

Submission to Joint Standing Committee on the NDIS

Inquiry into the Capability and Culture of the NDIA

12 October 2022

Public Interest Advocacy Centre
ABN 77 002 773 524
www.piac.asn.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone +61 2 8898 6500
Fax +61 2 8898 6555

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

Contact

Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

Website: www.piac.asn.au



Public Interest Advocacy Centre



@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Contents

Contents	3
Central Recommendations	1
Other Recommendations.....	1
Introduction.....	4
1. The need for high cultural standards.....	5
2. A focus on people	6
2.1 Approach to designing policies, procedures and Operational Guidelines	7
2.2 Application and review of policies	8
2.3 Implementation of recommendations from inquiries and reviews	11
2.4 Moving from gatekeeper to facilitator	11
3. Openness and accountability	14
3.1 Clear decision-making processes	15
3.2 Transparency in the conduct of litigation	16
3.3 Publication of annual financial sustainability reports and data	19
3.4 Linkages between Agency teams.....	21
4. Training and skill development	23
4.1 Quality of decision-making	23
4.2 Timeliness of decisions	24
4.3 Staffing of the NDIA.....	25
4.4 Over-reliance on external lawyers.....	25
5. Case Study – Philip Simpson	26

Central Recommendations

Central Recommendation 1: Adopt a participant-focused cultural approach

The NDIA should focus on participants' goals and experiences, and adopt procedures which reflect its role to facilitate the delivery of the Scheme in partnership with people with disability.

Central Recommendation 2: Operate in an open and accountable manner

The NDIA should broadly shift culture and attitudes among its staff to welcome greater transparency, and to proactively emphasise the value of open government.

Central Recommendation 3: Invest in skilled and dedicated staff for the NDIA

The work of the NDIA should be conducted by a body of permanent staff dedicated to the mission of the Agency, with the numbers, skills, and training to understand and succeed in their tasks.

Other Recommendations

Recommendation 1: Ensure all policies are developed in consultation

Whenever the NDIA develops or reviews a policy, it should follow processes for consultation with the people most affected by it – including people with disability, peak bodies and other stakeholder groups. Consultation processes should be co-designed with people with disability.

Recommendation 2: NDIA policies should not set criteria that exclude consideration of individual cases

The NDIA should review its policies to ensure that they do not purport to impose mandatory criteria that are not supported by law. A policy should be accompanied with an explanation as to how it is supported by the statutory Scheme. The NDIA should not adopt processes or make decisions which are contrary to the NDIS Act or its principles.

Recommendation 3: Implement systemic changes to reflect AAT and court decisions

The NDIA should implement a transparent process to ensure the NDIA's advice and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The NDIA should report on any updates in its quarterly reports to the COAG Disability Reform Council.

Recommendation 4: Recommendations should be implemented

The Government and the NDIA should provide timely responses to recommendations made in inquiry reports and commit to implementing them in full. An implementation taskforce should be established to coordinate the effective implementation of all recommendations.

Recommendation 5: The planning process should be thorough and consultative

The processes followed by NDIA planners during plan development and reviews must be consultative, and aim to proactively problem-solve in collaboration with participants and their supporters. The NDIA should enforce performance standards for staff involved in planning that track relevant measures such as participant satisfaction with planning conversations, number of avoidable issues with evidence provided and accurate recording of participant views.

Recommendation 6: The NDIA should commit to acting as a model litigant, and take a conciliatory and constructive approach to AAT appeals

The NDIA should re-evaluate its approach, and that of lawyers acting on its behalf, in relation to appeals by participants at the AAT. It should ensure that it complies with its model litigant obligations, and that its behaviour in appeals reflects the intentions and spirit of the Scheme. In considering strategies to achieve this, it should look to the 16 recommendations of the Appeals Public Submission.

Recommendation 7: Publish typical support packages to improve transparency in the NDIA

If typical support packages are to be used by the NDIA as guidance in creating participant plans, the NDIS legislative framework should require their publication and recognise that any guidelines published are guidelines only in the creation of plans that are person-centred and tailored to an individual's goals.

Recommendation 8: Decisions that a requested support does not represent 'value for money' should set out the NDIA's evaluative assessment

A decision that a requested support does not represent 'value for money' should be the product of serious consideration by the NDIA of the costs involved in funding the support, the benefits (or lack thereof) the NDIA considers the support would provide, and an explanation for why and how the decision was made. At a minimum, NDIA decisions that rely on s 34(1)(c) to refuse funding should set out these matters.

Recommendation 9: The NDIA should fully comply with obligations of disclosure relating to T-documents

For all matters before the AAT, the NDIA should ensure that it provides the AAT with all documents required by disclosure provisions of the AAT Act. It should monitor the performance of responsible staff against this metric.

Recommendation 10: The NDIA should explain its decisions in full

The NDIA should adopt a policy of providing full and detailed reasons for reviewable decisions that comply with the requirements of section 28 of the AAT Act, to allow a participant to fully understand the NDIA's position and to evaluate how their case has been considered, as well as the prospects of any appeal.

Recommendation 11: The NDIA should provide further reasons when requested

Where a person with disability requests reasons, or further reasons (including in accordance with the AAT Act), for a decision that has been made about them, the NDIA should provide these reasons unless there is a strong reason not to do so (for example in rare cases where a request is vexatious).

Recommendation 12: The NDIA should record reasons for settlements

Where the NDIA decides to settle a matter before the AAT, it should agree to record in the consent orders made by the AAT appropriate notations reflecting the facts that it has been satisfied of that have led to it approving the settlement. The content of these notations and facts should be produced in consultation with the applicant, and should form the basis for future planning discussions with that participant.

Recommendation 13: Publication of settlement outcomes

The NDIA should publish information around AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates. The government should monitor implementation of this initiative – including, where necessary, through future inquiries of the Committee.

Recommendation 14: Ensure transparency of the costs and benefits of the NDIS

The NDIA should publish each Annual Financial Sustainability Report (current and historical) in full on its website to ensure transparency of data and information about the financial sustainability of the NDIS. An independent study on the benefits of the NDIS should be commissioned and published on the NDIA website to inform government and balance public debate.

Recommendation 15: The NDIA should function, and accept responsibility, cohesively

The NDIA should strengthen co-operation between its teams (particularly the Planning and Appeals Branches) and ensure that each team's processes link coherently with others. NDIA staff should be encouraged to take responsibility for identifying overlapping issues as they arise so that they can be fixed.

Recommendation 16: Disclose information about any specialist panels utilised by the NDIA

The NDIA should proactively disclose information about any specialist panels it utilises, and the policies and procedures that they apply, to the public. Where panels are making decisions about a particular participant, the participant should be informed of this in advance and given greater opportunity to engage with the panel.

Recommendation 17: Address and reduce regular errors

The NDIA should urgently review its internal processes and policies to eliminate critical administrative errors and the delivery of incorrect advice to participants. In doing so, it should consider conducting a top-down audit of processes, policies, and service delivery by staff at all levels. It should also explore the causes of the high error rate, and take appropriate steps to address these causes at their source.

Recommendation 18: The NDIA should urgently address extended delays in decision-making

The NDIA should prioritise ongoing reforms aimed at reducing the wait times for decisions, including through the implementation of the Participant Service Guarantee.

Recommendation 19: The NDIA should increase its in-house legal capacity for appeals matters

The NDIA should increase its legal staffing in order to directly act in appeals cases instead of relying on outside counsel. AAT matters that are particularly complex, or involve particular sensitivities or vulnerabilities on the part of the applicant, should be run by the NDIA in-house. The NDIA should be resourced appropriately for this purpose, including through the savings achieved in not retaining external lawyers.

Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make this submission to the Joint Standing Committee on the National Disability Insurance Scheme's (**NDIS** or **Scheme**) inquiry into the *Capability and Culture of the NDIA*.

PIAC has lengthy experience working with people with disability to tackle barriers to justice and fairness. Since July 2019, PIAC has worked on a legal advocacy project focused on delivering better outcomes under the NDIS for people with disability. This work has been done in close consultation with disability rights organisations.

Additionally, since August 2021, PIAC has partnered with the Housing Hub (an initiative of the Summer Foundation) to address issues with funding decisions regarding Specialist Disability Accommodation (**SDA**). This has involved both systemic policy advocacy, and providing advice and assistance to participants navigating the planning appeals process.

We welcome the Committee's decision to review the way the National Disability Insurance Agency (**NDIA** or **Agency**) operates, and to consider how decisions and attitudes of the Agency affect people who rely upon the Scheme. We strongly support the NDIS and believe in its potential to improve the lives of people with disability; but we consider there is room for improvement in the way it is administered and relates to people with disability.

Our submission is grounded in our direct experience engaging with the Agency on operational and policy matters, and the views and feedback we have received from participants and representative organisations.

In particular, our submission addresses the:

- Agency's failure to place participants at the centre of the Scheme;
- lack of transparency and public oversight into the Agency's administration; and
- shortfall of skills, experience and knowledge by the Agency.

These are all fundamental issues, which in turn lead to a number of further problematic practices that cause stress and hardship for participants.

We begin our submission by considering the basic principles and legal guidelines that should dictate the Agency's culture and design.

1. The need for high cultural standards

The NDIS was born from the idea that Australians with significant and permanent disability should have greater choice and control over their own lives. Its purpose is to support those individuals to be more independent, and engage more socially and economically, while building genuinely connected and engaged communities and stakeholders.

Choice and control was a paramount feature of the original framing of the NDIS. This can be seen in the 2011 Productivity Commission (**PC**) report¹ recommendation that a consumer choice model be used to determine what supports are required by an individual rather than outsourcing control to providers and standard assessment procedures.²

The PC proposed an ‘individual choice’ model, in which participants could choose how much control they wished to exercise in relation to their services and plans.³ The avoidance of paternalistic prescriptions reflects that choice and autonomy are important for people with disabilities and their quality of life.⁴

These principles are expressed in the implementing legislation of the NDIS. The *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) provides a list of stated objects, including to:

- support the independence and social and economic participation of people with disability;
- enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community; and
- raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability.⁵

The Act also lists a number of principles for guiding actions under the NDIS Act, including that:

- people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development;
- people with disability should be supported to participate in and contribute to social and economic life;
- people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports;
- people with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs;
- people with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity; and

¹ Productivity Commission, *Disability Care and Support* (Inquiry Report No. 54, 31 July 2011) (**‘PC’**).

² Ibid Recommendation 8.1 and Recommendation 10.1.

³ Ibid 30.

⁴ Ibid 6, 151.

⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 3.

- people with disability should have their privacy and dignity respected.⁶

These principles should establish a working philosophy for the NDIA. As summarised by Mortimer J in the recent Federal Court matter of *National Disability Insurance Agency v Davis*:

The NDIS Act is beneficial and remedial legislation designed to operate in relatively high volume decision-making, in a pragmatic context, and in respect of people (and their families and carers) already facing great challenges in their daily lives.⁷

Unfortunately, in PIAC's experience, the NDIA regularly falls short of these requirements and expectations. The Agency's internal culture and associated practices can exclude and diminish the voices of participants. The Agency also appears to suffer from substantial capability deficits that reduce its effectiveness and result in poor user experiences and service delivery.

This submission covers three broad areas of concern, addressed in the following three sections:

1. The NDIA's view of itself as governing the Scheme, as opposed to stewarding the Scheme and working in partnership with participants (Section 2);
2. The NDIA's resistance to transparency and evasion of responsibility (Section 3);
3. The NDIA's shortfalls of relevant skills and knowledge among its staff (Section 4).

In Section 5 we provide a case study illustrating how the above systemic issues affect a participant's experiences in a multitude of ways, and can hinder the delivery of much-needed supports.

As our expertise primarily relates to the development of participant plans, as well as associated policies, review, and appeal processes, our submission primarily draws on the systemic issues we have identified in these areas. Many of these issues have been outlined in our previous submissions to the Committee.⁸

2. A focus on people

Many of the concerns we have over the NDIA's practices arise from a loss of focus by the Agency on its core imperative to put participants and people with disability at the centre of its work. Instead, the NDIA has, at times, prioritised its own imperatives (including ease of administration and cost-reduction) over the preferences, needs, and experiences of Scheme participants. Many participants and stakeholders have told us their overall impression is the NDIA is more concerned with adhering to its own processes, in order to meet internal KPIs for staff and teams, rather than listening to and collaborating with the people the Scheme was set up to serve. In practice, this produces dealings where the NDIA appears rigid and inaccessible.

⁶ Ibid s 4.

⁷ *National Disability Insurance Agency v Davis* [2022] FCA 1002 ('Davis'), [142].

⁸ See for example PIAC, *Submission to Joint Standing Committee on the National Disability Insurance Scheme: Current Scheme Implementation and Forecasting for the NDIS* (February 2022) < <https://piac.asn.au/wp-content/uploads/2022/02/22.03.08-NDIS.pdf> > (February 2022 Scheme Implementation Submission); PIAC, *Submission to the Joint Standing Committee on the NDIS Inquiry on General issues around the implementation and performance of the NDIS* (25 August 2021) < https://piac.asn.au/wp-content/uploads/2021/09/sub_84GI.pdf >.

Central Recommendation 1: Adopt a participant-focused cultural approach

The NDIA should focus on participants' goals and experiences, and adopt procedures which reflect its role to facilitate the delivery of the Scheme in partnership with people with disability.

2.1 Approach to designing policies, procedures and Operational Guidelines

Policies serve important functions in public administration, providing guidance to decision-makers and creating fair and consistent approaches. In the case of the NDIA, policies need to balance complex considerations involving evidence from medical and allied health professionals, the costs, benefits and long-term sustainability of the Scheme and, most importantly, the individual views, rights and dignity of a wide range of participants.

Development of policies in such an environment is a sensitive task, and requires care and consultation. This is particularly so for policies governing eligibility for the NDIS, supports that can be funded, means of accessing those supports, and administration and communication with participants. The NDIA's process for developing and updating policies should be improved.

We are concerned the NDIA's approach to designing policies overlooks the rights of people with disability.

To give one example, as the Committee will recall, the NDIA previously released a Consultation Paper on Planning Policy for Personalised Budgets and Plan Flexibility in November 2020.⁹ The Consultation paper provided limited and high-level information about what the changes meant from a practical and legal standpoint without providing necessary detail for participants to provide informed feedback on its substance.¹⁰ Only after the consultation period closed, in June 2021, did the NDIA publish a Technical Information paper on personalised budgets with more detail.¹¹ This demonstrates the difficulties in obtaining information from the NDIA about proposed changes, bypassing the rights of people to meaningfully engage with the proposed policy.

PIAC has also received feedback from stakeholders (i.e., peak bodies, disability advocacy groups, support providers, and health professionals) that they have been inadequately consulted on the design of NDIA policies. For example, health professionals have expressed frustration at being asked to provide expert reports in line with Operational Guidelines they have not been invited to contribute to and which contain impractical or inappropriate requirements.

Any future reforms to NDIA policies should involve start-to-finish consultation that is accessible and meaningful. A participant-centred approach involves regularly consulting with those affected by policy design. This would also increase public confidence in the NDIA's approach.

⁹ NDIA, Consultation paper: Planning Policy for Personalised Budgets and Plan Flexibility, (Consultation Paper, November 2020) 4.

¹⁰ For example, it did not address how the 'total reasonable and necessary level of funding' would be determined, whether the s 34 criteria would remain or how a participant's circumstances would be considered.

¹¹ NDIA, Personalised Budgets: Proposal for a new NDIS budget model (Technical information paper, June 2021).

Recommendation 1: Ensure all policies are developed in consultation

Whenever the NDIA develops or reviews a policy, it should follow processes for consultation with the people most affected by it – including people with disability, peak bodies and other stakeholder groups. Consultation processes should be co-designed with people with disability.

2.2 Application and review of policies

Once policies have been designed, we are concerned that the way the Agency has applied them generates further issues.

2.2.1 Loss of participant focus through rigid policy approaches

Many policy documents, particularly the NDIA's Operational Guidelines and 'Would We Fund It?' website, contain concrete statements of mandatory criteria that must be met, or general bars to funding that do not necessarily reflect the statutory scheme.¹²

Case study

Sally has diagnoses of Dissociative Identity Disorder, Post-Traumatic Stress Disorder, Major Depression and Anxiety. Sally sought funding for a psychiatric assistance dog. The NDIA refused funding on the basis that this funding was not a 'reasonable and necessary' support, and referred to the 2021 NDIA Assistance Animals Guideline.

The Guideline provides that assistance animals will only be funded if trained by an 'accredited assistance animal provider'. In addition, the Guideline says that assistance animals will only be funded for participants who have 'long term but stable PTSD'. This excludes funding for an assistance animal unless the participant's only psychological diagnosis is PTSD.

The arbitrary criteria set out in the Guideline are inconsistent with the NDIS Act, which says that people must be funded for supports that are reasonable and necessary.

Sally's matter settled in the AAT after 18-months' dispute, with the NDIA agreeing to provide funding for her psychiatric assistance animal. The settlement is an acknowledgement by the NDIA that Sally's assistance animal is a reasonable and necessary support despite: (1) Sally's psychiatric assistance dog not being trained by an 'accredited assistance animal provider'; and (2) Sally having multiple disabilities, in addition to PTSD.

After Sally's AAT case settled, PIAC asked the NDIA to revise the Assistance Animals Guideline to reflect that people must be funded for psychiatric assistance dogs if there is evidence that this would be 'reasonable and necessary' depending on a person's individual circumstances. Regrettably, the NDIA declined to engage with PIAC on this issue.

Correspondence and decisions from the NDIA regularly refer to these policy positions, with participants told their requested outcome is not consistent with the policy. This is potentially

¹² See, for example, NDIS, 'Would we fund it: Improved health and wellbeing: Gym membership', *Gym membership* (Web Page) < <https://ourguidelines.ndis.gov.au/would-we-fund-it/improved-health-and-wellbeing/gym-membership> >; NDIS, *Operational Guideline – Home modifications*, (Web Page, 9 August 2022), <<https://ourguidelines.ndis.gov.au/media/1690/download?attachment>> .

unlawful. Decision-makers cannot lawfully apply policy that is inconsistent with legislation, or fail to fulfil their statutory role of considering and deciding the matter by inflexibly following a policy without regard for an individual's circumstances.¹³

Recommendation 2: NDIA policies should not set criteria that exclude consideration of individual cases

The NDIA should review its policies to ensure that they do not purport to impose mandatory criteria that are not supported by law. A policy should be accompanied with an explanation as to how it is supported by the statutory Scheme. The NDIA should not adopt processes or make decisions which are contrary to the NDIS Act or its principles.

2.2.2 Inconsistent decision-making

Even with rigid policy rules in many areas, PIAC still encounters inconsistent NDIA decision-making, particularly in relation to planning outcomes. As articulated in our submission to the previous Committee's Inquiry into Scheme Implementation in February this year (**February 2022 Scheme Implementation Submission**):

NDIS participants, carers and advocates have raised concerns that issues in the planning process are leading to inconsistent outcomes. These issues include:

- the ability of the participant and their medical professionals to articulate their goals and needs in the language of the NDIS, rather than in language that reflects their true needs;
- the participant's geographic location, with advocates stating that their experience shows inconsistent decisions made depending on the decision-maker in different locations (revealing poor training practices within the NDIA);
- the determination and endurance of the participant, their family and their advocates in pushing for the supports they consider necessary. This has a disproportionate effect on culturally and linguistically diverse and First Nations people with disabilities. Advocates advised that many participants found it difficult to advocate for themselves against government decision-makers. An obvious concern being that participants without advocates are worse off;
- whether a person's local MP is involved and advocating on a participant's behalf; and
- in some cases, even the profile of the participant. There is a concern held by some in the disability sector that participants with higher profiles may be more likely to get the supports they seek. Conversely, concerns have also been raised that people in marginalised and poorer communities receive lower levels of funding and support.

It is apparent that inconsistent decision-making at the plan variation stage may also be symptomatic of inconsistent decision-making during the planning process.

These issues not only manifest in inconsistent plans between different participants, but also for the *same* participant at the next plan review following an AAT decision or settlement of their appeal...¹⁴

¹³ See, for example, *Green v Daniels* [1997] HCA 18. See also *Drake v Minister for Immigration and Ethnic Affairs* [1979] FCA 39.

¹⁴ PIAC, February 2022 Scheme Implementation submission (n 8) [3.2.1] (citations omitted).

PIAC has seen a number of cases with particularly tenacious participants who have demanded their matter be escalated, or who have sought media and political attention. In those cases the external pressure appears to have triggered fresh engagement by the NDIA and a willingness to be flexible. The same applies to matters where an appeal is escalated to the Administrative Appeals Tribunal (**AAT**): before the AAT the NDIA will regularly settle matters for outcomes that are consistent with the NDIS Act but not in line with published policy. See the above case study about Sally and her request for a psychiatric assistance dog, where the NDIA settled Sally's case on terms that were consistent with the NDIS Act but contrary to the relevant Operational Guideline.

2.2.3 Failure to revise policy approaches in response to court or Tribunal outcomes

Good governance requires that where a legal flaw in a policy is identified, the Agency should review the policy and re-issue a lawful and applicable version.

In our February 2022 Scheme Implementation Submission, we observed:

We have previously made submissions to this Committee regarding our concerns that the NDIA is failing to implement systemic changes to policies following AAT decisions. This is a key issue, as the failure to do so results in inefficiencies in decision-making, and unfairness to people unwilling or unable to go through the appeals system. If policies deemed to be inconsistent with the NDIS Act (and thereby unlawful) continue to be applied by the NDIA, it also means the AAT appeals process is an ineffective oversight mechanism.

We appreciate the Committee well understands this point. This Committee has also observed that multiple inquiries, including the Committee itself, have now suggested the NDIA needs to do better in terms of how it uses AAT decisions to ensure consistency in its decision-making. Notably, the Committee said '[i]f multiple reviews are proposing the same solution, this would suggest that the solution itself is necessary, reasonable and clear'.¹⁵

In that submission, we cited the example of the NDIA's non-funding of gym memberships.¹⁶ This policy remains in place, despite findings by the AAT that it is not lawful. The same could be said of transport funding, where the policy remains identically worded to the version that was found to be unlawful and inapplicable by the AAT in a 2018 decision.¹⁷

In another example, the AAT observed that a drafting error in a policy document – the failure to make reference to the statutory scheme in Appendix G of the *SDA Price Guide* – would render an important part of that document 'invalid and inapplicable'.¹⁸ Invalidity could lead to participants committing to living situations they cannot afford or incurring debts out of mistaken reliance on the invalid policy. The NDIA could readily fix this issue by redrafting the policy. They have had over six months to do so since the decision in *Kennedy* was handed down.

¹⁵ PIAC, February 2022 Scheme Implementation submission (n 8) [3.2.3.2] (citations omitted).

¹⁶ See, eg, *King and National Disability Insurance Agency* [2017] AATA 643. See also NDIS, *Gym membership* (n 12).

¹⁷ See, eg, *Ewin and National Disability Insurance Agency* [2018] AATA 4726, [80]–[82]. See also NDIS, *Including Specific Types of Supports in Plans Operational Guideline – Transport* (Web Page) <<https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport>>.

¹⁸ *Kennedy and National Disability Insurance Agency* [2022] AATA 265, [40].

The unwillingness to review policies in the face of AAT commentary and explicit recommendations by the Committee undermines the role of the AAT and confidence in the Agency.

Recommendation 3: Implement systemic changes to reflect AAT and court decisions

The NDIA should implement a transparent process to ensure the NDIA's advice and operational guidelines are updated to reflect relevant settlement outcomes and AAT and court decisions. The NDIA should report on any updates in its quarterly reports to the Disability Ministers.

2.3 Implementation of recommendations from inquiries and reviews

Since 2016, there have been over 16 major inquiries relating to the NDIS resulting in over 300 recommendations to improve processes and procedures.

As at 22 August 2022, 68% (210 of the 311) recommendations require the NDIA to take action. 30% (62) have not been implemented with 46% (96) only partially implemented.

The above statistics demonstrate the failure of the NDIA to implement recommendations in full, some of which are long-standing, to improve the NDIS. For example, the Committee's 2020 inquiry into NDIS Planning recommended the NDIA to publish on its website detailed information about its Technical Advisory Branch and expert teams for transparency, so that participants and the allied health sector can have confidence in the NDIA.¹⁹ To date the NDIA has not published any of this information on its website.

Due to the high percentage of recommendations that remain to be implemented or implemented in full, PIAC launched an online NDIS Recommendations Tracker earlier this year to help advocates hold decision-makers to account in relation to NDIS policy and law reform recommendations.²⁰ The Tracker allows advocates to track the status of more than 300 inquiry recommendations made across various NDIS inquiries, as well as action that has been taken in response. The development of this tool has been necessary given the systemic failure of previous governments and the NDIA to implement important reform recommendations in a timely manner.

Recommendation 4: Recommendations should be implemented

The Government and the NDIA should provide timely responses to recommendations made in inquiry reports and commit to implementing them in full. An implementation taskforce should be established to coordinate the effective implementation of all recommendations.

2.4 Moving from gatekeeper to facilitator

A common experience for participants, in views expressed to PIAC, is that the NDIA approaches its role as being the gatekeeper, rather than facilitator, of access to support. This is at odds with the Scheme's core ideas and principles, which position the NDIS as a means for providing support through collaborative, individualised processes between people with disability and the government.

¹⁹ Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020) ('Planning Final Report') [6.99] and Recommendation 16.

²⁰ PIAC, 'NDIS Recommendations Tracker', *Our new NDIS advocacy tool* (Web Page, 31 August 2022) <<https://piac.asn.au/2022/08/31/how-government-is-tracking-on-ndis-recommendations/>>.

2.4.1 Insufficient engagement with participants

This concern arises particularly when participants make requests for funding in their plans. Although the NDIS Act requires a plan to be prepared *with* the participant,²¹ we have heard regularly from participants who have had only a cursory planning conversation with the NDIA – or no conversation at all. These conversations have often followed a proforma structure, with participants reporting they felt the planner working with them did not wish to dig beyond the listed questions and topics.

We have also heard it has been rare for planners to arrange more than a single planning conversation, even where a participant has complex needs and/or supports. For instance, in cases where a planning process might take several months, involving multiple requests from the NDIA for evidence such as expert reports and responses from the participant, participants still often report only having had a single planning conversation. In such cases, participants describe feeling that the planning conversation only happened because it was legally required.

This lack of engagement has often been reflected in the NDIA's interaction notes. PIAC has seen versions of these notes that erroneously record participants asking for supports they do not want or need; or failing to record important considerations that participants have raised.

These failures to engage are particularly problematic where participants have provided professional reports, but their requests for supports were still rejected due to an alleged lack of expert evidence. PIAC has regularly encountered cases where a participant provided, for example, a report from an occupational therapist (OT) to support a request for funding; the OT stated they would be happy to respond to further queries from the NDIA; the NDIA did not raise any concerns about evidence with either the OT or the participant; and, ultimately, the NDIA declined to fund the requested support, citing 'insufficient evidence' (sometimes claiming the report did not address a specific question or issue). This has been particularly frustrating for participants and professionals, who say they could have easily responded to the NDIA's concerns if they were asked to address them.

In other cases, it is clear that information or material provided by a participant to the NDIA in support of a request for funding had not been considered at all. This is most obvious in relation to internal review decisions. These decisions contain a list of all documents the Agency has taken into account. In nearly every internal review decision that PIAC has seen, this list has been incomplete. Often, the omissions are very significant; expert reports, letters from participants families, or even participants' own statements have been left off.

PIAC has acted for a client in a complex matter where only one planning meeting took place, the participant was given only four hours' notice of the planning meeting, and at the meeting the planner stated they had not read the documents the participant had provided in advance. The meeting lasted only 15 minutes.

Unsurprisingly, the plan contained numerous errors about the participant's circumstances and changed their goals without consent (despite the participant clearly providing their goals prior to the plan being created). The plan also gave rise to a number of disputes over the supports that were and were not funded. At internal review, the decision reflected the internal reviewer had

²¹ *National Disability Insurance Scheme Act 2013* (Cth) ss 31, 33.

considered 4 documents despite more than 50 documents being provided by the participant. The matter is now before the AAT.

Recommendation 5: The planning process should be thorough and consultative

The processes followed by NDIA planners during plan development and reviews must be consultative, and aim to proactively problem-solve in collaboration with participants and their supporters. The NDIA should enforce performance standards for staff involved in planning that track relevant measures such as participant satisfaction with planning conversations, number of avoidable issues with evidence provided and accurate recording of participant views.

2.4.2 Combative approaches in dealing with Tribunal appeals

The NDIA's rigid approach to decision-making has been coupled with a combative response to appeals by participants in the AAT.

Advocacy organisations have previously made this observation in detailed submissions. The public submission earlier this year by a number of legal and advocacy organisations, *National Disability Insurance Scheme Appeals at the Administrative Appeals Tribunal (Appeals Public Submission)*, articulated these concerns:

In the context of unprecedented levels of external reviews to the AAT, we have seen a shift in the behaviour of the NDIA and their representatives. This fight is an unfair battle, as unrepresented individuals are confronted with adversarial behaviours from the agency and their legal representatives. The NDIA holds all the power, the resources, and is under no time pressure. The individual meanwhile has necessary disability supports withheld from them and no capacity to negotiate...

The NDIA's model litigant obligations should ameliorate these issues. It provides a framework that requires government agencies to act fairly, ethically, and honestly to model best practice in litigation. The conduct of the NDIA falls well short of adhering to these guidelines, resulting in unnecessary distress for PWD and their families, as well as placing some PWD at significant risk...

The AAT also has guidelines for conduct of external appeals, which the NDIA consistently fails to comply with...

Advocates have attempted to raise issues with the conduct of the NDIA's representatives at the AAT, especially in the context of external lawyers acting on behalf of the Agency, in ways which do not align with the conduct expected of a government agency with 'no private self-interest of it's own', but have found that this process also falls short of expectations...²²

We would encourage the Committee to review the Appeals Public Submission in full.

The approach described above matches PIAC's experiences representing participants in AAT matters. NDIA lawyers regularly take adversarial stances, refuse to make reasonable concessions until just prior to a hearing, fail to meet basic obligations of disclosure and

²² Disability Advocacy NSW, Your Say Advocacy Tasmania and Villamanta Disability Rights Legal Service Inc, National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal (3 June 2022) 7.

timeliness, regularly raise technical points and objections rather than engaging with the substance of the applicant's needs, and cause excessive delays.

In the recent Federal Court decision of *NDIA v Davis*, Mortimer J criticised the Agency for its approach:

In a merits review the Agency would do well to remember its role. As a model litigant, and another part of the executive, it appears to assist the Tribunal to perform its function, which is to reach the correct or preferable decision on the material before it: *Drake v Minister for Immigration and Ethnic Affairs* [1979] FCAFC 39; 24 ALR 577 at 589, Bowen CJ and Deane J. While the Agency might seek to defend its internal decision-making, the Agency does not appear at the Tribunal as a true adversary in the sense of having private interests to defend and advance. It has a public, statutory function, expending public monies to administer the scheme of the NDIS Act. It has no agenda to exclude people from the NDIS. Nor to admit them. Its role is to ensure that the legislative scheme created by Parliament is administered objectively and carefully, in accordance with Parliament's intention, as objectively ascertained. In that sense, it has no 'stake' in the outcome, other than assisting the Tribunal to reach the correct or preferable decision.²³

These observations reflect the clear standards the law sets for the NDIA in litigation, and shortcomings in the Agency's approach.

In recent months the government has committed to reforms in this area that include implementing additional, less-adversarial appeal pathways, reducing the backlog of cases at the AAT by making reasonable settlement offers, and considering ways to adhere more carefully to model litigant obligations.²⁴ We welcome these commitments and the spirit of responsiveness they entail. We look forward to being able to work collaboratively with the NDIA to ensure these reforms are implemented in a manner which deliver more accurate and efficient outcomes for scheme participants, and which reduce the stress that can occur in the course of AAT appeals.

Recommendation 6: The NDIA should commit to acting as a model litigant, and take a conciliatory and constructive approach to AAT appeals

The NDIA should re-evaluate its approach, and that of lawyers acting on its behalf, in relation to appeals by participants at the AAT. It should ensure that it complies with its model litigant obligations, and that its behaviour in appeals reflects the intentions and spirit of the Scheme. In considering strategies to achieve this, it should look to the 16 recommendations of the Appeals Public Submission.

3. Openness and accountability

Another overarching issue we have seen with the NDIA is a broad culture of secrecy and resistance to oversight. While the very first principle of engagement in the NDIS Participant

²³ *Davis* (n 7) [40].

²⁴ See, for example, Luke Henriques-Gomes, 'Thousands of outstanding NDIS appeals to be reviewed by new taskforce, Bill Shorten says', *The Guardian* (online, 20 September 2022), <<https://www.theguardian.com/australia-news/2022/sep/20/thousands-of-outstanding-ndis-legal-appeals-to-be-reviewed-by-new-taskforce-bill-shorten-says>>.

Service Charter is to be 'Transparent', PIAC's experience has been that the NDIA is reluctant to embrace this.

For instance, while the NDIA should be commended on establishing a Participant Information Access (**PIA**) process where participants can freely access some materials relating to them for free and relatively quickly, this only applies to very specific categories of documents that would generally already have been provided to participants. Other documents that show *how* the NDIA has considered a participant's case are not included in the PIA scheme. Attempts by participants and advocates to seek these documents outside of formal processes like Freedom of Information requests or litigation are often refused.

This lack of broad transparency is compounded by refusals of Agency staff and teams to take responsibility for explaining decisions or operations. These attitudes and practices foster mistrust among the public, and inhibit the development of collaborative solutions to problems.

Central Recommendation 2: Operate in an open and accountable manner

The NDIA should broadly shift culture and attitudes among its staff to welcome greater transparency, and to proactively emphasise the value of open government.

3.1 Clear decision-making processes

In PIAC's February 2022 Scheme Implementation Submission we noted:

A lack of transparency impairs the ability of participants, carers and advocates to understand the types and level of supports a participant can seek, the amount of funding that could be provided and the reasons for decisions made in relation to support needs. It also impairs the ability of the community to hold the NDIA to account, to ensure that decision-making under the NDIS Act is consistent, accountable and in accordance with the law. It is practically very difficult for participants to challenge decisions made by the NDIA, when they are largely unaware of the basis on which the decision was made.

This issue was recognised in the Tune Review, which found that a lack of transparency 'is driving a lack of trust and confidence in the NDIA' and concluded that transparency and public accountability are likely to be 'the most effective tool to drive improved participant outcomes'.²⁵

In that submission, we wrote at length regarding the lack of transparency in relation to:

1. the use of 'Typical Support Packages' as a guide in planning decisions;
2. how 'value for money' is considered in assessing reasonable and necessary supports;
3. how the financial sustainability of the NDIS is considered in decision-making.

We consider each of these concerns remain relevant, and the NDIA has not adequately responded to them. These issues form part of our broader concerns about the opacity of the NDIA's approach to preparing individual participant plans.

²⁵ PIAC, February 2022 Scheme Implementation Submission (n 8) [3.2.2] (citations omitted).

Recommendation 7: Publish typical support packages to improve transparency in the NDIA

If typical support packages are to be used by the NDIA as guidance in creating participant plans, the NDIS legislative framework should require their publication and recognise that any guidelines published are guidelines only in the creation of plans that are person-centred and tailored to an individual's goals.

Recommendation 8: Decisions that a requested support does not represent 'value for money' should set out the NDIA's evaluative assessment

A decision that a requested support does not represent 'value for money' should be the product of serious consideration by the NDIA of the costs involved in funding the support, the benefits (or lack thereof) the NDIA considers the support would provide, and an explanation for why and how the decision was made. At a minimum, NDIA decisions that rely on s 34(1)(c) to refuse funding should set out these matters.

3.2 Transparency in the conduct of litigation

PIAC has also encountered strong resistance from the NDIA to requests for greater transparency in the course of litigation.

3.2.1 Incomplete and insufficient 'T' document disclosure

At the outset of matters before the AAT, the NDIA is required to provide a bundle of documents containing 'every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the AAT'.²⁶ These documents are known as the 'T-documents'. This disclosure is vital to the proper conduct of the matter, as it allows the AAT to understand what has occurred in the previous decision-making process, and to be fully informed as to the materials both parties have produced. The T-documents are supposed to represent a comprehensive list of the material the NDIA holds.

Unfortunately, in PIAC's experience, the NDIA regularly omits significant materials from the T-documents. In almost every AAT matter that PIAC has acted in over the last 12 months, we have seen significant omissions from the T-documents. PIAC has often found we need to raise these omissions with the NDIA in order to have them file these additional documents. This is concerning because the vast majority of applicants to the AAT are not legally represented and will likely be unaware of the scope of the NDIA's obligations of disclosure; there is accordingly a significant danger that failure by the NDIA to file comprehensive T-documents will deny applicants and the AAT significant relevant information.

The omissions we have seen particularly tend to relate to the NDIA's own deliberations, or records of conversations with and about a participant and their plan.

Recommendation 9: The NDIA should fully comply with obligations of disclosure relating to "T"-documents

For all matters before the AAT, the NDIA should ensure that it provides the AAT with all documents required by disclosure provisions of the AAT Act. It should monitor the performance of responsible staff against this metric.

²⁶ Administrative Appeals Tribunal Act 1975 (Cth) s 37(1)(b).

3.2.2 Resistance to providing reasons for decisions

The *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) provides participants with the right to receive complete reasons for the decisions they seek review of.²⁷

While the NDIA does give participants brief reasons for their internal review decisions, these regularly fall far short of participants' expectations and the standards required by the AAT Act. In most cases PIAC has seen, the internal review decision is made up almost entirely of boilerplate text, and provides only one or two sentences of actual explanation about the reasons for refusing the participant's specific request. This is legally inadequate, and leaves participants with little understanding of why the decision has been made or whether it should be reviewed.

Where participants have challenged the adequacy of these reasons, the NDIA has been unresponsive. In matters PIAC has acted in, we have seen the NDIA either fail to reply to a request for a more detailed statement of reasons, or respond providing further minimal (but still incomplete) information.

In some cases where participants have brought proceedings in the AAT, PIAC has been instructed to request a direction that the NDIA provide a compliant statement of reasons to assist to inform how their appeal should be run. The NDIA has resisted these requests.

In PIAC's view, this approach by the NDIA is inappropriate. It is a fundamental principle of good public administration, and administrative law, that government bodies should provide detailed reasons that allow a person affected to understand why a decision has been made.

In *HGLS and NDIA*, the participant requested a statement of reasons under section 28 of the AAT Act. The NDIA left the participant waiting four weeks before ultimately refusing to provide further reasons.²⁸ When the AAT, months later, considered whether to order these reasons be provided, it declined to do so but stated:

What is clear from the Applicant's helpful and comprehensive written submission is that she would have benefitted greatly from better communication from the Respondent at the time she was deciding whether to exercise her review rights. One of the general principles that is to guide actions taken under the NDIS Act (and, by reasonable extension, actions taken in reviewing a decision made under that act) is that people with a disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs. It is difficult to see how this principle has been met by the Agency in these

²⁷ Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that a participant can request reasons for an internal review decision from the NDIA within 28 days after that decision is made. Those reasons must:

- set out 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.

Sub-section 37(1)(a) provides that, whether or not the participant has sought reasons under section 28, in an AAT review the NDIA must provide such a statement of reasons along with the T-documents.

²⁸ *HGLS and National Disability Insurance Agency* [2022] AATA 2774, [5]-[6].

circumstances when they have not admitted mistakes or offered the timely correction that would have been appropriate in the circumstances.²⁹

This criticism cuts to the heart of the problem: the NDIA's failure to communicate openly and clearly with participants undermines people's capacity to exercise choice and control as well as trust and confidence in the NDIA.

Recommendation 10: The NDIA should explain its decisions in full

The NDIA should adopt a policy of providing full and detailed reasons for reviewable decisions that comply with the requirements of section 28 of the AAT Act, to allow a participant to fully understand the NDIA's position and to evaluate how their case has been considered, as well as the prospects of any appeal.

Recommendation 11: The NDIA should provide further reasons when requested

Where a person with disability requests reasons, or further reasons (including in accordance with the AAT Act), for a decision that has been made about them, the NDIA should provide these reasons unless there is a strong reason not to do so (for example in rare cases where a request is vexatious).

3.2.3 Refusal to explain basis for settlement offers, or to acknowledge factual findings

Of the NDIA's decisions appealed to the AAT, 59% have settled.³⁰

In matters that PIAC has run, this has generally occurred after we have provided evidence on behalf of the applicant, including expert reports and statements from the participant and their family. This fresh evidence has resulted in the Agency agreeing to settle matters, taking into account facts that were not before the Agency at the internal review stage. Where this is the case, the applicant generally welcomes a settlement agreement that includes funding for the supports they have sought.

However, to give greater certainty for the participant and the Agency in relation to future plans, PIAC has sought to have settlement decisions record the basis for the agreement being reached between the parties. We consider it would be appropriate to record the facts which have led to a settlement as notations to the settlement orders made by the AAT, to form a commonly agreed basis from which the parties can begin future planning discussions about the same or similar supports.

The NDIA's lawyers have regularly refused to include such notations.

In litigated matters between private bodies, this approach may be expected; settlements in those cases may be a question of legal and commercial judgement, rather than statutory interpretation.

²⁹ Ibid [23].

³⁰ National Disability Insurance Scheme, *NDIS Quarterly Report to disability ministers* (Report, 30 June 2022) <<https://www.ndis.gov.au/media/4615/download?attachment>>.

Notably, a further 35% of matters were 'withdrawn or dismissed', which is likely to include a significant number of cases where the applicant and the NDIA reached agreement and the applicant withdrew the matter in order for the NDIA to implement the terms of the agreement through issuing a new plan.

However, the nature of NDIS cases is such that for the NDIA to agree to a settlement that provides further funding for supports, it must consider the supports are ‘reasonable and necessary’ for the purposes of the NDIS Act. The NDIA should also conduct litigation in a way that facilitates good public administration of the Scheme (including future collaborative planning decisions).

In this context, recording and explaining the reasoning behind settlements will play an important role in ensuring transparency and may prevent the future re-litigating of matters that have previously been resolved.

Recommendation 12: The NDIA should record reasons for settlements

Where the NDIA decides to settle a matter before the AAT, it should agree to record in the consent orders made by the AAT appropriate notations reflecting the facts that it has been satisfied of that have led to it approving the settlement. The content of these notations and facts should be produced in consultation with the applicant, and should form the basis for future planning discussions with that participant.

3.2.4 Implementation of a settlement outcomes register

PIAC has made submissions to several inquiries, including those conducted by the Committee, regarding the importance of the NDIA publishing a settlement outcomes register for AAT cases. Two prior reports of this Committee, as well as a report of the Australian National Audit Office, have agreed this would be appropriate.³¹ Despite these recommendations, the NDIA has previously resisted their implementation.

We are pleased the NDIA is now working to implement a settlement outcomes register, and we have engaged in discussions with the NDIA as to how this could be done effectively. This will be an important step in supporting a culture of transparency and accountability, improving the quality of decisions and building public confidence in the NDIA.

Recommendation 13: Publication of settlement outcomes

The NDIA should publish information around AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates. The government should monitor implementation of this initiative – including, where necessary, through future inquiries of the Committee.

3.3 Publication of annual financial sustainability reports and data

In PIAC’s February 2022 Scheme Implementation Submission, we submitted:

The NDIS Act contains specific provisions relating to the functions of the Scheme Actuary including their duties relating to financial sustainability. Each time an annual report is being prepared, the Scheme Actuary must assess the financial sustainability of the NDIS, risks to

³¹ Joint Standing Committee on NDIS, *NDIS Planning Interim Report* (December 2019) [3.96], Recommendation 6; Joint Standing Committee on the NDIS, *Planning Final Report* (n 19) [2.81]–[2.84], [10.85]–[10.87], Recommendation 34; Australian National Audit Office, *Decision-making Controls for NDIS Participant Plans* (Report, 29 October 2020) [3.84], Recommendation 2.

that sustainability and any trends in provision of supports, consider the causes of those risks and trends and make estimates of future expenditure, to prepare:

1. an Annual Financial Sustainability Report (**AFSR**); and
2. a summary of that AFSR including their estimates of future expenditure.

The summary of the AFSR must be included in the annual report which is publicly available on the NDIS website and the Government's Transparency Portal. However, there is no legislative obligation on the NDIA to publish the AFSR in full and the NDIA has previously refused to publish AFSRs despite consistent calls through parliamentary processes for their release.

On 8 October 2021, the NDIA publicly released the 2021 AFSR in full on its website. The NDIA's AFSR webpage states: '*The release of the Annual Financial Sustainability Report is part of the Agency's ongoing commitment to NDIS participants, the disability sector and other stakeholders for greater transparency.*' The accompanying media release also confirms that the full AFSR has been published '*so participants, their families and carers and the wider disability sector have a comprehensive picture in relation to the NDIS's projected financial evolution.*'

PIAC welcomes the decision by the NDIA to release the full AFSR for 2020-21. However, it is concerning that the NDIA has not released the full AFSRs for each financial year between 2013 and 2021...

... PIAC has requested access to each historical AFSR through Freedom of Information legislation. This request was initially refused by the NDIA however following an application for internal review PIAC has been granted access to edited and heavily redacted historical AFSRs. This release is listed on the NDIS FOI Disclosure Log.

The financial sustainability of the NDIS is a matter of significant public importance and publication of historical and future AFSRs in full would improve transparency and public confidence in government administration and promote effective oversight of public expenditure. The AFSRs would also assist in providing a more accurate context for the public to understand the financial sustainability of the NDIS, the basis for any proposed future reforms, and support effective participation in consultation processes between the NDIA and the community. It is difficult for the public to participate in this process when documents as straightforward as historical AFSRs are not published and measures should be introduced to ensure transparency of this information.³²

Access to data and independent reports concerning the financial sustainability of the NDIS is essential. The financial sustainability of the NDIS has been the subject of significant public debate, with the costs of the Scheme dominating the discourse instead of its economic and social benefits. The lack of transparent and balanced information regarding the financial sustainability of the Scheme has generated distrust. As recommended in *NDIS 2.0 A Disability-Led Plan* for the NDIS, an independent study should be commissioned to quantify the benefits of the Scheme.³³

³² PIAC, February 2022 Scheme Implementation Submission (n 8) [4.1] (citations omitted).

³³ Get Skilled Access, NDIS 2.0: A disability led plan for the NDIS (October 2022) <<https://getskilledaccess.com.au/wp-content/uploads/2022/10/GSA-NDIS-2.0-report-30-Sept-FINAL-REPORT.pdf>> 20.

Recommendation 14: Ensure transparency of the costs and benefits of the NDIS

The NDIA should publish each Annual Financial Sustainability Report (current and historical) in full on its website to ensure transparency of data and information about the financial sustainability of the NDIS. An independent study on the benefits of the NDIS should be commissioned and published on the NDIA website to inform government and balance public debate.

3.4 Linkages between Agency teams

It is often unclear to participants and advocates who is responsible for certain functions and decisions of the NDIA, and consequently who they should seek answers from or raise concerns with. In some cases, this seems to result from a lack of understanding by Agency staff themselves of how the Agency's processes intersect, and also possibly a siloing of skills and operations within the NDIA.

3.4.1 Appeals and planning teams

We understand there is a significant operational division between the NDIA's Planning and Internal Review Branches, which are responsible for developing plans and handling internal reviews of planning decisions, and the Appeals Branch, which oversees matters that have progressed to the AAT.

PIAC has found attempts to discuss and address systemic issues faced by participants are funnelled towards one or another of the Planning, Internal Review, or Appeals Branches. This means issues are presented in a disconnected and segmented way, such that their overall magnitude cannot be appreciated and only piecemeal solutions can be developed.

For instance, participants regularly describe finding repeated requests for evidence by the NDIA to be exhausting, frustrating and costly. A participant may be asked, for example, to provide a report from professionals such as occupational therapist(s), medical experts, etc at a) the initial planning phase, b) the internal review stage, and c) during an AAT review. The NDIA staff who work at each stage may feel they have acted entirely appropriately by asking once for a relevant report. It is only when the process is viewed as a whole that the burden of requesting tranche after tranche of the same evidence is apparent, and can be addressed.

We consider it is likely this issue contributes to many of the issues described elsewhere in this submission. For instance, the failure to revise policies in response to AAT outcomes described above at [2.2.3] may be partly due to the disconnect between Appeals and Planning functions. Where an unlawful policy is developed and relied on, the consequences of this are most likely to be felt where that policy is scrutinised externally by the AAT or a court – the domain of the Appeals Branch. However, the branch with the greatest interaction with these policies is the Planning Branch, given the large number of planning and internal review decisions they make. The disconnect between these NDIA teams means the Planning Branch is shielded from feedback about the policies they adopt; while the Appeals Branch can disclaim reliance on unlawful or improper policies and either settle cases or defend them on alternative grounds.

Case study

During Greg's appeal to the AAT, the Agency's lawyers told Greg they were offering to settle the case because the Agency's Home and Living team made a determination that Greg is eligible for certain supports.

Greg felt there had been serious failures in the development of his plan, and wanted to understand the basis for the NDIA's decision to guide his future engagement with the Agency. After his matter settled, Greg lodged an FOI request seeking information about that determination. The FOI team said the documents did not exist, instead saying:

We consulted the relevant NDIA line area in relation to your request and are advised that the NDIA's Home and Living Team (Team) did not make findings with respect to [the relevant AAT case and supports]...The Team has not been consulted or had input with respect to the review or adjustment of [the] original assessment.

Greg asked both the NDIA's FOI team and lawyers to explain the apparent contradiction between these communications. Both parties maintained the information they had provided was correct and did not explain the disjunct, and it remains unclear to Greg how the Agency assessed the matter for settlement.

Recommendation 15: The NDIA should function, and accept responsibility, cohesively

The NDIA should strengthen co-operation between its teams (particularly the Planning and Appeals Branches) and ensure that each team's processes link coherently with others. NDIA staff should be encouraged to take responsibility for identifying overlapping issues as they arise so that they can be fixed.

3.4.2 Secretive operation of specialist panels used by the NDIA

In our February 2022 Scheme Implementation Submission, we noted:

The NDIA utilises a number of specialist panels for making decisions about whether certain kinds of supports should be funded. These include the Home and Living Panel, which makes determinations regarding the funding of various home and living supports (including funding for Supported Independent Living and Specialist Disability Accommodation), and panels relating to specialised kinds of participant circumstances and disability. While there may be value in having specialised and senior decision-makers within the NDIA assigned to make determinations about complex and high-value supports, no information about the composition, operation and even existence of these panels is made available to the public. The entirety of PIAC's knowledge of these panels has been obtained via requests under the Freedom of Information Act 1982 (Cth). No information is distributed to participants regarding how the panels consider matters, how often they meet, or how the panel will work with other NDIA staff such as the planner responsible for the participant's NDIS Plan.

This secretive mode of operation of the panels erodes faith in the NDIA's decision-making. PIAC has had several participants and stakeholders voice concerns that decisions made by

these panels had disregarded relevant information and reports provided by participants, made decisions in a piecemeal and slipshod manner, or applied irrelevant and unlawful criteria and policies to make decisions to deny participant funding requests. It is impossible to verify whether these concerns are well-founded or not, due to the lack of transparency regarding the composition and operation of the panels.³⁴

We are not aware of any further information having been released publicly about these panels since the date of that submission.

One consequence of this secrecy is that panel members are shielded from feedback about their decisions from participants who are affected. Participants do not know if or how the panel has considered the information they have put forward, but they are also not correctly advised of who is responsible for making the decision. For example, in cases where the Home and Living Panel makes planning and internal review decisions, these plans and review decisions are signed by a NDIA staff member from the standard planning team. The Agency should make clear to participants who the decision-maker for their matter is so that avenues for input and scrutiny can be established.

Recommendation 16: Disclose information about any specialist panels utilised by the NDIA

The NDIA should proactively disclose information about any specialist panels it utilises, and the policies and procedures that they apply, to the public. Where panels are making decisions about a particular participant, the participant should be informed of this in advance and given greater opportunity to engage with the panel.

4. Training and skill development

In addition to addressing the cultural issues outlined above, PIAC recommends that the Agency's staffing, capabilities and skill base be reviewed and be given greater investment.

Central Recommendation 3: Invest in skilled and dedicated staff for the NDIA

The work of the NDIA should be conducted by a body of permanent staff dedicated to the mission of the Agency, with the numbers, skills, and training to understand and succeed in their tasks.

4.1 Quality of decision-making

In PIAC's casework, we have seen a wide range of errors in decision-making processes that suggest a need for a significant investment in skills and capacity. Errors have included:

- clearly expressed s 100 internal review requests being incorrectly processed as section 48 plan review requests;
- documents not being saved or preserved correctly when received from participants, meaning these documents have not been properly considered in relevant decisions about plan funding;
- correspondence or information being sent to participants purporting to be a 'decision' by the NDIA, but which does not meet the formal requirements to be either a decision to approve a statement of participant supports or a decision on a section 100 internal review request;

³⁴ PIAC, February 2022 Scheme Implementation Submission (n 8) [3.2.2].

- failing to address all supports requested for (re-)consideration pursuant to a section 100 internal review request; and
- failure to inform a participant that a section 48 plan review has been commenced (whether at the request of the participant or initiated by the NDIA).

From our experience representing participants, we are aware participants have been incorrectly advised that:

- a support could not legally be funded and so should not be requested for inclusion in a plan, when no such legal bar to funding exists;
- a particular decision could be reviewed by the AAT (when, in fact, it was a type of decision that could not be reviewed by the AAT);
- they would need to lodge a fresh section 48 plan review request to have a support considered, while neglecting to inform the participant of their right to request a section 100 internal review; and
- they were required to withdraw their section 100 internal review to achieve a particular outcome, when no such requirement existed.

The above examples can have serious consequences for participants. We recommend that the NDIA gives particular attention to improving the quality of decision-making to ensure better and fairer outcomes.

Recommendation 17: Address and reduce regular errors

The NDIA should urgently review its internal processes and policies to eliminate critical administrative errors and the delivery of incorrect advice to participants. In doing so, it should consider conducting a top-down audit of processes, policies, and service delivery by staff at all levels. It should also explore the causes of the high error rate, and take appropriate steps to address these causes at their source.

4.2 Timeliness of decisions

A consistent concern expressed to PIAC by participants relates to delay. For instance, a review by PIAC in partnership with the Housing Hub of the experiences of 357 participants seeking SDA funding found median wait times for various decisions were:

- 97 days for an initial decision on their NDIS plan (compared to the Participant Service Guarantee standard at the time of 56 days);
- 99 days for an internal review decision (compared to the Participant Service Guarantee standard at the time of 60 days); and
- 205 days for a resolution of matters appealed to the AAT.³⁵

More recent reporting has referred to dramatic delays with NDIS participants in hospital, who are left waiting an average of 160 days to be discharged due to delays in arranging funding and supports to return home.³⁶ These delays and extended wait times correspond with PIAC's experience, and the accounts we hear from partners and participants in the sector.

³⁵ PIAC, *Housing Delayed and Denied* (April 2022) 18.

³⁶ Di Winkler, 'NDIS participants are left waiting for too long in hospital beds due to bureaucratic delays', *The Conversation* (Web Page) <<https://theconversation.com/ndis-participants-are-left-waiting-for-too-long-in-hospital-beds-due-to-bureaucratic-delays-188439>>.

The implementation of the recently-legislated Participant Service Guarantee should provide a framework for addressing at least some of these delays; but given the significance to participants, we consider that this should be treated as a matter of particular urgency.

Recommendation 18: The NDIA should urgently address extended delays in decision-making

The NDIA should prioritise ongoing reforms aimed at reducing the wait times for decisions, including through the implementation of the Participant Service Guarantee.

4.3 Staffing of the NDIA

In PIAC's experience, and from the feedback we receive from clients and stakeholders, it is common for participants to be introduced to multiple different Agency staff members responsible for their planning and funding. In one of our cases, four separate planners were involved in the development and approval of a single participant plan.

This is frustrating and concerning for participants. It makes it difficult for a decision-maker to develop familiarity with the relevant issues and documents and build rapport with participants. It also increases the risk of mistakes.

We are also aware of significant outsourcing of staffing functions by the NDIA. Figures released to Senate Estimates show the NDIA spent \$192,589,008 on labour hire expenses over financial year 2020-21.³⁷ The NDIA's most recent disclosure under Senate Order 13, listing all contracts over \$100,000 in value active at 30 June 2022 or entered into in the previous 12 months, listed 644 contracts described as 'Temporary Staffing and/or Recruitment Support'.³⁸ Of these, 49 contracts were for a value of over \$1 million; 7 were for a value of over \$10 million; and the largest was for \$82.5 million.³⁹ These figures suggest a significant percentage of functions are dealt with by external labour-hire staff.

As outlined above, the NDIS has a distinct mission, underlying philosophy, and guiding principles. It would be unrealistic to expect short-term staff to appreciate these frames or quickly incorporate them into their practice. The heavy use of such labour hire staff may therefore result in worse outcomes for participants.

We encourage the Committee to seek further information on these issues, their causes, and possible solutions from the NDIA.

4.4 Over-reliance on external lawyers

Further to [4.3] above, the NDIA's large spending on external lawyers to run AAT appeals has been subject to significant public commentary.⁴⁰ In cases that PIAC has run, we have often found that externally retained lawyers, particularly those from commercial firms, adopt a more

³⁷ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 28 October 2021, 33 (Nita Green).

³⁸ NDIS, *Senate Order 13 Murray Motion - 2021-2022 Financial Year* (Report, 2022).

³⁹ Ibid.

⁴⁰ See, for example, Luke Henrique-Gomes, 'NDIS agency to spend \$50m on lawyers to fight people with disability who appealed funding cuts', *The Guardian* (online, 1 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/01/ndis-agency-to-spend-50m-on-lawyers-to-fight-people-with-disability-who-appealed-funding-cuts>>.

adversarial approach (as outlined above at [2.4.2]) than in-house lawyers. The tactics adopted can be distressing for participants and run counter to model litigant obligations. External lawyers are also more likely to be unfamiliar with the Agency's preferred positions and ways of operating, and more likely to contribute to slow progress of cases due to delays in obtaining instructions. We also observe that in-house lawyers may be more motivated to seek the early resolution of cases as they have no commercial interest in the matter continuing.

We consider the situation will be improved if the NDIA were to retain more in-house lawyers to run their matters, and to be resourced accordingly. We understand from our recent engagement with the NDIA and the government that this change is currently being implemented for AAT matters, but that the transitions to a predominantly in-house legal team will take some time.

Recommendation 19: The NDIA should increase its in-house legal capacity for appeals matters

The NDIA should increase its legal staffing in order to directly act in appeals cases instead of relying on outside counsel. AAT matters that are particularly complex, or involve particular sensitivities or vulnerabilities on the part of the applicant, should be run by the NDIA in-house. The NDIA should be resourced appropriately for this purpose, including through the savings achieved in not retaining external lawyers.

5. Case Study – Philip Simpson⁴¹

Philip is a 54-year-old man. In 2019, he was living in a rural part of Western Australia when he was diagnosed with a serious degenerative nerve disease (similar to Parkinson's) that was rapidly progressing and would ultimately be terminal. As a result of this condition, Philip became an NDIS participant. By 28 June 2021, the progress of the disease led Philip's doctor to write that Philip had a life expectancy of 'less than two years'.

Philip was supported by his family – in particular, his sister Laura – and his support co-ordinator Stephen, as well as a team of committed professionals from relevant health and allied health fields. Together, in June 2021, they agreed Philip's rural home had become unsuitable for him, as it did not meet his disability-related needs (such as full wheelchair accessibility), was very remote which made it difficult for him to access care and medical services, and was also causing serious distress for his whole family. Philip was told by his support co-ordinator and OT that the only appropriate kind of home for him would be SDA.

In July 2021, Philip and his family began compiling the evidence they were told they would need for the NDIS to fund him for SDA. This included an OT report, a speech pathologist's report, letters from his treating doctors, and statements from Philip, Laura, and others. It took several months to gather all of the evidence.

In December 2021, Stephen assisted Philip and Laura to submit the request for SDA funding. By this time, Philip's health had declined further such that he needed to live alone in SDA (rather than sharing with other people) due to the intensity of care that he required and the difficulties he now had in communicating with strangers. Additionally, if Philip needed to share his SDA home with other residents, his family would only be able to visit him at restricted times. Philip and his

⁴¹ Name of participant, and others involved, have been changed here to protect anonymity.

family wanted to spend as much quality time together as they could in the limited time that Philip had left.

Stephen explained these factors to the NDIA, and provided a further report from Philip's OT in support of Philip being funded to live alone in SDA. He also stressed the urgency of Philip having an appropriate home to live in, as well as the risks posed by Philip's current accommodation. Stephen, Laura, and Philip's OT all made it very clear they would be happy for the NDIA to contact them if any further information was required.

Two months later the NDIA made a decision on Philip's request. While they agreed Philip required SDA, they would only agree to fund Philip for SDA that was shared with two other people; and for a category of SDA that provided less support than what Philip's OT had recommended. In coming to this decision, the NDIA did not contact Philip, his family, or his treating professionals. It was not clear to Philip and his team whether the NDIA had even considered all of the documents that had been provided. The NDIA did not provide any reasons why Philip had not been funded for his requested SDA; nor did it explain what, if any, additional information Philip would need to change the decision.

PIAC understands that, at the time of Philip's application, the common practice of the NDIA was to fund only shared SDA, unless there was a 'disability-related reason' why they require single-residency SDA. This approach is widely perceived as being driven by a desire to cut costs, with shared SDA being cheaper to fund than single-resident SDA. Such an approach is, however, contrary to rule 16 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (Cth) (SDA Rules) which requires the NDIA to consider a range of factors in determining the appropriate type of SDA to fund, amounting essentially to a holistic assessment of the person rather than a narrow focus on what their disability alone might require.

Not knowing this context, Philip and his team were shocked by the NDIA's decision. They began considering whether to request an internal review. They were not sure what would be needed to change the NDIA's mind, so they sought a fresh OT report, comparative costings (which showed it would be cheaper for Philip to live alone in SDA rather than in shared SDA, due to efficiencies in his required support hours), and reports and letters from Philip's treating doctors. His GP wrote:

I strongly believe that [single residency SDA] is the only feasible option for providing for [Philip's] ongoing care needs which are intensifying, requiring PEG feeding, potentially home oxygen care and palliative input...He is unable to effectively communicate and living in a shared environment is only likely to hasten his decline due to an increase in stress. I strongly urge you to consider this advice in a timely manner as his decline appears to be advancing rapidly and his needs are increasing on a week by week basis.

As Philip's team gathered this evidence, Philip's plan ran out of funding for him to be cared for elsewhere and Philip resorted to moving in to a three-person shared SDA home, despite its unsuitability. It immediately became obvious that Philip could not receive adequate care in the shared home; within a week, his overall condition declined seriously, including observable damage to his mental and physical health, and Stephen and Laura arranged for him to temporarily move into a family member's home.

In April 2022, Stephen helped Philip to request an internal review by the NDIA of their SDA funding decision. He provided the further reports and letters they had obtained, and explained in detail the need for an expedited and common-sense outcome as Philip's health had continued to deteriorate. In order to ensure the matter was recognised as urgent and escalated as quickly as possible, Stephen sent copies of the request to high-level staff within the NDIA.

In response, an Assistant Director replied to Stephen's email, copying in several of Philip's treating professionals and family members, rebuking Stephen for raising the issue. The reply stated:

Unless there is a significant delay or you have a valid complaint, I request for the sake of expediency you refrain for these kinds dramaturgical acts. [sic]

The email also included an apparent threat to report Stephen to the NDIS Quality and Safeguards Commission for breach of the code of conduct for providers, on the basis that Stephen may have shared confidential information about Philip with other parties copied to Stephen's email without Philip's consent. (Stephen and Philip had, in fact, discussed the matter and Philip had consented to Stephen's email being sent to all receiving parties). This hostile and defensive response by the Agency frustrated and discouraged Philip and his family.

Two weeks later, the NDIA made a decision on the internal review. They decided to affirm the initial decision, and refused to fund Philip for single-resident SDA. The reasons provided for the internal review decision were very brief, comprised of boilerplate text except for three short paragraphs that did not engage at all with the reasons Philip had given for wanting to live alone, simply stating:

The available supporting evidence on file does not demonstrate that [Philip requires] an increase to SDA funding from a 3 residents house to a Single Occupancy with 1:1 care and that the goals in [Philip]'s plan cannot be achieved with the current statement of supports provided. To be satisfied that a higher level of support meets value for money criteria I must also be satisfied that the costs are reasonable compared to the benefits achieved and the costs of alternate supports.

It was not clear how these conclusions had been reached by the Agency, nor how they had assessed Philip's reasons for wanting to live alone based on his personal dignity and the level of care he required. Instead, the decision letter concluded with an invitation to Philip's family to provide yet more reports and evidence from allied health professionals should he wish to request a change to his SDA funding in the future. Again, no attempt was made by the NDIA to speak to Philip, Laura, Stephen, or any of the treating professionals involved; or to explain in advance what further information they might need.

Philip and his family lodged an application with the AAT on 20 April 2022. They did not have legal representation. Shortly after applying, they received the T-documents from the NDIA; these omitted significant documents, including any mention of the way the Agency's SDA Panel had considered and made recommendations on Philip's case, but without legal advice Philip and his team had no way of knowing about this or challenging the omissions. The Agency's lawyers

requested further evidence, and asked Phillip to explain why his disabilities meant he needed to live alone rather than in shared SDA. The Agency also suggested Philip might be able to contribute his own money to pay for the type of SDA he wanted. These requests were frustrating for Philip and Laura, but also intimidating as they had come from a team of lawyers acting for the NDIA. The NDIA made no offers to resolve proceedings at this stage.

In June 2022, PIAC began acting for Philip. On 1 July 2022, PIAC wrote to the NDIA's lawyers explaining we were representing Philip, and noting we intended to request a 'fast-track' hearing of the matter. Shortly after, the matter settled and Philip received the funding to live alone in SDA.

In the end, Philip got the funding he had sought in August 2022 – more than 12 months after he had begun the process. Philip and Laura both felt exhausted and stressed; and were upset that Philip had been unable to live comfortably and spend quality time with his family for over a year of his limited remaining lifespan.