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NDIS Insights 2023-24



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This report has been prepared by the Public Interest Advocacy Centre (PIAC) and Dr Darren O'Donovan at La Trobe University.

We acknowledge and pay our respects to the Gadigal as the Traditional Owners of the land on which our office stands. We recognise that sovereignty over Gadigal land was never ceded and stand with First Nations people in their struggle for justice.

The artworks in this report have been licensed from Studio A, a supported studio based in Sydney, Australia that tackles the barriers artists with intellectual disability face in accessing conventional education, professional development pathways and opportunities needed to be successful and renowned visual artists. Studio A paves professional pathways for such artists so that they can achieve their artistic and economic aspirations.

Cover artwork by Lisa Tindall, Blue Cockatoo, 2019. **studioA**



INTRODUCTION

2023 was a big year for the National Disability Insurance Scheme ('NDIS').

We saw the much-anticipated final reports of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission'), and the Independent Review into the NDIS ('NDIS Review'), which collectively made 248 recommendations.

These developments were accompanied by a loud, persistent and largely negative media narrative and political debate about the NDIS, with a focus on the cost, integrity and sustainability of the Scheme.

Substantial reform in 2023 was, however, limited.

2024 may bring more significant changes.

Commonwealth, state and territory governments will respond to the collective recommendations on the NDIS and outline if and how they will implement reforms. In addition, the Administrative Appeals Tribunal ('AAT') is expected to be replaced by the Administrative Review Tribunal ('ART'), which will look to improve the way NDIS decisions are made and reviewed.

Here are our insights on what this all means for NDIS participants and the disability organisations that represent them. ✨

WHAT HAPPENED IN 2023?

Over the past 12 months, major developments included:

- the **Disability Royal Commission** and the **NDIS Review** each released their final reports;
- the **NDIS Financial Sustainability Framework** set an annual NDIS costs growth target of 8%, which it aims to meet by 1 July 2026;
- the **Australian Government committed to investigating** and preventing fraud and price gouging of goods and services within the NDIS;
- the National Disability Insurance Agency ('NDIA') Independent Expert Review ('IER') program pilot came to an end, and an **evaluation of the pilot** was released;
- the **NDIA introduced alternative dispute resolution initiatives** to reduce the backlog of NDIA appeals at the Administrative Appeals Tribunal ('AAT'), including the Early Resolution team;
- the Australian Parliament's Joint Standing Committee on the NDIS released its **final report on the Culture and Capability of the NDIA**;
- the **Administrative Review Tribunal Bill 2023 (Cth)** ('ART Bill 2023') was introduced to Parliament – once passed into law, it will establish the Administrative Review Tribunal to replace the AAT; and
- the **2022/23 NDIS Annual Financial Sustainability Report** ('AFSR') was released.

Many of these developments are part of larger reform processes that involve further changes over the coming months and years. ✨



Artwork by Catherine McGuiness, Feather Flower Mandala, 2020. **studioA**

NDIS REVIEW: TEN TAKEAWAYS



Everyone should be able to choose where they live and who they live with, and any NDIS funding approach must enable this choice and control.

The NDIS Review, commissioned by the Australian Government, published its **Working together to deliver the NDIS** Final Report on 7 December 2023.

The Review makes 26 recommendations with 139 supporting actions, to provide 'a blueprint to renew the promise of the NDIS'. Commonwealth, state and territory governments are yet to confirm if and how they will implement these recommendations.

Our 10 key takeaways from the Review's recommendations are:

1. The NDIS must be supported by inclusive and accessible mainstream services

The NDIS was designed to operate as one part of a connected ecosystem of supports available to people with disability. However, supports from mainstream services, including health, education, housing and transport, have been inconsistent and underfunded. As a result, the NDIS has become the dominant source of support, and was described in the Final Report as an 'oasis in the desert'.

The Review warns the NDIS cannot provide a balanced and sustainable disability support ecosystem on its own. All mainstream government services must be inclusive and accessible to better serve people with disability.

2. Commonwealth, state and territory governments must work together to provide foundational supports

The Review also advises Commonwealth, state and territory governments to work together to provide baseline 'foundational supports' to people with disability. These 'foundational supports' will be provided outside individualised NDIS budgets and include:

- **general foundational supports**, eg information and advice, capacity-building for individuals and families, peer support, self-advocacy, and disability employment supports; and
- **targeted foundational supports**, eg home and community supports, aids and equipment, early childhood supports, psychosocial supports, and transition supports for young people. These would be for people with lower-level support needs who are not eligible for an individualised NDIS budget.

3. Home and living supports could get a shakeup

The Review recommends significant changes for participants accessing home and living supports, particularly those requiring 24/7 living supports. Funding for support workers would be allocated with an average ratio of one support worker to three participants (with some exceptions, including where those arrangements would be risky, or for participants with more complex needs). The Review says this 1:3 ratio approach would not necessarily result in people having to share housing, but should encourage innovative and efficient housing solutions.

However, it is not yet clear how this would work in practice. We suggest the community should closely monitor any implementation of this recommendation. Everyone should be able to choose where they live and who they live with, and any NDIS funding approach must enable this choice and control.

4. Enrolment and registration of providers could become mandatory

The Review recommends making enrolment and registration mandatory for all NDIS providers, with four levels of regulation based on the type of service being provided and the risks involved. The Review says this is important to prevent harm to participants.

There are different views about this within the disability community. Giving people choice and control over their own supports and providers is a central principle of the NDIS. Some people are concerned that increased regulation would give participants less choice.

On 12 February 2024, the **Government announced** a new NDIS Provider and Worker Registration Taskforce, which will work with people with disability to recommend a new registration system that can lead to better outcomes for the NDIS, 'while, crucially, maintaining choice and control for participants - as recommended by the NDIS Review'.

We recommend that any changes to enrolment and registration of providers are co-designed and tested with the disability community, to ensure they strike the right balance between protecting participants and letting them have choice and control.

5. There could be a new approach to decisions about NDIS access

The Review recommends major changes to simplify decision-making about who gets access to the NDIS.

- **Return focus to a person's 'functional impairment'** (how disability affects their daily life), rather than their medical diagnosis. This should enable multiple disabilities to be considered with a whole-of-person approach, and end the current inappropriate focus on a person's 'primary' and 'secondary' disability.
- **End use of 'access lists'** (ie Lists A and B). Currently, 'access lists' give people with certain conditions automatic access to the NDIS, while others must go through a complex case-by-case process to apply for access. The Review proposes designing a single, fairer and simpler process to access the NDIS.

The Review also recommends new approaches to accessing the NDIS for particular groups.

- **People with psychosocial disability:** most new participants with psychosocial disability would enter a new specialist early intervention pathway and stay in it for up to three years. Participants requiring lifetime support would transition to the permanent disability pathway under the NDIS.
- **Children with high support needs:** all children under the age of 9 would enter the NDIS through the early intervention pathway. Children requiring lifelong support needs would transition to the permanent disability pathway.

6. Planning and budget setting should be based on need, not impairment

With the goal of making the NDIS simpler and fairer, the Review recommends changes to planning and budget-setting. It proposes budgets be based primarily on support needs and intensity, rather than functional impairments.

A new 'needs assessment' process would determine an overall 'reasonable and necessary' budget for each participant. This budget would be set at a whole-of-person level that evaluates a participant's overall support needs, rather than line-by-line consideration of individual items. After the needs assessment, the total cost of the recommended supports would be translated into a budget for participants to spend flexibly.

Participants would receive a draft budget before it is set so they can discuss it with the NDIA and raise objections if needed. If additional professional reports are necessary to complete a 'needs assessment', the Review recommends the NDIA pay for these reports.

The Review also says more of the NDIA's processes and requirements should be made clear in laws and not left as informal policies. We support this recommendation to improve transparency and consistency in decision-making, and overall accountability of the NDIA.

7. Specific groups of people with disability need specific supports

The Review recognises First Nations people, people living in regional, rural and remote locations, and LGBTIQ+SB (Lesbian, Gay, Bisexual, Intersex, Queer, Asexual, Sistergirl and Brotherboy) communities can experience multiple layers of disadvantage. It therefore makes recommendations aimed at creating a more inclusive and accessible society.

The Review found a lack of culturally safe services for First Nations people with disability and recommends alternative commissioning approaches to give First Nations communities more choice and control over the disability services available to them. The Review also emphasises the importance of involving First Nations communities in decision-making, including about implementing its recommendations.

The Review recognises people in remote communities need easier access to supports within their community, delivered by people who are part of their community.

For LGBTIQ+SB people with disability, the Review says governments should fund systemic advocacy under the Disability Representative Organisation program, to ensure representations of this community are equal, inclusive and safe.

8. Governments should do more to ensure availability of providers

The Review recognises it has been difficult for some participants to access suitable providers of supports they need because of limited availability. The Review says governments should do more to ensure there are enough providers to meet the needs of people with disability, including by actively monitoring the market to quickly identify when people have issues accessing supports.



The Review's vision for the NDIS also relies on commitment from and collaboration between all levels of government, which has often been absent in the past.

The Review also recommends governments provide tools to help participants. For example, 'provider panels' of providers delivering certain supports in specified locations could be set up to ensure participants have access to, and choice and control over, supports where competition between service providers is limited or not possible.

9. There is a five-year transition plan

The Review's recommendations are intended to be implemented over five-years. Some recommendations should be prioritised (eg foundational supports), while more complex recommendations will involve a staged transition approach (eg a new regulatory model for providers). The report acknowledges government will need time to get the proposed changes right, and this will require consultation, co-design and testing – which must be done with the disability community.

10. Implementing the Review's recommendations requires co-design and government collaboration

The Review recognises that best practice implementation of the recommendations must involve genuine co-design. People with disability and their representatives must be included at all stages of the process. Culturally safe and tailored approaches designed in partnership with First Nations and culturally diverse communities must be adopted.

The Review's vision for the NDIS also relies on commitment from and collaboration between all levels of government, which has often been absent in the past. State, territory and federal leaders must each decide how to best implement the Review's recommendations, as well as those made in the Disability Royal Commission's Final Report. ✨

OTHER DEVELOPMENTS



The Joint Standing Committee links many problems with the NDIS to a NDIA culture of cost-cutting and saying ‘no’ to people with disability.

Inquiry into the Capability and Culture of the NDIA

The Australian Parliament’s Joint Standing Committee on the NDIS (‘JSC’) investigated the NDIA’s processes, culture and staffing, and how these impact NDIS participants. In March 2023, the JSC released an interim report because of the urgency of the issues the Government needed to address (most of which were not, however, new).

The JSC links many problems with the NDIS to a NDIA culture of cost-cutting and saying ‘no’ to people with disability. The JSC recommended better training for NDIA staff, an expanded and more stable workforce, and improving the NDIA’s planning and decision-making processes.

In its final report released in November 2023, the JSC made further recommendations to improve the participant experience. One recommendation is that the NDIA considers the totality of a person’s disabilities rather than distinguishing between ‘primary’ and ‘secondary’ disabilities, when making funding decisions. The JSC found this distinction has no legal basis and affects participants negatively.

The JSC’s recommendation to adopt a ‘whole of person’ approach aligns with the recommendation of the NDIS Review (see above) and a series of AAT decisions (see below).

The final report also highlighted the need for increased funding for advocacy groups to support people to navigate the NDIS and AAT.

As the Government is yet to respond, it remains to be seen whether and how any of the JSC’s recommendations will be implemented.

Changes to the administrative review process – ART Bill 2023

The ART Bill 2023 was introduced to Parliament in December 2023. If passed, it will abolish the Administrative Appeals Tribunal and establish the new Administrative Review Tribunal (‘ART’) in its place.

Through the ART Bill 2023, the Government aims to ensure reviews are conducted effectively, efficiently and fairly, to improve the experience of people seeking review of government decisions. One proposal for this is to have some proceedings occur in the absence of the government decision-maker. For example, in an NDIS appeal, if the NDIA did not comply with the ART’s orders, the ART could remove the NDIA from the proceeding. The ART may do this if it thought removing the NDIA could achieve a less formal and adversarial approach to the proceeding.

The ART Bill promotes greater access for people to participate in the ART’s review processes, including for people with disability. The Bill includes a legal definition of ‘accessibility’, to assist the ART to pursue its objective of being ‘accessible’.

The ART Bill 2023 includes several positive changes to improve decision-making by government agencies, including:

- introducing a pathway to escalate systemic issues to a new ‘Guidance and Appeals Panel’; and
- re-establishing the Administrative Review Council to investigate systemic issues in administrative law.

The ART Bill 2023 is currently being considered by the Australian Parliament.

Public debate on the ‘sustainability’ of the NDIS

Public debate concerning the sustainability of the NDIS continued throughout 2023.

In April 2023, the **Government set an annual growth target of 8%** to be reached by 1 July 2026, in an effort to moderate the growing cost of the scheme. At the time, annual growth was 13.8%. The Government said the lower growth rate is expected to reduce spending by \$50 billion over the next decade.

Responding to concerns raised by disability advocates, the Government assured the community that 8% growth is a ‘target’ and not a ‘cap’, and the NDIS will remain demand-driven. **PIAC has warned about the dangers of cost-cutting to the NDIS** under the guise of ‘sustainability’ and will be monitoring any impacts of the target.

In its 2023–24 federal budget, the **Government committed to investing \$732.9 million** over four years on initiatives to support better participant outcomes and the sustainability of the NDIS. The initiatives include refining planning processes, improving access to supports in remote and First Nations communities, and trialling new payment models.

We saw continued discussion about unethical and fraudulent conduct by NDIS providers, including overcharging and underservicing. In its first year of operation, the **Fraud Fusion Taskforce investigated** over \$1 billion of NDIS payments across more than 100 cases.

The Government also announced a targeted crackdown on price gouging by NDIS providers and proposes to introduce laws in 2024 which could see providers fined or banned if caught out.

Alternative dispute resolution initiatives

The **NDIA reports it resolved over 7,000 NDIS cases at the AAT since June 2022** through alternative dispute resolution initiatives which avoid lengthy, stressful and costly hearings. These initiatives included early assessment of new appeals and accelerated reviews of aged appeals, as well as the Independent Expert Review (‘IER’) program trial.

The NDIS released **its evaluation of the IER program in October 2023**. Although the NDIA initially expected the pilot to resolve around 1,000 cases, it ultimately involved only about 150 cases.

Participants and their representatives reported high satisfaction with the IER. Participants found the IER less legalistic and adversarial than the AAT, with a more trauma-informed approach to dispute resolution.

The evaluation also found the IER was a more time- and cost-efficient process than the AAT. Although the IER pilot was limited in its scope and scale, it showed the need for and viability of designing an efficient and participant-centred alternative dispute resolution process. ✨

“PIAC HAS WARNED ABOUT THE DANGERS OF COST-CUTTING TO THE NDIS UNDER THE GUISE OF ‘SUSTAINABILITY’ AND WILL BE MONITORING ANY IMPACTS OF THE TARGET.”

DECISIONS OF THE AAT AND FEDERAL COURT



The AAT cautioned the NDIA not to adopt a narrow approach with an artificial focus on only addressing the person's 'qualifying disability'.

The year's caselaw deals with several issues that will remain relevant to the NDIS, even after the major reforms proposed by the NDIS Review.

Key themes in AAT decisions included the need to recognise the complexity of disability and that the NDIA must provide clear reasons for its decisions. Even though AAT decisions are not legally binding 'precedents', they provide valuable guidance on the correct application of the scheme.

1. Funding supports for participants with multiple impairments

In a series of cases over several years, the AAT has considered how supports should be funded for participants with multiple impairments. In AAT decisions from 2023, three different interpretations have emerged:

1. Participants should only be funded for supports that relate to an impairment that met, or would meet, the NDIS access criteria (interpretation one);
2. Participants should be funded for supports that relate to the disability connected to impairment(s) that met, or would meet the NDIS access criteria (interpretation two); and
3. Participants should be funded for supports that relate to any disability they have (interpretation three).

Most published AAT decisions have rejected interpretation one (being the NDIA's position), noting it fails to account for a 'whole of person' approach and is inconsistent with the NDIS Act.

The AAT adopted interpretation two in several decisions this year. The first was [HRZI and NDIA \[2023\] AATA 481](#), where the AAT said the correct legal test is whether the support relates to a 'qualifying disability', being a disability that relates to an impairment that met, or would meet, the NDIS access criteria. The AAT cautioned the

NDIA not to adopt a narrow approach with an artificial focus on only addressing the person's 'qualifying disability'. This decision was a welcome confirmation that support planning under the NDIS should be individualised and holistic.

The reasoning in *HRZI* was again adopted by the AAT in [ZJSG and NDIA \[2023\] AATA 2784](#). The AAT stressed that NDIS access decisions are separate from planning decisions and involve a distinct set of processes and considerations.

In [Spires and NDIA \[2023\] AATA 1230](#), the AAT went even further than in *HRZI* and adopted interpretation three. The AAT decided a participant could be funded for supports for any disability they have, not just the 'qualifying disability'.

Since these decisions, different AAT members have adopted either interpretation two or three. Despite the growing number of these decisions by the AAT, the NDIA continues to apply interpretation one, only funding supports that relate to an impairment that meets NDIS access criteria.

These disagreements between the NDIA and AAT, and the competing interpretations of different AAT members, means NDIS participants cannot be sure of the supports they can expect to have funded in their plan.

The ART Bill proposes the new ART have mechanisms, including a 'Guidance and Appeals Panel', to settle diverging lines of cases such as this.

Whether the ART ultimately adopts interpretation two or three, the NDIA needs to build a holistic understanding of a person's functioning and not rely on a snapshot of the effects of their 'qualifying disability' and discrete impairments. A broader understanding of a participant's day-to-day life would lead to more effective and appropriate supports being delivered.

2. Reasons for decisions

The need for NDIS planning decisions to be clear and evidence-based was emphasised in the decision of **Sharp and NDIA [2023] AATA 1323**. The applicant had asked the NDIA to recognise and consider her additional disability (ie a disability additional to the impairment for which she was originally granted access to the NDIS) when making her NDIS plan. The NDIA declined to do so. At the AAT, the NDIA argued that its decision about whether to include an additional disability on its file was not a reviewable decision. However, the AAT found that the decision was a necessary part of developing the applicant's plan, and so could be reviewed by the AAT.

The AAT criticised the lack of detail in the NDIA's original decision approving the applicant's statement of participant supports. The AAT noted that, despite the NDIA's legal obligation to explain why it had or had not funded supports, it had not produced any statement of reasons. This meant neither the applicant or AAT could tell which disability or impairment the supports the NDIA had funded were related to. The AAT instead had to consider the NDIA's interaction notes and other records to determine whether the applicant's additional disability had been considered. It stressed, 'providing a participant with a formulaic plan setting out supports that will be provided

or funded does not satisfy the requirement to inform the person of supports that will not be provided or funded and the reasons for this'. The NDIA has since indicated its new computer system will allow for improved recording and communication of reasons, but we have not yet seen how this will happen in practice.

The AAT also ordered the NDIA to produce further reasons for its internal review decision in **BLZQ and NDIA [2023] AATA 2629**, in response to a request by the applicant. The AAT found the reasons the NDIA had provided were incomplete. For example, there was no explanation for how the NDIA arrived at the number of therapy hours it would fund, and why it rejected the applicant's request for more therapy hours.

The AAT also dismissed the NDIA's argument that providing further reasons would be futile, because the AAT would be considering the issue afresh for itself. The AAT said providing proper reasons for decisions is important, to give people affected by government decision-making fairness and transparency. The AAT's decision explains the importance of decision-makers providing proper reasons for their decisions and how this contributes to good governance.



Artwork by Damián Showyin, Watercolour Submarine, 2022. **studio A**

3. Cases concerning housing supports

A key theme in 2023 AAT decisions about funding for housing, including Specialist Disability Accommodation ('SDA'), was the importance of needs-based assessments that consider individual participants' goals and family lives. Several decisions stressed that a well-designed living environment can make a central contribution to overall support.

The decision in [QKNJ and NDIA \[2023\] AATA 794](#) emphasised how accommodation can facilitate an applicant's family to contribute to support. The applicant had only been funded for SDA in an apartment, which would be unsuitable for his family circumstances. Although the NDIA agreed a house would be more appropriate, it argued its standardised SDA Price Guide did not allow it to provide the needed funding. The AAT was critical of the NDIA's approach, stressing the planning process should have started with the 'applicant's requirements as opposed to attempting to fit the applicant's circumstances into some form of standard category'. This meant the NDIA needed to be able to make exceptions and be flexible in its planning processes where that would further the goals of the NDIS and deliver clear benefits. In this case, it was important the applicant's wife was a 'major participant and assistant' in his day-to-day affairs. The AAT found the space available in the applicant's preferred SDA would support her caring role, allowing respite and facilitating her ongoing employment.

A similar focus on specific participant needs and overall goals underpinned the decision in [Woolf and NDIA \[2023\] AATA 1312](#). The applicant successfully argued a one-bedroom, one-resident apartment was a reasonable and necessary support, in contrast to the shared house initially funded by the NDIA. For the previous two years, the applicant had lived in a single occupancy apartment with an established team of seven support workers from 7am to 11 pm. He also worked from home as a lived experience facilitator within the disability sector. The NDIA's initial funding decision would not have allowed these arrangements to continue.

The applicant highlighted his strong desire to live autonomously, and how his current living space facilitated the effective delivery of support to him, his work, and pursuit of his long-term goals to socialise and live autonomously. In response, the NDIA cautioned any expansion in 'living alone' accommodation would increase the cost of the NDIS. The AAT said increased cost was



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an 'unsurprising conclusion' but stressed its focus was upon evaluating the particular case. It found there was 'no cogent evidence' that allowing 'this applicant access to single-resident SDA would have any meaningful impact on the sustainability of the Scheme'. Instead, it accepted the evidence about the applicant's specific circumstances (such as how the applicant could not work from his bedroom because of his need for privacy and circulation space for his wheelchair) and found single-resident SDA would be a more effective and appropriate support for the NDIS to fund for him.

In the case of [Cofre and NDIA \[2023\] AATA 810](#), the AAT decided the NDIA should fund the construction of a self-contained unit on the applicant's parents' property for the applicant to live in. The AAT acknowledged this was an unusual support to fund, and it fell outside the NDIA's guidelines for home modifications. Nonetheless, the AAT was persuaded by the evidence from the applicant, his family, and his care team about all the other housing options they had tried (without success), and the cogent and realistic plan they had for using the unit to support the applicant into the future. In those circumstances, the AAT decided the NDIS should respond flexibly and in an individualised way to the applicant's needs and circumstances.

These decisions are of broad importance as policymakers consider the implementation of recommendations about disability accommodation made by the NDIS Review and the Disability Royal Commission. These decisions contain important observations about autonomy, the interconnection of living arrangements with the delivery of support, and the achievement of economic and social inclusion, which should inform policy discussion. More specifically, these cases provide valuable examples of the importance of stable and appropriate housing to all aspects of life and illustrate why people with disability must not be forced into inappropriate shared living arrangements.

4. Consistency in decision-making

Due to the time required to complete an AAT appeal, a participant's plan will often expire while AAT proceedings are ongoing. To ensure continuity of funding for participants, these matters are sometimes 'remitted' (sent back) to the NDIA, using the process in s 42D of the *Administrative Appeals Tribunal Act 1975* (Cth), so additional funding can be provided. A series of cases considered how the AAT should treat extensions of plan funding provided through this process.

In *Klewer v NDIA [2023] FCA 630*, the Federal Court said this process creates a new NDIS plan to replace the original plan, and the AAT should then review the new plan. However, several subsequent decisions of the AAT took a different approach. They instead treated the s 42D procedure as extending the statement of participant supports in the initial plan rather than creating a new plan. The decisions give several reasons as to why the AAT was justified in declining to follow the Federal Court's reasoning in *Klewer*, for example, because it was inconsistent with prior Federal Court decisions. This conflict over a relatively abstract matter has caused confusion and unpredictability for many participants, exacerbated by the NDIA taking shifting positions on the issue over time and in different cases. In *Hill and NDIA [2023] AATA 3626*, the AAT stressed the NDIA needed to take a consistent approach to technical issues (including, if necessary, by challenging or appealing those it disagrees with).

As this issue only applies to AAT appeals lodged before 1 July 2022 (due to a change in the NDIS Act which now remedies this issue), it should only apply to a specific and time-limited group of cases. Nonetheless, this experience demonstrates the benefits the ART's new 'Guidance and Appeals Panel' (see above) may bring to resolve technical questions and promote consistent legal and policy interpretations for NDIS matters.

5. Federal Court unpacks NDIS legislation

2023 also saw a number of cases in the Federal Court reviewing decisions of the AAT.

In *Public Trustee of South Australia (as litigation representative for Isherwood) v NDIA (No 2) [2023] FCA 852*, the Federal Court provided a detailed interpretation of the way 'reasonable and necessary' is to be applied. Based on the structure of the NDIS Act, the Court determined the NDIS Act requires a two-step process in considering the supports to be included in a participant's plan:

1. is the support reasonable and necessary; and
2. does the support satisfy each of the criteria in s 34(1).

This means that, while some supports that meet all s 34(1) criteria might not be funded because they are not considered 'reasonable and necessary', the NDIA has no general 'residual discretion' to refuse to fund a support that meets these criteria and is reasonable and necessary.

The Court also stressed an assessment of the criteria in s 34(1) cannot focus only on a participant's functional capacity. The assessment needs to consider how the support would affect a participant's daily life by helping them achieve their goals and/or facilitate their community participation.

The Full Federal Court was also asked to interpret NDIS legislation in *NDIA v Foster [2023] FCAFC 11*. This case considered how to apply the *NDIS (Becoming a Participant) Rules 2016* (Cth) to decide a person's request for access to the NDIS.

The Court accepted the wording of a critical part of the Rules was ambiguous – for example, the phrase '...unable to participate effectively or completely in the activity...' could mean either 'completely unable to participate', or 'unable to completely participate' as was used in the AAT's decision. After considering the broader principles of the NDIS and how the government intended the NDIS to work, the Court disagreed with the AAT's interpretation and overturned its decision.

The Court's decision shows that the underlying philosophy of the NDIS is important to interpreting the law and deciding individual cases. As the NDIS Review recommends overhauling the way access and planning decisions are made, this case highlights why any amendments to the objects and philosophy of the NDIS will be just as important as changes to legislated processes and legal tests. ✨

WHAT DIDN'T HAPPEN IN 2023?

While several key reports were released in 2023, substantial reform was limited. Many of the recommendations made in those reports are awaiting a response from government and it is yet to be seen if or when they will be implemented.

1. The AAT backlog remains

Although the introduction of alternate dispute resolution initiatives reduced the backlog of cases in the AAT, **the number of NDIS appeals in the AAT queue remains high:** 2,873 as at 31 December 2023. This reflects the need to improve both the AAT's review and alternate dispute resolution processes and the NDIA's initial decision-making and communication, to reduce the demand for these reviews.

The IER evaluation showed participants remain unsatisfied with the NDIA's planning and internal review processes, including the lack of opportunity to discuss their needs and preferences; the NDIA's failure to understand important issues; and how the NDIA communicates the reasons for its decision.

We acknowledge the NDIA has implemented changes that align with these concerns but further investment is required.

2. IER settlement outcomes have not been published

The NDIA committed to publishing de-identified information about settlements reached through the IER program in early 2023 but has still not done so. Publishing this information will improve transparency, consistency and accountability around NDIA decision-making. We urge the NDIA to fulfil its commitment without further delay.

3. Changes to the NDIS Rules yet to be finalised

In legislation passed in 2022, the Government foreshadowed it would issue new NDIS Rules to formalise the **Participant Service Guarantee**. These Rules would give participants greater certainty about how long it will take the NDIA to make decisions about access, planning and internal reviews.

The Rules are being developed by the Department of Social Services and state and territory governments, and we expected progress on the development of the Rules in 2023. This has not occurred, and no timeline has been provided for the release of the NDIS Rules.

It remains to be seen whether these proposed NDIS Rules will be issued as planned, noting that both the NDIS Review and Disability Royal Commission have now recommended other legislative changes. ✨

Artwork by Peter Dudding,
Andrew Lloyd Webber, 2018.
studioA



LOOKING AHEAD

In 2023, a number of significant inquiries and reviews delivered recommendations aimed at returning the NDIS to its original vision, with the experience and needs of people with disability at its centre and renewed commitment from governments at all levels.

We join with Disability Representative Organisations and allies calling on the Australian Government to urgently establish a **Disability Reform Implementation Council** to oversee the implementation of recommendations from the Disability Royal Commission and NDIS Review.

1. Implementing the NDIS Review

The Australian Government will release its full response to the NDIS Review's recommendations in 2024. In an **initial response**, National Cabinet agreed to 'implement legislative changes to the NDIS to improve the experience of participants and restore the original intent of the Scheme to support people with permanent and significant disability, within a broader ecosystem of supports', and 'design additional Foundational Supports to be jointly commissioned by the Commonwealth and the states'. The **Australian Government said** it will invest \$11.6 million over two years to develop and implement a Foundational Supports Strategy. The Government has also committed \$118.1 million to take action in response to the NDIS Review, covering design and consultation across a number of areas including access to the NDIS, early childhood supports, home and living options and repairing the NDIS market.

The Review recommended a range of legislative reforms and we expect the Government to introduce draft legislation amending the NDIS framework in 2024, which will need to be examined by the disability community.

2. Responses to the Disability Royal Commission

The Australian Government established a Commonwealth Disability Royal Commission Response Taskforce ('Taskforce'), led by the Department of Social Services, to coordinate the response to the Disability Royal Commission and its recommendations. A full response is expected by March 2024.

The Disability Royal Commission Final Report covers a range of issues relating to the NDIS, including the accessibility of the complaints handling process, oversight and regulation of service providers, and the many people in custody who are missing out on appropriate disability supports.

The Taskforce will work closely with government Ministers, departments and agencies responsible for considering the NDIS Review recommendations.

3. Introduction of the Administrative Review Tribunal

The Bill establishing the ART is expected to pass through Parliament in 2024. Cases before the AAT will be transitioned to the ART.

The ART will have a range of powers, and flexibility to adjust its processes for different types of review. Once established, we expect the ART to make practice directions setting out its approach to reviews of NDIS decisions, including how it will assess evidence and how it will expect applicants and the NDIA to participate in reviews.

