

Committee bombshell: NDIA has been operating unlawfully



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Contributor
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The long-awaited report from the Parliamentary committee Inquiry into the Culture and Capability of the National Disability Insurance Agency (NDIA) has landed. And it is steaming.

After ten years of NDIA and the operations of its National Disability Insurance Scheme, inquiries and literally thousands of submissions pointing to the same defect, [this report](#) makes the bombshell finding that the NDIA has been operating unlawfully:

...the distinction between primary and secondary disability has no basis in governing legislation... which operates as a form of discrimination.'

The [Joint Standing Committee on the NDIS](#) (JSCNDIS) looked to legal precedents to confirm there is no legislative basis for distinguishing between 'primary disability' and 'secondary disability'. The Committee noted that this is *'...an artificial distinction that the NDIA has introduced and imposed.'*

The [Tune Review](#) also noted that the NDIS Act does not distinguish between a 'primary' or 'secondary' disability.

The [JSCNDIS Report](#) referenced the Villamanta Disability Rights Legal Service submission:

'...the agency is making their own decisions about what the most important condition is. Regardless of what doctors tell them, regardless of what the participant tells them, and regardless of repeated challenges, they are deciding, 'No, your primary disability is hearing loss and the other conditions don't even count.' That is not what the legislation says, that's not what the case law says and it's not fair or reasonable.'

Year after year. Inquiry after inquiry. And thousands of submissions. The unlawful fiction of 'primary disability' persists. Echoes of the way in which questions over the lawfulness of RoboDebt were ignored and waved away by the bureaucracy. For how much longer will this unlawful and harmful administrative device be allowed to persist?



NDIS campaigner Marie Johnson

In my opinion, this is the original sin. This artificial distinction has discriminated against and caused harm to every NDIS participant: there is no escaping this.

How did this happen? In my JSCNDIS [submission](#), which had been held confidential for months and now published and covered by Parliamentary Privilege, I asked the question:

'... whether the fictional device of 'primary disability' arose because the systems built by DHS could not be configured for multiple disabilities...Was this design fiction of 'primary disability' ever examined as to its lawfulness or unlawfulness?'

This might very well be a catastrophic multi-billion-dollar design defect: one that has caused untold human harm, including for my family.

The NDIA actuarial fiction of [primary disability](#) has utterly distorted the operations of the NDIA and any actuarial legitimacy.

So serious is this decade-long fiction, that Recommendation 1 calls for this fiction to be dumped.

'The committee recommends that the National Disability Insurance Agency assess people according to the totality of their disabilities and no longer require participants to nominate a 'primary disability' and 'secondary disability'.

Well this all becomes a bit tricky politically, with Minister Bill Shorten scheduled speak about the NDIS Review at the National Press Club on December 7. We now know that these two reports do not line up.

The NDIA Review has indicated cutting access to the NDIS for children with autism and pushing tens of thousands of people with psychosocial disability off the NDIS, which will be a catastrophe for Australia's mental health servicing infrastructure.

That is, key pillars of the NDIA Review and the main cost cutting strategies, by definition rest on the continuation of the actuarial fiction of primary disability. The NDIA legislation requires that a person be funded for supports for the functional impairment of *all* their disabilities – not slicing bits off that are inconvenient for The Treasury.

How this dilemma is sold to the state and territory governments will be extremely problematic with consequences not only for their budgets, but potential ethical and legal implications over their acquiescence and participation in what is shown to be an unlawful administration.

And where does this leave the new NDIA Salesforce PACE system, apparently an uncapped cost. There is still no explanation by any party, as to why a sales and marketing platform such as Salesforce, is needed for the NDIA, which is not a sales and marketing program.

Notwithstanding the NDIA CEO asserting that the new NDIA PACE system has not been designed with this constraint (that is, recording just primary disability) (2.49), are we simply to believe that the operations of the NDIA will simply switch from being unlawful to lawful – after ten years – because of a new IT system, which is already problematic?

"Trust us" doesn't wash, and I would not take this statement as a positive development. Rather, it is a statement that needs to be tested. There needs to be an end-to-end audit assessment of the NDIA PACE system and associated processes, as to their legislative compliance – and for this audit to be done by the ANAO.

Given the inherent systemic risk, this audit must be done prior to and as part of the PACE introduction to service decision. To reiterate, there is enormous risk exposure for State and Territory governments riding on this decision.

The new PACE system is the new algorithm machine that will drive the anticipated Independent Assessments and upon which the recommendations of the NDIA Review will depend. The Australian Greens Additional Comments noted my description as to how the NDIA automated technologies operate:

'Algorithms based on 'behavioural insights' create a fiction, a persona comprised of assumed or typecast features whose fictional behaviours are used as a proxy in order to predict behaviours of real people, and for this prediction to be treated as fact. It makes huge generalisations, reductions and determinations on complex human conditions, experiences, and disparate factors ...

'The NDIA legislation specifies that PLANS are INDIVIDUALISED and directed by the participant. That facilitates tailored and flexible responses to the individual goals and needs of the participant. The application of statistical averages in automated Roboplanning eliminates the individual person and their needs, transmuting instead to a fictional average, a fictional 'persona'.'

The JSCNDIS Report also examined parallels with RoboDebt with additional comments on Automated Decision Making from the Greens. The Committee noted that the recommendations of the RoboDebt Royal Commission are applicable to the capability and culture of the NDIA (2.213).

That is a very powerful statement, reflecting the concerns of a great many NDIS participants, families, and advocates. Let's hope that commentary is not disappeared, like Recommendation 57 on FOI of the RoboDebt Royal Commission Report.

With the fever pitch surrounding Artificial Intelligence and the use of algorithms by the Australian government, Recommendation 5 from the Australian Greens Additional Comments is a timely warning.

'The Australian Greens note the impact of algorithmic technologies, such as Robodebt and recommend that the NDIA and the Department of Social Services immediately cease any use of algorithmic technologies or automated decision-making with participants.'

For those who remember the crisis of the RoboDebt period of December 2016/January 2017 and the contortions of the bureaucracy seven years ago, the next few weeks will be hauntingly familiar. Expect the campaign for a Royal Commission Class Action into the operations of RoboNDIS to heat up over Christmas.

Marie Johnson is the CEO of the Centre for Digital Business. She is a global award-winning digital authority and advocate for the humanitarian application of AI. Her experience encompasses the public and private sector experience in Australia and internationally, including leading Microsoft's Worldwide Public Services and eGovernment industry based in Seattle.

Marie was Head of the Technology Authority for the National Disability Insurance Scheme responsible for the technology business case, co-design, and the creation of Nadia. For many years, Marie was the Department of Human Services Chief Technology Architect, with responsibilities including the architecture and technology business cases bringing together the massive systems of Centrelink, Medicare Australia, and the Child Support Agency.

Do you know more? Contact James Riley via [Email](#).

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Brilliant analysis by Marie Johnson, anchored firmly in robust analysis by JSC NDIS and an amazing collection of personal experiences told to the Committee.

While we have been told that the "new" PACE system does not enforce the notion of a primary disability, we have also heard that in its first iterations, it will do exactly that.

I believe that the NDIA executive was told from the outset that the primary disability concoction was the NDIA.

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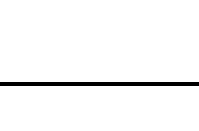
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