Submission to the Joint Standing Committee on the NDIS

General issues around the implementation and performance of the NDIS

Unreasonable and unnecessary harms: Joint submission regarding the NDIS internal review and external appeals processes

August 2021

Signatory Organisations

- Action on Disability within Ethnic Communities Inc. (ADEC)
- Action for More Independence & Dignity in Accommodation (AMIDA)
- Advocacy for Inclusion
- AED Legal
- Brain Injury SA
- DACSSA
- Disability Advocacy Network Australia
- Disability Advocacy NSW
- Disability Advocacy Victoria Inc.
- Disability Justice Australia Inc.
- Gippsland Disability Advocacy
- Grampians Disability Advocacy
- Independent Advocacy NQ
- Leadership Plus
- People with disabilities WA
- Rights Information and Advocacy Centre (RIAC)
- Sussex Street, Community Law Service
- VMIAC
- Villamanta Disability Rights Legal Service Inc.
- Your Say Advocacy Tasmania

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Executive Summary and Recommendations

This submission aims to highlight the collective and ongoing concerns from signatories regarding the NDIS internal review and external appeals processes. Many of these concerns have already been raised in different forums by people living with disability, their families/caregivers, peak bodies, advocacy organisations and the broader disability sector. Indeed, many have also been raised with this Committee previously. The ongoing failures by the NDIA to recognise and address these concerns has necessitated this joint submission.

We bring the perspective of advocacy and legal organisations working in the NDIS appeals area. As a collective we are concerned about the harm this process is causing persons with disabilities both directly and indirectly. This is unacceptable and is inconsistent with the *Convention on the Rights of Persons with Disabilities* 2006 ('*CRPD*') and the objectives of the National Disability Insurance Scheme Act 2013 (NDIS Act).

Furthermore, we are concerned about how the inefficient and ineffective reviews and appeals system is creating significant costs for the NDIS and directly impacting the operations of organisations involved in these processes. This is a matter of concern for all Australian taxpayers.

Data produced by the NDIA and the Administrative Appeals Tribunal ('AAT') show that not only is there an increasing number of AAT applications year-on-year, but that NDIS appeals are also significantly more likely to result in a change to the original decision as compared to the AAT's other divisions. That is, in cases that are appealed to the AAT, the NDIA's initial decision is more frequently found to be wrong than decisions made by any other government body appealed to the AAT.

Within this context, our submission shows that:

- The AAT process is unnecessarily complex, slow and difficult to navigate;
- The NDIA's conduct during AAT processes compounds the issues facing participants. To this end, we are concerned the NDIA is conducting the appeals process in an improper and unfair way that is incongruent with the *Commonwealth's Model Litigant Obligations*, pursuant to Appendix B of the *Legal Services Directions 2017 (Cth)*;
- Advocates and legal services are overwhelmed and under-resourced, leading to decisions being made to ration services;
- The lack of transparency in AAT settlements and decision making, the failures to implement systemic changes to policies, and the inconsistent planning decisions following AAT resolutions results in the review and appeals process being an ineffective oversight mechanism; and
- Initial decision making by the NDIA is poor and inconsistent with well-established administrative law principles, leading to more appeals to the AAT.

Since the NDIS commenced, improvements to this process have been slow and largely ineffective as it continues to be impacted by the NDIA's lack of transparency and poor administrative decision making at the first instance. We believe significant reform is required and the NDIA must commit to working *with* people with disability and the sector rather than adopting what often seems like an adversarial stance at all stages of review. This combative approach has resulted in a lack of trust in the NDIA among many people with disability and the sector.

To repair the system and improve the experience for people with disabilities exercising their right to request a review or an appeal we make the following recommendations:

RECOMMENDATION 1:

The Joint Standing Committee to initiate a specific inquiry into the NDIS internal and external review processes to understand the issues discussed herein and the level of participant distress, distrust and anxiety being experienced as a result. An inquiry will enable the Committee to understand the different barriers and impacts experienced by the diversity of NDIS participants and prospective participants which prevent access to justice.

RECOMMENDATION 2:

DSS and the NDIA to commission an independent report using a co-design strategy to investigate how the reviews and appeals system can be improved to be more efficient, effective and promote the rights of persons with disabilities.

RECOMMENDATION 3:

The NDIA to co-design a 'Guiding Principles on the Conduct of NDIS Appeals' document. This is necessary for the NDIA's accountability during the NDIS appeals process and to build trust with persons with disabilities and the disability community.

Such a document should include, but not be limited to, principles concerning: timeframes, reporting obligations, applicant feedback surveys, the conduct of internal and external lawyers and case managers, training requirements on disability rights and awareness, approach to evidence, addressing equality of representation, approach to settlement offers and approach to diverse groups such as Culturally and Linguistically Diverse and First Nations applicants.

RECOMMENDATION 4:

Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to ensure the NDIA addresses equality of representation at the AAT. The NDIA must provide equal legal representation when it chooses to be legally represented. In addition, there must be sufficient resources for advocacy support where this is requested to ensure applicants have effective access to justice.

RECOMMENDATION 5:

The NDIA to co-design amendments to the *NDIS Act* to reduce complexity and simplify processes in the AAT process by clarifying the AAT's jurisdiction.

RECOMMENDATION 6:

a. The NDIA to co-design improvements to the accessibility of the AAT process with an emphasis on information and communications improvements, including through the use of plain and simple English and communication through a variety of means.

b. Following from 6a, the NDIA to co-design improvements to the accessibility of the AAT process to be inclusive of all disabilities, diversities, languages and cultural backgrounds etc.

RECOMMENDATION 7:

Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to establish measurable timeframes to address delays of the AAT process and hold the NDIA accountable to *Model Litigant Obligations*.

RECOMMENDATION 8:

a. The NDIA to invest sufficient resources into the Early Resolutions team to enable a greater opportunity for resolution at the internal review stage or early stages of the AAT process. This can improve the efficiency and accessibility of the AAT process for persons with disabilities and reduce the requirement for legal representation.

b. The function and expectations of the Early Resolutions team to be set out in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).

c. The NDIA to also establish measurable timeframes for contact from the Early Resolutions team with reported outcomes.

RECOMMENDATION 9:

a. The NDIA to provide additional funding when evidence is required from the applicant's treating professionals for the purpose of the AAT. This will reduce delays and minimise distress for applicants.

b. The NDIA to co-design criteria for circumstances where it is appropriate for the NDIA to use an independent assessor and the conduct regarding this process to be included in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).

RECOMMENDATION 10:

The 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3) to adopt principles that ensure settlement offers are made as early as possible. This ensures more efficient use of resources.

RECOMMENDATION 11:

a. DSS and the NDIA to consult with persons with disabilities and the disability advocacy sector to accurately measure demand for support to review and appeal NDIA decisions.

b. Once the demand is measured accurately - DSS and the NDIA to implement 'Recommendation 33' from the Joint Standing Committee Planning Final Report to ensure appropriate funding is allocated to ensure persons with disabilities have support to exercise their right to access justice.

RECOMMENDATION 12:

DSS to fund longer-term contracts for the NDIS Appeals Program to enhance the sustainability of organisations in the advocacy sector.

RECOMMENDATION 13:

The NDIA to provide applicants with a contact list for advocacy organisations with all reviewable decisions, and internal review decisions in a variety of accessible formats and in a way preferable to the individual.

RECOMMENDATION 14:

a. Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to include guidelines regarding the conduct of external lawyers and to ensure NDIA Instructors/case managers are present at conferences in preference to lawyers to engage in a meaningful and respectful discussion about progressing matters as efficiently as possible.

b. All external lawyers conducting NDIS AAT matters to undergo training regarding disability rights and awareness.

RECOMMENDATION 15:

The NDIA to publish transparent data regarding their expenses on external legal representation for AAT matters in the Quarterly Reports.

RECOMMENDATION 16:

The NDIA to implement Recommendations 34 and 35 of the Joint Standing Committee's NDIS Planning Final Report (December 2020) relating to transparency of AAT settlements.

RECOMMENDATION 17

a. Transparency from the NDIA regarding procedures it has in place to ensure continuous improvement of administrative decision making. This will ensure decisions are scrutinised that are varied in the process of internal review, AAT early resolutions, AAT settlements or final hearings and improve the quality of decision making for future decisions and improve the trust from persons with disabilities and disability sector of the NDIA.

b. The NDIS to publish statistics each year regarding the performance of original decision-makers to reflect where improvement is required. Statistics to include:

- Number and percentage increase of plans varied by internal review.
- Number and percentage increase in plans settled in the AAT prior to a hearing.

RECOMMENDATION 18:

The NDIA to develop a transparent and accountable system for implementing systemic changes to policies in response to Federal Court and AAT decisions. This can include:

- the implementation of a feedback loop which ensures that following an AAT or Federal Court decision, the NDIA's lawyers advise the relevant policy team of the consequences of the decision for the existing policy, and the policy team be required to consider whether changes are required to the policy; and/or
- a Policy Advisory Committee is set up, including lawyers and advocates, to advise the NDIA of policy changes required following AAT or Federal Court decisions.

RECOMMENDATION 19:

Policy changes made following AAT and Federal Court decisions to be reported in the NDIA's Quarterly Report to ensure transparency and accountability.

RECOMMENDATION 20:

The current Transport Operational Guidelines to be immediately withdrawn and rewritten in the light of the criticisms expressed by the Federal Court and AAT.

RECOMMENDATION 21:

The NDIA to separate the forms for seeking internal reviews of access decisions and reasonable and necessary supports decisions. These forms must meet accessibility guidelines and specifically refer to the relevant legislative criteria in easy english.

RECOMMENDATION 22:

The NDIA to implement a practice to ensure participants have appropriate notice before any meetings to discuss an internal review occurs. To improve transparency, if the meeting is conducted over the phone, the content should also be confirmed in writing and provided to the participant.

RECOMMENDATION 23:

The NDIA to revise public statements regarding what they will and will not fund that do not accurately reflect the NDIS legislation. In particular, statements on the 'would we fund it' section of the NDIS website should be revised to ensure legal accuracy.

RECOMMENDATION 24:

All primary and internal review decisions should be required to reference **all** internal NDIA policies that are applied in reaching the decision.

RECOMMENDATION 25:

All internal policies that are used by delegates in making decisions should be included in T documents prepared for the AAT.

RECOMMENDATION 26:

All planning and Internal Review Decisions to be required to reference **all** internal NDIA advice that is determinative in reaching the decision.

RECOMMENDATION 27:

All internal advice that is used by delegates in making decisions should be included in T documents prepared for the AAT.

RECOMMENDATION 28:

a. The NDIA to automatically provide an accessible statement of reasons for the following decisions:
    - Rejection of a request to access the NDIS
    - The first NDIS plan
    - A new NDIS plan that substantially lowers a participant's supports in any category
    - A new NDIS plan following a change of circumstances
    - All internal review decisions, even where the decision results in a new NDIS Plan

b. The statement of reasons from above should include:
    - findings on material questions of fact, refer to the evidence which those findings were based on, and give the reasons for the decision.
    - guidance on what sort of evidence would be required for the applicant to meet the relevant statutory criteria.

c. Time limits on appeals should not commence until a valid written statement of reasons is received.

d. All NDIA delegates should receive training in the preparation of statements of reasons that meet statutory requirements.

1. Introduction

This submission is a collaboration between disability advocacy and legal organisations nationwide in response to ongoing systemic issues with the NDIS internal review and external appeals system.

Signatory organisations ('the signatories') have contributed based on the experiences of persons with disabilities, their families and caregivers, NDIS Appeals advocates, lawyers and peak bodies, representing a very diverse range of individuals and perspectives.

The aims and objectives of the NDIS Appeals Program funded by the Department of Social Services ('DSS') is to ensure that **all** people with disability and other affected persons have access to an advocate (for applicants seeking review of NDIA decisions)[1]. The advocacy sector as it is currently funded cannot meet the demand for requests of AAT support. This is due to the complexity and time-consuming nature of the AAT process and the limited availability of legal referrals.

As this submission will demonstrate, the current structure of the NDIA's internal review and external appeals process is largely unfair, harmful, and inefficiently utilises government resources. To illustrate this, we discuss the trends in rising cases going to the AAT, key issues with the appeals process, advocacy scarcity, the harmful impact of the process on individuals, and the significant imbalance of power with the NDIA's excessive use of external lawyers.

We also highlight the reasons for significant and increasing demand for reviews and appeals which stems from three broad issues: poor and inconsistent planning decisions arising from lack of compliance with administrative decision-making principles, the failure to implement systemic changes to NDIS Operational Guidelines and policies following AAT and court decisions and perhaps most importantly, the NDIA's continued lack of transparency in the decision-making process.

It is important to have an effective, efficient and user-friendly appeals system for persons with disabilities to challenge NDIA decisions to ensure that they can seek a fair and reasonable outcome. Yet the appeals processes are time-consuming, confusing, stressful and burdensome for persons with disabilities which manifestly causes harm.

One of the central objects of the NDIS Act is to 'give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities'.[2] However, we are concerned that the administration of the internal review and external review process may contravene the following articles of the *CRPD*: Article 13 - Access to justice, Article 12 - Equal recognition before the law, Article 9 - Accessibility, Article 21 - Freedom of expression and Article 4(3) - Co-design. Because of the inefficient and ineffective reviews and appeals system, numerous other articles of the *CRPD* are also impacted.[3]

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[1] Department of Social Services, 'Operational Guidelines for the NDIS Appeals Program'(January 2021) pg 5-6 Oopehttps://www.dss.gov.au/sites/default/files/documents/03_2021/ndis-appeals-operational-guidelines_0.pdf

[2] NDIS Act 2013 s.3(1)(a).

[3] For example: Freedom from exploitation, violence and abuse (Article 16); Living independently and being included in the community (Article 19); Personal mobility (Article 20); Respect for privacy (Article 22); Respect for home and the family (Article 23); Health (Article 25); Habilitation and rehabilitation (Article 26); Work and employment (Article 27); Adequate standard of living and social protection (Article 28); Participation in political and public life (Article 29); Participation in cultural life, recreation, leisure and sport (Article 30).

It is also important whilst reading this submission to consider the multiple layers of intersectionality experienced by persons with disabilities and how this may impact their ability to access the NDIS reviews and appeals system. This submission cannot address all intersectionality but serves as a starting point for a further investigation necessary for the Joint Standing Committee to undertake.

All case studies have been de-identified, and names have been changed.

RECOMMENDATION 1:

The Joint Standing Committee to initiate a specific inquiry into the NDIS internal and external review processes to understand the issues discussed herein and the level of participant distress, distrust and anxiety being experienced as a result. An inquiry will enable the Committee to understand the different barriers and impacts experienced by the diversity of NDIS participants and prospective participants which prevent access to justice.

RECOMMENDATION 2:

DSS and the NDIA to commission an independent report using a co-design strategy to investigate how the reviews and appeals system can be improved to be more efficient, effective and promote the rights of persons with disabilities.

2. External reviews

In this section, we consider the issues arising at the external review stage - that is, the issues at the AAT. First, we extrapolate trends in AAT data, showing the upward trend in the number of AAT applicants and highlighting the fact that the vast majority of these applications result in outcomes in the applicant's favour. Second, we set out issues in the AAT process, raising concerns about both the impact on the wellbeing of applicants as well as inefficiencies in the process which results in a waste of taxpayer money. Third, we examine the difficulties in accessing advocacy and legal representation at this critical AAT stage. Finally, we examine the problems post-AAT resolution which result in a cycle of ongoing increases to AAT applications, including failures to implement systemic changes, ongoing lack of transparency, and planning decisions inconsistent with AAT resolutions for the same individual.

a. Trends in AAT data

The publicly available AAT data shows a clear picture of the problems resulting from the external review process. As the graphs below demonstrate, there has been a steady increase in the number of NDIS participants appealing to the AAT with many resulting in overturned decisions either at settlement or in the AAT's decision. That is, these are matters in which the NDIA's original decisions have been identified as unfair, incorrect, and/or inappropriate - including by the NDIA itself, in relation to matters that settle - and thus changed.

While these cases have often established fairer outcomes for persons with disabilities, these processes require the time and resources of NDIS participants, their families and caregivers, the AAT, advocates and lawyers to realise a person's rights - that is, the denial of rights which should have been realised at the outset leads to wasted time, effort and resources on appeal to the AAT.

Figure 1 below, extrapolated from the NDIA's Quarterly Report for March 2021 shows that as the NDIS has progressed to full rollout, participant numbers have increased. And, so too have the number of appeal applications made to the AAT.

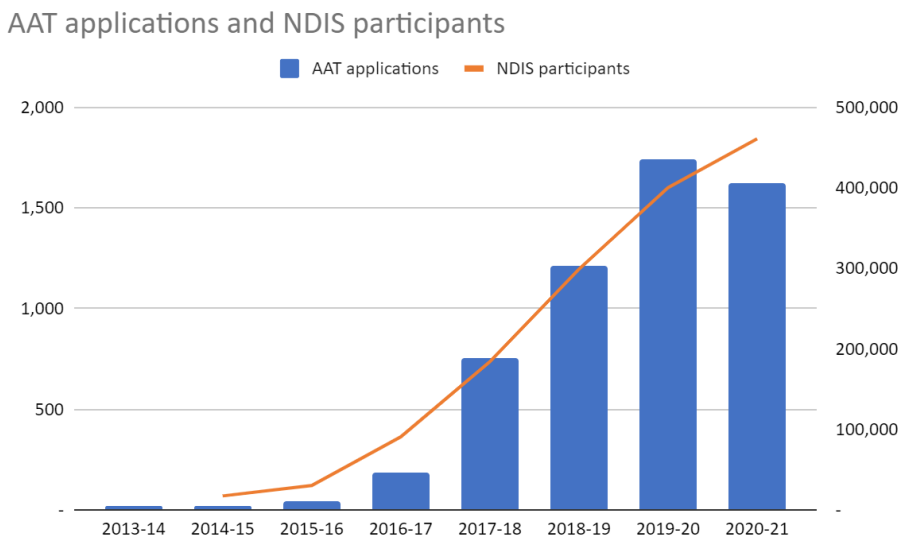

Figure (1) Source: NDIS Quarterly Reports

AAT cases as a percentage of the number of access decisions made by the NDIA has more than doubled in the last 6 months, rising from 0.27% in the Dec 2020 quarter to an all-time high of 0.62% in the June 2021 quarter. Of these AAT cases, 85% are for planning decisions.[4]

Alongside this increasing number of AAT applications, the data shows that NDIS appeals are significantly more likely to result in a change to the original decision as compared to the AAT's other divisions, such as Centrelink, Child Support, Workers Compensation and Veterans Affairs. Figure 2 below, extrapolated from the AAT's 2019-2020 Annual Report,[5] shows that in 2019-2020, 65% of NDIS appeal applications resulted in a change to the original decision, up from 59% in 2018-2019. In contrast, for example, only 32% of Veterans' Affairs appeals resulted in a change to the original decision. In 2019-2020, the NDIS division was the only AAT division in which the proportion of appeals that resulted in changed decisions exceeded 50%.

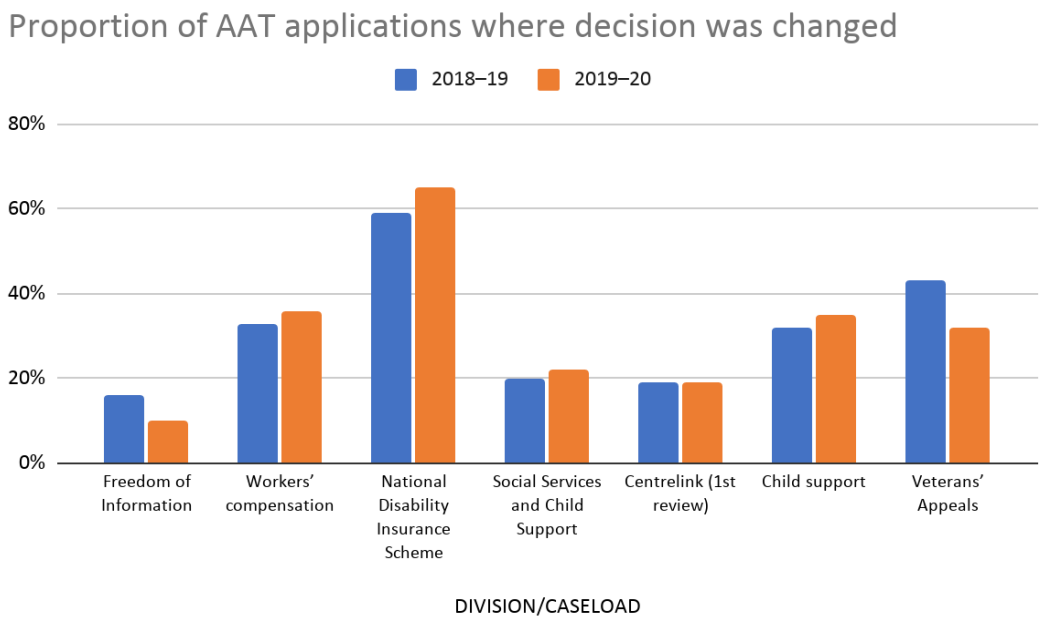

Figure (2) Source: Administrative Appeals Tribunal Annual Report 2019-2020

The data in Figure 2 includes data in relation to AAT applications which were heard by the AAT, as well as AAT applications which were resolved by consent or withdrawn. When broken down further, data from the AAT shows that in 2019-2020:[6]

- Out of 18 cases that were decided by the AAT, 13 resulted in a variation to the NDIA's decision. That is, 72% of cases were at least partially in favour of the applicant; and

[4] NDIS Quarterly Report: 2020-21 Q4 https://www.ndis.gov.au/about-us/publications/quarterly-reports (Note: all types of AAT cases are compared to total number of access decisions made)
[5] https://www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2019-20-37
[6] https://www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2019-20-38

- Out of 1,012 cases that were resolved by consent between the parties, 985 resulted in a variation to the NDIA's decision. That is, in 97% of cases that were resolved by consent, the NDIA itself agreed to change its original decision at least partially in favour of the applicant.

Again, NDIS matters are an outlier here. By comparison, in the AAT's General Division, only 32.8% of cases decided by the AAT resulted in a variation to the original decision. Similarly, in Veterans' Affairs appeals, only 33.3% of cases resulted in a variation, and only 30% were settled.

These figures paint a bleak picture of the NDIA - they show that of the decisions appealed to the AAT, the NDIA got the vast majority wrong. The comparison with non-NDIS appeals shows that this level of poor decision-making is not seen in the AAT's review of any other government decision-making.

The data suggests that the NDIA's external review team, responsible for settling cases, may even be aware of this poor decision-making. Figure 3 below shows that the vast majority of NDIS appeals in 2019-2020 were resolved by agreement between the parties, without a hearing: 66% of cases were resolved by consent, with just 1% of cases being determined by the AAT (the remainder were withdrawn by the applicant or dismissed for want of jurisdiction). This suggests the NDIA knew, in 66% of cases, they were wrong or likely to be proven wrong in a hearing.

The resolution of disputes by settlement in and of itself is not a bad thing. It prevents further waste of time, effort, and resources for all involved. However, NDIS disputes only get to this stage after an initial decision is made and then subject to internal review. The fact that most cases are resolved in the applicant's favour at the AAT stage points to problems in the original decision-making and internal review stages which are not being fixed earlier. It also shows the lengths that participants must go through to have their rights realised.

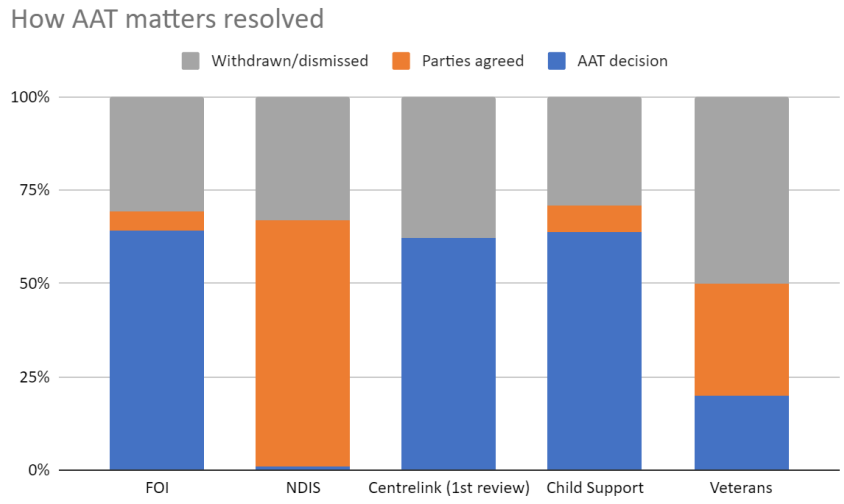

Figure (3) Source: AAT Annual Report 2019-20

As relatively new legislation, it is to be expected that NDIS decisions are still being tested by appeals. However, the signatories are concerned there are many other contributing factors to the high levels of demand for reviews and appeals which extends beyond the testing of legislation.

The significant increases in the number of applications to the AAT is creating delays and backlogs at the AAT. This consequently places strain on advocacy and legal services and ultimately leads to greater stress on applicants and their family/caregivers who seek to exercise their right to appeal a decision.

b. Issues with the AAT process

"The AAT process needs to be investigated, the process is weighted against the applicant and very intrusive and dangerous for the physical and mental health of the applicant"

-Anonymous survey respondent (DANSW).

We now turn to the participant's experience at the AAT. As NDIS appeals advocates and lawyers, we observe firsthand the negative impact the AAT process can have on the health and wellbeing of participants, prospective participants, and their families/caregivers.

This section addresses the challenges a participant comes up against when they want to appeal to the AAT. The key areas include: first, the harmful impact of appeals; second, difficulty understanding the process and jurisdiction issues; third, delays; fourth, lack of early resolutions efforts; fifth; additional request for evidence; sixth, issues with changes to plans before the AAT; finally, settlements just before hearings.

As discussed earlier, NDIS appeals at the AAT differ from other divisions because most matters resolve by consent. The vast majority of NDIS participants going to the AAT do not end up going to a hearing but resolve the matter through case conferencing and conciliation. While this potentially results in a positive outcome for the individual, it also:

- creates a much longer process, with multiple case conferences over many months;
- requires the NDIS participant or their informal support to know what is a "good" or acceptable outcome;
- creates a significant demand for advocacy support (with Legal Aid generally not being involved with the conferencing and conciliation stages);
- increases the pressure for the participant to reach an agreement in cases where their NDIS funding is running low, and the AAT does not agree to send it forward to hearing;
- does not address, and maintains, the power imbalance between the parties; and
- results in many decisions being unpublished which leads to poor transparency and accountability in NDIA decision-making.

Unsurprisingly, such experiences are often stressful, placing undue pressure on applicants on top of the everyday challenges people may experience in a disabling society.

RECOMMENDATION 3:

The NDIA to co-design a 'Guiding Principles on the Conduct of NDIS Appeals' document. This is necessary for the NDIA's accountability during the NDIS appeals process and to build trust with persons with disabilities and the disability community.

Such a document should include, but not be limited to, principles concerning: timeframes, reporting obligations, applicant feedback surveys, the conduct of internal and external lawyers and case managers, training requirements on disability rights and awareness, approach to evidence, addressing equality of representation, approach to settlement offers and approach to diverse groups such as Culturally and Linguistically Diverse and First Nations applicants.

i. The harmful impact of appeals

"The process was emotionally exhausting. I found myself needing days to recover after case conferences and it was always on my mind. I became extremely depressed throughout the process and once it was over, I needed to seek out additional psychological support. I am now trying to move on with my life."

- Client testimonial based on personal experience of the NDIS appeals process. (Rights Information Advocacy Centre)

For applicants, the AAT appeal process is hard work. It is often emotionally exhausting for persons with disabilities and their family/caregivers, and people report feeling disempowered by it. People tell us they are intimidated by the number of people on "the other side", including NDIA staff/ lawyers, and external lawyers.

It is a lengthy process involving many stages and people. In fact, by the time a matter gets to the AAT the participant/family will have explained their circumstances numerous times to:

- Therapists (who wrote reports)
- NDIA planners/ Local Area Coordinators (who ignored reports)
- Internal Review Officer (who may or may not have contacted the participant/family)
- The AAT
- An advocate (or multiple, as they search for someone to help)

Then, as the first step at a case conference, the applicant is required to retell their story again to another group of people. Often applicants do not understand why they must go over things repeatedly, especially when they receive the same outcome. The consistent retelling of their stories can create and contribute to mental distress and in some instances, trauma.

Additionally, ongoing delays are harmful where funding for vital supports is unavailable, and the applicant has no control over how long the process will take. They cannot often gauge the likely length of the overall process. If existing NDIS funding does run out during this process, the participant will either have their supports cease, or need to self-fund supports in the interim. For those who can self-fund (in our experience, the minority), it is unlikely that they will be reimbursed for those amounts if the NDIA does agree they were reasonable and necessary and should have been funded. For those seeking NDIS access, they receive no funding and rely on the often inadequate mainstream system for support.

Therefore, many people will also choose to not continue to challenge the decision through the AAT, due to concerns about the adverse effects that it can have on their mental health. This means that despite many NDIA decisions being changed, there are people who will not pursue a fairer outcome. While the AAT is intended to be a relatively informal process, there are still many elements of the process that closely resemble a trial.

Going through this process can be onerous for people who are already overwhelmed by their life circumstances. Many of the signatories' report clients experiencing additional mental health challenges as a direct result of the stress and interrogating process. Clients have expressed suicidal ideations and have needed to seek additional psychological support as a result of being traumatised by the experience. The reliance placed on informal supports during the process also creates the potential for carer burnout which can result in a higher cost to NDIA.

The burden of this process is illustrated in the Case Study 1.

Case Study 1 – Burden of the Process

Jane is appealing the NDIA's decision not to grant her NDIS access. She wanted to participate in the Tribunal process to feel involved and empowered. Jane attended the first phone case conference which had 2 external lawyers representing the NDIA.

She could not follow what was going on because the lawyers were talking too fast in complex language, and no one was addressing questions to her. Jane uses an electric scooter to mobilise due to severe spine degeneration and requires a substantial amount of support. Jane felt completely disempowered as the lawyers spoke about her different disabilities and health conditions as if they could be separated out. Jane became extremely upset when the lawyers requested she provide a report from her psychologist as evidence this is not the reason she uses a scooter. Jane felt like the lawyers had not read the hundreds of pages of evidence she had provided from treating specialists supporting her NDIS application.

This experience exhausted and overwhelmed Jane, she required days to recover from the first case conference and is still heightened by the experience. Jane has requested not to participate in any further case conferences, her advocate will attend on her behalf in the future.

RECOMMENDATION 4:

Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to ensure the NDIA addresses equality of representation at the AAT. The NDIA must provide equal legal representation when it chooses to be legally represented. In addition, there must be sufficient resources for advocacy support where this is requested to ensure applicants have effective access to justice.

ii. Understanding of the process and jurisdiction

"The Agency's processes are unduly complicated and confusing for all concerned and should be addressed in the interests of good public administration."[7]

"Negotiating the review process from beginning to end can be stressful for applicants in this jurisdiction. It is incumbent on the Agency and the Tribunal to make the experience as accessible, informal and quick as possible" [8]

"It is a process that I respectfully suggest is often too complex for a participant to navigate with any ease, let alone with any confidence, and that is not conducive to the NDIA's being able to respond quickly to the needs of participants."[9]

-Quotes from AAT Tribunal Members.

As the quotes by AAT tribunal members above reflect, the NDIA's processes are complex and challenging to navigate. These challenges result from poor communication, lack of transparency and lack of advocacy support.

The complexity of the NDIS legislation continues to create jurisdictional issues at the AAT which add to all the existing challenges. The numerous AAT decisions dedicated to jurisdictional challenges proves this point.

Broadly, there have been three types of jurisdictional complexities:

- confusion between an internal review sought of 'a decision not to reassess a participant's plan' (that is, a decision made under NDIS Act s 48(2)) and an internal review sought of a decision not to approve a statement of supports (that is, a decision made under NDIS Act s 100(6), with regard to s 33(2)). The characterisation of the review sought has significant consequences for the AAT's jurisdiction. This was the issue considered in *LQTF* [10] and has been a longstanding issue. The Commonwealth Ombudsman has stated:

> The inaccurate classification of review requests creates issues for participants—who are required to await the outcome of two processes (rather than one) before they can access their right to external merits review; and the NDIA—which unnecessarily expends time and staff resources on additional review processes.[11]

- difficulties that arise when internal review and AAT delays have been so significant that a participant's plan comes up for review before the appeal is heard. These issues have been addressed by the AAT in *Holland* and *Williamson and NDIA* [2019][12] AATA 2944 for example; and

[7] *Holland and National Disability Insurance Agency* [2021] AATA 92 [1]
[8] *Holland and National Disability Insurance Agency* [2021] AATA 92 [58]
[9] *LQTF and National Disability Insurance Agency* [2019] AATA 631 [2]
[10] *LQTF and National Disability Insurance Agency* [2019] AATA 631
[11] Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013* (Report, May 2018) [3.14]
[12] *Holland* and *Williamson and National Disability Insurance Agency* [2019] AATA 92

- more recently, whether the AAT has jurisdiction to review all supports requested or only supports specifically requested to be reviewed at the internal review.[13]

These jurisdictional complexities are also discussed further at Part 2(b)(vi) below.

Errors from the NDIA contribute to jurisdictional issues as demonstrated in Case Study 2.

Case Study 2- The impact of NDIA's mistakes on participants

A participant sought an internal review of their NDIS plan, with a number of supports in dispute. A letter headed "Outcome of your internal review request"(IR1) provided a response for all of these supports except one, about which it stated: "xx has been declined at this stage. We are seeking further internal clarification, and when we have this advice we will contact you with a final outcome decision."

The "final outcome decision" was not communicated for three months. In another letter headed "Outcome of your internal review request"(IR2), the NDIA declined to fund the support.

The participant applied to the AAT. The day before the first case conference the NDIA's external lawyers sent the participant a document stating that they had a jurisdictional objection to the application. It was their view that the AAT could only hear an appeal of IR1 (which did not decide on the support) and not on IR2 (which did).

The matter went to an interlocutory hearing, and at the time of writing, no decision has been made. The matter has not progressed in the five months since the AAT application was made, due solely to the manner in which the NDIA communicated the decision.

These matters have been previously represented to the Joint Standing Committee and confirmed by the Tune Review. However, no significant reform to make the process simpler and more accessible for persons with disabilities has occurred. The complexities result in:

- Many NDIS participants not fully understanding the process, which minimises their capacity to exercise choice and their rights of review and appeal;
- Added stress for participants and their families/caregivers;
- Increased dependence on informal supports;
- Over-reliance on funded NDIS supports to use funding allocated for other reasons to assist with the process;
- Increased demand on NDIS Appeals funded advocacy and legal organisations; and
- Waste of time, effort and resources, including taxpayer funds, on jurisdictional disputes.

These complexities are compounded by communication barriers. The AAT process is characterised by a significant reliance on legal terminology and procedural steps that are not explained in plain and simple English. The processes are not accessible for persons from culturally and linguistically diverse backgrounds and there are no adaptations to ensure the process is culturally safe for Aboriginal and Torres Strait Islander applicants.

[13] See for eg *QDKH and National Disability Insurance Agency* [2021] AATA 922.

There is also a reliance on electronic communication. This has been heightened since COVID-19, which changed the way the Tribunal operates through its increased use of digital communications. Within this, is an assumption of a level of technical proficiency and device ownership that is not always reflected in the population group that are NDIS participants.

RECOMMENDATION 5:

The NDIA to co-design amendments to the *NDIS Act* to reduce complexity and simplify processes in the AAT process by clarifying the AAT's jurisdiction.

RECOMMENDATION 6:

a. The NDIA to co-design improvements to the accessibility of the AAT process with an emphasis on information and communications improvements, including through the use of plain and simple English and communication through a variety of means.

b. Following from 6a, the NDIA to co-design improvements to the accessibility of the AAT process to be inclusive of all disabilities, diversities, languages and cultural backgrounds etc.

iii. Delays

"My experience at the AAT lasted 11 months. I had 4 case conferences until it was finally over. During the process, we agreed on a number of supports, but the NDIA did not give me a new plan including those supports, instead, I nearly ran out of money and felt like I had to beg for more. I nearly ran out of money because I had to keep on providing evidence that had already been provided, I had to slow down all my therapies to make the funding last. "

- Client testimonial based on personal experience of the NDIS appeals process (Rights Information Advocacy Centre).

As the quote above illustrates, time delays can create financial pressures and they can risk a person's access to support and services. From when a person receives their NDIS Plan to seeking a review at the AAT, the following steps and time delays may have been experienced:

- 3 months from when the plan is received to put in an application for internal review
- 3 months to receive an internal review outcome
- 28 days to appeal to the Tribunal
- 2 months until the first AAT case conference
- Once the matter is at the AAT, it takes an average of 18 weeks to resolve.[14]

The AAT's statistic of 18 weeks, however, vastly understates the length of time that can be experienced by some participants. This statistic includes most cases that resolve by settlement, as discussed above. The time taken to hearing in our experience is much longer. There are many examples of matters that advocates and lawyers have supported that take between 1-2 years to resolve, which either settle very close to hearing or are finalised by a hearing.

Delays during the AAT matter are caused by the following structural problems:

- Applicant is self-representing or informally supported due to a lack of available services.

[14] AAT Annual Report 2019-2020 pg 34

- Applicant is waiting for access to advocacy or legal representation (see part 2(c) & (d) of this submission).
- The complex procedural and jurisdictional questions and changes needing to be made to plans (see part 2(b)(ii)).

In addition to these structural factors however, the NDIA's conduct during AAT proceedings compounds the delay. In our experience, the NDIA has routinely:

- Made additional and unnecessary requests for evidence (see part 2(b)(v)).
- Made settlement offers just before the hearing (see part 2(b)(vi)).
- Raised points of contention at the hearing which had been conceded earlier on, either during the internal review stage or at the start of the appeals process.
- Caused delays to the appeals process by failing to meet deadlines set by the AAT.
- Raised points of contention which were not truly in dispute.
- Made arguments that were not legally supported and assertions around financial sustainability which were unsupported by evidence. The Full Federal Court decision of *NDIA v WRMF* [2020] FCAFC 79 provides an example of the NDIA's conduct in these matters - including by making financial sustainability assertions based on inaccurate and irrelevant reports[15] and raising entirely new arguments on appeal which it had disavowed before the AAT.[16]
- Failed to show transparency and accountability in making settlement offers and decisions (see part 2(b)(vii)).

Considering these concerns regarding the NDIA's conduct, the signatories believe the NDIA has in a number of cases contravened the following obligations:

- Rule 2(a) of the *Commonwealth's Model Litigant Obligations*, pursuant to Appendix B of the *Legal Services Directions 2017 (Cth)*, which outlines the NDIA's obligation to deal with claims promptly and not to cause unnecessary delay in the handling of claims and litigation; and
- Section 33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) states that in a proceeding before the Tribunal, the proceedings shall be conducted with 'as much expedition' as the requirements of the Act and proper consideration of the matters before the Tribunal permit.

RECOMMENDATION 7:

Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to establish measurable timeframes to address delays of the AAT process and hold the NDIA accountable to *Model Litigant Obligations*.

iv. Early Resolutions is part of the solution

It is of the utmost importance for the NDIA to invest resources into early resolutions. It can help to increase the availability of resources, decrease costs, and minimise stress upon participants. Many NDIS appeals advocates report that, for a period of 12 months starting approximately 2.5 years ago (at the time of writing), there was a noticeable presence of the Early Resolutions Team in the NDIA. We considered that this had a lot of potential, however since that period, their presence has considerably reduced. In recent verbal consultations at a high level with the NDIA, resource constraints

[15] *NDIA v WRMF* [2020] FCAFC 79, [111]-[114].
[16] Ibid, [167].

have been provided as the reason for this reduction. It has been regularly promised in discussions this will improve.

Currently, reports of contact from the Early Resolutions Team are almost non-existent. Most often in the AAT process, the first contact an applicant has with the NDIA is with an external lawyer at the first case conference.

However, early resolution efforts have the benefit of making the process less formal and intimidating and increasing accessibility. In the months leading up to the first case conference, it can support participants to understand what evidence could assist with a resolution.

Early resolution should also be implemented at the internal review stage where more effort is needed to resolve the matter before it reaches the AAT level.

Case Study 3 reflects the benefit of the Early Resolutions Team as an important step to prevent further unnecessary delays. Not only can it resolve matters early, but it can also pick up on errors made at earlier stages. It also reflects the importance of increasing resources to focus on early resolutions at the internal review level to avoid unnecessary AAT appeals.

Case Study 3 – Benefit of Early Resolutions

A client's participant status was revoked after she requested funding for assistive technology. All services were ceased with 5 days' notice. During the next six months, the client received only cleaning assistance through State Community Care and could not afford to continue with allied health supports such as hydrotherapy, exercise physiotherapy, and physiotherapy. The client's physical condition deteriorated significantly during this time and she fell multiple times in her home and in the community. When the internal review decision confirmed the revocation, the advocate filed a request for review in the AAT on her behalf. Before the first Case Conference, and without any additional evidence being filed on the client's behalf, the advocate was contacted by the NDIA Early Resolution Unit, which conceded that both the initial decision and internal review decision were wrong, stating that the internal reviewer had "not understood" the client's disability. When the advocate attended a subsequent planning meeting with the client, it was discovered that the NDIA planners who made the earlier decisions had incorrectly classified her Autonomic and Sensory Neuropathy as a physical disability instead of a neurological disability.

RECOMMENDATION 8:

a. The NDIA to invest sufficient resources into the Early Resolutions team to enable a greater opportunity for resolution at the internal review stage or early stages of the AAT process. This can improve the efficiency and accessibility of the AAT process for persons with disabilities and reduce the requirement for legal representation.

b. The function and expectations of the Early Resolutions team to be set out in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).

c. The NDIA to also establish measurable timeframes for contact from the Early Resolutions team with reported outcomes.

v. Additional requests for evidence

"I could not understand why the NDIA wanted the same evidence we had already provided but written in a way that suited them. What I really couldn't believe was the requested 'Assistive Technology Assessment' was going to cost more than the support itself being requested and I was expected to fund it. "

- Client testimonial based on personal experience of NDIS appeals process (Rights Information Advocacy Centre).

The case conference process is intended to resolve the matter by agreement if possible. However, in instances where the NDIA's representative considers that there is insufficient evidence to determine the matter, they may request the applicant to provide more evidence. While this may seem like a reasonable step, the NDIA and their representatives are often not engaging in a fair process for the following reasons:

- The NDIA challenges evidence already provided but which they assert is "out of date". This is problematic when the reason it is considered "out of date" is the length of time the NDIA has taken in the initial decision and internal review stages;
- When the request for further evidence is not framed clearly enough, the evidence subsequently provided by the applicant simply leads to more questions from the NDIA. Applicants have felt like the Agency is "drip feeding" their inquiries, and unnecessarily prolonging the process;
- We have had instances where the Statement of Issues and request for further evidence from the NDIA articulate the basis for their rejection of the applicant's claim (for access or funding), however upon providing the NDIA with the requested evidence, the basis of the rejection is shifted to another ground;
- Additional evidence generally comes from allied health professionals, and this is often at participants' expense as the NDIA rarely agrees to fund this. The ongoing and increasing costs associated with the Agency's non-specific and changing requests can discourage Applicants from continuing their appeal;
- Even after additional information is provided from treating professionals the NDIA can then request their own independent assessment. This causes greater delays and can be extremely frustrating for Applicants who have used their time, money, and resources seeking evidence, which is then not utilised by the NDIA.
- The NDIA may issue summonses for an applicant's entire medical record, even where those records were not relevant to their disability. This adds to further delays and trauma for the applicant, especially where it leads to applicants reliving past trauma.

Case Study 4 demonstrates how the NDIA can request information in a manner that not only exploits a person's time but their finances as well. These processes place undue stress on participants. See part (2)(b)(i) for further detail on the harm caused to applicants.

Case Study 4 – When is it Enough?

Mary's application for access to the NDIS was rejected and she applied to the AAT for an appeal. The NDIA requested further evidence so Mary asked her doctors to provide responses to their specific questions.

The NDIA was not satisfied by this and requested an assessment by an independent medical professional. Mary was very concerned about this but participated in good faith wanting to resolve the matter. Mary requested some information about what she could expect the assessment to entail, but this was rejected by the NDIA who claimed legal professional privilege over all briefing materials. This made Mary feel very uncomfortable and unsafe.

Five months later, the matter had still not been resolved and the matter was being prepared to be heard at a full hearing.

Mary considered an OT report would be beneficial for both parties at the hearing. The NDIA was put on notice of Mary's intention to engage an OT for this purpose. Mary spent over two thousand dollars of her own money and participated in a painful and exhausting assessment in the hope of resolving the Agency's questions.

Two days prior to Mary filing the OT report, the NDIA requested Mary undergo an independent OT assessment. Mary suggested the NDIA review the OT report first, but they confirmed their intention to proceed and advised a date had already been booked.

Mary was extremely distressed about this. Her response, upon being told of this request was that if the NDIA wants to provide her with anything, "it may as well be voluntary euthanasia" as she feels "so incredibly overwhelmed and sick of being treated as the government's guinea pig."

Before she had even had a chance to absorb this news and respond, the NDIA had filed a request

RECOMMENDATION 9:

a. The NDIA to provide additional funding when evidence is required from the applicant's treating professionals for the purpose of the AAT. This will reduce delays and minimise distress for applicants.

b. The NDIA to co-design criteria for circumstances where it is appropriate for the NDIA to use an independent assessor and the conduct regarding this process to be included in the 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3).

vi. Changes made to plans before the AAT

There are currently several interpretations of the NDIS Act, specifically in relation to the "decision" that is being reviewed when a participant appeals their funded supports.[17] As a result, NDIS

[17] Conveniently summarised in McLaughlin and National Disability Insurance Agency [2021] AATA 496 at [35]-[36]:
"Since the advent of the Scheme, the Tribunal has made numerous decisions regarding how a decision on supports in relation to a particular plan might impact on supports claimed by a participant in respect of other, usually later, plans: see for example the discussion in *Ewin and National Disability Insurance Agency* [2018] AATA 4726 (**Ewin)** at [280]-[318]; *Castledine and National Disability Insurance Agency* at [2019] AATA 4240 at [76]-[79]. In *Williamson and National Disability Insurance Agency* [2019] AATA 2944 Deputy President Forgie considered that a participant may have access to supports after the review date for the relevant plan has passed,

participants become caught up in a legal dispute about jurisdiction which becomes long and complex. There are two interpretations that can impede a person's capacity to access changes in supports and service while a case is under review.

1.<u>The decision is the plan</u>

If the decision being reviewed by the AAT is the participant's current plan, what does that mean for the "plan" while the AAT process is underway?

The AAT process can take a year or more. During this time, life circumstances and conditions can change - equipment may be recommended, goals can change, emergencies might occur. The NDIS processes have some flexibility to allow for these events, through:

- Receipt and approval of an equipment prescription resulting in a new plan under an Agency initiated review.
- New information from the participant accompanied by a change of circumstances request triggers a participant initiated review.

However, many take the view that this cannot happen when a participant has an appeal underway at the AAT, and all such changes must occur within the context of the AAT appeal. This is cumbersome, disconnected from the planning process, and delays the AAT matter even further. Moreover, it is not responsive to significant changes or emergencies.

Case Study 5 demonstrates some of these issues and highlights that this approach effectively denies the participant access to the appeals process unless they can either personally fund, or do without, supports in the interim.

Case Study 5: Blocking Access to Appeal

A participant was unhappy with the outcome of an internal review and made an application to the AAT. By the time this occurred they had no more funding for one component of their NDIS plan (that was not in dispute before the AAT, but support required due to a change in circumstances in the interim) and could not access supports.

Once the AAT application was received by the NDIA, the participant was contacted and told that nothing could be done about the absence of funding because the matter was before the AAT. However, if they chose to withdraw the AAT application, a new plan would be created, with the same content as the previous plan. Effectively the plan would be rebooted, providing access to funding now, but not resolving the issue, which would likely recur in another three months. In that time, the participant would need to request another internal review and start the process over again.

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but that a new plan made by the Agency means that the previous plan is no longer in effect. The Tribunal may continue to hear any application for review of the earlier plan, and may increase the level of supports under that earlier plan, so that a participant may be reimbursed for any costs incurred. However, to review the supports provided under a new plan, a participant must make an application for review of that new plan. However, in *Holland and National Disability Insurance Agency* **[2021] AATA 92** Deputy President Constance took a different view, deciding that a fresh application for review was not necessary in respect of each new iteration of a participant's plan, where the same supports were essentially under review. He considered that such *bureaucratic "red tape"* is not mandated by the legislation."

2. The decision is not the plan

The other position is that the decision is one not to fund specific supports[18], as articulated in the plan. This leaves all other supports outside of the purview of the AAT, and able to be adjusted, reviewed, and altered as necessary.

While this is a more straightforward approach, it has other implications:

- Where the participant makes a request for internal review, the only true and complete record of this request is when it is done in writing. Many people call and ask for it. When this occurs, they are reliant on the call centre operator correctly understanding and recording the request made, this may be recorded in a lot of detail, and every word the person says, or they can simply record that an internal review was requested.

- A person's comprehension of their plan can vary. When they request an internal review, they may understand all of the details of their plan and know exactly what is not funded (rare, because the NDIA does not provide a breakdown of the plan budgets) or they may have a vague understanding that the plan will not be sufficient. This subjectivity of what was "in" the internal review can be problematic.

- These variations may not be significant if the reviewer discusses the matter with the participant, and forms assist them to develop a clear picture of what the concerns are. However, that is another point at which the information and recording are conducted by the NDIA and may be subject to misinterpretations and misrepresentations of the participants' concerns.

- Once the matter gets to the AAT, if specific support was not documented they then face a *QDKH* type challenge.[19] Here, the NDIA will argue that if this has not gone through the internal review process, the AAT has no jurisdiction to consider it. Most participants do not understand the legal implications of *QDKH*, because they are not lawyers.

vii. Settlements just before hearings

"The appeals process has been nothing short of a "game" to the NDIS, where the NDIS are not transparent in what they request and very vague in their reasoning, leaving families stressed and exhausted supplying endless reports and letters stating the same information they already have just in a different context. The NDIS continues to do this to see just how far a participant is willing to proceed through the tribunal process. The result you receive from the NDIS through tribunal is not fair, but rather relies on how far the participant is willing to go. This to me, shows that it is more of a game, than a fair, ethical process."

[18] See for eg *QDKH and National Disability Insurance Agency* [2021] AATA 922 in which the AAT held that jurisdiction is limited to supports which have been considered at internal review; we understand that this decision is currently being appealed.

[19] See above n 15

- Client testimonial based on personal experience of NDIS appeals process (Rights Information Advocacy Centre).

It has been our experience that the NDIA settles many matters just before or very close to scheduled hearing dates. This leads signatories to believe the NDIA is not genuine in their opposition to funding the support, but they want to stretch the process out as long as possible.

Preparing for a hearing requires a significant investment of time, resources, and mental capacity for the applicant. For many, it is a highly stressful process. In terms of public expenditure, preparation requires additional resources from lawyers, advocates, barristers, AAT, expert witnesses, NDIA workforce. It is a costly process for all parties.

It is extremely disheartening for a person with a disability to see the resources being expended in the appeals process far exceeding the cost of the support they are seeking.

Case Study 6 demonstrates common tactics that are employed by the NDIA. While the Agency's intention behind these actions is unclear, it nonetheless places a burden on the participants using not only their time and resources but also the services and people involved who provide support.

Case Study 6 – Settlement Before Hearing

Conner was supported by an advocate to appeal to the AAT. Before the first case conference, an offer was made verbally to fund the support on appeal and an updated quote was requested. Conner arranged an updated quote and provided this to the NDIA. Conner heard nothing.

At the first case conference, it was communicated that the offer was revoked. Conner was very upset. The NDIA had further questions for Conner and his allied therapy team to answer. Conner was supported by his advocate to obtain and provide this evidence to the NDIA.

After 9 months since the AAT application was made the NDIA decided it would not agree to fund the support and a hearing was scheduled. Conner was not approved for Legal Aid funding because the amount of support was too minor ($2,500). Conner was supported to contact 5 other legal organisations without any success at gaining representation for the hearing.

In communication with Conner, the NDIA indicated it would be represented by both external lawyers and a barrister. Three weeks before the scheduled hearing date and after Conner's Advocate had provided the Statement of Issues, Facts and Contentions to the Tribunal, the NDIA agreed to settle the matter.

Conner was confused why the matter was now settling when nothing had changed in his situation. When asked, the NDIA could provide no explanation.

RECOMMENDATION 10:

The 'Guiding Principles on the Conduct of NDIS Appeals' document (see Recommendation 3) to adopt principles that ensure settlement offers are made as early as possible. This ensures more efficient use of resources.

c. Accessing advocacy

"If I did not have the support of an NDIS Appeals Advocate and a Legal Aid Lawyer I don't know if I could have continued."

- Client testimonial based on personal experience of NDIS appeals process (Rights Information Advocacy Centre).

NDIS appeals advocates play an essential role in providing support to applicants. However, the increase in appeals, in addition to insufficient funding of advocacy organisations, has meant that not every NDIS participant or prospective participant requesting an external appeal and seeking advocacy can access advocacy services.

This is troubling because in many circumstances signatories see harm mitigated and greater outcomes received for applicants who have access to advocacy. This is because they can advocate for what the participant is entitled to under the legislation/rules rather than what the NDIA has told them is available.

It is here that we draw attention to the aims and objectives of the NDIS Appeals Program funded by DSS that state:

> *"To ensure that **all** people with disability and other affected persons have:*
>
> *-access to an advocate (for applicants seeking review of NDIA decisions); and*
>
> *-access to legal services in circumstances where applicants are found eligible for NDIS Appeals legal services funding (for applicants seeking an external merits review in the AAT only)."* [20]
> (Emphasis added)

The signatories who are funded under the NDIS Appeals Program state that these objectives are not being met. Organisations are insufficiently resourced to meet the demand of all people seeking advocacy support for internal review and external appeals of NDIA decisions. This is largely due to:

- Significant issues with the standard of decision making within the NDIA, which has led to;
- Significant increases in the number of people seeking a review of decisions, followed by;
- Failures of the internal review process to rectify deficits in decisions, which leads to;
- Significant increases in the number of applications to the AAT for external review of decisions, creating delays and backlogs at the AAT; and
- Compounded by the significant increase in outsourcing to corporate law firms and the apparent absence of NDIA instructors, resulting in overcomplicated and lengthy processes that require more advocacy time for each appeal.

The consequences of the lack of resources are:

- People unaware of their rights to appeal;
- People deterred from appealing;
- People withdrawing applications without appropriate advice;
- Unfair settlement outcomes;
- Participants using NDIS funded support to assist with an appeal e.g. support coordinators and allied health professionals; and

[20] Department of Social Services, 'Operational Guidelines for the NDIS Appeals Program'(January 2021) pg 5-6 https://www.dss.gov.au/sites/default/files/documents/03_2021/ndis-appeals-operational-guidelines_0.pdf

- An imbalance of power.

Figure 4 below shows just under 40% of AAT applicants are either self-represented or have support from a friend, relative or other. However, these statistics do not reflect the proportion of participants who may have attempted to access advocacy assistance. It is possible that a large majority of those who were self-represented were unable to access advocacy support. Moreover, these statistics reveal little of the number of people who have received their internal review outcome and do not apply to the AAT because they did not have appropriate assistance.

So far in 2020-2021, there have been 23,763 internal reviews relating to plan funding and 4,035 regarding access.[21] It is unclear how many of these internal review outcomes uphold/partly uphold the decision of the NDIA, which may be accepted by people who believe that such decisions are unfair and unreasonable. However, they acquiesce due to pressure, concerns of prolonged stress and/or fears of losing support and services.

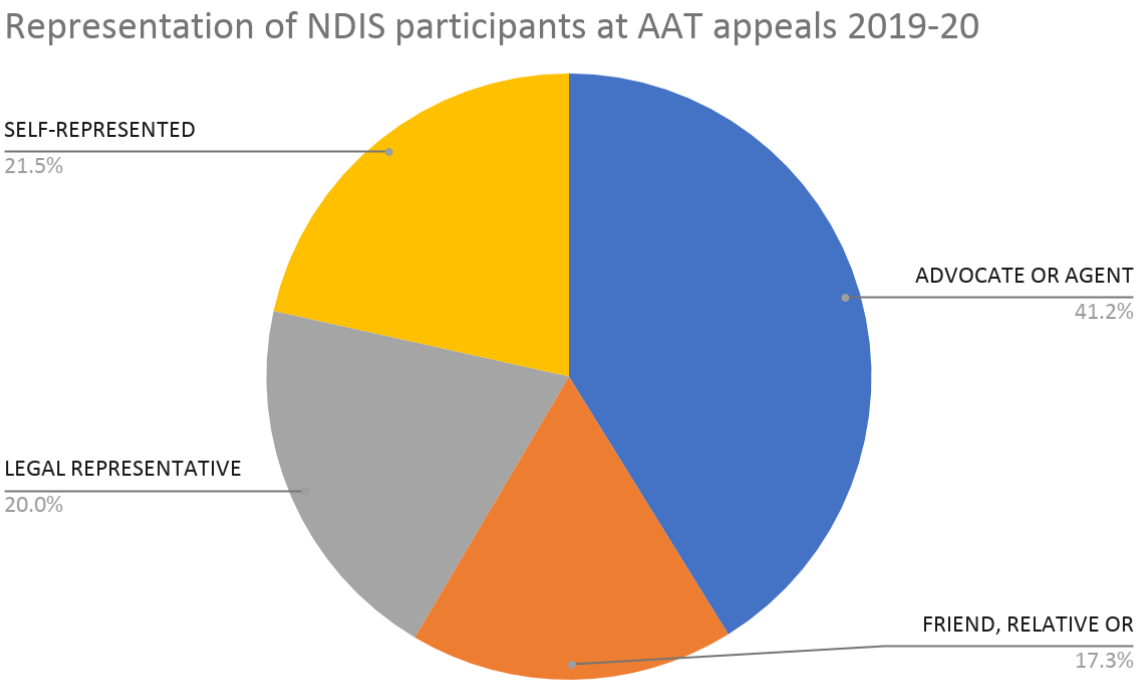

Figure 4 Source: AAT Annual Report 2019-2020 [22]

[21] NDIS Quarterly Reports 2020-2021 (Q1 - Q3)

[22] https://www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2019-20-36#mdfigure-34-209-table-1382

i. Choices advocates are having to make: rationing services

Advocacy organisations have their own criteria as to who they assist, including:

- Type of disability or condition
- Particular demographics (CALD, gender etc)
- Location specific and operate within particular areas only

The ongoing increase in requests for assistance with NDIS appeals has meant that advocacy organisations have had to introduce new criteria for who they prioritise for assistance.

Some advocacy organisations have limited *who* they can help, such as only providing those with an intellectual disability who are unable to participate in case conferences. Other advocacy organisations have limited *when* they can help, such as advising people to make their own application to the AAT and attend the first case conference on their own, with advocacy offered after that. And some advocacy organisations have limited *what* they can help with. For instance, they provide information and advice about the process rather than individual advocacy or they close waitlists for some time and refer all inquiries to other advocacy organisations.

Ultimately, this narrows the scope of the assistance available to applicants, as advocates effectively ration their services in different ways amongst NDIS participants/prospective participants. There are also groups who are already at risk of not being able to access sufficient advocacy supports, including those:

- Who do not have access to electronic communication or informal supports to assist them;
- Whose informal supports have a conflict of interest issue (eg service providers);
- Who are unaware of the availability of advocacy, or do not understand their NDIS plan and how to seek review or appeal;
- Who live in remote/rural communities.

ii. Funding Advocacy Services

Recommendation 33 from Joint Standing Committee Planning Final Report:

> *The Joint Standing Committee recommends that the Australian Government review the amount of funding that it provides to advocacy organisations through the NDIS Appeals program and ensure these organisations are sufficiently funded to support participants throughout the Administrative Appeals Tribunal process.*[23]

In its response to the JSC Planning Final Report, DSS has merely 'noted' recommendation 33 and has stated, 'The Department is continuing to monitor demand for NDIS Appeals advocacy support and legal assistance. This includes understanding the impact of reforms such as the NDIA Early Resolution Team, the Participant Service Charter, and the Participant Service Improvement Plan on the demand for the NDIS Appeals program. This will inform advice on appropriate future funding levels'.[24]

[23] Joint Standing Committee on the National Disability Insurance Scheme, NDIS Planning Final Report 2020 pg 235 [10.83]

[24] Australian Government response to the Joint Standing Committee on the National Disability Insurance Scheme (NDIS) Final Report: Inquiry into NDIS Planning 2021, pg 17

The response from DSS is concerning. Many signatories note they have been in regular contact with DSS to make them aware of the impact of demand for the NDIS Appeals program. Many signatories with NDIS Appeals Program funding also receive funding for the National Disability Advocacy Program (NDAP). Organisations report their effectiveness to support persons with disabilities under the NDAP has reduced directly because of the demand and intensity of NDIS appeals related advocacy.

RECOMMENDATION 11:

a. DSS and the NDIA to consult with persons with disabilities and the disability advocacy sector to accurately measure demand for support to review and appeal NDIA decisions.

b. Once the demand is measured accurately - DSS and the NDIA to implement 'Recommendation 33' from the Joint Standing Committee Planning Final Report to ensure appropriate funding is allocated to ensure persons with disabilities have support to exercise their right to access justice.

RECOMMENDATION 12:

DSS to fund longer-term contracts for the NDIS Appeals Program to enhance the sustainability of organisations in the advocacy sector.

iii. Failure to adequately inform people about review rights and advocacy service availability

Internal review decision letters do not provide consistent information about review rights and advocacy availability that is prominent or accessible. Decisions include a one-line reference to the availability of advocacy and a hyperlink to the NDAP website.

RECOMMENDATION 13:

The NDIA to provide applicants with a contact list for advocacy organisations with all reviewable decisions, and internal review decisions in a variety of accessible formats and in a way preferable to the individual.

d. Legal representation

i. Access to legal representation

Wait times to access Legal Aid funding is increasing. Even if people have been approved for Legal Aid funding, due to the sector's capacity constraints, there can be long delays for a lawyer to become available to assist them.

This puts downward pressure on advocacy organisations to manage matters until assistance is available. This has the effect of limiting the number of people advocacy organisations can support and puts increased pressure on participants to use informal and other support (if they have any available). If they cannot receive support many people may choose not to pursue an appeal.

It is important to highlight that legal assistance in NDIS Appeals addresses a different need to that of advocacy assistance. The advocate's role is to support a person to participate in the review and appeals process and promote the interests of the person with a disability. Non-legal advocates cannot give legal advice.

Legal representatives work with the applicant and their advocate to obtain evidence, present their position before the AAT, and in many cases help to resolve the matter without it needing to go to a hearing. Based on National Legal Aid's experience in assisting applicants before the AAT, the availability of legal assistance assists to resolve disputes efficiently and early. Legal assistance plays an important role in advising people against pursuing non-meritorious matters. This saves the individual the stress and anxiety of pursuing an appeal where there is no prospect of achieving what they desire. It also saves the AAT and NDIA appeals team valuable resources.[25]

If people have the knowledge or support, they may be able to access a pro bono lawyer. However, this is rare and creates further inequities in the NDIS for people who do not have the means to access such support.

ii. External Lawyers

From the first case conference at the AAT, the NDIA can (and often do) engage private external lawyers. Frequently these are corporate lawyers with little to no experience working with disability, the NDIS, and the importance of using correct terminology. Case Study 7 shows the impact of using improper terminology and highlights the consequences when evidence is ignored by the NDIA.

[25] National Legal Aid Submission - Review of the National Disability Advocacy Program pg 4-5 https://www.nationallegalaid.org/resources-2/nla-submissions/

Case Study 7 – Inaccurate Information in Statement of Issues

The NDIA provides a Statement of Issues before each conference at the AAT, in which they document their current position on the issues in dispute. In the introductory paragraphs of this document, their representatives stated:

> ***The Applicant is a xx-year-old xx, born xxx, who was diagnosed with a primary condition of 'unspecified psychosocial disorders' and a secondary diagnosis of 'other physical'.***

These are not diagnoses. In our experience, it is highly likely these are the categories 'ticked' by the NDIA when entering the participant's details into the NDIS database.

From the very outset, this distressed the participant. There were multiple requests to remove this offending statement which were consistently ignored.

The NDIA argued that there was insufficient evidence that the requested support was related to the participant's "disability". Furthermore, there were ongoing issues with the NDIA failing to recognise the totality of the participant's impairments which had been provided but repeatedly ignored and excluded from the official tribunal documents prepared by the NDIA (T-documents).

The signatories collectively have had regular experiences of external lawyers who are not appropriately authorised to provide information or answer questions about the matter and the NDIA instructor is largely absent with very little to no observable involvement. This slows matters down considerably and is a source of deep frustration for participants who see little progress in matters and have many questions at case conferences that are not able to be answered by the NDIA's representatives and result in a constant back and forth for weeks between conferences.

Further, the NDIA's representatives can take an unnecessarily aggressive stance at odds with both the principles of the *NDIS Act* and the NDIA's responsibilities as a model litigant. This is mostly seen where there is no discernible instructor (they do not attend conferences, do not appear to be copied on emails, and there is no ongoing reference to them in discussion).

The reliance on lawyers for early stages of the AAT process creates an immediate power imbalance when the participant is either self-representing or being supported by a non-legally trained advocate. Jurisdictional challenges and legal issues such as professional privilege are not within the scope of training of a disability advocate and require the support of legal representation if the participant is to be guaranteed access to assert their appeal rights.

Case Study 8 is an example of the unnecessary stance the NDIA can take when defending a matter at the AAT. Unfortunately, this is not uncommon and is not aligned with key principles of the NDIS including choice and control, independence, respect, and dignity.

Case Study 8 - Extraordinary Arguments by Lawyers

An NDIS participant had been approved for a powered wheelchair and an electric bed on the basis of their functional impairments and difficulty mobilising independently.

In their AAT appeal, they were seeking six hours per week of personal assistance in their home (total, not additional). They gave examples of how this would be used, including being able to shower three times a week, and light household tasks such as meal preparation, attending to laundry and looking after pets.

The NDIA engaged a barrister to write their submissions in preparation for the matter going to hearing, including arguments about the personal assistance:

-The occupational therapist recommended 6 hours per week personal assistance, but not for showering, only for laundry and cooking
-A shower chair, grab rails and non-slip mat would achieve the same thing and be cheaper, so no assistance is necessary for showering
-The Applicant's partner should be able to do all the laundry and cooking

Finally, the NDIA augmenting its resources by using external lawyers presumably adds significantly to the Agency's costs. The NDIA's external legal expenditure in 2019-2020 in relation to AAT matters was $13.4 million.[26]

Advocates are concerned about the oversight of these costs, and that the additional activity, jurisdictional objections, disputes about privilege, and excessive efforts to reject supports that are well below those deemed reasonable in the Agency's own modelling are not related directly to the generation of billable hours for commercial law firms.

Meanwhile, the funding for NDIS appeals advocacy is stagnant, despite significant increases in the number of appeals. On a per participant basis, the billable hours of external hours to defeat an appeal appear to be not only considerable but without limit. In contrast, the advocacy hours to support a person with their appeal are reducing constantly, and as a result, advocates are forced to stretch finite resources to assist more people. This is an unfair fight and limits effective access to justice.

RECOMMENDATION 14:

a. Continuing from 'Recommendation 3', the 'Guiding Principles on the Conduct of NDIS Appeals' document to include guidelines regarding the conduct of external lawyers and to ensure NDIA Instructors/case managers are present at conferences in preference to lawyers to engage in a meaningful and respectful discussion about progressing matters as efficiently as possible.

b. All external lawyers conducting NDIS AAT matters to undergo training regarding disability rights and awareness.

RECOMMENDATION 15:

The NDIA to publish transparent data regarding their expenses on external legal representation for AAT matters in the Quarterly Reports.

[26] Senate Community Affairs Legislation Committee, Answer to Question on Notice, 29 October 2020, Portfolio question number NDIA SQ20-000296.

e. Inconsistency after the AAT

It is well established that inconsistencies are a significant problem in NDIA decision-making. There are many instances where a participant goes through an internal review and the issue is resolved at the AAT, but then that same support is refused at the next plan review. The participant then needs to go back to internal review and appeal all over again, repeating what is often a stressful and time-consuming process.

This can also be inconsistent with the *NDIS Act* s.33(5)(f) which requires the NDIA CEO to 'have regard to the operation and effectiveness of any previous plans of the participant' when deciding whether to approve participant supports.

Aside from the unfairness to participants who are required to go through the same lengthy and often expensive process, this also leads to an ineffective oversight mechanism and poor government administration. Where a matter has already been resolved at the AAT level, outside of any significant changes in circumstances, resources should not be wasted on needless appeals.

Case Study 9 demonstrates the frustrations and inefficient use of resources when AAT settlements are ineffective after each plan.

Case Study 9 – Having the Same Battle Over and Over

Georgia is in her forties, and still very dependent on her parents for assistance. Whilst they love her, they had hoped that by this stage of her life the focus would be on ensuring she is supported to live her best life when her parents are no longer around.

Transport funding for her was underfunded in 2016, and only resolved the day before an AAT hearing when the NDIA agreed to fund the amount required. This funding was not carried into her 2017 or 2018 plans, and both times it was necessary to request an internal review of the decision before it was resolved. In 2020, not only was transport reduced, so was funding for personal supports. This decision is now going through the AAT process again.

Georgia can not manage this process without support, and her parents are exhausted and afraid of what her future looks like if this continues.

f. Lack of transparency in settlement decisions

As noted above at Part 2(a), most AAT applications are resolved by consent. Of the cases that are resolved by consent, 97% of those involved at least a partial variation to the NDIA's original decision. This means that in a very significant number of cases, the NDIA has accepted that the original decision was incorrect and that it could be resolved by agreement with the participant. A core concern within this process is the lack of transparency and accountability in the settlement of cases.

This is an issue that is well-known to this Committee, having been addressed in two previous reports of the Committee.[27] Yet the ongoing failure by the NDIA to acknowledge and address these recommendations requires the signatories to again raise this matter.

The lack of transparency around settlement outcomes at the AAT impairs consistent decision-making, hampers effective oversight of government administration, and makes it difficult for participants to understand the types of supports they are entitled to. The nature of settlements is such that they are private, confidential, and non-binding on non-parties.

Increasing transparency in settlement outcomes will assist with addressing inconsistencies in decision-making, as it will allow some level of public accountability in ensuring the NDIA makes decisions consistently with matters that it has settled. This is especially in circumstances where some $13 million is spent by the NDIA on external legal fees at the AAT annually.

The publication of this information may also improve the ability of participants to understand the types of supports that are funded and assist participants to decide what types of supports they could seek. A survey conducted by the Tune Review found that out of 985 respondents, only 41% of people had planners who 'clearly explain[ed] how the planning process would work and the sorts of things that might be included in [their] plan'.[28]

There have been numerous attempts to make this information publicly available. Disability advocates have repeatedly called for the NDIA to publish AAT settlement outcomes in a de-identified manner in numerous submissions and within an open letter to the Minister. This recommendation has also been unanimously adopted by the Joint Standing Committee twice in its previous inquiry into NDIS Planning.[29] In October 2020, the Australian National Audit Office made similar findings of the need for the NDIA to improve decision-making by using outcomes data from AAT reviews and early resolution outcomes.[30] While the NDIA agreed with the Australian National Audit Office recommendation, we have yet to see anything officially implemented.

Settlements that the NDIA enter reflect the provision of funding and supports that the NDIA believes it is empowered to make under the NDIS Act. That is, settlement outcomes provide examples of the *proper* exercise of the NDIA's function and powers under the NDIS Act. They are not examples of the NDIA being pushed outside the limits of the legislation. Planners and participants should rightfully have the benefit of understanding this exercise of the NDIA's powers.

The NDIA's treatment of settlement outcomes seems to suggest an aversion to publishing information that it considers may encourage participants to seek higher levels of funding. Any such views must be

[27] Joint Standing Committee, Final report into NDIS Planning (December 2020); Joint Standing Committee, Interim Report into NDIS Planning (December 2019).

[28] David Tune, Removing Red Tape and Implementing the NDIS Participant Service Guarantee: Review of the National Disability Insurance Scheme Act 2013 (Report, December 2019) 192.

[29] Joint Standing Committee, Report into NDIS Planning, December 2020, Recommendations 34 and 35.

[30] Australian National Audit Office, *Decision-making Controls for NDIS Participant Plans* (Report, 2020), [3.84] (Recommendation 2).

resisted. Participants are entitled to seek the support they require; it is the role of the NDIA to approve (including at settlement) only those that fall within the boundaries of its legislative framework.

Advocates also routinely encounter the names of the same planners on internal reviews that are overturned either by the AAT or by agreement with the NDIA after an AAT appeal has been filed. Unless this information is made available both to the planner and to the broader workforce, the same incorrect decision will be made repeatedly, resulting in unnecessary reviews and appeals.

RECOMMENDATION 16

The NDIA to implement Recommendations 34 and 35 of the Joint Standing Committee's NDIS Planning Final Report (December 2020) relating to transparency of AAT settlements.

RECOMMENDATION 17

a. Transparency from the NDIA regarding procedures it has in place to ensure continuous improvement of administrative decision making. This will ensure decisions are scrutinised that are varied in the process of internal review, AAT early resolutions, AAT settlements or final hearings and improve the quality of decision making for future decisions and improve the trust from persons with disabilities and disability sector of the NDIA.

b. The NDIS to publish statistics each year regarding the performance of original decision-makers to reflect where improvement is required. Statistics to include:

- Number and percentage increase of plans varied by internal review.
- Number and percentage increase in plans settled in the AAT prior to a hearing.

g. Implementing systemic changes

The NDIA has often failed to implement, in a timely way, systemic changes to its policies following AAT and Federal Court decisions.

Concerning AAT decisions, the NDIA has taken contradictory positions. If the decision is in favour of an applicant, the NDIA's position is usually that AAT decisions provide non-binding interpretations of law and policy and need not be implemented by the NDIA. However, if the decision is in favour of the NDIA's position, the NDIA will adopt this position as if it is law.

While AAT decisions are technically not binding, the NDIA's refusal to consider and implement relevant changes to policies following AAT decisions renders it an ineffective oversight mechanism, especially where the AAT has consistently decided on a particular policy issue. An example of this is gym memberships discussed below at Part 3(d). The NDIA should have a consistent and transparent approach to AAT decisions.

This failure to make appropriate systemic changes to NDIA Operational Guidelines has also extended to Federal Court decisions. Court decisions that directly contradict NDIA policies and practices are binding and must be implemented systemically at the first opportunity.

The failure to implement decisions swiftly undermines the oversight mechanism of the appeals process, and wastes resources by resulting in confusion and reviews and/or appeals on issues that should be considered settled. This failure forces participants to initiate appeals on similar grounds as previous cases[31], simply to achieve a similarly successful outcome in the individual case.

This has been demonstrated in the following example:

> ***Example: Ignoring Federal Court decision***
>
> *In the case of Mr. Liam McGarrigle, the outcome of a Federal Court decision in 2017 did not result in an update to the NDIA's policies until October 2019. This change was only made following significant representations by disability organisations to the NDIA. Even then, the NDIA's transport guideline continues to misconstrue the law.*
>
> *The NDIA's Operational Guideline on Transport sets down 3 levels of transport funding that can be provided to participants.[32] There is no expectation that the actual transport needs and costs of participants be determined, only that the participant meets the criteria to qualify for each level. In McGarrigle[33], Mortimer J held that the NDIA was required to pay for the full costs of transportation that were found to meet the criteria for reasonable and necessary supports. This decision was upheld in the Full Federal Court.[34]*
>
> *Despite these decisions, the NDIA has continued to apply the Transport Operational Guideline to determine transport funding and has generally refused to provide funding for actual transport costs unless the participant takes the matter to the AAT, resulting in unnecessary litigation costs.*

[31] See '*CASE STUDY: HAVING THE SAME BATTLE OVER AND OVER' above pg 28*

[32] https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-transport#12

[33] *McGarrigle v National Disability Insurance Agency* [2017] FCA 308; *David and National Disability Insurance Agency* [2018] AATA 2709

[34] *National Disability Insurance Agency v McGarrigle* [2017] FCAFC 132

We submit that the failure to implement changes to Operational Guidelines in response to AAT and Federal Court decisions is a key driver of poor decision-making by NDIS planners, as well as poor internal review decisions, leading to the continued rise of appeals to the AAT. Addressing this issue would improve outcomes not only for participants, but also for the NDIA's use of resources.

RECOMMENDATION 18:

The NDIA to develop a transparent and accountable system for implementing systemic changes to policies in response to Federal Court and AAT decisions. This can include:

- the implementation of a feedback loop which ensures that following an AAT or Federal Court decision, the NDIA's lawyers advise the relevant policy team of the consequences of the decision for the existing policy, and the policy team be required to consider whether changes are required to the policy; and/or
- a Policy Advisory Committee is set up, including lawyers and advocates, to advise the NDIA of policy changes required following AAT or Federal Court decisions.

RECOMMENDATION 19:

Policy changes made following AAT and Federal Court decisions to be reported in the NDIA's Quarterly Report to ensure transparency and accountability.

RECOMMENDATION 20:

The current Transport Operational Guidelines to be immediately withdrawn and rewritten in the light of the criticisms expressed by the Federal Court and AAT .

3. Decision making within the NDIA

Signatories believe a significant number of appeals to the AAT are caused by poor administrative decision making and lack of transparency at the planning and internal review stage. If greater resources and training were invested in getting the initial stages of planning and reviews correct, AAT appeals would reduce. This would result in significant cost savings and reduce exposure to harm for persons with disabilities.

In our experience, the approach taken by NDIA delegates to make decisions under the *NDIS Act* is often inconsistent with principles of administrative law. These principles are well-established and accepted at common law and crystallised in the *Administrative Decisions (Judicial Review) Act 1977*. In this section, we highlight a few key examples by reference to these principles.

a. Evidence-based decisions

Good decision making relies on good evidence. NDIA decision-makers have a duty to obtain evidence that is relevant to their decision, and readily available to them. If a phone call or letter will resolve a question of fact, failure to inquire could be considered a 'manifestly unreasonable' failure that amounts to a legal error.[35]

Unfortunately, the NDIA does little to assist participants and prospective participants to understand what evidence is required or to present the right information when it comes to reviews. Further, many participants have reported issues with document management, including:

- Documents provided to the NDIA, but then not referred to in the internal review;
- Documents provided to the NDIA multiple times, but NDIA staff being unable to locate them; and
- Documents that are attached to the participant's record but not referred to by the planner, internal reviewer, or in the tribunal documents for an AAT appeal ('T-documents').

The NDIA will often provide the reason for not funding support based on "insufficient evidence", despite the relevant document being provided.

> **Example: Request for Internal Review form asks the wrong questions**
>
> *The NDIA form[36] to request an Internal Review, or "Application for Review of a Reviewable Decision" (RORD form) is unfit for ensuring the reviewer has access to the relevant evidence to decide.*
>
> *The form itself does not address the criteria relevant to the decision being reviewed, nor seek confirmation of evidence provided in support of those criteria.*
>
> *Rather, people seeking a review are asked 'why do you want the decision reviewed?' and 'how has it affected you?" and what outcomes are you seeking?''. Unsurprisingly, many internal review applications do not provide evidence to address the legislative criteria and are therefore unsuccessful in their review. When these matters reach the AAT and the NDIA finally provides*

[35] See: Administrative Review Council, Best Practice Guide 3, "Decision Making: Evidence Facts and Findings", p5. https://www.ag.gov.au/legal-system/publications/administrative-review-council-best-practice-guide-3-evidence-facts-and-findings

[36] https://www.ndis.gov.au/media/3101/download

details of what evidence it requires, such matters usually settle. A RORD form that is better designed to elicit the necessary evidence for a successful appeal would save both the NDIA and the AAT from dealing with needless appeals.

Similarly, the NDIA also accepts RORD requests over the phone. While this is potentially more accessible, in practice it leads to reviews being conducted based on conversations that are not always correctly transcribed, rather than on actual evidence. NDIS Reviewers do not always follow up and request additional evidence to support the review request. Participants are not provided with adequate information and may not fully understand the statutory criteria.

Advocates report the following themes in relation to contact made by internal review officers:

- Participants are contacted by phone without notice to discuss their internal review, with no chance to prepare, seek an advocate or reschedule.
- Internal reviews are being incorrectly withdrawn following phone conversations with participants or informal supports who are unfamiliar with the process.
- Participants have not been offered to have an advocate or support person with them when the internal review officer contacts them (despite this request being noted on the RORD form).
- Participants are being contacted in a manner inconsistent with the contact preference on the file.

RECOMMENDATION 21:

The NDIA to separate the forms for seeking internal reviews of access decisions and reasonable and necessary supports decisions. These forms must meet accessibility guidelines and specifically refer to the relevant legislative criteria in easy english.

RECOMMENDATION 22:

The NDIA to implement a practice to ensure participants have appropriate notice before any meetings to discuss an internal review occurs. To improve transparency, if the meeting is conducted over the phone, the content should also be confirmed in writing and provided to the participant.

b. Relevant considerations

There is an overriding obligation on NDIA decision makers to examine and weigh all the relevant considerations and to ignore irrelevant ones. In our experience, NDIA decision makers will narrowly base their decisions on one part of the NDIS Rules without considering other criteria that are also listed in the NDIS Rules and should be taken into account in decisions.

Example: false equivalence

*When making decisions about funded supports for child participants, the NDIA must consider Rule 3.4(a) of the NDIS (Supports for Participants) Rules 2013 (**Support Rules**), which states that it is normal for parents to provide substantial care and support for children.*

This phrase is often used to deny a range of supports where the planner considers them the responsibility of the parents, without reference to the other three factors required to be considered in this Rule.

The second factor clarifies that parental responsibility is relevant, so is the level of support required due to the disability of the participant, requiring consideration of:

> *whether, because of the child's disability, the child's care needs are substantially greater than those of other children of a similar age*

Decisions made on the basis of only one of a list of factors cause significant hardship and distress to participants and their families and increase the reliance on review and appeals processes.

c. Applying policy without regard to individual circumstances

Delegated decision making requires the development of internal policies to ensure fairness and consistency in decision making. The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power.[37]

NDIA decisions are often based on internal policies that go well beyond the NDIS Act, Rules, and Operational Guidelines. These policies place additional limits on supports and access that are neither transparent nor justified by the NDIS Act. Such policies unduly restrict the discretion of decision makers when applied inflexibly without regard to the individual circumstances of the participant/prospective participant. Decisions will also refer to a policy or Operational Guideline *as if it is the law and* cannot be challenged. Such statements directly discourage people from seeking review of a decision.

For example, the *NDIS Act* requires the NDIA to provide participants with their choice of plan management arrangements, subject to the exceptions in s 44. These exceptions relate solely to self-management.

Frequently planners deny plan management as an option to participants. The legislation does not support this decision, and yet it is made often and confirmed at internal review. It is speculated this

[37] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.

is a result of an internal policy. This creates unnecessary appeals to the AAT, unnecessary stress for participants, reliance on NDIS Appeals advocates, and costs all around.

It also has the potential to place participants at significant risk of harm due to possible loss of support as reflected in Case Study 10.

Case Study 10: Internal Policy Causing Harm

William was using unregistered service providers because they provided him with the consistency of staff that he valued. Following his plan review his funding was changed to agency managed, which he only found out when his plan manager advised they were no longer managing his funding. He was unaware his new plan had been approved; it was posted to him and arrived at his home some weeks later.

He had been using services meanwhile, and now he could not pay them. When they were not paid, they withdrew support and he was forced to call an ambulance and present at the closest hospital, as he relies on support for eating, bathing, and toileting, transfers to and from bed and wheelchair/s, and leaving the house.

While he had been provided with funding for support coordination, he had not been supported to access a service and remained in hospital for months without supports. Nobody from the NDIA checked on why his plan was not being used. He only came to the attention of disability advocates when the hospital made an application for a guardian to be appointed, and the Tribunal assisted him to access support for the hearing.

d. Policy over law

Policies can be very helpful in decision making; however, they cannot be relied on if they conflict with a statute, a subordinate law, or a court ruling. If an NDIA policy is not consistent with the law, it is the law that must be applied, not the policy.

Many of the NDIA's policies are not transparent to participants and prospective participants. While the NDIA publishes "Fact Sheets" about a range of topics, it does not publish internal policies beyond the Operational Guidelines. This is problematic as participants and advocates do not have visibility over the policies applied by the NDIA in making its decision, making it difficult to ensure the NDIA is only applying policies which are consistent with the law.

Example: public statements of policy inconsistent with the law

The NDIA continues to state unequivocally on its website that 'The NDIS does not fund gym memberships.'[38] *However, in appropriate circumstances, the NDIA has and does fund gym memberships.*[39]

[38] https://ourguidelines.ndis.gov.au/would-we-fund-it/improved-health-and-wellbeing/gym-membership; https://ndis.gov.au/participants/using-your-plan/managing-your-plan/support-budgets-your-plan

[39] *Milburn and National Disability Insurance Agency* [2018] AATA 4928; *King and National Disability Insurance Agency* [2017] AATA 643.

The unequivocal statement that the NDIS does not fund gym memberships is not only incorrect but apt to mislead both NDIA delegates and participants. An inflexible application of this policy by a delegate, without considering the merit in the participant's circumstances, would lead to an incorrect decision.

RECOMMENDATION 23:

The NDIA to revise public statements regarding what they will and will not fund that do not accurately reflect the NDIS legislation. In particular, statements on the 'would we fund it' section of the NDIS website should be revised to ensure legal accuracy.

RECOMMENDATION 24:

All primary and internal review decisions should be required to reference **all** internal NDIA policies that are applied in reaching the decision.

RECOMMENDATION 25:

All internal policies that are used by delegates in making decisions should be included in T documents prepared for the AAT.

e. Acting under direction

When a decision maker has the power to make a decision that involves discretionary power, only that officer can exercise that power or make that judgment. The decision maker can consider the advice or recommendations of others, but it is their personal responsibility to exercise discretion and make the decision.

In our experience, the NDIA is not transparent about who is providing advice and who is making decisions about reasonable and necessary supports. This lack of transparency (as discussed in detail in section 2.F) raises concerns that the delegate may be acting under direction from technical advisory teams or the Scheme Actuary, rather than exercising their discretionary power.

An example of this lack of transparency around who is providing advice and who is making decisions is the Special Disability Accommodation (SDA) panel. The SDA panel make recommendations to planners and internal review officers regarding a participant's eligibility for SDA funding. There is no publicly available information about who sits on the SDA panel, how many people make up the SDA panel, how often they meet or what their qualifications are. This lack of transparency raises questions of the independence of an internal review, as required by NDIS Act s100(5)(d), and whether the decision maker may be acting under direction. Case Study 11 demonstrates the concerns regarding the SDA Panel and discretionary power more broadly.

Case Study 11 – Discretionary Power

An advocate supported Chandra, an NDIS participant to request an internal review for the decision not to approve their requested level of SDA funding.

The internal review officer communicated they sought an updated recommendation from the SDA panel that confirmed the original decision.

During the conversation the internal review officer asked if they ever would make a decision that conflicted with SDA panel advice. The internal review officer replied, "not if I wanted to keep this job… the panel are really really senior staff, much more senior than I am. I guess you could say that I just sign off on their recommendations."

Chandra appealed the decision to the AAT. The T-documents included the SDA panel recommendation which had no reasons for the recommendation but included the following statement:

"The Panel's advice is designed to assist the SDA element of your planning decision and should be included as demonstration of your consideration of the relevant matters stated in the SDA Rules. For your information, the advice reflects the views of the Panel as a whole, based upon its collective experience and expertise. The Panel's membership includes persons of SES Band 1 seniority.

The advice provided by the Panel is not a decision pursuant to the NDIS Act or any relevant Rules. It remains a matter for the CEO's delegate to be satisfied that the advice is appropriate and to decide whether to include SDA in the participant's plan.

In the event that you disagree with any of the opinions reached by the Panel, please contact the SDA Panel via email prior to any related planning decisions being finalised. If you think the Panel may have made a mistake or has overlooked something, a discussion can be scheduled and the matter re-visited if necessary.

If any decisions are made contrary to the Panel's advice, the reasons why the advice was rejected must be recorded. This is to ensure that the Agency's process for arriving at a decision is clear to the participant, as well as any person or body who may be required to review that decision in the event that a request for review is received."

During the AAT case conferences where the NDIA was represented only by external lawyers it was accepted Chandra was eligible for the requested level of SDA funding. The only additional evidence provided was a re-statement of what earlier reports had recommended. The whole review and appeal process took just over 11 months. Chandra is now successfully living alone in SDA.

RECOMMENDATION 26:

All planning and Internal Review Decisions to be required to reference **all** internal NDIA advice that is determinative in reaching the decision.

RECOMMENDATION 27:

All internal advice that is used by delegates in making decisions should be included in T documents prepared for the AAT.

f. Failure to provide adequate reasons

A clear and transparent decision letter allows a person affected by a decision the opportunity to understand why a particular decision has been made. The person can then decide whether to exercise their rights of review and appeal and, if they decide to do so, they can exercise these rights in an informed manner.

NDIS participants are often confused when their plan is substantially lowered without explanation. This makes it difficult for participants to effectively file a RORD, as they have not been equipped with the information that has formed the basis for the planner's decision on funding.

The failure by the NDIA to provide clear, transparent reasons for their decisions leads to time and money being wasted on unnecessary reviews, and to a participant obtaining irrelevant additional reports.

Even when reasons are provided, NDIA's decision letters have often not met the requirements for a statement of reasons in accordance with section 37 of the AAT Act. A properly written statement of reasons should refer to the evidence on which *each* material *finding of fact* is based. It is not sufficient simply to list documents that were considered in reaching the decision, as is routinely done by NDIA decision makers. The statement should identify the evidence that was considered relevant, credible and significant in relation to each material finding of fact.[40]

If further 'reasons for decision' is provided by the NDIA it does this by sending a huge document which a participant must search through to find the relevant information. This is incredibly inaccessible and is inconsistent with advice from the Tune Review.[41] This is demonstrated in Case Study 12.

Case Study 12 – Requesting Reasons for a Decision

Emma received an internal review outcome with limited explanation for the decision not to fund an assistance dog. She requested more detailed reasons from the NDIA. She was horrified when she received a 100-page document in response. She has PTSD and severe anxiety and attempting to navigate this document heightened her anxiety.

The document also had incorrect information about her in many areas and made many assumptions about her circumstances. She needed to contact an advocate because she was intimidated by the process and the next steps. Following the internal review being rejected, she is now appealing to the AAT.

[40] See: Administrative Review Council, Best Practice Guide 4, "Reasons", p8, https://www.ag.gov.au/legal-system/publications/administrative-review-council-best-practice-guide-4-reasons

[41] David Tune AO PSM, 'Review of the National Disability Insurance Scheme Act 2013 Removing Red Tape and Implementing the NDIS Participant Service Guarantee' (December 2019) pg 11

RECOMMENDATION 28:

a. The NDIA to automatically provide an accessible statement of reasons for the following decisions:
    - Rejection of a request to access the NDIS
    - The first NDIS plan
    - A new NDIS plan that substantially lowers a participant's supports in any category
    - A new NDIS plan following a change of circumstances
    - All internal review decisions, even where the decision results in a new NDIS Plan

b. The statement of reasons from above should include:

    - findings on material questions of fact, refer to the evidence which those findings were based on, and give the reasons for the decision.
    - guidance on what sort of evidence would be required for the applicant to meet the relevant statutory criteria.

c. Time limits on appeals should not commence until a valid written statement of reasons is received.

d. All NDIA delegates should receive training in the preparation of statements of reasons that meet statutory requirements.

4. Conclusion

Investing in reforms to make the reviews and appeals process more efficient and effective will provide widespread benefit to persons with disabilities and their family/caregivers, the disability sector, the NDIA, the government, and the broader Australian community.

This will save costs for the Australian taxpayer and will avoid situations of causing immeasurable harm and trauma to persons with disabilities consequently violating their human rights.

There must be a commitment from the NDIA and DSS to work with persons with disabilities and the disability sector to co-design reforms to the reviews and appeals process to make it fair and just. Specifically, any reforms need to have persons with disabilities at the centre and a rights-based approach must be adopted.

We welcome the opportunity to attend a public hearing regarding this submission.

Please contact Rachael Thompson from the Rights Information and Advocacy Centre rachael@riac.org.au or 0491 208 130 to discuss this submission further.

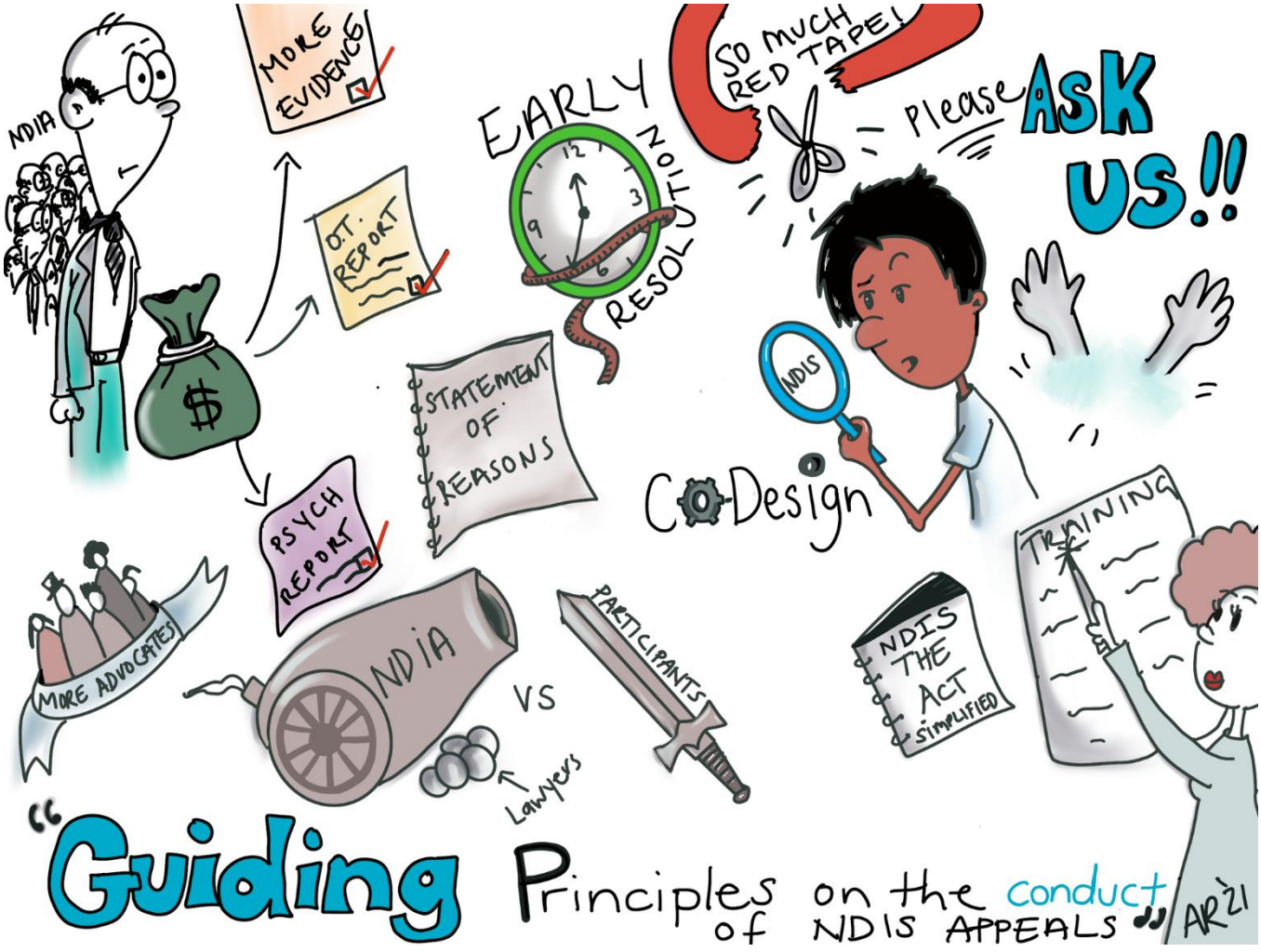

Illustration by Amanda Robinson, Rights Information Advocacy Centre