after their child, and it has been reported that over 500 families Australia wide have relinquished custody of their child with a disability to the state due to the inability to obtain adequate funding from the NDIS.

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<sup>13</sup> Operational Guideline on Personal Care Supports <https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-personal-care-supports#9>



## Examples

- Client was sixteen years old with severe intellectual disability and challenging behaviours involving significant property damage. His mother suffered from PTSD due to past behaviours and had tried to relinquish custody to Child Safety several times. Client had attended local Special School for 2 hours per day for several months but was expelled due to behaviour. The NDIS refused to provide and funding for supports during the day because he was of school age despite the fact that he had been expelled from the only school that would accept his enrolment,
- Parents have a four-year-old son with significant disabilities that required him to be monitored 24/7. The parents slept in four-hour shifts. When a request was made for some overnight assistance the mother was told that “it is your responsibility to look after your child”. The mother was well aware of what it took to look after a four-year-old child as her disabled son had a twin brother who did not have a disability. An internal review has been filed and the family is extremely reluctantly considering relinquishment if additional assistance cannot be secured. This would be a heart-breaking decision brought about by a systemic funding failure by the NDIA.

## Funding for Transport

The NDIA’s Operational Guideline on Transport sets down 3 levels of transport funding that can be granted to participants.<sup>14</sup> There is no expectation that the actual transport needs and costs of participants be determined, only that the participant meet criteria to qualify for each level.

This Operational Guideline has been widely discredited by both the AAT and the Federal Court.<sup>15</sup> In *McGarrigle*, Mortimer J held that the NDIA was required to pay for the full costs of transportation that were found to meet the criteria for reasonable and necessary supports. This decision was upheld in the Full Federal Court.<sup>16</sup> Despite these decisions the NDIA has continued to apply the Transport Operational Guideline to determine transport funding and has generally refused to provide funding for actual transport costs unless the participant takes the matter to the AAT, resulting in unnecessary litigation costs.

The COAG Disability Reform Council Meeting October 2019 endorsed an approach to improve the provision of transport supports under the NDIS, including interim measures to increase transport funding for NDIS participants who are significant users of taxi subsidy schemes, and the full reimbursement of states and territories for the continuation of their schemes for NDIS participants until longer-term transport support policy and funding is resolved.<sup>17</sup>

## Recommendations

13. All staff exercising delegated power should be provided with training in administrative decision making, including in the provisions of the AD(JR) Act detailing improper exercise of power and the High Court decision in *Drake*.
14. The current Transport Operational Guidelines should be immediately withdrawn and rewritten in the light of the criticisms expressed by the Federal Court and AAT
15. The NDIA should conduct a full audit of the following to ensure they are consistent with the NDIS Act and Rules:
  - a. Operational Guidelines
  - b. Internal Policies
16. All Internal Review Decisions should be required to reference **all** internal NDIA policies that are applied in reaching the decision.

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<sup>14</sup> <https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport#12>

<sup>15</sup> See, for example, *McGarrigle v National Disability Insurance Agency* [2017] FCA 308; *David and National Disability Insurance Agency* [2018] AATA 2709 ,

<sup>16</sup> *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132

<sup>17</sup> [https://www.dss.gov.au/sites/default/files/documents/10\\_2019/communique-drc-9-october\\_2019.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2019/communique-drc-9-october_2019.pdf)

## 1G: Accessible

IATI strongly supports the inclusion of Accessibility in the Participant Service Guarantee. The issue of the accessibility of the NDIS and its technical infrastructure remains a significant problem for many participants. IATI again notes that there is a difference between the Description of this Principle and the underlying Service Standard. The Description states that “All people with a disability can understand and use the NDIS” and that culturally appropriate services are available for distinct groups. By contrast, the proposed Service Standard simply states that identified cultural groups are able “to access the NDIS like any other citizen”. IATI believes that this wording misses the point of the Principle of Accessibility: that there needs to be alternative pathways to ensure that **all people with a disability** can understand and access the NDIS.

### Portal

It seems to IATI that the whole NDIS system has been designed for the university educated, tech savvy parents of a young person with obvious physical disabilities. Unfortunately, the majority of IATI’s clients do not fall into this category. Many of our clients do not have access to the technology or do not possess the skills to manage their own plans via the portal. Many of IATI’s clients are not even contactable via email.

Expecting participants with psychosocial disabilities, intellectual disabilities or significant physical disabilities to access the NDIA online is simply unrealistic. It is similarly unrealistic to expect people living in remote areas, or even regional areas with poor internet access to effectively manage their NDIS plan online. Many people with a disability live on limited income and do not have access to the latest technology. Even for those who do have access to the necessary technology the portal itself is not easy to navigate and is usually well behind in terms of processing of bills and the current status of budgets (this is further discussed in Part 2C).

### Accessibility of NDIS Staff and Offices

The NDIA also does not make its staff readily accessible to participants. Even if a participant knows who their planner is, it is only possible to call a central 1800 number and leave a message. IATI clients have experienced numerous issues with calls they have made to the NDIS Call Centre not being passed on or recorded on their NDIS files. IATI welcomes the recent introduction of a system whereby callers to the NDIS 1800 number can request Reference Number for their call. IATI believes that the issuing of a reference Number should be an automatic process for all calls to the NDIS rather than an optional service provided at the request of the caller.

Policy decisions made at NDIA Headquarters have also affected our client’s ability to access the NDIS. When the NDIA recognised that the Remote Access Pathway needed to be changed, it decided to run the pilot of the new in pathway in Victoria, a state which has no genuinely “remote” areas, particularly when compared to jurisdictions such as Queensland, Western Australia and the Northern Territory.

### Examples

- The NDIA decided that all of Queensland’s offshore islands would be serviced via the remote LAC in Mount Isa. Magnetic Island is a commuter suburb of Townsville and can be reached by a very regular, 20-minute ferry service. NDIA participants on Magnetic Island are treated as “remote” and serviced by the LAC in Mount Isa almost 800 kilometres away.

### Recommendations

17. A reference number should be provided to all callers to the national 1800 number
18. The NDIA should introduce an internal standard for the timeliness of returning phone messages
19. The NDIA should review the “remote” status of all offshore islands. Islands that are not genuinely remote but are readily accessible from mainland Australia should receive service from local NDIA LAC rather than the remote LAC.
20. The NDIA should publish the following statistics each year:
  - Wait/hold times on 1800 number
  - Number of calls unanswered
  - Timeliness for return of telephone messages

## 1H: Choice and Control

IATI strongly recommends including choice and control as one of the participant guarantees and is surprised that it did not form part of the Discussion Paper. Enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports is one of the Objects of the NDIS Act. Unfortunately, as discussed in more detail in part 2B of this submission choice and control has proved to be elusive in reality for many participants, with Senior Planners adopting old thinking and prefer their own opinions on what supports are beneficial to those of the participants and their treating team.

### EPOAs/Capacity

Where a participant is under 18 or there is a formal Guardianship Order in place the question of whether a participant has the capacity to be make decisions is clearly answered. However, the question of capacity can be more complex where there is no formal guardian in place but an EPOA has been executed.

IATI notes that the existence of an EPOA does not in and of itself mean that the participant does not have capacity to make decisions. EPOAs are made in anticipation of future lack of capacity and are not in and of themselves evidence of a current lack of capacity. Unfortunately, IATI has seen situations where NDIA Planners cut participants out of the process with no evidence of lack of capacity, leaving choice and control in the hands of the EPOA holder rather than the participant.

IATI believes that the NDIA needs better policies and procedures around the issue of capacity and EPOAs and should develop a better understanding of how and where capacity assessment fits within the NDIS.

Even where there are limitations to a participant's capacity, there is no need for the participant to be removed from the decision making process. **Supported decision making** is a model for supporting people with disabilities to make significant decisions. The person with a disability draws on the support of trusted people (such as friends, family, carers and or disability advocates) who assist them to weigh up the pros and cons and to reach their own decision. This model builds and extends the decision making skills of the person, allowing them to make and communicate decisions with more independence and confidence. Supported decision making is a capacity building approach which fits neatly within the aims of the NDIS and will assist the person both during NDIS planning and in their everyday life.

### Recommendations

21. The Principle of Choice and Control should be included in the Participant Service Guarantee
22. Where no formal Guardianship Order is in place the NDIA should assume that an adult participant has capacity to participate in planning meetings **unless** there is written evidence of lack of capacity from a suitably qualified health professional.
23. The NDIA should develop and publish clear guidance on what evidence it accepts as suitable to justify a determination that a participant lacks capacity to participate in the planning process.
24. The NDIA should review its current policies and procedures in relation to EPOAs to ensure that stronger protections for participants are put in place to ensure that the participant is able to exercise choice and control in the planning process.
25. Where a participant has limited to capacity, the NDIA should adopt a Supported Decision-Making model to assist a participant make their own decisions rather than seeking to remove a participant with limited capacity from the planning process.

## Part 2: The NDIS Participant Experience

### 2A: Eligibility and Application

#### Role of General Practitioners

One of the biggest hurdles faced by prospective participants is often getting their GP to provide enough detail when completing the Supporting Evidence Form, particularly in providing information about the functional impact of the person's disability.

Many people with a disability do not have the financial ability to pay for a non bulk billing doctor. They instead use large, bulk billing medical facilities where each doctor sees upwards of 50 patients each day and do not have the time or willingness to spend time filling in forms in any detail. There also tends to be churn at bulk billing facilities so the person may not have a GP that knows their history, which increases the amount of time necessary to complete the form.

GPs are very familiar with the requirements to qualify for the DSP, and both GPs and prospective participants often assume that a client who is on the Disability Support Pension will be eligible for the NDIS because the word "disability" is used in both cases. Of course, the criteria are different for the two schemes, and GPs therefore sometimes unwittingly create unrealistic expectations in their patients by saying that they "definitely" should be part of the NDIS.

While the NDIA has produced a 6 page Doctors kit, IATI does not believe that it provides adequate instructions for GPs. In this context, we note that the local LAC in Townsville, Feros Care, have made a significant effort to reach out to all GP practices in Townsville, Ingham, Charters Towers and Ayr. They have developed a 50 page guide to assist GPs.

#### Access Request Form

The NDIA keeps strict control over the distribution of ARFs. ARFs are not generally available but a prospective participant must call the 1800 number to request that a form be posted to them. It is also extremely difficult to get the NDIA to email the ARF: such a request is strongly resisted and IATI's experience was that it took 4 business days for the NDIA to even email an ARF.

IATI does not understand why the NDIA believes that it needs to control access to ARFs so closely. We do not see any reason why potential participants need to speak to the NDIA and get a reference number before they make an application. We note that the NDIA has created a complex, bureaucratic process by which it takes a week or more to just get a copy of the form. IATI sees no reason why these forms could not be available online or at NDIS and LAC Offices and notes that Centrelink application forms are freely available without the need to make a specific request.

IATI also notes that when the request form is forwarded to a prospective participant the covering letter states that the NDIA will consider the request to have been withdrawn if the ARF is not returned to the NDIA within 28 days. IATI notes that the requirement to return the ARF within 28 days is not reflected in the NDIS Act. IATI assumes that the NDIA is effectively treating the ARF as a formal request for evidence under section 26 of the NDIS Act but is unsure whether the NDIA Officer who is posting the letter and ARF has the appropriate delegation to make a section 26 request. In any case, IATI does not see any purpose in requiring prospective participants to return completed ARFs within 28 days and believes this procedure places yet another bureaucratic hurdle for people trying to access the scheme.

#### Primary and Secondary Disabilities

The ARF requires prospective participants to identify their primary and secondary disabilities. IATI believes that the NDIA's strong emphasis on the distinction between "primary" and "secondary" disabilities is inappropriate. The primary/secondary is therefore not based in the NDIS Act, NDIS Access Rules or Operational Guidelines. Becoming a participant is not a qualified status – a person is either a participant, or they are not. There is no statutory requirement for access approval to be made with reference to a

specific impairment/disability. Section 28(2) of the NDIS Act and states that the NDIA must notify a prospective participant in writing of the decision that they meet the access criteria and include in the notice the date on which the participant became a participant. For prospective participants who have identified multiple disabilities on their ARF, the access approval decision letters do not even refer to the impairment(s) for which access has been gained, so there is no notice to applicants of this aspect of the decision to enable them to appeal it.

Even though the primary/secondary distinction is not supported by the legislative framework the NDIA uses this distinction to determine total funding packages and to determine whether particular supports will or will not be funded for a particular person. This is discussed below in Part 2B.

### Support for Provision of Additional Evidence

When a GP fails to provide sufficient detail in the ARF a common response by the NDIA assessor is to request full capacity assessment from a suitably qualified professional. Depending on the nature of the report requested, these could cost thousands of dollars to obtain. Adults with an intellectual disability may have been tested 20-30 years ago and no longer have access to the original reports, and yet they are denied access because they cannot afford the costs of testing. This issue can be particularly problematic when the NDIA requests evidence of disability from people who accessed the NDIS as “List C”<sup>18</sup>

Section 6 of the NDIS Act empowers the NDIA to provide assistance, including financial assistance, to prospective participants to assist them meet obligations under the act. Part 10.2 of the Access Operational Guideline reinforces this, stating:

“Where the NDIA has made a request that a prospective participant undergo an assessment or examination, the NDIA will support the prospective participant to comply with the request by providing assistance, including financial assistance where appropriate (section 6).”

In IATI’s experience, the NDIA generally will not use this provision until pushed to do so in the AAT. Sometimes, it will not even agree to pay for reports at that stage. This represents a significant disadvantage for those of lower economic status, who do not have additional disposable income to use to prove they are eligible to be a participant in the NDIS. Access to the NDIS should be open to all Australians with a disability, not only those who have sufficient money to pay for expensive tests to prove their eligibility.

### Example

- Client with a learning disability was rejected by the NDIA and filed an application for review by the AAT. The NDIA insisted that the client would not gain access without psychometric testing and a full functional assessment but refused to pay for any testing to be done. The client’s parents spent over \$4000 on psychometric tests and a functional assessment from an occupational therapist and was eventually granted access to the scheme under the early intervention provisions.

### Recommendations

26. The NDIA should significantly improve its advice/instructions for GPs. As part of this process, the NDIA should create “dummy” completed ARFs identifying the level of detail that is necessary.
27. The NDIA should not reject a prospective participant for lack of evidence without either:
  - a. contacting the GP and seeking further information; or
  - b. meeting with the prospective participant to see their lived experience.
28. The NDIA should remove the administrative practice of treating an access request as withdrawn if the ARF is not returned within 28 days of it being sent to the prospective participant.
29. The distinction between primary and secondary disabilities should be removed. The ARF should simply ask prospective participant to list all permanent disabilities.
30. NDIS rejection letters should not only explain which criteria weren’t met but should also explain what sort of evidence would be required for the applicant to meet access criteria.

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<sup>18</sup> People with a disability who were already part of listed State and Territory programs were granted automatic access to the NDIS without the need to provide any evidence.

31. There should be a specific Medicare Item for GPs completing the ARF to recognise the additional time required to complete it properly.
32. Where the NDIA determines that it requires expensive testing to prove eligibility, either the NDIA should agree to fund the testing or prospective participants should be provided with an interim plan that covers the costs of necessary assessments.

## 2B: Creating your Plan

### Preparation

IATI notes that the NDIA Planning Booklet (No 2) encourages participants to consider details of their life and all current supports in preparation for a planning meeting, but does not encourage them to come up with a list of the supports that they believe they need over the next 12 months. They are also not asked to provide any justification for the level of supports that they are seeking or to explain what they have achieved with the supports they have been provided in the previous year. The planning booklet also provides no space for the participant to list the types of supports they want from the NDIA. Instead, it asks a series of background questions, including spending considerable time asking the participant to describe their existing formal and informal supports. This means that participants often go into a planning meeting with an expectation of the status quo, often to find that without sufficient written evidence from their providers to justify their current level of funding their supports are cut.

While this Booklet may be useful for the participant's first planning meeting, IATI believes that it does not provide sufficient information for a participant to adequately prepare for subsequent planning meetings. The NDIA needs to be more explicit in its advice to participants about how to prepare for their planning meeting. Current publications present the planning meeting as a friendly chat but participants sometimes find that it is not the case and that their lack of preparation leaves them at a significant disadvantage when faced with a planner who has already determined what the package should be based on the NDIA's standard funding envelopes.

The NDIA is quick to reduce funding if adequate reports are not provided. IATI believes that plans should include funding for reports as all capacity building supports require goals, outcomes and reports.

### The Planning Meeting

In IATI's experience there is currently a qualitative difference between the participant planning experience through Feros Care and a planning meeting with an NDIA Senior Planner as set out in the table below. Again, IATI's least productive planning experiences have been with Senior Planners who were previously employed by DSQ. These planners appear to have imported the paternalistic philosophy behind previous disability service models to their role in the NDIS.

#### **Feros Care LAC**

Meeting is a conversation with a sense of partnership between the participant and the LAC aimed at achieving goals

Limits on what can and can't be funded by the NDIA are made clear during the meeting

LAC and participant work towards maximising benefit and capacity building for participant

Participant leaves planning meeting with a clear idea of what is likely to be in the plan

#### **NDIA Senior Planner**

Planner directs all aspects of meeting and controls who is permitted to speak and when they can speak

Planner refuses to answer direct questions about possible levels of supports

Planner works to minimise size of plan by emphasising existence of informal supports

Planner makes supportive noises at planning meeting but when the plan delivered it is a total surprise and inconsistent with planning meeting discussions.



## Examples

- An advocate was told that she was not allowed to ask any questions at a planning meeting and that the meeting would be terminated if she continued to ask questions. The advocate had always remained respectful in her interaction with the Senior Planner and was merely asking for clarification on the level of supports that was being proposed.
- An advocate had been told by a senior planner that transport funding “was not up for discussion” at a planning meeting. When the planner overheard the advocate relaying this to the client, the Planner publicly berated the advocate, stating that it was “my meeting”, and that it was not the advocate’s place to have this discussion with the participant.

## Standardisation of Packages

The NDIS was described to be a “demand driven system of care tailored to the needs of each individual...the scheme will respond to each individual’s goals and aspirations for their lifetime, according certainty and peace of mind for people with a disability and their carers alike”<sup>19</sup>. This statement is reflected in section 31 of the NDIS Act, which lists a number of principles relating to plans that inform the planning process. These include that packages should:

- (a) be individualised
- (g) be underpinned by the right of the participant to exercise control over his or her own life be individualised
- (j) facilitate tailored and flexible responses to the individual goals and needs of the participant

Unfortunately, in IATI’s experience these principles are not applied by many NDIS Planners during the planning process. While IATI understands the need to develop standards to ensure that there is some consistency in decision making across all NDIS offices, plans are often based around pre-existing envelopes of funding for particular types of disability without considering the needs and wishes of individual participants.

## Primary and Secondary Disabilities

Clients usually receive a standardised “package” based on the Planner’s view of their primary and secondary disabilities rather than an examination of the individual circumstances of the participant. As noted in Part 2A, the primary/secondary distinction is not part of the statutory regime, and yet this administrative process can have a significant effect on the content of a participant’s plan. Two participants with the same two conditions can have vastly differently NDIS plans depending on which condition is listed as “primary” by the NDIA.

NDIA planners also regularly refuse to fund supports for disabilities that were not listed in the original ARF, or which were included but the NDIA did not accept as meeting the access criteria. As noted in Part 2A, participants are not notified of which impairments were accepted by the NDIA and therefore have no way of challenging this artificial limitation on their access.

IATI believes that this approach is inconsistent with the intent of the legislation. Once a person becomes a participant, there is no statutory pathway to ‘reapply’ for access for additional conditions. It would become prohibitive for participants with degenerative conditions, or those who develop multiple co-morbidities or conditions, to go back through the access process and reapply for each new ‘impairment’. Similarly, for people who become participants at a very young age (eg through a genetic condition), it could require multiple access requests as their condition evolves with age and progression.

If reasonable and necessary supports were to be limited to those impairments for which a participant gained access, it would also present barriers for participants who gained access through the List A, List B or List C provisions.

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<sup>19</sup> National Disability Insurance Scheme Bill 2012, Second reading Speech by Prime Minister Gillard, 29 November 2012. (Hansard pp13877-13878)

- Conditions on List A are ‘generally considered to satisfy the disability requirements without the need for further evidence’.<sup>20</sup> This often only requires evidence of (primary) diagnosis and does not provide the need or occasion to evidence any other conditions. This is a similar case for the List B provisions, with the addition of evidence regarding functional capacity.<sup>21</sup>
- People transitioning into the scheme under List C only need to evidence being a participant of a ‘defined program’ to meet the access criteria.<sup>22</sup> The NDIA therefore has no statutory requirement for evidence of diagnosis/es to be provided for access approval, which creates an even greater issue than the List A and B pathways. It would also create administrative difficulties in determining which condition/s a participant gained access to for the relevant ‘defined program’. Such information would also not be relevant to the NDIS access impairment process, given that the criteria to enter a defined program would differ to the NDIS access criteria.

IATI believes that once a person becomes a participant their functional capacity and needs are viewed as whole and the question of what supports are funded becomes a consideration under section 34 of the NDIS Act. This does not mean that once a person becomes a participant for one condition, the NDIS will fund supports relating to any condition; each requested support must meet the requirements in s34 of the NDIA Act.

### *Recommendations*

33. Abolish all reference to primary/secondary in planning process and fund all supports that meet the criteria for reasonable and necessary supports
34. Where a planning decision has resulted in a change in funding levels the NDIA should provide the participant with a statement of reasons for the decision to change funding as well as a copy of the new NDIS Plan.
35. NDIS Plans should include a small amount of funding to allow allied health professionals to provide annual reports on capacity building achievements prior to the participant’s annual plan review.

## **2C: Using and reviewing plans**

### **Finding Providers**

Failure to spend funding in one NDIS plan usually results in a reduction in funding for the next plan, as the NDIS argues that the funds were clearly “not needed”. However, participants cannot spend their NDIS funding if there are no suitable providers to provide them with services. The market failures of the NDIS, particularly in rural, regional and remote areas have been discussed numerous times.<sup>23</sup>

Even where providers are available, funding them is not an easy process for a new NDIS participant. The Provider Lists that are published on the NDIS website are not user-friendly documents and they provide no practical assistance for participants who are looking for service providers in their area. Key issues are:

- The provider lists are XL spreadsheets rather than a searchable database.
- Only the Head Office address of a provider is listed, therefore participants cannot determine easily whether a service is provided in their area
- Providers are grouped according to their NDIS “Registration Group” a concept that bears no direct relationship to categories in NDIS plans and has no meaning for participants.

<sup>20</sup> Paragraph 8.6.1, Access to the NDIS Operational Guideline, <https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/access-ndis-disability-requirements#8.6>

<sup>21</sup> Paragraph 8.6.2, Access to the NDIS Operational Guideline, <https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/access-ndis-disability-requirements#8.6>

<sup>22</sup> Paragraph 8.6.3, Access to the NDIS Operational Guideline, <https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/access-ndis-disability-requirements#8.6>

<sup>23</sup> See, for example, Commonwealth Parliament Joint Standing Committee on the NDIS Inquiry into Market Readiness for Provision of Services under the NDIS



It is critical that the NDIA develop better resources to enable participants to know what providers are available in their area to enable participants to exercise choice and control over their service providers. A database that is searchable by postcode and utilises service types that are meaningful to participants is a vital. While the NDIS Commission has recently launched a Provider register, the search fields are limited to provider business name, ABN and registration status, so the Register is currently designed to allow participants to see if a known provider is registered rather than to allow participants to find a provider in their area.

### Using the Portal

The portal is poorly designed and payments on the portal lag behind, often by more than a month. It has not been an uncommon experience in AAT Appeals for the NDIA legal team to assert that there is plenty of funds left in a participant plan after checking the portal, while the participant's plan manager and own records show that all funding has been expended. As noted in Part 1G, IATI believes that it is unreasonable to expect many NDIS participants to manage their own NDIS plan through the portal.

### Support Co-ordination

NDIA has significantly reduced funding for support co-ordination since roll out, arguing that once contracts are established there is no need for ongoing support co-ordination for most participants. However, where a participant seeks to move away from an unscrupulous or poorly performing service provider, the lack of any available assistance can make this process difficult. Similarly, where a participant experiences a significant change in life circumstances, or a crisis, Feros Care LACs can offer only limited assistance to participants in these circumstances. IATI believes that there should be the possibility of the NDIA providing short time support co-ordination funding to assist participants who are going through significant life changes.

### Plan Management

Plan management is a little understood and underutilised way of increasing participant choice and control. In IATI's experience, participants with plan management inevitably have more accurate, up to date information about their remaining funds because plan managers are more efficient in uploading/paying invoices than the NDIS Portal. Good plan managers also assist participants remain within budget by providing this up to date information on spending patterns.

Finding a plan manager is becoming increasingly difficult as more and more organisations pull out of plan management, arguing that the funding level is too low for plan management to be sustainable. IATI believes plan management should be encouraged and that the fees paid to plan managers should be increased so that they are properly funded.

One-way plan managers attempt to keep costs down is by conducting all transactions and contacts via the internet with no physical paper copies. As already noted, many of IATI's clients are not comfortable with this technology. IATI believes that the NDIS fee structure should allow for an additional fee payable to plan managers for participants who prefer paper transactions to cover the additional costs to the plan managers.

### Recommendations

36. The NDIA should develop a provider database searchable by radius from postcode, with searching available according to type of service rather than granular NDIA categories.
37. Support co-ordination should be made available to participants for life transitions.
38. Fees payable to plan managers should be reviewed and increased.
39. increase fees and allow additional fee for clients who want paper copies.

## 2D: Appealing a Decision

### Barriers to Internal Review

#### *The Internal Review Form*

NDIS Participants can seek an “internal review” of an NDIA decision that denied them access or if they believe that they were not provided with reasonable and necessary supports in their participant plan.

- The form itself is called “Application for a review of a reviewable decision”. There have been numerous instances of people who intended to seek an internal of review completing the wrong form.
- There is no provision on the form to include a date of lodgement.
- There is no provision on the form for the participant to sign it. Nevertheless, advocates have experienced NDIS staff refusing to accept an internal review application filed by an advocate because it has not been signed by the participant.

Most importantly, the questions asked in the form in no way address either the criteria for reasonable and necessary supports or the access criteria. People seeking review are asked why they are seeking a review, how they are affected by the decision and the outcome they are seeking. In these circumstances, there should be no surprise that many internal review applications do provide evidence to address the legislative criteria and are therefore unsuccessful in their review.

#### *Discouragement from NDIA Staff*

In IATI’s experience, NDIA employees discourage participants from filing internal reviews about the level of supports in their NDIS Plan. This is not isolated to Townsville: Advocates across the country report that participants are told that they may end up with less money rather than more if they challenge their plan, and that challenging one type of support will place all parts of their plan in jeopardy.<sup>24</sup> There has been situations where clients have been successful in making applications for reviews and they have received a new plan, but the participant has also been advised that the client’s status as a NDIA participant is still be determined by the NDIA

IATI has also been informed by NDIS staff that an automatic review of a participant’s eligibility to remain in the scheme is conducted with each request for a review of supports. IATI has had many clients who came to us when their access was revoked after a request to review current plan funding. In many cases, the decision was made purportedly due to “lack of evidence or disability and permanence”. Most of these participants were people who were granted access from state systems included in [List C of the Access Operational Guidelines](#). These participants were not required to provide evidence of disability at the time of their access, and the NDIA choose to not make arrangements with DSQ for transfer of relevant documents. IATI believes it is somewhat unconscionable for the NDIA to revoke access on this basis and put them at risk of being without much needed supports. This can take an extreme emotional toll and add significant pressure to informal supports and other services such as carer supports.

We note that the NDIA has cited “privacy reasons” for not making arrangements for evidence to be provided by the State Governments; however, privacy issues can be overcome with express consent.

#### *Example*

- A client filed a request for internal review of their new plan within a month of the plan being delivered. Eight months later the internal review had not been conducted. The NDIA then decided to conduct the scheduled plan review early because the client was running out of funding. NDIA planners then pressured the client to withdraw the internal review before the client had seen the new plan and told the client that they would need to start the review process again from scratch.

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<sup>24</sup> <https://probonoaustralia.com.au/news/2019/10/they-see-it-as-a-threat-people-with-disability-warned-not-to-challenge-ndis-decisions/>

This request ignored section 100(6) of the NDIS Act, which specifically provides that Internal Review applications remain on foot even when the plan being challenged is amended by the NDIA

### Internal Review Decisions

IATI's experience is that an Internal Review decision usually confirms the original decision. By the time the matter reaches the AAT is often becomes clear that the reviewer did not read or adequately consider the evidence provided but relied on internal policy to confirm the original decision.

If a new plan is issued following a request for Internal Review, no reasons are given for the levels of supports in that plan, even where they differ significantly from the supports requested. Participants must then file AAT appeals within 28 days of receipt of new plan without having the benefit of a statement of reasons.

It is well documented that the NDIA often takes an inordinate amount of time to consider internal review applications and it is not uncommon for review decisions to still be outstanding when the next plan is due to be developed or the disputed funding runs out. After the additional time taken to go through AAT proceedings is added to the process, matters are sometimes still being contested two years after the original plan was promulgated. Participants can remain in limbo for this whole period, with support frozen and a series of "interim plans" replicating the disputed plan but in place pending consideration of the matter by the AAT. Those who have been refused access, or had their access revoked, are left without any supports whatsoever for extended periods of time.

IATI also believes that the decision letters do not provide sufficient information about review rights and advocacy availability. Decisions currently provide a one-line reference to the availability of advocacy and a hyperlink to the NDAP website. As already noted, many people with a disability do not have ready access to technology. In this context, IATI notes that the AAT provides applicants with a contact list for advocacy organisations rather than a weblink. IATI believes that this approach would make advocacy services more readily accessible for many participants.

### Recommendations

40. The NDIA should review the user friendliness of all forms
41. The NDIA should develop separate forms for seeking internal reviews of access decisions and reasonable and necessary supports decisions. These forms should meet accessibility guidelines and specifically refer to the relevant legislative criteria.
42. The NDIA should engage sufficient trained and experienced staff to conduct internal reviews in timely manner
43. All internal review decisions (including decisions where a new plan is issued) should be accompanied by a statement that meets the requirements in section 28 of the AAT Act.
44. All internal review decisions should provide guidance on to the type of evidence that would be required to meet the relevant criteria.
45. Internal Review decisions should attach a list of funded NDIS Appeals advocate organisations in that state rather than a hyperlink to the NDAP website.

### AAT Processes

The initial experiences of disability advocates assisting clients with NDIS AAT appeals were anything but positive. Advocates across the country reported similar problems:

- NDIA instructors appointing solicitors (both internal and private sector) only days before the first Case Conference;
- NDIA solicitors not having read material submitted by the applicant before a case conference;
- NDIA solicitors not seeking instructions before a case conference, and then requesting up to three weeks to get instructions;
- NDIA solicitors not complying with time frames in agreed Case Plans. The AAT decided to use Case Plans instead of Directions when procedures were first developed for the NDIS Division but has now moved towards formal Directions because there can be sanctions for non-compliance.

- ‘Court door’ concessions: applicants and their advocates/Legal Aid Solicitors making preparations for a full hearing, only to have the NDIA concede only days or weeks before the hearing date.

In general, IATI’s experiences of delays/lack of preparation/lack of co-operation were worse where the assigned lawyer was working inside the NDIA. By contrast, externally sourced lawyers from private law firms with Government Law Units were, in our experience, accustomed to working with the Model Litigant Rules<sup>25</sup> and were considerably better prepared and less obstructive.

### *T documents are often incomplete*

Section 37 of the AAT Act states that the “T documents” prepared by the NDIA for the AAT appeal should include every document that is in the decision maker’s possession or under the person’s control that is relevant to the review of the decision. Unfortunately, IATI’s experience is that T documents are often deficient in a number of respects.

Transaction records have been particularly deficient as details of phone calls and meetings are often not supplied with the T documents. Many conversations do not appear in the past to have been recorded at all. In addition, internal assessments by the NDIA Technical Advice Team (TAT) also seem to be omitted from many T documents.

Also (as discussed in Part 1B) there is little doubt that NDIA decision makers rely heavily on unpublished internal policies in their decision making processes. IATI believe that there are numerous NDIA policies that directly affect participants and prospective participants that the NDIA is not making public and is not including in T documents contrary to section 37 of the AAT Act.<sup>26</sup> There have also been instances where the documents provided by the NDIA and included in the T Documents are unreadable due to being a bad photocopy. IATI has also had one matter where the NDIA included documentation relating to a completely different participant in the T Documents.

### *Lack of follow through on agreed settlements*

Even where the NDIA and AAT applicant agree to a settlement, there has often been a lack of follow through by the NDIA on implementing agreed settlements. Advocates across the country have reported that there has been matters conceded at case conferences where the NDIA subsequently failed to action anything for several months. IATI can report that such delays have occurred for many of our clients and that such issues continue to occur to the present day despite the restructure of NDIA Legal Services.

Unlike courts, the AAT has no power to enforce its decisions. The logic behind this was discussed by the former President of the AAT, the Honourable Justice Garry Downes AM:

*Enforcement of decisions of the Administrative Appeals Tribunal is accordingly to be found in the actions of Government itself. Government and its agencies would never decline to carry a Tribunal decision into effect.*

*Part of the reason for this approach is that in law the decision of the Tribunal becomes the decision of the relevant government minister, department or agency. That this is so has the consequence that the Tribunal's rulings on the law, as well as its findings of fact have legal effect.<sup>27</sup>*

Unfortunately, the NDIA does not always follow through in a timely manner. IATI also notes that in earlier cases the NDIA at least agreed to including a time frame for implementation in settlements; however, since May 2019 we have been informed by NDIA lawyers that NDIA policy is to no longer agree to including timeframes for action in agreed settlements. This seems to contradict the direct that the ERT is headed in other areas and is of concern to IATI.

<sup>25</sup> See Appendix B of the *Commonwealth Legal Services Directions 2017*, <https://www.legislation.gov.au/Details/F2018C00409>

<sup>26</sup> For example, in *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, an additional internal policy entitled *Work Practice – Guide to Funded Supports, Operations Branch version 2.1. NDIA – Plan Review – Conversation Tool* was eventually revealed. It included the statement “Funding should never equate to the total funding required for transport – it is only ever a contribution”

<sup>27</sup> Speech to International Association of Supreme Administrative Jurisdictions VIIIth Congress, Madrid, 26-28 April 2004, <https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/the-implementation-of-the-administrative-courts-d>

## Examples

- A settlement was reached whereby a client was granted access to the NDIS under the Early Intervention provisions. Two months later no action had been taken by the NDIA. The principal support that was being sought was access to the School Leaver Employment Supports, which are time limited to 2 years after a participant leaves school. The 2 months of lost supports could therefore never be recovered.
- Two months after an agreed settlement was approved by the AAT and after multiple contacts with the local office about the lack of a new plan, a client was informed by a local planner that the agreed settlement of his matter had never been passed on to them by the NDIA Instructor in the matter. A plan was eventually issued almost 3 months after the agreed settlement. Unfortunately, the issued plan reflected the agreed settlement but contained an error which (ironically) reversed the only change to the client's plan sought in the internal review that the internal reviewer had agreed to. Despite multiple approaches by the client's advocate to the NDIA this error still has not been corrected at the date of writing this submission approximately 4 months after the AAT settlement was reached.

## NDIA Early Resolution Team

The NDIA's restructure of legal services has, in IATI's view, seen a significant improvement in the handling of AAT appeals by the NDIA. ERT staff now contact applicants or advocates well before the first Case Conference to attempt to narrow the range of issues and determine where additional evidence is required. In access matters ERT has also agreed to pay for additional assessments to determine whether particular access criteria are met. IATI welcomes this development but notes that (as discussed in part2A) the NDIA possesses ample power to provide financial assistance to applicants and prospective applicants at an earlier stage of the process. We believe it would be more cost effective and less stressful if the NDIA did not wait until the matter had reached the AAT to agree to funding essential reports for prospective participants.

IATI also notes that in recent times a number of IATI client matters have been settled by ERT *without any additional evidence being provided by the applicant*. This evidences the fact that the internal review decisions (and presumably the original decisions themselves) were determined to be indefensible. While IATI is grateful that there is now a team to identify and correct these errors, the fact that there is no time limit placed on internal review decisions means that internal review requests can wait for 6 months or sometimes even longer before reaching the AAT, and this represents time that the participant (or prospective participant) is not receiving reasonable and necessary supports, or in some cases getting no supports at all. While ERT now provides a safety net, IATI would obviously prefer that the NDIA employ sufficient well-trained staff to ensure that both initial decisions and, in particular, internal review decisions:

- are made in a timely manner;
- properly consider all of the evidence provided by the applicant; and
- consider NDIA internal policies but do not apply them flexibly without regard to the merits of the case.

## Recommendations

46. The NDIA Instructor should attend all AAT Case Conferences with the NDIA appointed lawyer to prevent unnecessary delays due to the lack of available instructions.
47. All NDIA lawyers and instructors should be provided with training in the Model Litigant Rules to ensure that they understand and meet their obligations.
48. The ERT should provide a report to any IR decision makers whose decisions are overturned either by agreement or by a formal decision by the AAT to ensure that the identified error is not repeated.
49. Performance criteria should be introduced relating to overturned decisions at AAT (either by decision or agreement). Delegates whose decisions are regularly overturned should be required to attend additional training.
50. The NDIA should agree to pay for any expert report or assessment that it determines must be obtained to prove eligibility.
51. All internal policies that are used by delegates in making decisions should be included in T documents prepared for the AAT.

## Part 3: Removing Red Tape

### 3A: The Legislative Framework

Apart from the absence of time limits, most of IATI's issues have been with the NDIA's interpretation of the NDIS Act and Rules rather than the legislation itself. Some proposals for amendments, particularly in the area of including time frames for decision making, have been identified in other parts of this submission.

#### Statements of Reasons

One area where legislation could be clarified is in the area of the provision of statements of reasons for decisions. While information for the basis of decisions is included when access decisions are made and in response to an internal review request, the issuing of a new plan is never accompanied by a statement explaining the basis for the plan, even where the new plan is substantially different from the participant's previous plan, or where it does not reflect the participant's expressed wishes for funding. This makes it difficult for participants to effectively challenge their plans via internal review as they have no idea of the basis for the planner's decision on funding.

Even where internal review decisions are accompanied by reasons, in IATI's experience the decision letters have often not met the requirements for a statement of reasons in section 37 of the AAT Act. When IATI has formally requested a statement of reasons for an internal review decision the NDIA has refused to provide one. This means that participants are expected to file requests for review in the AAT without fully understanding the basis for the decision that they are appealing. Even though section 37(1) of the AAT Act requires the NDIA to file a statement of reasons setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, the NDIA simply files the internal review decision, even where it does not fulfil these requirements. As noted earlier in this submission, the NDIA will then alter their position during the course of the AAT matter and argue that additional criteria have not been met.

#### Recommendations

52. The Decision maker should be required to provide a statement of reasons for all decisions, including issuing of plans. This statement of reasons should be required to include the findings on material questions of fact, refer to the evidence or other material on which those findings were based and give the reasons for the decision. Time limits on appeals should not commence to run until a valid written statement of reasons is received.

#### Consent to release Information

The NDIA has frequently not co-operated with advocates and has often preferred to create barriers to stop advocates effectively representing their clients. Advocacy organisations nationally have had ongoing issues with NDIS staff refusing to discuss client's cases, even where they have been provided with a valid CTRI executed by the client. At the local level IATI has faced significant resistance from NDIA staff and repeated refusal to accept validly executed CTRIs. This continues to occur at the local level (including at Feros Care) even though the NDIA Deputy CEO has stated in writing that there is no requirement to use an NDIA CTRI.

#### Recommendations

53. NDIA management should clarify in writing to all staff that there is no requirement that an NDIA generated CTRI be completed to release information.

### 3B: Plan amendments

IATI supports amending the NDIS Act to allow plan amendments. We note that the NDIA has already introduced an administrative category called a "Light Touch" plan review that it currently uses to correct errors in plans and to add funding for assistive technology after it has been approved. IATI also believes that allowing participants a preview their proposed plan would be one simple method to circumvent the requirement to issue a new plan where the original plan contains an obvious error.



The NDIS Act sets a clear timeline of 14 days for the NDIA to act on requests for plan reviews under s48 of the NDIS Act. In IATI's experience it is very common for the NDIA to miss the 14 day deadline. This leads to the NDIA having been deemed to refuse to conduct a plan review and an automatic internal review of the (non) decision to refuse to review the plan. The result of this sequence of events is a confusing letter for participants, and further delay in conducting the requested review. Participants who request unscheduled plan reviews often do so after a significant change (or even crisis) in their personal circumstances.

IATI would like to see the NDIA improve its internal administrative processes so that legislative deadlines are met for plan reviews, as the current system merely wastes time in circumstances where the participant may have had a significant life change and is in desperate need of additional or changed supports. The NDIA needs to improve its processes so that requests for plan reviews due to a change of circumstances do not fall between the administrative cracks but are dealt with as a matter of urgency and with the timeliness that the NDIS Act prescribes.

### *Recommendations*

54. The NDIS Act should be amended to allow a plan to be altered without the need to issue a new plan.
55. The NDIA should develop a more robust administrative system to ensure that all change of circumstances review requests are forwarded to the relevant planner automatically to prevent the need for automatic internal reviews.

## Table of Recommendations

1. The following time limits should be imposed in legislation:
  - a. Acting on requests for Access Request Forms: 3 days
  - b. Decisions on access requests: 21 days
  - c. Time between access decision and planning meeting: 14 days
  - d. First Plan approval: within 7 days of planning meeting
  - e. Approval of subsequent plans: within 7 days of planning meeting
  - f. Requests for unscheduled plan reviews (change of circumstances): 14 days
  - g. Internal Reviews (Note: this time frame should be for a decision, NOT just for “contact made” as is suggested in Attachment A to the Discussion Paper.): 3 months
  - h. Decisions on AT Requests: 30 days
  - i. Decisions on SDA: 30 days
  - j. Decisions on Home modifications: 30 days
  - k. Implementation of AAT Decisions: 14 days
2. The NDIA should be required to publish statistics on outcomes in relation to the above time limits. The Government should agree to remove the current staffing cap at the NDIA and employ enough staff with appropriate expertise to meet these deadlines.
3. The NDIA should engage in meaningful consultation with participants, their families and carers and other stakeholders from the disability sector on all policies and policy amendments affecting access and planning decisions
4. All internal policies and guidelines that guide NDIA decisions surrounding access and reasonable and necessary supports should be made public under the IPS.
5. NDIA should employ staff with appropriate expertise and provide additional training to all staff holding decision making delegations.
6. NDIA staff should accept the expert opinions of specialists and not seek to override them.
7. The Service Standard on expertise should state that NDIA assessors will respect the opinions of the participant’s treating team
8. Where a decision is overruled or altered on appeal or by the NDIA ERT the original decision maker should be provided with written feedback about what they need to consider improving the quality of decision making for future decisions.
9. The NDIA should publish the following statistics each year:
  - a. Number and percentage of decisions overturned/alterd by ERT without additional evidence being provided by the applicant;
  - b. Number and percentage of decisions overturned/alterd after the NDIA agreed to pay for additional reports
  - c. Number and percentage of decisions overturned/alterd at conciliation
10. NDIA Planners should participate in stakeholder meetings for participants with complex interagency issues.
11. The NDIA should develop specialist expertise and linkages in areas of overlap between state and commonwealth services to ensure that clients they are refusing actually do have access to state supports.
12. The draft Service standard should be broadened to include a requirement that the NDIA treats all participants, prospective participants and their carers and families with respect and recognises their lived experience.



13. All staff exercising delegated power should be provided with training in administrative decision making, including in the provisions of the AD(JR) Act detailing improper exercise of power and the High Court decision in Drake.
14. The current Transport Operational Guidelines should be immediately withdrawn and rewritten in the light of the criticisms expressed by the Federal Court and AAT
15. The NDIA should conduct a full audit of the following to ensure they are consistent with the NDIS Act and Rules:
  - a. Operational Guidelines
  - b. Internal Policies
16. All Internal Review Decisions should be required to reference **all** internal NDIA policies that are applied in reaching the decision.
17. A reference number should be provided to all callers to the national 1800 number
18. The NDIA should introduce an internal standard for the timeliness of returning phone messages
19. The NDIA should review the “remote” status of all offshore islands. Islands that are not genuinely remote but are readily accessible from mainland Australia should receive service from local NDIA LAC rather than the remote LAC.
20. The NDIA should publish the following statistics each year:
  - Wait/hold times on 1800 number
  - Number of calls unanswered
  - Timeliness for return of telephone messages
21. The Principle of Choice and Control should be included in the Participant Service Guarantee
22. Where no formal Guardianship Order is in place the NDIA should assume that an adult participant has capacity to participate in planning meetings **unless** there is written evidence of lack of capacity from a suitably qualified health professional.
23. The NDIA should develop and publish clear guidance on what evidence it accepts as suitable to justify a determination that a participant lacks capacity to participate in the planning process.
24. The NDIA should review its current policies and procedures in relation to EPOAs to ensure that stronger protections for participants are put in place to ensure that the participant is able to exercise choice and control in the planning process.
25. Where a participant has limited to capacity, the NDIA should adopt a Supported Decision-Making model to assist a participant make their own decisions rather than seeking to remove a participant with limited capacity from the planning process.
26. The NDIA should significantly improve its advice/instructions for GPs. As part of this process, the NDIA should create “dummy” completed ARFs identifying the level of detail that is necessary.
27. The NDIA should not reject a prospective participant for lack of evidence without either:
  - a. contacting the GP and seeking further information; or
  - b. meeting with the prospective participant to see their lived experience.
28. The NDIA should remove the administrative practice of treating an access request as withdrawn if the ARF is not returned within 28 days of it being sent to the prospective participant.
29. The distinction between primary and secondary disabilities should be removed. The ARF should simply ask prospective participant to list all permanent disabilities.

30. NDIS rejection letters should not only explain which criteria weren't met but should also explain what sort of evidence would be required for the applicant to meet access criteria.
31. There should be a specific Medicare Item for GPs completing the ARF to recognise the additional time required to complete it properly.
32. Where the NDIA determines that it requires expensive testing to prove eligibility, either the NDIA should agree to fund the testing or prospective participants should be provided with an interim plan that covers the costs of necessary assessments.
33. Abolish all reference to primary/secondary in planning process and fund all supports that meet the criteria for reasonable and necessary supports
34. Where a planning decision has resulted in a change in funding levels the NDIA should provide the participant with a statement of reasons for the decision to change funding as well as a copy of the new NDIS Plan.
35. NDIS Plans should include a small amount of funding to allow allied health professionals to provide annual reports on capacity building achievements prior to the participant's annual plan review.
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39. increase fees and allow additional fee for clients who want paper copies.
40. The NDIA should review the user friendliness of all forms
41. The NDIA should develop separate forms for seeking internal reviews of access decisions and reasonable and necessary supports decisions. These forms should meet accessibility guidelines and specifically refer to the relevant legislative criteria.
42. The NDIA should engage sufficient trained and experienced staff to conduct internal reviews in timely manner
43. All internal review decisions (including decisions where a new plan is issued) should be accompanied by a statement that meets the requirements in section 28 of the AAT Act.
44. All internal review decisions should provide guidance on to the type of evidence that would be required to meet the relevant criteria.
45. Internal Review decisions should attach a list of funded NDIS Appeals advocate organisations in that state rather than a hyperlink to the NDAP website.
46. The NDIA Instructor should attend all AAT Case Conferences with the NDIA appointed lawyer to prevent unnecessary delays due to the lack of available instructions.
47. All NDIA lawyers and instructors should be provided with training in the Model Litigant Rules to ensure that they understand and meet their obligations.
48. The ERT should provide a report to any IR decision makers whose decisions are overturned either by agreement or by a formal decision by the AAT to ensure that the identified error is not repeated.
49. Performance criteria should be introduced relating to overturned decisions at AAT (either by decision or agreement). Delegates whose decisions are regularly overturned should be required to attend additional training.
50. The NDIA should agree to pay for any expert report or assessment that it determines must be obtained to prove eligibility.

51. All internal policies that are used by delegates in making decisions should be included in T documents prepared for the AAT.
52. The Decision maker should be required to provide a statement of reasons for all decisions, including issuing of plans. This statement of reasons should be required to include the findings on material questions of fact, refer to the evidence or other material on which those findings were based and give the reasons for the decision. Time limits on appeals should not commence to run until a valid written statement of reasons is received.
53. NDIA management should clarify in writing to all staff that there is no requirement that an NDIA generated CTIR be completed to release information.
54. The NDIS Act should be amended to allow a plan to be altered without the need to issue a new plan.
55. The NDIA should develop a more robust administrative system to ensure that all change of circumstances review requests are forwarded to the relevant planner automatically to prevent the need for automatic internal reviews.

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Independent Advocacy in the Tropics Inc.  
Office 2, 179 – 181 Ross River Rd Mundingburra Qld 4812  
PO Box 3065 Hermit Park Qld 4812  
Phone: 61+ 7 4725 2505  
FreeCall: 1800 887 688  
Fax: 61+ 7 4725 6106  
Email: [reception@ianq.org.au](mailto:reception@ianq.org.au)  
Website: [www.ianq.org.au](http://www.ianq.org.au)