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*Advocacy, Self Advocacy, Rights, Accessibility, & Community Living for People with a Disability*

**17 February 2021**

To the NDIA

Uploaded to website

**Response to NDIA’s Consultation Paper on Independent Assessments**

AMIDA is a government funded advocacy organisation and we are part of AMIDA’s NDIS appeals support service. We work with NDIS participants and potential participants in relation to a wide range of NDIS issues. We are responding to the NDIS *Consultation Paper: Access and Eligibility Policy*, released in November 2020. Of the three Consultation Papers released in November 2020, this one is of most concern. We are writing a separate response to the Consultation paper on Planning and Budgeting.

We have some very serious concerns that the proposals for Independent Assessments (IAs) are inconsistent with the *NDIS Act 2013* (Cth) (the *Act*). They are also not in keeping with the *Tune Report*, 2019. We are concerned the proposals will not alleviate the concerns identified by the NDIA. We are also concerned that the proposals will create new areas of inconsistency and inequity, the very rationale of the proposed changes.

Our concerns all have a common source – the NDIA is not consulting on the shape of the substance of reform, but on the process of implementing pre-determined content. This is not in keeping with the Participant Service Guarantee. It is not in keeping with transparent consultancy. And it causes so much angst in the community, that the NDIA will struggle to have any good will towards whatever implementation process is adopted.

Our opinions are primarily informed from our work over several years as advocates in our roles at AMIDA. We have read the NDIS Consultation paper, and attended workshops and seminars conducted by the NDIA and other advocacy organisations. In our response, we make some general comments before answering the specific questions asked in the Access and Eligibility Consultation. We will then provide some constructive suggestions towards improvement.

**General Comments**

The proposed design and use of IAs are contrary to the *Act*. The whole operation of the *Act* is founded on individualised and participant-directed responses of a government agency (s31). The object of ‘choice and control’, by the person with disability, best exemplifies this approach (s3)(1)(e)). These foundational principles are evident in many sections of the *Act*, including specifically s6 and s34.

The general nature of IAs as “tick-box collected information” lacks the ability to collect detailed and nuanced material of each individual. The compulsory nature of IAs lack choice and control.

The structure and use of IAs is not in keeping with the *Tune Report* recommendations. The proposals have gone far outside the *Tune Report* recommendations, and as such the *Tune Report* should not be used to justify the proposals. IAs, as a set of tick-box questionnaires, were not a *Tune Report* recommendation. The compulsory use of IAs was not a *Tune Report* recommendation; Recommendation 7 of the *Tune Report* specifically and relevantly used the word ‘discretionary’.

IAs will not alleviate issues of consistency and equity. IAs may well assist to achieve consistency and equity if used in conjunction with other forms of evidence. But if used as the sole source of evidence, they will still result in inconsistent and inequitable decisions across the Australian population.

IAs will create new areas of inconsistency and inequity. Significant issues will arise from inconsistency and inequity in budget planning and review rights, if the current proposals proceed without reasonable adjustment. Before commenting further on budget planning and review rights, it is worth noting that it is poor government policy to correct identified problem areas without ensuring different issues of inconsistency and inequity do not arise from the implementation of new proposals. This cannot be ignored in the current consultation process.

NDIS budgets need individual assessment not independent assessment; budget planning should follow conversations with participants, not precede it. Budget planning will reveal inconsistencies if only IAs are used to determine budgets. Planners will lack insufficient detail of individual circumstances to be able to differentiate the needs of two or more participants with a similar functional impairment. In changing circumstances, planners need detailed and timely evidence. IAs are not designed for this level of specificity. And the proposed process does not indicate a rapid pathway for those with a change of circumstance requiring a plan review.

The lack of substantive review rights on IAs is inequitable and impinges on legal rights of citizens in a functioning democracy. IAs must be reviewable. Substantive errors must be correctable by a review process. Confidence in the whole NDIS system will fail if errors are not reviewable and correctable. One process mechanism to ensure correction is the option for second opinions, and possibly by ongoing service providers.

We consider that IAs have a role in the NDIA if utilised appropriately. IAs could provide data at a high level of abstraction to guide policy development. And they could inform the decision maker on an individual’s request for access and budget planning, provided it is in conjunction with other evidence provided by the person with disability.

**Response to questions in Access and Eligibility Consultation Paper**

1. **What will people who apply for the NDIS need to know about the independent assessments process?**

People applying for the NDIS should be given access as much information as possible about independent assessments. This information should include the following;

* who is doing the assessment,
* what their professional background and experience is,
* what assessment tool will be used and why this tool was chosen over others,
* whether the person will automatically get a copy of the assessment as soon as it is completed,
* exactly how the assessment will be used to inform budget planning and budget decisions and
* how the person can challenge the outcome of an independent assessment or request another independent assessment.

**How this information is best provided?**

There is no single way this information is best provided. Information should be provided in the manner chosen by the person applying for the NDIS. The person should be given the opportunity to tell the NDIA how they want to receive information and the NDIA should ensure that information is provided in this manner.

1. **What should we consider in removing the access lists?**

The access lists have not meant that a person is automatically accepted as a participant without any further supporting evidence. A person with a condition on List A, List B or List C has always been required to produce additional supporting evidence that they meet the access criteria. The lists are a starting point only. It is therefore incorrect and misleading to say that the NDIA have relied upon them to determine whether someone has met access. When a person is looking to access the NDIS, it is usually a quick process to determine the age and residence requirements. The disability requirements are more complex to understand and to get through. The lists provide a degree of comfort to the individuals, and their families, that have a condition on the list that it is likely that they will accepted on the NDIS, provided they can produce evidence supporting the access criteria. It is difficult to understand how removing the access lists will improve the access process.

1. **How can we clarify evidence requirements from health professionals about a person’s disability and whether or not it is, or is likely to be, permanent and life long?**

There is an important difference between permanent and life-long. They should not be linked together the way this question does.

In regards to permanence, the question should be asked differently. Currently the Access Request Form asks “*Is there any other treatment that is likely to remedy the impairment?*” and is followed by a tick box Yes or No. It should be changed to “*An impairment is, or is likely to be, permanent only if there are no known available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment. Is the impairment attributable to the disability, or disabilities, that you have listed above, permanent, or likely to be permanent?*” Links to the NDIS Operational Guidelines, Access to the NDIS Operational Guideline 8.2 should be provided if the health professional requires further information. These guidelines should also be provided in a way that it easier to find and in downloadable pdf format.

In regards to life long, much greater clarification is required. The relevant access requirement in s24(1)(e) is not that the impairment will be life long, it is that the person is likely to require support under the NDIS for their lifetime. The relevant Operational Guideline demonstrates the opaqueness of s24(1)(e) by not providing a clear explanation of what this actually means. In our experience it seems that if a person meets the criteria in s24(1)(a)-(d) they seem to automatically also meet s24(1)(e), and if they do not meet one or more of the s24(1)(a)-(d) criteria then that is used to demonstrated that they cannot meet s24(1)(e).

1. **How should we make the distinction between disability and chronic, acute or palliative health conditions clearer?**

This is a difficult because in so many cases the distinction is difficult, if not impossible to make. The disability and health conditions are frequently interrelated. For example, trying to separate the reasons why a person cannot walk down the street into either disability or health condition is artificial. Assigning responsibility of a functional impairment to only one of disability or health belies the reality and complexity of functional impairment. Similarly, chronic and acute categories are often the mirror of a good day and a bad day in those with permanent disabilities.

In moving toward an IA model of disability, the NDIA policy is moving away from a health focus. If the policy focus is now functional, based solely on IAs, then health related conditions lose their relevance and importance. The NDIA cannot have their cake and eat it too.

1. **What are the traits and skills that you most want in an assessor?**

The person with disability needs to trust the assessor. This is equally important as the NDIA requiring trust in the assessor.

Trust by the person with disability is best achieved by qualified professional assessors who are highly experienced in their chosen field. But this must be combined with the assessor having significant disability specific experience in that experience. The level of experience including recognised practice in disability is crucial. These aspects of experience in their field and experience in disability are not separable. An assessor must have both at a minimum.

1. **What makes this process the most accessible that it can be? For example, is it by holding the assessment in your home?**

Choice is the most important aspect of the process. The particular process that best fits any particular assessment will depend on the person with disability. This is consistent with choice and control under the *Act*. It is consistent with individualised operation of the *Act*. If the person with disability wants the assessment in their home, then this will make the process most accessible to them. If the person wants to choose their assessor, then this will make the process most accessible to them. If the person wants a nominated person present when the assessment is conducted, then this will make the process most accessible to them.

Transparency of the process, from releasing the tool kit forms, to naming assessors, to automatically providing the assessment results, all go hand-in-hand with choice. Choice is a fundamental aspect of democracy, a vital aspect of Australian governance. People can choose assessors in provision of non-NDIS services, and should be able to do so in the NDIS.

1. **How can we ensure independent assessments are delivered in a way that considers and promotes cultural safety and inclusion?**

First and foremost, IAs should be optional rather than mandatory. Providing choice to have an IA will promote safety and inclusion for all.

Providing choice in the process will promote safety and inclusion for all. And accepting a person nominates one aspect of the process, does not exclude the right to nominate other aspects of the process. All reasonable requests must be accommodated.

The issue of this question is relevant to all persons with disability. There may be cultural and safety issues that are not apparent from profiling. Every person must be asked in advance of their IA if they have any process issues that need to be taken into account. Presumptions should not be made; the person with disability must be asked.

Some examples of process to accommodate concern timing, location and length of appointments. They include asking if they would like a family member or friend present. They include choice in gender and ethnicity of the assessor. And the NDIA must be proactive in asking the person to be assessed, not only responding when asked.

A key aspect for safety and inclusion, especially for those with psychosocial disabilities, is choice of assessor. As the concept of independent assessors conflicts with the nature of the disability, the NDIA need to be flexible in the assessment process. A person’s own service provider should be permitted to complete the required toolkit forms if requested. This is particularly relevant to those with psychosocial disabilities.

Exemption from IAs, if they are mandatory, is a crucial aspect of promoting cultural safety and inclusion. Allowing a broad range of exemptions is one way to promote safety and inclusion, including a request to be excluded. Many people with psychosocial disability will struggle with mandatory IAs by unknown assessors. Recognising people’s request to be excluded is an important part of the process recognising safety and inclusion.

1. **What are the limited circumstances which may lead to a person not needing to complete an independent assessment?**

The circumstances should not be limited.

The real issue with this question is that it pre-supposes a conclusion of compulsory IAs that is inconsistent with the operation of the *Act* and contrary to the *Tune Report* recommendations.

Issues of safety and culture are reasons an IA need not be completed. Recognising the detrimental impact IAs may have on those with a psychosocial disability are reasons an IA need not be completed.

1. **How can we best monitor the quality of independent assessments being delivered and ensure the process is meeting participant expectations?**

Communications and accessibility of information are vital. Ask the participants. Ask the assessors. Ask the planners. And respond respectfully. Evaluation needs to be more than listening; it requires a response to accommodate genuine concerns. More than lip service to consultation is required.

The irony of this question is not lost on participants, their families, support providers and advocates. If the NDIA do not listen to the uproar of concerns about the introduction of IAs, what reason do we have to think the NDIA will listen to participant feedback after their introduction?

1. **How should we provide the assessment results to the person applying for the NDIS?**

In the manner nominated by the person assessed. Every person should be asked what their preferred delivery format is for each assessment. Each assessment should be provide in full; the person assessed should received the same information as provided to the NDIA.

**Suggestions**

We believe IAs have a role for providing a baseline of demographic and disability-related information that is useful for the NDIS. But this information should not form the sole basis of information and data to make decisions on access and eligibility or budget planning.

First, IAs should not be the sole source of evidence for either access and eligibility or budget planning purposes. IAs should not be used to limit valuable evidence of a participant that is consistent with the principles of the *Act*. IAs used in conjunction with other reports of service providers and medical professionals, will provide a more complete picture for NDIA decision makers to utilise in all decisions.

Secondly, IAs should not be compulsory. As an option, IAs will allow an avenue of collection of evidence for those unable to source reports from commercial providers. But used as an option, will enable those able to provide personalised evidence from providers who know them, as a source of detailed information consistent with the principles of the *Act*.

**Conclusion**

The issues raised by the Consultation Paper on Eligibility and Access demonstrate a bias in NDIS consultation and policy making. The IAs and the proposals for implementation resemble legislative reform by stealth. The NDIS must not only consult and listen to the myriad of objections to IAs, they must be flexible and adjust policy accordingly. The NDIA should accommodate a variety of processes and use IAs as a baseline of functional impairment for eligibility and ongoing monitoring. But they should not be the sole means of eligibility, access or budget planning.

Yours sincerely,

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