Submission to Senate Inquiry: The impact of changes to service delivery models on the administration and running of Government programs

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Summary

This submission focuses on the legal risks which have accompanied outsourcing/service delivery models under the Online Compliance Initiative and the NDIS. The author expresses no political views on the issue of outsourcing.

Robodebt is a discredited programme which **strips out traditional safeguards** of information gathering and qualified judgment based on assembled evidence.[1] It relies upon **the legally flawed assumption** that a debt may be raised through the bald, premature resort to averaged matched data. This data will not be probative for vast numbers of people whose earnings and employers vary across the year. It is not designed to reflect variations that go into determining someone's *earned, fortnightly* income. From this crude assumption has grown the perception that ATO data can support debt finalisations being reflexively issued by labour hire staff. These staff possess limited delegations[2] and appear heavily reliant on poor quality policy guidance. Calling for the Online Compliance Initiative to end is about standing up for the things that have always united us no matter what our background: measured judgments on the best possible evidence, certainty, being open about government decisions.

The current system is shaped by slicing up statutory decision-making processes into purported "simple" phases accompanied by complex escalation or referral procedures.[3] The robodebt system 'effectively shift[s] complex fact finding and data entry functions from the department to the individual'[4]. Unfortunately, this programme has misconstrued the nature of the decision-maker's task at law. By reversing the onus, it obscures the Department's legal responsibility to recognise and resolve the uncertainties a robodebt file can throw up prior to debt raising.[5] As a result the Department cannot legally justify the current structure of its programme and the programme of outsourcing tied to that structure.

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[1] This simply does not reflect the original intention of the legislation, see Commonwealth Parliamentary Debates, Senate 20 September 1999 (Senator Ian Campbell), which refers to how the legislation is underpinned by a logical structure and flow, and reflects best and desired practice in public administration.

[2] They cannot waive a debt, inbuilding a delay in processing cases relating to vulnerability and departmental error. The relevant delegations were disclosed the Community Affairs committee through *Question on Notice HS 36 (SQ18-000110)*, Budget Estimates, 31st May 2018. I note that the delegation includes the power to review the debt, likely reflecting contractor's role in reassessment and checking process. Contractors clearly have a clearing house role, which complicates the idea their work is "simple".

[3] When questioned regarding the type of work it outsources Department representatives have insisted that it will outsource work only where it is "simple", will shortly disappear or is conducted on a short-term project basis.

[4] Office of the Ombudsman, First Report, page 23.

[5] The bald reality of the system is well communicated by page 17 of the BOOST document obtained by ABC 7.30. The decision-maker is told that **any one of** bank statements, payslips or ATO data suffices to issue a debt. The 'claimable' time allocated for investigating the data match and the decision is minimal.

Core recommendations:

Recommendation 1. The Robodebt programme be discontinued, and the process of debt raising conducted in a manner which reflects legal requirements.

Recommendation 2: The Committee should ensure that complex statutory decision-making is only vested in secure, experienced staff and is not inappropriately fragmented through inflexible evidential onus, complex delegations, workflow divisions and opaque escalation procedures.

Recommendation 3: The Committee should ensure greater transparency in the training and structuring of frontline decision-making, by mandating that all operational information and training documents are published promptly without the need for freedom of information requests.

(i) Accuracy of decisions under the robodebt programme

The author notes that the Committee can expect to receive a semantic rejoinder from the Department addressing the use of the terms "automated" and "without human oversight" in its terms of reference.[6]

The legal arguments against robodebt are well established, drawing from the specific statutory provisions and the application of standard administrative law principles. The relevant legislative provisions s 1222A and s1223(1) of the *Social Security Act 1991* (Cth) are structured to position the Commonwealth as the entity which asserts and proves the existence of the debt. This structure sits on top of the long-established principle that in administrative decisions, **"the person who asserts must prove".**[7] This principle underlines that any uncertainty in the calculation of debt amounts is to be resolved against the Department.

The Department asserts that "every decision is based on the best information available". This obscures other vital qualities decisions must have at law: logic and sensitivity to circumstances. The Department has no right to push past known variables in files. The statute does not permit uncertainty to be answered by disregard. The task of persuasion is borne by the party seeking to upset the previously existing state of affairs, and this task requires adequate supporting materials.[8]

The broad statement that "there is no duty to inquire in administrative law" is not a licence to deny the existence or import of available and obvious missing information. It does not, in any

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[6] Little of substance is furthered by debating the department's press release terminology. The author has previously responded to their laboured semantic framing in pieces such as: https://law.blogs.latrobe.edu.au/2019/07/30/dial-1800-reverse-onus-coming-to-grips-with-robodebt/ and https://law.blogs.latrobe.edu.au/2017/06/21/correcting-record-rebutting-five-flawed-defences-robodebt-programme/

[7] *Re Martin and Commonwealth* (1983) 5 ALD 277 at 287. An everyday principle applied by the Tribunal. The untidy term 'onus' is only used to promote public understanding. *McDonald* 1 FCR 354 Woodward J at 357-358 is of course the leading case on how to handle uncertainty. See Peter Hanks, 'Administrative Law and Welfare Rights: The 40-year story from Green v Daniels to "robot debt recovery"' (2017) 89 *AIAL Forum* 1. The Committee will also be aware of Professor Terry Carney's writings on these issues.

[8] See *Power v Comcare* [2015] FCA 1502. (Katzmann J). There is a long history of courts warning that administrators must not think that where something central is uncertain, they can nevertheless proceed to initiate administrative actions against people: ***Telstra** Corporation Ltd v **Arden*** [1994] FCA 524, *Commonwealth v Borg* [1991] FCA 710, *Reitano v Commonwealth of Australia* (unreported, Evatt, Northrop and Burchett JJ, 13 December 1985). The High Court rulings of *Phillips* (1964) 110 CLR 347 and *The Commonwealth v Muratore* (1978) 141 CLR 296 are often not foregrounded but reflect the principle in operation.

way, function to modify the **standard of certainty** required to raise the debt under the relevant statute. Simple examples include calling a phone number on file or accepting that averaging relatively low amounts cannot be a logically probative decision given the pattern of people's past reporting. The Department's continued descriptions of averaging as "a long established" technique have never progressed beyond broad, de-contextualised assertion. The isolated tribunal decisions to which these statements seem to allude do not provide sufficient ground for the robodebt system.[9]

The Committee should, in particular, **seek detail on the visible pattern of variation or settlement** following legal appeals taken against the department. Why have cases been lost at the AAT1 level? Why were they settled at AAT2? How has department policy evolved to ensure compliance with tribunal rulings? The Social Security (Administration) Act, section 8(f) emphasises "the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal".[10] The Department should provide evidence which identifies the grounds whereby decisions were set aside and remitted, and how it intends to harmonise its policy settings with those findings. On the final day of the first Senate inquiry, an AAT decision which directly contested Centrelink's approach to the legislation, setting aside a debt with a direction to obtain employer records, was put to departmental representatives. With respect, I believe it is important to return to that part of the transcript and secure a more detailed response from the Department.[11]

These questions have never gone away and will not go away. The questions will be put in every available context until they are answered. The principled action is for the Department to appeal any tribunal decisions which have directly contested its statutory interpretation. Given the prevailing failure to justify its structure, the programme should be discontinued.

Recommendations:

- **The Department discontinue its robodebt approach, specifically disavowing its asserted right to "average" ATO data in order to populate its debt decisions.**
- **Prior to a debt being raised department make efforts to gather accurate information from all sources evident from its record, and it proactively confirms the existence all relevant evidence prior to any debt being raised.**
- **Experienced staff immediately review all identifiable instances where debts were populated using the apportionment (averaging) method.**
- **The Department should be required to outline the steps it is taking to have due regard to tribunal decisions which reject its approaches in line with section 8 of the Social Security Administration Act.**

[9] In the circumstances it is not necessary for applicants to deploy other background pleadings available to them, such as the application of the *Briginshaw v Briginshaw* standard.
[10] Given the centrality of this legislative principle, Committee should not accept claims answering these questions constitute an unreasonable diversion of resources. Principle (d) also mandates the Secretary to have regard to (d) the importance of the system of review of decisions under the social security law.
[11] Senate Community Affairs, Hearing, Thursday, 18 May 2017, Page 47.

Impact on people

The Department's restrictive approach to decision-makers' roles has driven the decision to use labour hire employees as part of a blended workforce. It is important that the Committee not replicate the errors of past inquiries by focusing on whether the "call to action" given by letters is clearly communicated or whether the underlying calculator is wrongly calibrated.[12] The key question is the Department's responsibility to issue decisions which meet the standard of certainty immanent in the statutory provisions. It possesses the ability to gather information to clarify any obvious, outstanding questions. It must cease asserting the right to apply ATO data where this does not exist. Such statements constitute an **illegitimate behavioural shove of our most vulnerable people.**

The putative right to average is the cork in the bottle of this mass system. It places a moving treadmill, an imbalance of power underneath all the interactions. It asserts that any silence or inaction on the part of the individual can be resolved against the person. That claim is fundamental to all interactions with the department and the desperation many people feel. Noting the existence of a phoneline or adopting plain language does not change the fundamental legal contest and administrative torpor characterising the Department's actions.

Robodebt is a debate about a particular *form* of debt calculation. A form which a majority of the Australian public has now clearly rejected.[13] The department is obtaining an **unfair forensic advantage** over vulnerable people who may be unaware of details like the consequences of averaging or that the initial letters do not generally constitute formal statutory notices. Even on the department's own terms, the programme represents an access to justice crisis. This is seen by the low levels of people taking up their appeal rights.[14] The department has not modelled how many Australians keep 7 year old payslips in their shoebox. Rather, the costings for this project reflect baked in behavioural assumptions about how many people will secure information, accept or appeal the debt. The projections across the forward estimates have continually varied, with costs increasing as legal advocacy secures changes or with media outreach regarding people's entitlements.

A person's outcome under this system is very often shaped by their knowledge, resources and choices. Consider for instance how the Department is willing to permit people to "accept" ATO data.[15] How we still have no answer on how many debts involve the use the averaging method? How we don't know exactly how many people just accepted the debt?[16] The author has been saddened to continually meet people who, exhausted, have given up fighting because they

[12] Equally finessing the data match will not automatically deliver sound decisions, the annual ATO data is just not constructed to deliver the actual pattern of fortnightly earning.

[13] Support for abolishing robodebt exists across all demographics: https://www.essentialvision.com.au/wp-content/uploads/2019/08/Essential-Report-050819-V2-1.pdf

[14] The Ombudsman's second report reported on the concerningly low numbers of people who reviewed their 10% penalties even after being specifically written to about their review rights. 707 people appealed out 114,000 letter recipients. Last year's disclosure that one third of debts were with debt collectors is a worrying sign of disengagement or even lack of awareness of the debt.

[15] This idea of statutory decision by "election" is so embedded it is the leading example given to staff in the BOOST document is of a person calling up to "accept" the ATO data. The first report of the ombudsman indicated a substantial proportion of people did this for the 2015 pilot also.

[16] The author notes that over 150,000 debts have been completely paid back without formal ARO review, response to QonN from Senator Siewert, Additional Estimates 2018-2019, HS 26 (SQ19-000039).

"don't have the payslips". Or people who have no idea of the complications that can arise from using bank statements to calculate the pattern of a person's gross fortnightly **earned** income. The Department's unjustified decision to block a freedom of information request for the operational blueprint for its programme is unacceptable in this context.[17]

The Department has also failed to take intermediate actions which might moderate the impact of reversing the onus for key groups of people. The Department accepted the 2017 recommendation of the Ombudsman that it publish a policy on when it will ***on an exceptional basis*** secure evidence on behalf of people. I would like the Committee to ask the Department (and if necessary the Department of Social Services) to account for why:

- It took around 18 months to publish the wording of an existing internal policy on the use of section 192 in the Guide on Social Security Law.
- It did not properly integrate this policy into core training and frontline documents until challenged by the Ombudsman.[18] It still does not feature prominently in its communications.
- The policy seems to have been used 570 times (Ombudsman, second report) when the system at the time was around half a million debts.[19]
- the policy is so poorly drafted as to be merely facilitative of a structureless "mercy" discretion. In its drafting, it makes a person's vulnerabilities a "relevant factor" to an exceptional decision to go get the evidence necessary to establish a debt.[20]

The stories on ABC 7.30 or other media outlets are not outliers or oversights, they are the predictable outcome of a deliberately opaque, reactive only approach to information gathering and "assistance".

Recommendation:

- **The Department should amend its exception only information gathering policy into a direct front up commitment to secure accruate information before raising debts.**
- **The committee should secure data on whether information is more likely to be gathered following appeals (across the levels) or other legal, media or political pressure. It should demand consistency of practice.**

[17] The total refusal is available here: https://www.righttoknow.org.au/request/eic_online_compliance_interventi#incoming-14718 The documents should be released with some limited redactions. The fact the recent Ombudsman follow up report links to operational blueprint…on the department's intranet encapsulates the limited flow of information about the initiative.

[18] Ombudsman second report, para 2.56.

[19] As at 20 December 2018, Ombudsman, second report, para 2.56. The author thought this number might be a typo or in need of clarification on first reading?

[20] Guide to Social Security Law, 6.3.9 *Confirming Employment Income*. The ambit grab in this guideline is clearly the lead in sentence:
"When assessing whether exceptional circumstances exist, DHS should review each case on its own merits, taking the **following factors** into consideration:"

The integrity of robodebt and debt collection practices

The deployment of contracted labour in decision-making roles should be carefully thought through. The job security and working conditions enjoyed by the modern APS reflect bipartisan public policy choices. A public servant's role as a decision-maker differs in some important ways from a frontline commercial employee. The law requires that, while due regard be paid to policy designed by Ministers or department heads, a decision-maker must be free to confidently deploy their independent judgment. It is the duty of the frontline decision-maker to engage with the individual's circumstances, and disapply policy where statutory values are not furthered by it.

This requires human qualities of courage and principle, but also the practical protection of job security and experience in how APS values counterbalance corporate rhetoric. While APS leaders often extoll frank and fearless quality of policy advice, there has been comparatively little discussion of the frank and fearless frontline *decision*. Robodebt is a dangerous privileging of abstract system talk, business processes, and behavioural design over concrete files, evidence and decisions.

The media coverage of the BOOST programme, and the working environment these corporate techniques generate, should concern all Australians. It requires serious investigation.

In relation to debt collection, the Committee should pay particular attention to the issue of **garnishing**. Garnishing attracts specific criteria, which heavily emphasise properly characterising the individual's communications with the department. The department's processes for this subtle and discrete assessment must be evaluated.

Recommendations:

All operational informational (including training materials) issued to frontline staff be immediately published on the DHS website. This should include the core operational blueprints for CUPI and EIC processes.[21]

The Committee establish a data publication scheme for the online compliance initiative, where monthly statistics are published on the DHS website. This should include outcomes for ARO and AAT. It should include the number of debts which are populated using ATO data alone.

The committee should secure all the quarterly audits undertaken of contracted debt collectors by DHS. It should consider closely evidence relating to commissions, communication tactics, high repayment arrangements and the failure to freeze debts for review.

The review and appeals process for debt notices

In relation to the current controversy, I would highlight the **significant scaling up of debt raising activity** which occurred from **May 2018**. It was only at this point that the system reached full maturity, with the unfreezing of the **due date processing pool**.

[21] Freedom of information exemptions may ground some minimal redaction of how negotiations for debt repayment arrangements are undertaken.

The staged release of **this pool of legally risky debts**[22] has, alongside the interception of tax refunds, driven recent media case studies and litigation. The existence of this pool and the Department's staged approach to the robodebt rollout complicates statistical analysis of appeal rates.[23] As the ombudsman noted (at footnote 28 of its second report):

> "Until early 2018, the department focussed on actioning interventions where the customer contacted the department, as part of a **phased, incremental approach.** From February 2018, the department began contacting the due date processing pool"[24]

The Committee should examine why the decision was taken to stage the release of debt files in this way. 113,000 debts have partially waived, reduced or set aside since the launch of this programme.[25] Its staged nature and the time lags involved in reassessment means it must be subjected to continual interrogation.

I note the Department has recently made the claim that the Ombudsman has "exhaustively reviewed" this programme.[26] In response I would endorse the observations of Peter Hanks QC regarding the nature and limitations of the Ombudsman's initial inquiries:

> "This report does not comment 'on the policy rationale behind the OCI process', the report says nothing about the legislative context in which the OCI operates…it does not ask whether DHS *can* shift the function of complex fact-finding to the individual and require the individual to disprove the existence of a debt."[27]

The distinct focus of the Ombudsman was also underlined by how the Office responded when serious legal issues were raised regarding the application of 10% penalties on debts.[28] The Office found that the legal questions raised "can only be answered by a Court".[29] The Ombudsman's recent follow up report was necessarily limited to overseeing the recommendations which flowed from this specific approach.

In defending its system, the Department will state that a debt can be reassessed at any time. It will continually use phrases such as "it is open to the person" or "we look for the person to engage…". This language marks a shift off responsibility for their administrative actions. The entity which asserts must prove. When a debt is raised its original state can and must be questioned. While it may be efficient for people to be nudged into reassessments and the lengthy evidence hunt they entail, they must be affirmatively advised that they have a right to challenge the decision directly.

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[22] The people in this pool seemed to be those who had not completed the review, may not know of the existence of the debt due to dated contact details and were thus more prone to be averaged.
[23] The Ombudsman itself noted an uptick in complaints to it at the end of their follow up investigation period.
[24] Emphasis added.
[25] Calculated from the latest figures provided to Senator Patrick in response to question HS 7 (SQ19-000113), 2019-20 Budget estimates
[26] http://mediahub.humanservices.gov.au/ontherecord/17-august-2019-correction-reporting-on-online-compliance/.
[27] Hanks, above n 7 at page 9.
[28] The extent of this legal issue was such that the Department hurriedly recalled tens of thousands debts in the middle of the first senate inquiry in order to send a specific form letter to affected individuals.
[29] Paragraph 2.40 of the first report. This perspective was puzzling given the Office can refer unresolved or contested questions of law for resolution under its statute.

The Committee should also investigate the **serious issues** raised by recent FOI Commissioner decisions.[30] These highlight the Department's oppositional handling of freedom of information requests. For many affected by robodebt, **FOI is a key port of call** to obtain necessary records of interactions with the Department. The Department's unacceptable failure to meet legislative standards in claiming practical refusal grounds must be addressed.

DHS has developed a predictive tool in an effort to strip out some of its more ludicrously flawed identity/small amount data matches.[31] This still won't answer the "earned income" question or prevent crude assumptions about the number of jobs a person held at once. The emphasis the Department places on these technological innovations underlines the danger that it is becoming **an organisation with its eyes in its hands**: it only sees and values what it touches. These measures distract from the real practical reform that can deliver certainty: securing employer information which addresses the pattern of fortnightly earning and allowances. Robodebt remains a tale of a robot calculator being fed a starvation diet.

The current complicated scheme of floor walkers, subject matter experts, authorised review officers and AAT teams is sending debt files pinballing across the department as blunt assumptions unspool. The timeline for a reassessment is not reported on, and people report significant time lags. The Committee **should track the pressure building around these roles**, securing data on workload and outcomes at each step.

In terms of debt collection, the requirement that a person request a recovery hold alongside a review, creates a last mile problem resulting in the continual freezing and unfreezing of debt repayments.

The author is strongly of view that the current approach of decisions by default, administration to escalation, resolution through intercession is neither administratively sensible nor in the public interest.

Recommendation:

The Department immediately reform its unacceptable approach to the practical refusal exemption for FOI requests.

All debts currently being reassessed or reviewed should have a recovery hold placed on them absent a specific request from a person to begin repayment.

The Committee secure all data on the due date processing pool, its extent, the outcomes of clarifications and appeal rate.

The Committee recommend that the time it takes to reassess debt from initial request to outcome is recorded.

The committee should investigate whether the experience levels and position qualifications for ARO or subject matter expert positions have changed since the system was rolled out.

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[30] See for instance, *'QG' and Department of Human Services (Freedom of information)* [2019] AICmr 23 (5 June 2019) and *'QI' and Department of Human Services (Freedom of information)* [2019] AICmr 27 (5 June 2019).
[31] This tool is reported on by the Ombudsman in the second report. It seems to be driven by the Department's own data set and related standard of proof.

Outsourcing and the National Disability Insurance Agency

(i) the impact outsourcing has on service provision

Within the **NDIS**, the tribunal case of Hughes represents a troubling example of how the role of contractors or consultants can insert themselves into statutory decision-making processes, despite not possessing the relevant delegation. Unless there is improved transparency in internal policy documents and staff guidance and stable, experienced staffing, there is a danger of inconsistent administration and the continual triaging of initial decisions upon appeal.

Recommendation:

The Committee should fully map the use of contracted or outsourced staff within the NDIA and ensure their delegations, roles and responsibilities are fully published. NDIS participants are entitled to know the employment level and powers of people they are interacting with.

I would like to draw the committee's attention to the tribunal matter of *Hughes and National Disability Insurance Agency***.** This decision raises issues regarding the management of delegations and the role of non-Agency staff in decision-making.

Hughes and National Disability Insurance Agency **[2018] AATA 4572 (10 December 2018).**

This matter concerned an internal review of a refusal to approve specialist disability accommodation for an NDIS participant. The applicant's nominee received an email from an address ending with "@ndis.gov.au" and bearing the signature Ms 'D', Planner – Service Delivery (Supported Accommodation), National Disability Insurance. This provided them 'with advice from our SDA Advisor' in relation to the applicant's eligibility for SDA. The email stated that Mr Hughes was not eligible for SDA. The applicant attempted to review this "decision".

At the tribunal hearing, the Agency attempted to argue that the email sent by Ms D was not an internal review decision because Ms 'D' did not have delegated authority under paragraph 100(5)(c) of the NDIS Act to make an internal review decision.[1] On the day of the tribunal's interlocutory hearing on jurisdiction, the Agency supplied what it viewed as the formal "internal review decision' to the participant. "Confusingly" (tribunal's words) this document incorrectly viewed Ms D's email as the original decision.

Ultimately, the tribunal held that Mr Hughes was entitled to access the tribunal due to the utterly confused nature of the Agency's processes. Senior Member Kelly held that the contractor had made a "purported decision", and the tribunal had the right to intervene to set the defective process right:

"…**I accept that Ms 'D' is not an employee of the NDIA or an agency officer as described in the NDIS Act. However, I find that this fact is not evident from the information contained in the documents before the Tribunal set out in paragraph 13 above. Indeed, I am satisfied that no person of reasonable mind could read the information in these documents and conclude that Ms 'D' is not an employee of the NDIA**; the email address used in the email dated 7 September 2018 is 'D@ndis.gov.au', the email signature block describes an employment position at the NDIA, and the email refers to 'our SDA advisor' (with 'our' presumably referring to the Agency)." (emphasis added)

Recommendation: The Committee should evaluate the extent and administration of the evidential onus put on participants to validate or support their access or planning requests

The Committee is well positioned to provide us with the first consolidated analysis of the roles assigned to non-Agency staff. I would surmise that any contractors are most likely to be used in the onboarding of access requests, which are peaking at this point in the scheme's rollout. It is important to note that the process of validating an application form can involve complexities. This was highlighted in the recent case of *FSQQ*, where the tribunal underlined the need for flexibility when demanding individuals supply all relevant information to the Agency prior to having their access request processed.[32] It is important that individuals are supported to become prospective participants under the Act. There is evidence that the scheme has been a frustrating paper chase for many. The committee should evaluate how many people have withdrawn and how long it takes to progress from initial approach to valid request. The committee should investigate the evidence burdens that are placed on people, and whether frontline staff (possibly including contractors) are showing sufficient flexibility in evaluating the access or funding criteria.

Recommendation: The NDIA publish all its frontline operational information. This includes reference packages, budget tools, quick reference guides and task cards. Call scripts and resources for the NCC line should also be proactively released.

The author notes a number of occasions where the Agency has announced an initiative or adverted to the existence of internal staff guidance and not published this operational information.

There is an abiding tension between line-management and standardisation and the need for individualised decision-making. This tension is best managed by publishing internal-facing documentation and data rather than through episodically tabled, inadequately framed actuarial evidence or policy frameworks in tribunal matters.

All sides of politics have recognised the need for effective, clear and accessible communications on the phonelines, and it is worth recalling the NDIS standing committee's recent recommendation:

> "The committee is concerned that inconsistent information continues to be provided to participants by NDIA staff, planners and NCC staff. As recommended by the committee on many occasions, the NDIA should develop additional guidance and training materials to ensure its staff and contractors provide clear and consistent information to participants, their families and carers"

Onboarded contractors or frontline staff tend to be heavily reliant on internal guidance, process maps and escalation procedures. It is vital that these documents are made available to the participants, advocates and the broader public so that they know where they stand and can demand quality treatment.

[32] *FSQQ and National Disability Insurance Agency* [2019] AATA 186 (18 February 2019)

Recommendation: The Agency ensure that where outsourced expertise is deployed, the relevant outputs reflect and are tested against the relevant statutory criteria they seek to inform.

The Agency needs to be supported to develop greater internal legal and assessment capacity. The rollout of the NDIS has seen heavy reliance on insourced expert reports and legal representation in tribunal matters. Commissioned reports are secured late in the day, resulting in distress for applicants.[33] There are also issues where medical experts are commissioned to inform Agency decisions, but their perspectives are not properly integrated with the statutory criteria.[34] For instance, the Agency failed to properly account for the relevant statutory test for "permanence" in its approach fibromyalgia, with the recent tribunal matter of *McFarlane v NDIA* overturning its overly restrictive approach to the condition.[35]

The Agency currently has a range of projects underway where it is attempting to generate assessment tools to be deployed in its processes. Where such a task is outsourced, it is vital that the relevant researchers are clearly briefed on the nature and flexibility of the statutory test for "substantially reduced" capacity and the nature of the life domains in section 24. Otherwise the vital loop between medical expertise and the legal requirements will not be closed. We have already had a number of concerning trends in the application of overly rigid medical assessments to NDIS applicants.

The author believes that the NDIA should be supported to grow its legal team. It appears heavily reliant on outsourced legal representation in the tribunal. There is a pattern of reactive triage as appeals progress rather than building a good solid culture of internal criticism and review within the agency.

[33] None of the author's comments reflect on the hardworking experts, who are often asked to provide commentary late in the day. See for instance *Ditchfield v National Disability Insurance Agency* [2019] AATA 2121 (23 July 2019), paragraph 99.
[34] *McFarlane and National Disability Insurance Agency* [2018] AATA 4727 (17 December 2018)
[35] This comment is addressed solely to the Agency, not the relevant expert report.