

NDIS

2022 The Year In Review

Public Interest Advocacy Centre



Artwork by Emily Crockford, *Patterns with Hands and Leaves*, 2022

studio A

This report has been produced by the Public Interest Advocacy Centre 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 licenced 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.

2022 was a year of significant change for the National Disability Insurance Scheme (NDIS). We saw the most important changes to the National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act) since its commencement; public and government recognition of the cultural issues within the National Disability Insurance Agency (NDIA); and the introduction of some immediate measures to begin addressing problems with planning, reviews of NDIA decisions, and service provision.

The wide scope of changes reflects a growing public awareness of the NDIS, its prominence as a political issue and pressure on government to fix the problems the disability community has been raising for many years.

What happened in 2022?

Major developments included:

- a change in the Federal Government, leading to a new Minister for the NDIS, a new Chair of the NDIA Board and a new CEO of the NDIA;
- the Joint Standing Committee on the NDIS consider and report on Scheme Implementation and Forecasting;
- public and media attention on cuts to NDIS plans and the NDIA's excessive use of external lawyers at the Administrative Appeals Tribunal (AAT);
- the passing of the *NDIS Amendment (Participant Service Guarantee and Other Measures) Bill*, which implemented many recommendations from the [2019 Tune Review](#);
- the design and piloting of a new Independent Expert Review process to address the backlog of appeals at the AAT;
- the announcement of new inquiries and reviews to improve the operation of the NDIS and NDIA, including the [SDA Pricing Review](#) by the NDIA, a [Joint Standing Committee inquiry into the Capability and Culture of the NDIA](#), and the [independent NDIS Review](#);
- Federal Government commitments to ensure funding for the NDIS into the future, address fraud and poor practices within the NDIS, and overhaul practices around the NDIA's planning practices and policies;
- the publication of all past and present [Annual Financial Sustainability Reports](#); and
- the announcement the AAT will be abolished, with a new review body to be established in 2023.

Many of these developments address urgent problems with the NDIS. Others lay the groundwork for longer-term reforms that will require additional legislation or structural changes.

What *didn't* happen (yet)?

Work on several expected reforms has commenced, but progress has been slow. Many of the changes will be implemented in 2023 and beyond.

One way to assess the progress of reform is to track the implementation of recommendations made by NDIS-related inquiries.

PIAC's [NDIS Recommendations Tracker](#) was launched this year, to support advocates and the disability community to hold government to account. At the time of this report, only 53 out of 302 relevant recommendations are fully implemented (17.5%) with another 126 (41.7%) only partially implemented.

These partially implemented reforms, and the remaining 123 that are not yet implemented at all, represent a considerable outstanding reform agenda.

With the passing of the *NDIS Amendment (Participant Service Guarantee and Other Measures) Bill*, we expect to see new or changed NDIS Rules. The amended NDIS Act says that NDIS Rules may set out more information about:

- varying participant plans;
- when the CEO on their own initiative may decide to reassess a participant's plan;
- management of a participant's plan; and
- the timeframes for making decisions about access, participant plans and internal reviews.

The NDIA says updated Rules are being developed by the Department of Social Services and State and Territory governments, but they are yet to be released and there is no announced timeframe for delivery.

What *is* happening now?

Operational guidelines refresh

The NDIA's 'Operational Guidelines Refresh Project' aims to make the NDIS more transparent, accessible and easier to understand. The NDIA wants to ensure the Guidelines are up-to-date, accurate and disclose as much of their internal policy as possible. They are publishing the refreshed Guidelines on a new micro-site [on the NDIS website](#) along with a series of 'Would We Fund It?' examples for different kinds of supports.

The NDIA has said it is receptive to feedback about how the Guidelines could be updated or changed. This is a good opportunity for the disability community to raise issues about inaccurate or inappropriate NDIA policies.

Independent Expert Review process at the AAT

In line with promises from the Minister for the NDIS and the new Government, the NDIA has taken steps to reduce the backlog of AAT appeals through a new Independent Expert Review (IER) program. Applicants with NDIS cases at the AAT can request an independent reviewer with relevant expertise, including involvement with the disability sector and experience as an advocate or mediator, look over their case. The reviewer then recommends how the case should be resolved.

The IER is intended to reduce the backlog of AAT cases by helping parties reach a quick and fair agreement, without compromising a person's right to get a decision from the AAT if needed.

Following a 'pilot' phase with a small number of cases, the IER is being rolled out more broadly. The [Oversight Committee](#) convened by the NDIA to monitor, improve and evaluate the IER is considering how the program might need to be revised to accommodate all NDIS cases at the AAT. The NDIA plans for about 1,000 AAT cases to go through the IER program by June 2023.

Settlement outcomes publication

The NDIA has committed to publish information about settlements reached through the IER program. This would allow others to see how similar cases at the AAT have been treated, improve consistency of decision-making by the NDIA and highlight where policies and practices need to be updated in light of settled cases.

Publication of settlement outcomes is in line with several longstanding recommendations by independent bodies, including the Joint Standing Committee on the NDIS and the Australian National Audit Office. The publication process is still under development but once it has been rolled out for IER cases we would like to see it expanded to cover all cases settled at the AAT.

Lifting the NDIA staffing cap

Following the Federal election, the new Government has lifted the NDIA staffing cap to allow the NDIA to recruit additional staff. The Federal budget delivered in October 2022 provides for an additional 380 permanent staff. This represents a shift in philosophy: away from contracting out many NDIA functions to private firms and labour-hire organisations, towards growing the public service to meet the demands of the NDIA's mission. We expect this will lead to ongoing recruitment by the NDIA for a wide range of roles.



Artwork by Meagan Pelham, *Chitter Chatter*, 2021

studio A

What about the AAT and Federal Court?

Below is a summary of some significant AAT and Federal Court decisions this year, arranged by major themes.

Access decisions

The test for access to the NDIS received its most advanced judicial examination so far in the case of [NDIA v Davis \[2022\] FCA 1002](#). The Federal Court considered when a person will be found to have a permanent impairment.

Justice Mortimer examined the requirement of when a treatment likely to remedy an impairment can be said to be 'available'. Her Honour found the main question was whether that treatment is, as a matter of practical reality, available to the applicant.

Decision-makers cannot simply conduct a desk review of the theoretical possibility of a treatment – they must also consider the specific person's circumstances to determine whether the treatment 'is one that an individual can in reality access'. This will involve considerations of affordability, whether accessing the treatment is simply impossible or if a person's other impairments make treatment inaccessible. Her Honour described this as a 'common sense' approach to avoid making the NDIS difficult to administer.

The Court made significant findings on when a treatment can be said to be 'likely to remedy' the person's impairment under the relevant NDIS Rules. It found that remedy 'should be understood to mean more than just relieve or improve'. Even if

there 'are prospects for improvement', remedy must be understood to 'mean something approaching a removal or cure of the impairment'.

Justice Mortimer also commented on the NDIA's conduct before the AAT. Her Honour stressed the importance of the NDIA assisting the AAT to reach the correct or preferable decision, noting the NDIA had 'deluged' the AAT with technical submissions. Mortimer J observed that 'the [NDIA] would do well to remember its role': to assist the AAT, and to defend its internal decision-making, but not 'as a true adversary'.

Justice Mortimer's comments reflect many of the concerns people have raised about the NDIA's adversarial approach to appeals.

[JLZT and NDIA \[2022\] AATA 541](#) concerned a 68-year-old with longstanding psychosocial disability and life trauma. The AAT directly cautioned the NDIA about its approach to chronic conditions. Specifically, the AAT warned that a person's function must be assessed as a whole, and without disregarding acute episodes. It emphasised 'there is no legislative basis for the exclusion' of such episodes and decision-makers should take all the experiences of the person into account.

Decisions on ‘reasonable and necessary’ supports

[NDIA v KKTB, by her litigation representative CVY22 \[2022\] FCAFC 181](#) was an appeal from three decisions of the AAT, which were heard together because of the similarity of the issues. The cases concerned NDIS participants in a supported living home who had requested funding for their weekly care hours to be provided by a registered nurse.

In each case, the NDIA agreed to fund only some of the hours for a registered nurse, with the rest of the support hours to be provided at a lesser cost by a disability support worker, who would be trained and supervised by a registered nurse under a ‘Delegated Model of Care’.

The AAT decided all three cases in favour of the applicants. While the AAT acknowledged the need for the NDIS to find financially sustainable solutions and to manage the costs of the Scheme, it rejected the NDIA’s arguments that it should consider the overall impact of adopting particular ‘models of care’ across the Scheme. Instead, the AAT focused on which supports were reasonable and necessary for the three particular applicants, based on their individual circumstances, impairments, and goals.

The NDIA appealed these decisions to the Full Federal Court. The Full Court’s decision was largely based on administrative law principles, which led it to find that the NDIA had not identified any legal error in the AAT’s decision. Helpfully, the Court also said the AAT’s approach was appropriate, and ‘reasonable and necessary’ supports must be considered based on each participant’s unique life circumstances rather than generalised considerations about Scheme budgeting.

While most AAT decisions inevitably focus upon high intensity or expensive supports, [Green and NDIA \[2022\] AATA 2872](#) was a successful appeal relating to household assistance.

The decision underlines the importance of not taking a narrow line-item approach to NDIS plans but reflecting on the bigger picture of support. In *Green*, a 21-year-old woman sought funding for 2 hours per week domestic support and 2 to 3 hours per month for yard and garden maintenance. The decision strongly emphasised the importance of avoiding ‘carer burnout’.

The AAT approved funding to ensure the applicant’s mother could sustainably assist the applicant in other areas. It noted the applicant’s mother was ‘constrained by limitations on her availability through her employment, the requirements of providing intensive, continuous support and care to her daughter’.

The AAT also considered the administrative tasks that arose from the mother’s guardianship and NDIS plan nominee role and the absence of family and community supports to sustain her in her caring role. The case therefore underlines the importance of individualised funding and sensitivity to a family’s circumstances in building NDIS plans.

Reasoning in internal review decisions

In [HGLS and NDIA \[2022\] AATA 2774](#), the applicant requested updated reasons for the NDIA's internal review decision. The AAT can order this under section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). For reasons of efficiency, the AAT instead allowed the NDIA to submit a Statement of Facts, Issues and Contentions.

The AAT did, however, strongly suggest the NDIA should have provided more detailed reasons earlier in the process, prior to the AAT. It noted the applicant 'would have benefitted greatly from better communication' from the NDIA when deciding whether to exercise her review rights.

A similar issue arose in [Witsen and NDIA \[2022\] AATA 2205](#) where the applicant unsuccessfully requested detailed reasons for the original decision; and in [YKDD and NDIA \[2022\] AATA 2541](#), where the applicant unsuccessfully sought reasons for a renewed plan the NDIA had prepared following a mid-review remittal under section 42D of the AAT Act.

In each of these cases, the AAT was reluctant to intervene to force the NDIA to provide more detailed reasons. The AAT's approach makes it difficult for applicants to scrutinise the basis for the NDIA's decisions, or to know whether the NDIA's decisions were supported by sufficient reasoning.

Decisions about Specialist Disability Accommodation (SDA) funding

After the first AAT decision concerning SDA at the end of 2021 ([LWVR and NDIA \[2021\] AATA 4822](#)), several more followed in 2022.

In [Boicovitis and NDIA \[2022\] AATA 204](#), the applicant successfully sought funding to live alone in SDA. The AAT considered there would be practical difficulties for the applicant sharing a home due to issues like clutter, but particularly gave weight to the fact that most people at the applicant's stage of life would prefer – and it would be reasonable for them to expect – to live alone and have privacy, flexibility and independence. This decision took into account the applicant's personality, hobbies, and lifestyle, and how these might not be compatible with a shared home.

By the time the matter of [Kennedy and NDIA \[2022\] AATA 265](#) reached an AAT hearing, the NDIA agreed the applicant should be funded to live alone in SDA, but refused to fund him for a second, 'spare', bedroom – which he particularly wanted so he could parent his children and have them stay overnight. The AAT was persuaded this was 'value for money'. The AAT also rejected the NDIA's arguments that the cost of the second room should be treated as 'rent' (that the applicant's family should pay for themselves), or that the applicant needed to start co-parenting his children more intensively before the second room could be funded. Notably, the AAT placed weight on evidence provided by a consultant, that the NDIA had funded other people with lower needs for a second SDA bedroom in the past and should therefore fund the applicant's second bedroom as a matter of fairness.

[Paterno and NDIA \[2022\] AATA 3908](#) also considered whether the applicant could have a second bedroom in their SDA. The evidence convinced the AAT the additional room would be better for the applicant's mental health and quality of life: the applicant could use it as a study (instead of working at her dining table), store equipment, and have family and friends stay over. The AAT emphasised the NDIA should value these benefits of the increased space.

The decision focused on the applicant's particular lifestyle, impairments and goals, and how a second bedroom would shape these. The AAT rejected the NDIA's submission that the second bedroom was not related to the applicant's disability needs, and that funding for it was unjustified.

In [Barrett and NDIA \[2022\] AATA 445](#), the applicant wanted funding for 'Robust' category SDA, rather than the less expensive 'Improved Liveability' SDA, based on the applicant's behaviours that could destroy property or be disruptive to others. The case turned heavily on the evidence provided about these specific behaviours, whether they occurred regularly, how serious they were, and whether the particular features of 'Robust' SDA would help to address these behaviours. The AAT found the features specific to the 'Robust' SDA design standards would not help the applicant with his behaviours, and so 'Robust' SDA would not be value for money.

In [Charrington and NDIA \[2022\] AATA 1160](#), the AAT considered whether the applicant, who has a vision impairment, should be funded for SDA of any type. As the AAT found the applicant did not meet the legislative threshold of having an extreme functional impairment or very high support needs, it decided not to fund SDA. The AAT took into account the applicant's choice not to use several of the existing supports that had been funded for her (and which the AAT thought would be useful). In the AAT's view, not using those supports showed the applicant's independence and suggested she had been 'single-minded' about wanting to get SDA funding rather than exploring alternatives.

Together, these SDA cases emphasise the importance of identifying specific benefits of increased SDA funding, linking those benefits to features of the desired SDA, and supporting those claims with expert evidence. While the AAT was willing to put some weight on individual personal experiences and preferences, it also took seriously the NDIA's submissions about financial sustainability and needing to reduce costs, and was reluctant to override the NDIA's position without expert evidence.

What will happen next year (and what do we *want* to happen)?

NDIS Review

The Government has announced an independent review of the NDIS in two parts.

Part one

will examine the design, operations and sustainability of the NDIS, including:

- how people access the NDIS
- how people are assessed
- how people engage with the planning process
- review processes
- how people find supports
- improving the interface between the NDIS and mainstream services
- the effectiveness of the [Information, Linkages and Capacity Building](#) program as well as Local Area Coordination
- economic and social participation by participants and families
- the financial sustainability of the NDIS.

Part two

will look at ways to make the market and workforce more responsive, supportive and sustainable. This will involve improving the pricing and payment system, building a capable workforce to enhance participant experience and retention, and improving access to services in thin markets (areas where there are limited service providers).

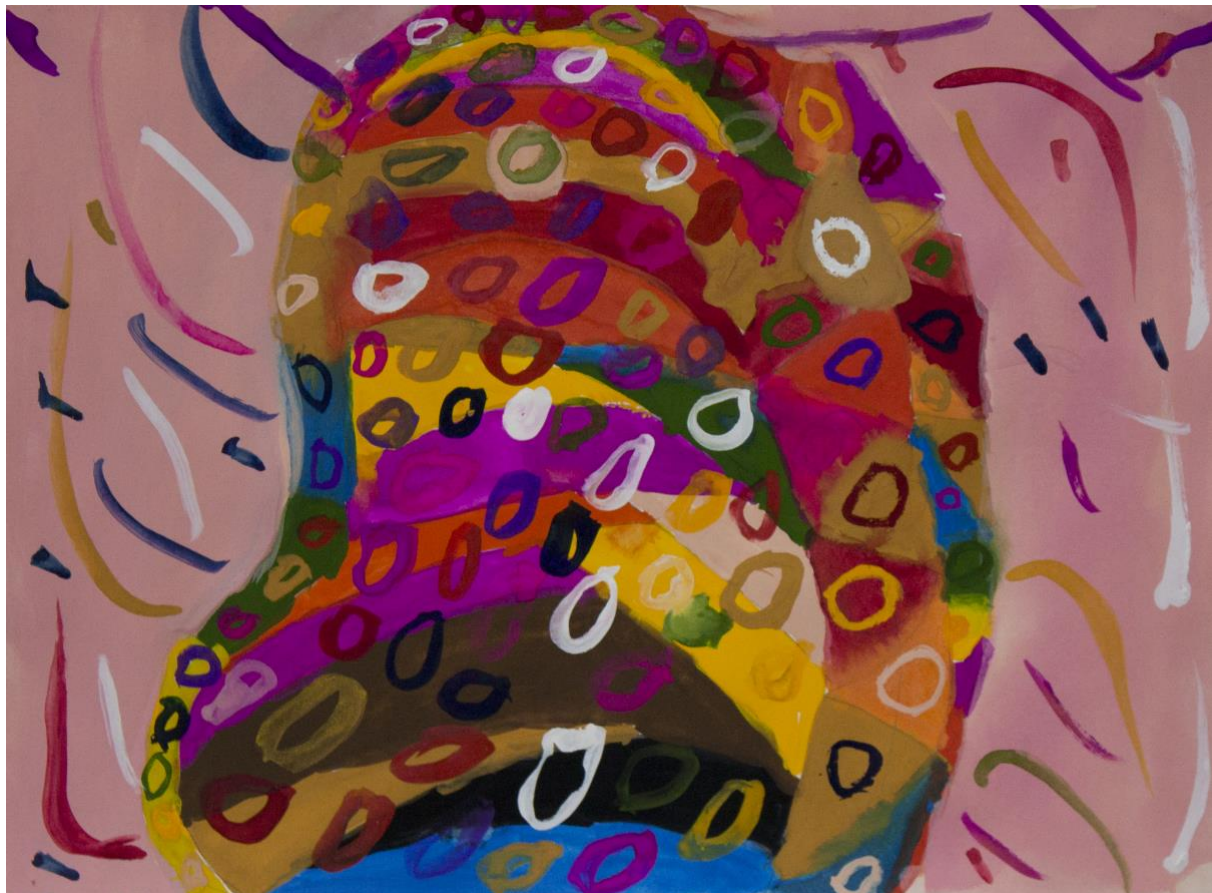
Beyond the Terms of Reference, there is limited publicly available information about the Review. Currently, the Review is calling for people to [have a say](#) about the NDIS. The Review intends to use best practice to design policy that supports people with disability, including wide consultation and co-design directly with participants, carers and providers. Although the final report and recommendations are due by October 2023, the Government has said it will fix the NDIS as findings are made.

Recommendations to improve the capability and culture of the NDIA

The Joint Standing Committee on the NDIS will publish its report on the inquiry into the *Capability and Culture of the NDIA*, which we expect will include detailed findings and recommendations.

PIAC highlighted three key areas for reform in [our submission](#) to the inquiry, which we hope the Committee will adopt:

1. The NDIA should focus on participants' goals and experiences, and adopt procedures to facilitate the delivery of the NDIS in partnership with people with disability.
2. The NDIA should shift culture and attitudes among its staff to welcome greater transparency and proactively work in an open and visible manner.
3. The NDIA's work should be conducted by permanent staff dedicated to the mission of the NDIA, with the numbers, skills, and training to understand and succeed in their tasks.



Artwork by Victoria Atkinson, *Colour and Circles*, 2016

studio A

Disability Royal Commission report

The Disability Royal Commission will conclude next year, with its final report due on 29 September 2023. This is likely to cover a range of issues relating to the NDIS, including in relation to accessibility of the NDIS, oversight and regulation of service providers, and the way participants are treated by the NDIA.

We hope this will give rise to detailed and constructive reforms to prevent violence, abuse, neglect and exploitation of people with disability.

Structural reforms to the review process – replacement of the AAT

In December, the Government announced it would abolish the AAT and replace it with a new administrative review body. The Government said its aim was to restore trust and confidence in Australia's system of administrative review. It announced the new review body would have a merit-based appointment process to ensure members are appropriately qualified, and that ongoing review cases would be transitioned to the new body for decisions.

We expect to see further announcements, consultations and proposals early in the new year.

Structural reforms to the review process – implementing a new review tier

The Minister for the NDIS has also proposed a new stage of review for decisions made by the NDIA, to help resolve disputes earlier and fairly before they get to the AAT (or the new replacement body). We expect 2023 will see consultation on the design of this new mechanism, and perhaps legislation to implement it.

These reforms should be coupled with greater transparency over the way the NDIA handles appeals, including by the NDIA publishing information about the outcomes of all settled cases. Importantly, the NDIA must improve the way its lawyers handle AAT appeals to ensure compliance with the NDIA's 'model litigant' obligations and to treat people with disability with fairness and respect.

Rethinking planning and decision-making

There are longstanding issues in the way the NDIA makes decisions, prepares plans for participants, and manages internal reviews. Each of the reform processes referred to above, including the ongoing co-design process, have the potential to produce solutions to these problems.

We hope renewed attention on these elements of the NDIS will drive much needed changes for participants in 2023.