National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal

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Signatory Organisations

The following organisations[1] have endorsed the submission on the basis of their experiences supporting clients in their appeals to the AAT, and the reports clients have made to them of their experience during times when they have not had assistance. This includes the feedback from persons with disabilities, their families and caregivers, NDIS Appeals advocates and lawyers, representing a very diverse range of individuals and perspectives.

Brain Injury SA.

DACSSA DISABILITY ADVOCACY

Disability Advocacy NSW

DeafVictoria

Disability Justice Australia Inc.

ideas.

Iat inc. Independent Advocacy in the Tropics Inc.

GdA Grampians disAbility Advocacy

Leadership Plus

PWd WA people with disabilities western australia

Queensland Advocacy for Inclusion

SUFY SPEAKING UP FOR YOU

Villamanta DISABILITY RIGHTS LEGAL SERVICE INC.

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[1] For full written list see appendix

The following organisations are supporting organisations and/ or peak bodies that have endorsed the submission on the basis of feedback provided by members of the organisations.

"[An] agency of government … has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve …That public interest ... is to be determined from what is express or implied in the [relevant] Act itself." - Finn J[2]

[2] *Hughes Aircraft Systems International v Air Services Australia* (1997) 76 FCR 151, 196

Contents

Executive Summary

This submission raises issues about the experiences of NDIS participants at the Administrative Appeal Tribunal (AAT), specifically in relation to both the conduct of the National Disability Insurance Agency (NDIA) and the procedures of the Tribunal itself.

In the context of unprecedented levels of external reviews to the AAT, we have seen a shift in the behaviour of the NDIA and their representatives. Often this fight is an unfair battle, as unrepresented individuals are confronted with adversarial behaviours from the agency and their legal representatives. The NDIA disproportionately holds the power, the resources, and is under no time pressure. To the contrary, the individual often has necessary disability supports withheld from them and little or no capacity to negotiate. (Section 1)

The NDIA's model litigant obligations should ameliorate these issues. It provides a framework that requires government agencies to act fairly, ethically, and honestly to model best practice in litigation. The conduct of the NDIA often falls well short of adhering to these guidelines, resulting in unnecessary distress for PWD and their families, as well as placing some PWD at significant risk. (Section 2)

The AAT also has guidelines for conduct of external appeals, which the NDIA frequently fails to comply with. (Section 3)

Advocates have attempted to raise issues with the conduct of the NDIA's representatives at the AAT, especially in the context of external lawyers acting on behalf of the Agency, in ways which do not align with the conduct expected of a government agency with "no private or self-interest of its own", but have found that this process often also falls short of expectations. (Section 4)

The Tribunal itself has also at times made decisions about how these matters will be conducted, which we believe should be reviewed for appropriateness. (Section 5)

We offer a set of recommendations for improvement across the entire process of decision making and review, so that NDIS participants can regain a Scheme whose entire purpose was to provide them with support.

ACRONYMS AND ABBREVIATIONS

AAT – Administrative Appeals Tribunal

ADR – Alternative Dispute Resolution

ASD – Autism Spectrum Disorder

CALD – Culturally and linguistically diverse

ID -Intellectual Disability

NDIA – National Disability Insurance Agency

NDIS – National Disability Insurance Scheme

NDIS Act – *National Disability Insurance Scheme Act 2013*

OT – Occupational Therapist

PWD – Person/people with disability

T-docs – The set of documents the NDIA is required to provide under s 37 of the *Administrative Appeals Tribunal Act 1975,* and which contains all materials relied upon when making the relevant decision

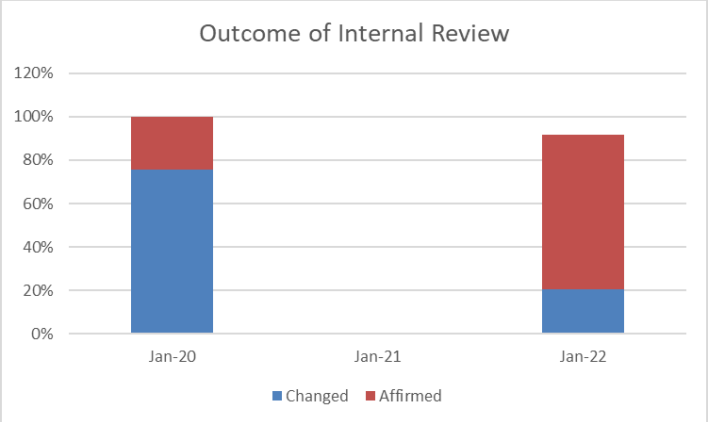
Introduction

This submission is a collaboration between disability advocacy and legal organisations nationwide in response to ongoing systemic issues with the conduct of appeals of NDIS decisions.

Figure 1

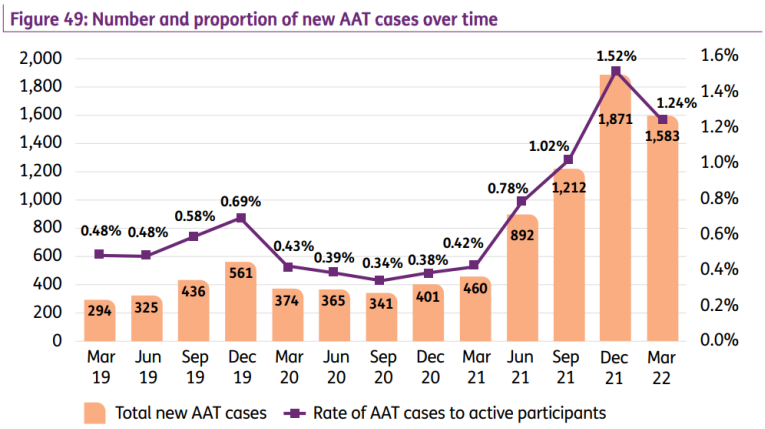
Our submission is informed by our experience supporting clients in their appeals to the AAT, and the reports clients have made to us of their experience during times when they have not had assistance. This includes the feedback from persons with disabilities, their families and caregivers, NDIS Appeals advocates and lawyers, representing a very diverse range of individuals and perspectives.

Over the past 12 months, the disability advocacy sector has seen a distinct shift in the NDIA's handling of requests for a review of a decision. Where previously an internal review altered the decision in dispute 76% of the time, in their most recent quarterly report, the NDIA note that this has now dropped to 21% (see Figure 1).[3]



The flow on effect of this has been an unprecedented surge of matters before the AAT[4] as people with disability (PWD) have no alternative to taking their issue to external review (see Figure 2).

Figure 2



In the context of these increases, processes have slowed at the AAT, and we have seen a shift in the behaviour of the NDIA and their representatives.

This fight is often an unfair battle, as individual PWD and/or their supporting family members go head-to-head with the agency. In this overly legalistic and formal context, there is a considerable risk of an unequal distribution of resources and imbalanced power relations. The agency has been observed to engage private law firms to represent their interests. In the context of a surge of demand, with no adjustment to resourcing, legal and non-legal advocacy can be difficult to access and PWD and their families often have no choice but to self-represent.

The NDIA's model litigant obligations should ameliorate these issues. It provides a framework that requires government agencies to act fairly, ethically, and honestly to model best practice in litigation. Specifically, it requires agencies to deal with claims promptly, not take advantage of individuals without resources, pay legitimate claims, avoid legal proceedings, keep costs to a minimum, and apologise where they have acted inappropriately.

[3] https://www.ndis.gov.au/media/4365/download?attachment, Page 67

[4] Figure 49 from Ibid, page 68

On occasion the conduct of the NDIA at the AAT falls significantly short of adhering to these guidelines, resulting in unnecessary distress for PWD and their families, as well as placing some PWD at significant risk.

Case Study 1: The personal face of an AAT proceeding

My daughter is an adult woman with intellectual and physical disabilities who lives with me, her elderly father. Her claim for building modifications was refused by the NDIA and was ultimately referred to the AAT with the support of Disability Advocacy NSW and Legal Aid NSW.

The behaviour of the NDIA did not demonstrate any urgency, intention to resolve the matter quickly or concern for my daughter's welfare. They missed deadlines, failed to comply with Tribunal directions and made no attempt to address the obvious adverse conditions she was living under.

At every point their actions only served to make the matter more protracted and less clear.

There were two good OT reports available. The NDIA insisted on a third OT report, which they sourced, with specifically targeted questions. But it just confirmed the previous reports.

The NDIA made assertions about my daughter's weight that contradicted all available evidence and literature, and which was not supported by any health professional. The NDIA's insistence on further medical reports as a result subjected her to more stress and anguish, and further delay. My daughter does not understand the process nor the reason for delays extending over a two-and-a-half-year period.

They got personal with me too. The NDIA questioned my health, asked for the details of my will, and also challenged several other decisions I have made, none of which is in any way relevant to the decision to be made by the Tribunal.

The NDIA did not operate as a model litigant.

They did not act fairly, failed to deal with the claim promptly, seemingly have not made a genuine attempt to assess the prospects of success and have failed significantly to keep costs to a minimum.

Surely, they have spent more money refusing this claim than the claim was actually worth?

The NDIA used what can only be described as delaying tactics by making assertions they had no right to make and in repeatedly missing deadlines. It seemed the NDIA were merely on a 'fishing expedition' and looking for any reason to refuse the claim. It seemed the NDIA's strategy was to inordinately postpone the resolution of the matter until such time as we got tired, gave up and went away. The NDIA's behaviour was time wasting and unreasonably harmful, both physically and emotionally, to my daughter and me.

It has caused both of us undue distress. There was no clear sign, that the NDIA were going to win the case on the merits of their argument. Indeed, they must have known their only chance of success lay in wearing us down to the point of exhaustion and despair. I believe strongly that the NDIA misused their power and their conduct was unconscionable.

Section 1: David and Goliath

The signatories to this document have been deeply concerned about the conduct of the NDIA in relation to many of the appeals brought to the AAT. Case study 1 (above) reflects commonly experienced issues of delay, refusing to accept evidence, failing to act reasonably and fairly, and not keeping the costs of the litigation at a minimum that exemplify the failure of the NDIA to act as a model litigation at the tribunal.

We have on multiple occasions observed behaviour that NDIS participants have described as 'bullying' and 'coercive'. This has included conduct that could be considered disrespectful, unacceptable and inappropriate, where the tribunal has often failed to reign such behaviour in or hold the NDIA to account.

As reflected in the case study above, the NDIA has sometimes been observed to employ multiple tactics that prolong matters unnecessarily, and rather than making genuine attempts to reach a resolution they tend to adopt an adversarial approach to 'win' a better outcome for the agency.

On occasion, they engage lawyers who are not only more equipped with technical knowledge of legislation and the AAT processes than PWD, but who are also skilled litigators who sometimes defend the position of the NDIA even when it is clear that the facts relied upon are incorrect, and do not focus on their obligation to assist the Tribunal to come to the right decision.

Parties

The NDIA is an independent statutory authority responsible for the implementation of the NDIS, the objects of which are stated at s 3 of the *National Disability Insurance Scheme Act 2013*:

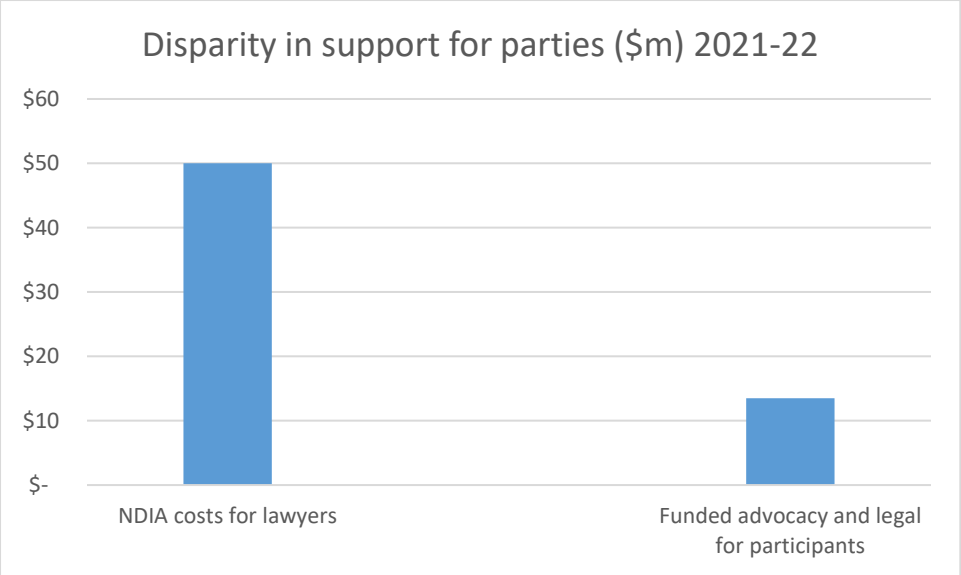
> *(1) The objects of this Act are to:*
>
> *(a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and*
>
> *(b) provide for the National Disability Insurance Scheme in Australia; and*
>
> *(c) support the independence and social and economic participation of people with disability; and*
>
> *(d) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme; and*
>
> *(e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and*
>
> *(f) facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and*
>
> *(g) promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community; and*
>
> *(ga) protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme; and*
>
> *(h) raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability; and*
>
> *(i) in conjunction with other laws, give effect to certain obligations that Australia has as a party to [a number of human rights conventions].*

These objects are within the public interest which the NDIA is bound to serve, and all actions taken by the Agency should be reflective of these objects.

In contrast, a NDIS participant is an individual with a disability. Participants[5] frequently face overwhelming barriers in accessing information, communicating with NDIS delegates, and appealing against an unfavourable decision, including:

- Disability related barriers in communication, including literacy, hearing impairment, verbal impairment;
- Technology access barriers for those who do not use email or other electronic communication (which the AAT and NDIA rely upon);
- Support barriers where individuals are reliant on paid supports to assist them with activities of daily life, including reading their mail and identifying the options available to them when responding to an adverse outcome;
- Advocacy barriers where individuals who require the support of disability advocacy for relatively simple challenges are now unable to access advocacy (due to limited resourcing) to support them with AAT Appeals.

Figure 3



In the year 2021-22, the Guardian Australia estimates the NDIA will have spent $50 million on lawyers to represent them at the AAT[6] (see also Figure 3). By comparison, the total funding provided for PWD to access legal and non-legal advocacy for NDIS Appeals is approximately $13.5 million.[7]

In our experience, in AAT appeals, the NDIA is represented by least a case manager and a legal representative. In contrast, a minority of participants are legally represented.

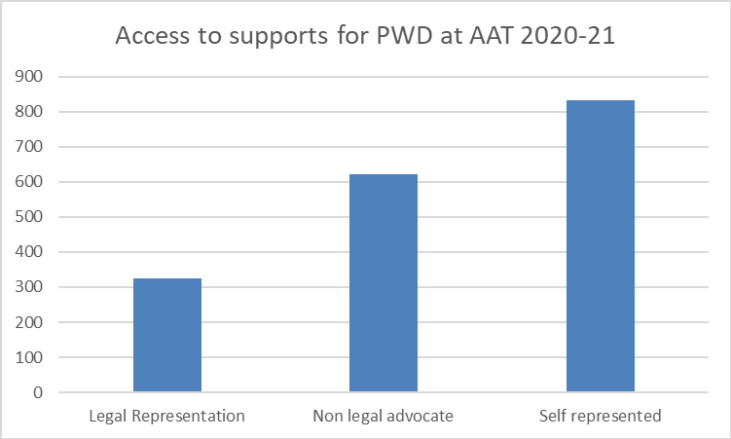
[5] It is acknowledged that many participants are reliant on the support of family members, carers, friends and others, who also experience these difficulties. For brevity we refer only to participants throughout this submission.

[6] https://www.theguardian.com/australia-news/2022/jun/01/ndis-agency-to-spend-50m-on-lawyers-to-fight-people-with-disability-who-appealed-funding-cuts

[7] Ibid

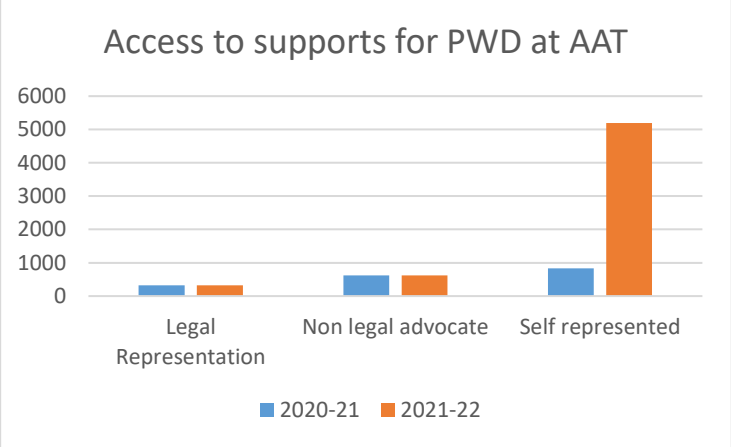
Information released by the AAT revealed that 1,780 external review applications were received in 2020-21. Of these, only 622 were represented by disability advocacy organisations and 325 received legal representation (see Figures 4 and 5).[8]

Figure 4



There has been a significant increase in applications to the AAT, but no increase in resources for legal or non-legal advocacy.[9]

Figure 5



Against this backdrop of fundamental power imbalance, it needs to be stressed that for the NDIA, the process of an external review is an administrative exercise in the implementation of the scheme. In contrast, for individuals it is a process to access the necessary supports for which they have a legislated right.

The time it takes to progress through an AAT appeal needs to be understood in the context of the preceding and subsequent events (see Figure 6).

[8] Chris Coombes, At What Cost?', December 17, 2021 https://teamdsc.com.au/resources/at-what-cost

[9] Commonwealth of Australia, Senate Hansard, *Community Affairs Legislation Committee*, 17 February 2022, Senator Steele-John, 78, stating 3,583 applications to AAT by January 2022. This graph relies on extrapolating that number out to end of financial year, and keeping the legal and non-legal advocacy at their current levels, with the remainder being self-represented.

Figure 6

Figure 6 (above) outlines a typical trajectory of a participant's engagement with the reviews and appeals process. To start, they must prepare for their plan review meeting where they and/or their support coordinator have requested updated reports from their allied health team and have a clear indication of what is needed for their supports in the coming plan.

Sometime later (which can range from a few weeks to months), they receive a plan that often does not fund the supports they believe are necessary[10] . They have 3 months to seek an internal review.[11]

After they apply for an internal review, it then takes 60 days for the internal review decision outcome.[12] During this time, the participant is aware they have insufficient funding, and is making difficult choices about how to manage the risks involved. The uncertainty about timeframe makes this more complicated because it is unclear how long they will be rationing supports, renegotiating service agreements, or, where it is impossible to do either of those things, just hoping for a good outcome from internal review.

When the participant receives the internal review decision, they then have 28 days to make an application to the AAT should they be unsatisfied of the outcome. Understandably, the participant experiences a new round of shock and anxiety, and now must learn how to navigate the AAT process. The participant or their support co-ordinator contacts NDIS Appeals advocates for advocacy support. However, in most jurisdictions, all appropriate advocacy agencies are frequently at capacity and unable to assist. Some will offer an advice call, or to waitlist the person, but for the majority of people in these jurisdictions nobody is able to assist.

[10] Previously about 30% of these were matters that could be resolved by assisting participants understand how they could use their plan, what NDIS does not fund and etc. These simply required advocacy and support, not an AAT appeal. Another 30% had clear deficiencies in evidence and support was needed to rectify this. In the last six months we are seeing ongoing and consistent issues of plans being cut for people who have stable support needs for a very long time, an arrangement that works for them, and providers in place. When the funding is cut by 30% they are immediately at risk.

The NDIA's recent quarterly report notes that the proportion of internal reviews that upheld versus changing the original decision has shifted from 25:75 in December 2020 to 80:20 in March 2022 (https://www.ndis.gov.au/media/4365/download?attachment, Figure 48)

[11] Depending on their understanding of the process, and how the plan review occurred (participants report a rushed plan review with a stranger who did not book a time and called them unexpectedly, others report a positive plan review meeting and then a nasty surprise when they receive their plan), there may be a period of trying to follow up on whether reports were received and read, whether there has been a mistake, and formal complaints about the process.

[12] NDIS Participant Service Guarantee https://www.ndis.gov.au/about-us/policies/service-charter/participant-service-guarantee.

Once the AAT application is made, it generally takes between 3 – 4 months for the first case conference. As reflected in the case study above, it can take numerous case conferences before a resolution occurs. As will be discussed this is because the agency, on many occasions, fails to meet its model litigant obligations and creates unnecessary delays by asking for more evidence, having legal representations without instructions, offering a statement of reasons, having agency representatives attend case conferences who do not have authority to make decisions, etc.

There are generally at least three, and sometimes *more* case conferences totalling up to five or six. This creates significant delays for participants needing crucial supports.

Whether by agreement, or by AAT decision, the matter is still not resolved for the PWD until the issue of a new NDIS plan with funding for the requested support. Under the Participant Service Guarantee, this should occur within 28 days, but we have seen this extended out to 72 and even 120 days.[13]

Recently we have seen even further delays whereby the AAT hands down a decision, but the NDIA does not implement the decision for months, and only when significant advocacy is applied.

[13] In those matters, a participant who had been identified as a "serious and pressing risk" in November 2020 took 306 days from initial decision to the issue of a new plan, and another PWD took 1091 days from initial decision to the issue of a new plan, including 120 days between the AAT decision in his favour and this resulting in a plan including the funding.

“NDIA lawyers employed a highly adversarial approach against me. They have bullied and harassed me and withheld supports they knew would trigger and exacerbate my conditions. They did everything to stress and pressure me into dropping my AAT case.”

Section 2: The NDIA's Model litigant obligations

The NDIA has a range of obligations as a model litigant including a requirement that the Commonwealth:

- deal with claims promptly and not cause unnecessary delays in the handling of claims and litigation
- pay legitimate claims without litigation
- act consistently in the handling of claims and litigation
- endeavour to prevent and limit the scope of legal proceedings including participating in ADR processes
- keeping the costs of litigation to a minimum, including by:
  - not requiring the other party to prove what the agency knows to be true
  - not contesting liability if the agency knows that the dispute is really about quantum
  - monitoring the progress of the litigation
- not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- not rely on technical defences
- apologise where the agency is aware that it or its lawyers have acted wrongfully or improperly.[14]

We have significant concerns about the NDIA's conduct and whether this meets the standard expected of a model litigant. Although concerns about this issue have been detailed in responses to previous reviews of the NDIS,[15] our experience is that the problems are significantly escalating, particularly in the last 12 months. In this section, we discuss concerns relating to each of the obligations.

The examples that follow arise out of the ADR process, where Tribunal oversight is limited to a registrar, unless otherwise noted. As noted in Section 5, we have concerns about the pressure on PWD to resolve their AAT appeal at the ADR stage, rather than having access to the appeal before a member for which they applied. The ability of the Agency to pressure PWD into a resolution in this context is not indicative of a fair and just process.

Timeliness and avoiding unnecessary litigation

As reflected in case study 1, the agency's conduct is often inconsistent with the obligation to act promptly and avoid unnecessary delays.

- A common experience of signatories to this submission has been an ongoing experience with the Agency failing to meet deadlines imposed by the Tribunal and failing to provide materials or respond to materials provided in a timely manner to keep the matter progressing.
- We often see the Agency fail to provide specific and clear questions about the information they believe will better inform the Tribunal, resulting in participants wasting their time and funding asking for "more evidence" from their allied health professionals, only to have more questions from the Agency as a result. Many advocates are now very cynical about the practice of "more

[14] Appendix B of *Legal Services Directions 2017* (Cth).

[15] See for example, National Legal Aid, *Putting People First: Removing Barriers for People with Disability to Access NDIS Supports*, Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, (2019); *Unreasonable and Unnecessary Harms: Joint Submission Regarding the NDIS Internal Review and External Processes*, Submission to the Joint Standing Committee on the NDIS: General Issues around the Implementation and Performance of the NDIS, (2021).

evidence", and see it as simply a time-wasting activity, with the Agency "drip feeding" their inquiries, or simply changing direction when one question is answered, inevitably prolonging the process. We are also seeing numerous health professionals simply refusing to write more reports because they see the process as pointless and, as one health professional stated, "I already told them the answer to that, do they even read these reports?"

- We are also seeing the very late filing of the required Statement of Issues, in some cases filed half an hour prior to the case conference. This results in a wasted conference, and the entire process is then delayed by a further 4-6 weeks.
- The NDIA, having relied on the above process of "more evidence" for multiple conferences, and having required the participant use their own time and funding to obtain additional reports, often then decides it will insist on an "independent assessment", which they will fund, and which generally delays the matter a minimum of an additional 8 weeks.
- Legal representatives attending ADR without instructions is a waste of time and resources for all concerned, and this delays the process for another 6 or so weeks. The length of time between conferences is extended unreasonably by the requirement that case managers have 3 weeks minimum to consider even the simplest of documents to provide instructions. This is exacerbated when the case manager cannot make a decision and must defer to a technical expert within the Agency, who may or may not be available in a reasonable period of time.
- These delays are particularly concerning where the effect is to create additional work for all concerned. Most participant plans are twelve months in duration, as can be seen in the timeline in Section 1, and it is highly likely that participant plans will end or funding will be depleted.[16] This places participants at risk, and the workaround to mitigate this risk – the extension of existing plans – simply adds more work for the Applicant the Agency and the Tribunal without actually resolving the substantive issue in dispute. When the matter resolves some months later with no substantially different evidence than was available at the outset (and only because a more senior member of staff has reviewed the matter) it becomes clear that all previous steps taken were just filling in time until the appropriate individual was available. This time wasting is extremely distressing for participants, puts them at risk of loss of supports repeatedly, and is a waste of the resources of the Tribunal and any supports the PWD has managed to access.

Act consistently

We have seen considerable inconsistency in the Agency's approach to a number of procedural matters.

- Whether they fund the expert report they are requesting, or whether they will insist that the participant funds this.
- Whether they rely on internal 'guidelines' (which are not publicly available, and often not provided to the PWD or their supports) about 'items the NDIA will not fund' or follow the requirements of the legislation.

[16] Especially where funding for a participant's plan has been cut significantly. In a recent matter, a plan was cut by 93%. Clearly the participant was going to have depleted their funding before even reaching the first conference. Failing to rectify the underlying issue meant that the NDIA, the participant, and the Tribunal all had to go through a process of repeated plan extensions to ensure the participant had funding available for basic supports while the matter was at the Tribunal. Each of these extensions was clearly going to be a band-aid, as a three month extension based on 7% of funding could only be expected to last for a week, or if supports were strictly rationed, a few weeks.

Prevent and limit the scope of legal proceedings

We have seen significant failures to limit the scope of proceedings in cases before the AAT, which also has had the result of prolonging the proceeding.

- The internal review may give one reason for the Agency's rejection of a funded support, but the Statement of Issues contains three, and subsequently four, significantly increasing the scope of the proceedings rather than limiting.
- The Agency contesting items not in dispute, despite those previously having been considered to be reasonable and necessary.
- The Agency bringing irrelevant considerations to the dispute, such as questioning whether "disability" meets access criteria in a matter about reasonable and necessary supports.
- The Agency raising issues at hearing which were not previously raised during ADR and requiring participants to respond to issues not in dispute. [17] For example, detailed questions asked about treatment history when the permanency criteria is not in dispute for NDIS access.

Keeping the costs of litigation to a minimum

Aside from the various other ways in which delays, increase in scope and failure to appropriately manage AAT appeals increase the costs of litigation, we have concerns about the following behaviours from the NDIA.

- The practice of the NDIA seeking an excessive number of extremely broad summonses, creating high work demands and resulting in large volumes of irrelevant material.[18]
- The practice of requesting additional reports and assessments, including by their own expert witness, which they then ignore and seek further reports and assessments.

Not requiring the participant to prove what is known to be true

The signatories share considerable frustration with the persistent failure of the Agency's record keeping and record management systems. These frequently fail to ensure the internal reviewer or the legal representative at the AAT have access to all the relevant materials provided by the PWD and their supports. Great attention is required to ensure that the T-docs are complete and that the relevant reports are referenced. Even more frustrating is that none of this material is then available to the subsequent planning process after the matter has resolved, and participants find themselves returning to the Tribunal to have the very same appeal because the planner did not know of the previous AAT decision or order.

Aside from the poor information management and refusal to read reports provided mentioned above, we have concerns about the Agency's failure to comply with this requirement in the following ways.

- The Agency often delays resolving a matter through ADR by stating that reports are out of date. This is unreasonable when the reports were current at the time of the decision, there is no evidence the situation has changed, and the time that has elapsed since is due to the Agency's own delays.

[17] We note this has previously been raised as an issue. See National Legal Aid, *Putting People First: Removing Barriers for People with Disability to Access NDIS Supports*, Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, (2019) 65.

[18] Ibid, 66

- On multiple occasions the Agency has insisted that a participant undergo an independent assessment with their own expert, only to have the same opinion returned. This is especially egregious where the opinion returned is consistent with the opinion of all involved with the participant for decades, and there has been no change. Unless there is a significant reason to consider that the health professional is not acting in accordance with their professional obligations, the Agency should consider their reports to be true.
- Further, we are now seeing situations where the Agency has access to a report from their own expert that supports the position of the Applicant, and yet the Agency does not release the report, nor act on its contents for months. On multiple occasions we have been informed by the legal representative that they cannot receive the report because it has not been paid for.
- The Agency requiring evidence of facts not previously in dispute and for which the cost of accessing evidence is high. For example, the Agency sought evidence that a person aged in their fifties has an intellectual disability. Their entire life has been defined by the presence of intellectual disability, but they have no recent neuro-psych assessment to substantiate this fact. They were excluded from mainstream schools, were separated from their families and lived in institutions, they were paid under $2 an hour for their work and have not been included in the community at large due to their intellectual disability, but this is now in dispute by the Agency. The relevant assessment costs in the range of $1,600 - $2,500.

Not contesting liability if dispute is about quantum

There are numerous occasions where we have seen the Agency argue that the requested support is not reasonable and necessary in entirety, when actually the only question is to the quantum of the support requested.

While an individual may make a decision to forgo two hours a week of support or an hour a month of therapy to end the appeal and get on with their life, they are unable to do so when the Agency argues the support does not meet the legislative criteria at all. This is demonstrably untrue when they offer a reduced quantum of the support at a later stage, even with no additional information that could account for the change in position.

Monitoring the progress

It would appear that the Agency does not routinely adequately monitor the progress of matters before the AAT, because their case managers often do not even attend the case conferences, and their representatives are often left without instructions. When some months later the matter is suddenly able to be resolved without any new evidence being available, it is clear that the Agency has not been monitoring the matter, and the legal representative has been left to their own devices without the input of any decision maker from the NDIA.

Further, when a matter that has been contested vigorously for months is briefed out to Counsel, and suddenly can be settled, it seems apparent that no advice has previously been provided as to the merits of the case.

Not taking advantage of a claimant who lacks resources

This entire process is at risk of being leveraged by the Agency to pressure PWD who often lack resources.

- The use of (multiple) private lawyers to appear against an unrepresented PWD who does not understand the process and has no experience arguing a case before a Tribunal, or engaging in ADR.
- The insistence on “more evidence” without any specificity, in the context of a NDIS plan where the very funding that would allow the PWD to access such evidence has been cut

significantly. The participant then has the choice of accessing the necessary therapies, or providing further evidence. Not using the therapies is subsequently used as a reason why they are not needed.

- While it is true that participants do often provide reports that are deficient in a number of ways requiring clarification, this is not the fault of the participant. The Agency could, and should, explain to allied health professionals what they are looking for in a report, so that they do not need to be rewritten so frequently.
- There is significant pressure on the participant when they have experienced a sudden and unexpected cut to the funding they require for everyday existence. Failure to provide sufficient relief from this pressure, by way of a reasonable plan extension, takes advantage of the lack of resources of the participant, and allows the Agency to push them to agree to partial resolutions.

Not rely on technical defences

There are numerous different ways the Agency relies on technical defences as evidenced by the following real-world examples:

- An unrepresented participant's detailed Statement of Lived Experience was entirely discounted on the basis that it was undated. Therefore, the relevance of the evidence could not be ascertained. The Statement specifically addressed NDIS access, which the client had applied for within the last six months.
- A participant was asked to write their response to various questions in their own handwriting and without assistance from anybody else. The participant was ten years old.

Apologise

We understand an increasing number of complaints have been made due to the model litigant breaches raised in this submission. We have experienced formal complaints being made with no response from the NDIA being received, and certainly no participant to the best of our knowledge has received an apology even in the most egregious circumstances.

Case Study 2: Not acting reasonably or fairly

The participant, A is 16 years old and has Autism and ADHD, a number of psycho-social conditions, Oppositional Defiant Disorder with severe behavioural issues, and sensory, sleep and speech impairments.

A received a NDIS Plan in September 2021 in which the capacity building budget for therapy was reduced by over 70% from the previous year, despite the relevant reports recommending an increase in funding.

An internal review was requested, and the decision was made in November 2021 not to change the original decision.

An application was made to the AAT and the first case conference was listed for the end of March 2022. Apart from the T-docs, there was no correspondence until a Statement of Issues the day before the first case conference.

Due to the high level of support required, the therapy budget in the NDIS Plan was exhausted in 2 months. No further information could be provided from the therapy team because funding has been exhausted. The NDIA was made aware of the exhaustion of funds and a request for an interim plan was made.

As a result of the delays in the progress of the matter and the exhaustion of supports, A has been regressing and does not leave their room. Any gains that were achieved in therapy have now been lost.

During the first case conference, it was clear the NDIA had not considered the materials provided by the family four weeks before. The NDIA was legally represented and no communication from the NDIA AAT Case Manager has been made. The NDIA offered to provide a 2-month interim plan, which would enable only 4 hrs of therapy funding. After significant advocacy the NDIA agreed to increase the interim plan to a 3-month plan – this would now enable 6 hours of therapy – an insufficient amount of support that can have serious implications on A's condition.

One month after the first case conference the NDIA prepared 4 x letters addressed to A's allied health providers, with a total of 52 questions. Due to the delay since therapy, all practitioners would need to see A to complete an updated assessment to inform responses to the NDIA's questions. The OT alone has indicated they would require 12 hrs to provide the additional evidence. There simply is no funding to enable that.

Section 3: AAT Guidelines to act in good faith

In addition to the model litigant obligations, the AAT's Guidelines require the parties to a case conference (a form of ADR) to act in good faith in relation to their conduct in ADR at the AAT. This includes a genuine effort to uphold the following principles:

- people have a responsibility to take steps to resolve or clarify disputes
- disputes should be resolved in the simplest and most cost-effective way
- people who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution

The Tribunal regards the following conduct as consistent with the duty to act in good faith:

- ensuring that the person attending an ADR process (other than conferencing) on behalf of a party has the necessary authority to settle the matter.[19]
- adopting an honest and genuine approach to resolving a dispute by discussion
- maintaining the confidentiality of the ADR process
- treating other parties to the ADR process and the AAT member or Conference Registrar respectfully
- acting reasonably and fairly having regard to the interests of all the parties disclosing information relevant to the dispute in a timely fashion
- being prepared to make concessions for the purposes of the ADR process, though not necessarily for the purposes of any subsequent AAT hearing
- endeavouring to limit the scope of proceedings by making partial concessions where appropriate
- having an open mind and a willingness to consider the interests of the other side, understand their position and consider options generated
- having a willingness to propose options for the resolution of the dispute and discuss your position in detail
- being faithful to any agreement reached in the ADR process that is, 'holding up your end of the bargain'.

Take steps to resolve or clarify disputes

As explained in other parts of this submission, the NDIA's conduct is contrary to the requirement to take steps to resolve or clarify disputes. Case study 2 (above) demonstrates that instead of seeking to resolve or clarify disputes, often the NDIA instead fails to take such steps by the:

- late provision of key documentation (including the Statement of Issues)
- failure to provide clarification of the evidence that is lacking to meet the legislative criteria and associated guidelines/policy
- expanding of the scope of the proceedings before the AAT beyond issues raised in the internal review.

Resolve disputes in the simplest and most cost-effective way

As reflected in both case study 1 and 2, often the conduct of the NDIA does not indicate a commitment to resolve disputes in the simplest and most cost-effective way. Rather, the process is

[19] https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/DutyToActInGoodFaith.rtf, which also refer to the relevant provisions of the *Administrative Appeals Tribunal Act 1975* (Cth).

delayed, unnecessary expert reports are obtained, legal costs for the NDIA are escalated, and the scarce resource of access to legal representation for participants is unnecessarily wasted.

Listening to other views and considering options for resolution

Although many matters ultimately settle without a hearing there has been a general reluctance by the NDIA at early stages of the ADR process at the AAT to listen to the participant's perspective, with them frequently insisting that the applicant provide more evidence as reflected in the case studies. The ADR process is seen by many of our clients as futile because of the failure of the Agency to take the process seriously and engage in good faith. We continue to see matters progress to hearing where they could well have been resolved in ADR if the Agency had engaged appropriately.

Person attending has authority to settle the matter

Unnecessary delays are caused by legal representatives attending case conferences without a case manager and without adequate instructions meaning that the person attending the ADR process does not have authority to settle the matter. It is common for the legal representative to state they will need to seek instructions multiple times throughout the duration of the conference. This severely limits the utility of the conference and progress of the matter.

Honest and genuine approach

A recent disturbing trend has been for the NDIA to make an "offer to settle" during the ADR stage, conditional upon either:

- The PWD withdrawing their AAT appeal and relying on a review within the Agency; or
- The PWD withdrawing other issues in dispute and abandon their claims to those items.

In both cases, the NDIA threatens to withdraw the offer if the PWD does not comply with the condition.

This is a serious breach of the Agency's model litigant obligation. If the Agency has formed a view that a support is reasonable and necessary, it must fund that support, and not use it as a bargaining chip. If the support is not reasonable and necessary under the Act they cannot fund it, even in ADR.

The use of purported "without prejudice" offers to unrepresented participants is an abuse of process and has occurred on many occasions with the Agency seeking to hide this type of offer from the Tribunal, including the registrar conducting the ADR. Under the guise of "genuine offer to resolve the matter" participants are being asked to trade off one right for another and are warned that if they disclose this to the Tribunal the offer will be withdrawn. Further the registrars conducting ADR do not have the authority to denounce this behaviour; it is only when the participant insists on taking the matter before a member that the offer suddenly loses the conditions.

Corporate law firms threatening unrepresented PWD in this manner is an abhorrent breach of the duty to assist the Tribunal to come to the correct and proper decision.

Treating other parties to the ADR process respectfully

PWD appearing at the AAT have the best knowledge about their own lives, their own needs, and what works for them. Whilst recognising that the Tribunal relies on the evidence before it, on occasion the Agency has been observed to actively undermine participants by requiring them to answer absurd and offensive questions from representatives speaking outside of their field of expertise. This is evidenced in the following examples:

- A participant required supports related to continence issues. The Agency's representative, a paralegal (not a medical professional, and with no evidence they were being advised by a

medical professional) argued that this could be managed by medication. The participant then felt obliged to request their medical practitioner provide evidence that this is not the case.

- A legal representative of the Agency proposed that a support for an autistic four-year-old was not necessary, because they could "catch the school bus". The nominee then felt compelled to utilise more funding to seek evidence that this was not possible.

It is a disrespectful misuse of people's time who are involved when the NDIS do not send an instructor during the ADR process.

The ongoing issuing of summonses for an applicant's entire medical record, even where those records are not relevant is also deeply disrespectful to both privacy and dignity of the participant. It also adds to further delays and trauma for the applicant, especially where it leads to applicants reliving past trauma. The Agency has no need for access to entire medical records, and in any other context individuals have a right to privacy in relation to such personal materials. Using an AAT proceeding to obtain access to these materials is disrespectful and unfair.

Acting reasonably and fairly

Multiple signatories have noted the NDIA's representatives often "shifting the goalposts" in relation to the issue in dispute. Having previously filed a Statement of Issues, and the participant having returned with the materials requested, the NDIA then issues another Statement of Issues raising a separate and previously unmentioned issue in dispute. This is neither reasonable nor fair, and participants experience this as an active campaign against them, rather than a genuine attempt to assist the Tribunal. As the participant in case study 1 described, it like a 'fishing expedition' where the Agency searches for anything to hold against them.

Frequent reliance on private lawyers to represent the Agency leads to issues with communication with unrepresented participants. Language which may be received as neutral in a dispute between two commercial entities is often received as threatening and coercive by NDIS participants at the AAT. Statements such as "open to the Applicant to withdraw", or "the Tribunal has the power to dismiss the matter" may be factually correct but are not actually necessary.

Further, the Agency's representatives have pressured many participants into accepting an offer to have certain supports funded, but the legal agreement provided to implement this actually ends the entire matter at the Tribunal. Where the participant is without funding for necessary supports, their focus on resolving the most urgent matter can lead them to sign such agreements without any advice or support[20] only to discover that this was against their interests.

Being faithful to agreements reached

It is common for an agreement to be reached, either in conference, conciliation or in writing, to then later be completely contradicted as reflected in the following examples:

- The NDIA provided a letter of instruction for a report to be completed by the Applicant's psychologist. The letter stated the NDIA would fund the report and requested an estimated invoice be provided before the report was undertaken. Upon receipt of the invoice, the NDIA then directly advised the psychologist that the funding should be claimed from the Applicant's plan.
- An agreement was reached at conference to have a plan extension to allow for funding continuity while the matter continues at the AAT. However, the plan extension issued did not contain the supports agreed as part of the ADR process.

[20] Noting that access to any advocacy or legal support is now extremely difficult to obtain

Section 4: Raising concerns about conduct

The above concerns about the NDIA's compliance with model litigant obligations and duty to act in good faith is one half of the problem. The other half of the problem is the inability to raise these issues and have them dealt with effectively and appropriately. The model litigant obligations are self-imposed rules and the Commonwealth has limited the circumstances in which they can be used against it. The model litigant obligations cannot be used in proceedings against the Commonwealth and are only enforceable by the Attorney-General.[21] This means that in an AAT NDIS appeal, the participant is limited in its ability to rely on the model litigant obligations in the proceedings and is only able to draw the rules to the attention of the NDIA and remind the NDIA of its obligations. The other option is to make a complaint and there are significant issues identified in the current complaint process.

No identified process

The only feedback process within the NDIA is to contact feedback@ndis.gov.au. Their website states that when a complaint is made:

> *Through our Participant Service Charter, we will:*
>
> - *act immediately where there appears to be a high risk of harm, neglect or abuse*
> - *acknowledge your complaint within one day after we receive it*
> - *make contact with you within two days after we receive your complaint to give you a reference number and information on what to expect as we resolve your complaint*
> - *resolve your complaint within 21 days after we receive it (keeping in mind that complex complaints, such as complaints with multiple issues, may take longer to address)*
> - *publish information on our website about our performance.*

NDIS Appeals advocates report that when they have attempted to make a complaint about failure to comply with Model Litigant Obligations, they were told that the NDIA complaints department does not address AAT matters, so the complaint was automatically closed. This leaves the participant with no clear means of making a complaint where the Agency fails to comply with their obligations.[22]

Even when the complaint is identified as having been forwarded to "the relevant department", the complaint is then closed within the NDIA's system, and there is no mechanism to ensure a response is actually received. No signatory has received a response (beyond an acknowledgement) to a model litigant complaint.

Barriers to complaints

Previous submissions by advocacy and legal aid organisations have highlighted the negative impact the AAT process can have on the health and wellbeing of participants, prospective participants, and their caregivers/families.[23]

These consequences include emotional exhaustion, feelings of disempowerment, and the need to retell their circumstances/story on numerous occasions potentially resulting in mental distress and trauma. Delays may also mean that funding for vital supports is unavailable. Some clients have

[21] *Judiciary Act* (Cth) s 55ZF(2) and (3).

[22] We note that this appears to have changed recently, and some signatories have seen evidence that there is now a new process which sends model litigant complaints to "the relevant department".

[23] *Unreasonable and Unnecessary Harms: Joint Submission Regarding the NDIS Internal Review and External Processes*, Submission to the Joint Standing Committee on the NDIS: General Issues around the Implementation and Performance of the NDIS, (2021), 14.

reported breakdown in family relationships due to the strain of the AAT process, while others have withdrawn from the AAT process, citing the need to protect those relationships.

Advocacy and legal aid organisations have highlighted the existence of barriers experienced by clients in making model litigant complaints. In relation to participants whose matters are still before the AAT, concerns exist in relation to the detrimental consequences of making a complaint (fear of reprisals) and the need to focus on the matter under review rather than the 'side process' of making a complaint that may not make any difference in the individual case anyway. A formal complaint was considered to further delay matters and did not assist in helping the participant establish their case at the AAT. For example, there was a concern that the appointment of a new lawyer may cause further delay and lead to new issues being raised that were considered 'resolved'. Other participants have indicated that they don't want 'trouble', they just want the case to end and have the issues resolved.

Once a matter has resolved at the AAT, fatigue/exhaustion in the appeal process and a sense that complaint is not likely to achieve anything have been identified as factors in participants not wishing to pursue a formal complaint. In relation to making complaints at any stage, there is a concern that it may impact on the participant's NDIS Plan and interactions with the NDIA in the future. There is also a very low awareness of the requirements of model litigant behaviour, and as discussed above, even lower awareness of the process for raising a complaint where those requirements are not met.

The following information, provided by advocates around Australia, illustrates the types of barriers identified:

- Generally, the client fears that it will alter the behaviour of the Respondent during the case, negatively impact the result of the AAT case, and may impact on their plan in the future. They fear being 'black marked' or similar. We do not advise not to complain, it is always the choice of the Applicant. General awareness of model litigant behaviour in these cases is very low in the people we support.
- Clients are reluctant to make complaints. Mostly they are not aware this is an option in the first place. Once they are aware however, they are worried that making a complaint will negatively affect the outcome of their appeal. Clients are exhausted by the entire process and simply lack the energy to take on another battle.
- Advocates taking time away from their actual cases to make a complaint about the lawyer consumes time that is already scarce. Advocates' primary focus is on obtaining the result for their clients. A model litigant complaint is often beyond this scope due to the lack of resources that comes along with a full case load. Additionally, there is little incentive for advocates to make a model litigant complaint because the process is seemingly 'toothless' and thus pointless. There are also concerns of having to continue working with the lawyer they have complained about for the duration of a case, or potentially in future cases.
- Fatigue and lack of knowledge/awareness are significant barriers to making complaints. People are so worn down by the AAT process that they have no will to submit a complaint during the process and when the matter is over, they want to move on because the process has been so distressing and/or traumatising.
- People who have made Model Litigant Complaints are underwhelmed by the responses received. One thing that was noted was that NDIA treats Model Litigant Complaints like any other complaint rather than dealing with them as a separate category. An anonymous advocacy organisation suspects these complaints do not make the purported NDIS "Model Litigant" complaint stats because they are just included as ordinary complaints.
- To the best of our knowledge, no one who has made a Model Litigant Complaint has received a satisfactory response, with little option, or clear avenue on how to escalate their complaint.

Section 5: The Role of the Tribunal

The AAT is an independent body which reviews decisions under the executive power of the Commonwealth government (and not the judicial power held by the courts).

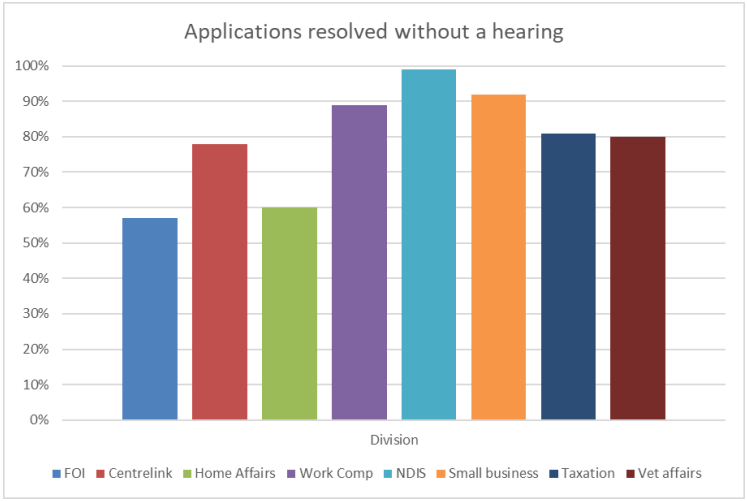
The AAT's objective is articulated at s 2A of the *Administrative Appeals Tribunal Act* 1975 which states:

> *In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:*
>
> *(a) is accessible; and*
> *(b) is fair, just, economical, informal and quick; and*
> *(c) is proportionate to the importance and complexity of the matter; and*
> (d) *promotes public trust and confidence in the decision-making of the Tribunal.*

In theory, the failure of the NDIA to comply with model litigant obligations ought to be a matter which the Tribunal has powers to respond to, in ensuring their processes are accessible, fair, just and informal.

The reliance on ADR

Figure 7



One reason this does not occur is the reliance on ADR in resolving NDIS appeals (see Figure 7).[24]

ADR is not conducted by a member of the Tribunal, but by a registrar. Registrars simply do not have the same authority as a member, and their capacity to reign in the poor conduct of one party is accordingly more limited. We question the appropriateness of relying on a process which allows the NDIA to cause such high levels of distress for some participants when the participant has appealed to the AAT for a decision.

The Tribunal states that "We use alternative dispute resolution (ADR) in many types of cases … to help parties understand and narrow the issues in dispute, identify further evidence that will be gathered, and try to reach agreement about how their case should be resolved."[25]

The Tribunal states that the decision to engage in ADR is based on the following factors:

- Capacity of the parties to participate effectively
- Whether the parties are represented
- Context of the application including the history of past applications by the applicant
- Any identified need for urgency
- Number of parties involved in the application

[24] AAT Annual report 2020-21 (https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf) p53

[25] Ibid, 52

- Complexity of the issues in dispute
- Bona fides of the parties
- Cultural factors
- The safety of the parties
- The likelihood of an agreed outcome or reduced issues in dispute
- Relative cost to the parties of an ADR process and a determination
- Case management requirements of the Tribunal
- Whether an ADR process might offer a more flexible solution than a determination
- Whether public interest issues require a determination.

Specific Considerations

- Attitudes of the parties
- Benefits of involving other persons in the ADR process
- Cost of each ADR process to the parties
- Stage of preparation of the application
- Progress of other applications which may impact on any decision
- Nature of the issues in dispute; ie: law, expert evidence, credit
- Impediments to settlement
- Any previous ADR attempts
- Availability of participants with authority to settle.[26]

It is unclear how these decisions are made by the Tribunal in relation to NDIS Appeals, but, as noted in the discussion above, the conduct of the NDIA in many cases would suggest that reliance on ADR is problematic.

CAPACITY OF THE PARTIES TO PARTICIPATE EFFECTIVELY

The overwhelming feedback from many PWD in relation to conferencing and conciliation is that they do *not* have the capacity to participate in it effectively. They do not understand how it works, they are confused and overwhelmed, they feel intimidated, not listened to, and pressured to agree with the demands of the NDIA. They have applied to have the Tribunal make a decision about the matter, but instead they are forced to undertake a process where the NDIA employs lawyers to argue against them, they are required to attend multiple conferences in which they describe the NDIA as “stonewalling”, “dragging it out”, “attacking” and requiring them to provide additional evidence repeatedly.

They do not understand their rights in these discussions, and believe they are required to comply with anything the Agency’s representatives ask of them, even if they are strongly opposed to it.

THE LIKELIHOOD OF AN AGREED OUTCOME OR REDUCED ISSUES IN DISPUTE

As noted, the intransigence of the NDIA in many cases does not indicate that ADR is likely to result in an agreed outcome. The feedback we have had from participants is that the reasons that so few matters actually go to hearing are:

- They are overwhelmed by the process and agree to resolve just to have it over with
- They are pressured into agreement, both by the NDIA’s representatives, and the Tribunal

[26] https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/alternative-dispute-resolution-guidelines pp4-5

- They fear having to go to a hearing as they do not have access to representation, and have not been informed that the Tribunal must assist them if they are self-represented

We do not agree that the statistics about matters settled by agreement is indicative of a successful process, but have concerns that it is more indicative of the power imbalance forcing the hand of PWD.

RELATIVE COST TO THE PARTIES OF AN ADR PROCESS AND A DETERMINATION

The costs to the parties of an extended ADR process rather than a hearing of the matters are:

- Repeated attendance at conferences, with PWD and their supports needing to take time away from their other commitments to attend
- Additional work for all parties in relation to ensuring the continuity of funding
- The Agency expending (an estimated) $47 million in legal fees[27]
- The cost of additional reports requested by the Agency, which may or may not actually contribute to the resolution of the issue
- The lives of PWD being effectively on hold when they are reliant on the supports in dispute to move forward.

The PWD who have experienced this process have frequently commented that they consider the costs to be excessive.

Further, in relation to the other factors:

- The vast majority of PWD are not represented at the AAT at any stage, and the Agency is always represented
- The severe and critical depletion of funding in a NDIS plan is a common occurrence in NDIS appeals, but only sometimes results in a matter being referred to a member. Most often the PWD is required to wait for a conference, by which time their pressing need for funding undermines their capacity to engage in genuine negotiation.
- Many participants have reported that their appeal is actually about quite simple issues, but the approach of the NDIA is to make the issues more complex during ADR, resulting in pressure for them to respond to additional issues not previously raised.
- As noted, the NDIA has often engaged in unreasonable conduct in the ADR processes of the AAT.
- The feedback we have received from the majority of PWD who have participated in the ADR processes of the AAT is that they do *not* feel safe. They often report significant distress and trauma, thereby signifying risks to their psychological safety.
- As noted, the intransigence of the NDIA in many cases makes a more flexible solution very unlikely.
- The NDIS is still a relatively new scheme, and there is significant public interest in determinations being available.
- As noted, the attitude of the NDIA is often not one of genuine efforts to resolve the issue.
- As noted, the NDIA routinely does not make available a person with authority to settle the matter at ADR.

[27] See footnote 3 above

Conduct of ADR

An application to the AAT is a request for the Tribunal to review the decision in dispute. It is not a request for the PWD to have to engage in further protracted dispute with the Agency. The Tribunal has an obligation to ensure ADR is fair and safe for participants if they continue to rely on it as a means of resolving disputes.

Too often it is not.

When the Tribunal altered its practice and matters were handled in registries unrelated to the location of the participant, NDIS appeals advocates became aware of significant inconsistencies in practice and standards between registries. The comments below recognise that these inconsistencies exist, but also reflect the fact that any appellant has the right to have their matter dealt with according to best practice.

INDEPENDENCE OF REGISTRARS

Whilst noting that there is significant inconsistency in the approach of registrars across jurisdictions, we consistently receive feedback from appellants that the registrar "was on the side of the NDIA".

It is critical to the success of ADR that the registrar is independent of the parties. It is not clear that all registrars understand this, and we receive ongoing feedback that appellants do not perceive some registrars as being independent and objective. They frequently report that they experience the process as one whereby the AAT is aligned with the NDIA, and that becomes a form of coercion that the participant cannot overcome.

Where registrars make individuals feel "ganged up on", rather than providing independent oversight of a process of resolution, this must be dealt with by the Tribunal.

ACCESS TO A MEMBER

If an appellant requests access to a member to determine an issue, this should not be able to be blocked by a registrar, except under extreme circumstances. The right to appeal a decision includes the right for access to a decision maker.

In one instance multiple requests to have a matter brought to an interlocutory hearing before a member were blocked by a registrar who insisted the matter be discussed at conference. At conference the registrar then stated, "that's not my decision to make, that requires a member."

Power imbalances cannot be dealt with effectively when the Tribunal's only representative has no authority to make a decision. Attempts by the Agency to force PWD to comply with their demands, under threat, must be dealt with by the Tribunal, and not allowed to play out under the confidentiality of ADR.

ACCESS TO A HEARING

If an appellant requests the matter go to hearing, rather than persist with futile ADR, this must be available to them. We have had repeated experience and reports from participants, where the registrar has made the decision to continue with ADR, and refused to allow the matter to go to hearing.

ADR is not fair or effective if it is forced, and one party is allowed to avoid their obligation to engage in good faith.

REQUIREMENT TO COMPLY WITH OBLIGATIONS

As noted, the AAT has guidelines which require parties to act in good faith. Ideally the NDIA would comply with these obligations, but too frequently they do not. We have had repeated experience

and reports from participants that the Tribunal simply allows the Agency to ignore this obligation. Understandably, this informs the perception that the Tribunal is siding with the Agency.

UNDERSTANDING OF THE PROCESS

NDIS Appeals advocates have had to make decisions about how they can use their limited resources to best support the increased demand for assistance. For many this has meant a decision to provide access to advice to participants, so that they are better equipped to engage in the process without advocacy.

Through providing this advice it has become increasingly apparent that the advice sought is not about their individual case, but the AAT process itself.

This is a role better suited to the Tribunal than individual advocates. The issues participants most often need to understand are:

- Is a conference the same as a hearing?
- Who will be at the conference?
- What do I need to do to prepare?
- Do I have to agree to what the NDIA proposes?
- What is a registrar? Whose side are they on?
- What can I talk about at the conference?

The Tribunal schedules case conferences months in advance. They are listed for half an hour, and the appellant has extremely limited information about what to expect. This is not conducive to resolution of a dispute. Most NDIS participants have no experience in ADR, or legal proceedings generally, and the absence of any support to understand the purpose, scope, and expectations of conferencing causes uncertainty, distress and confusion.

A PWD appealing a decision of the NDIA has an expectation that the Tribunal will provide an external review; a decision from outside of the Agency. Instead, they attend the conference as advised, and engage in a discussion with the Agency's representatives that generally involves them being told they have not provided evidence of their claim and must produce the requested evidence for the matter to proceed any further. As one participant described:

> *"I got called into a meeting where nobody listened to what I said and lawyers and the AAT told me I have to go and get more evidence. I already provided the evidence. What am I supposed to do now?""*

POWER IMBALANCE

The single most common theme in people contacting us after their first case conference is as one participant described, "they had high powered lawyers."

PWD attend the first conference expecting to talk about the issue in dispute and are shocked to be confronted by lawyers from large commercial firms or the Australian Government Solicitor.

Understandably, they immediately feel overwhelmed and unable to participate with confidence.

If ADR is to be successful, power imbalances need to be dealt with. If a PWD is unable even to access advocacy, the NDIA should not be allowed to attend with corporate lawyers. If ADR is to fairly seek to resolve the issue in dispute, it cannot be loaded with intimidation from the outset.

Costs and Enforcement

The AAT is not a court, it is a Tribunal which functions under the executive power of government. In the context of its role in reviewing government decisions, and the model litigant obligations attached to those, there should be no need for costs orders to penalise poor behaviour, nor enforcement powers to ensure orders are implemented.

However, the conduct of the NDIA in the past twelve months has demonstrated that if a government agency simply chooses not to abide by its obligations, there is very little an individual can do about it. We question whether legislators should contemplate a form of external influence in the conduct of a government agency which consistently fails to meet its obligations.

Section 6: Conclusion and recommendations

It is the view of the signatories that there are significant issues with the conduct of the NDIA before the AAT. Signatories have observed an increasingly adversarial approach to the conduct of appeals at the AAT, contrary to the Agency's obligations as a model litigant, and contrary to the Tribunal's guidelines. We note that the Agency's conduct in many regions of Australia has on occasion continued unchecked by the Tribunal, and without consequence. Participants are suffering as a result.

There is much work to be done before this is a fair process, and our recommendations below span the entire process, from initial decision to implementation of an external review outcome, and with reference to the NDIA as well as external bodies. It is our view that only when there is proper process, but also relevant safeguards and oversight, will participants be able to safely and effectively assert their rights enshrined in the NDIS Act.

Get the initial decision right

RECOMMENDATION 1

The NDIA invests in resources and training to provide clearer evidence guidelines to professionals preparing evidence for NDIS participants.

RECOMMENDATION 2

The NDIA ensures plan preparation is carried out by a skilled and knowledgeable planner, and is not determined solely by reference to demographic data about the participant, ensuring sufficient staffing and documentation of reasons for decisions at all stages.

RECOMMENDATION 3

The NDIA ensure the statement of reasons for a decision includes findings on material questions of fact, reference to the evidence on which those findings were based, and giving the reasons for the decision.

RECOMMENDATION 4

The NDIA ensure sufficient resourcing for the internal review process to be conducted *with* the participant, and with the reviewer advising participants of further information which may assist before finalising the review.

Commit to being a model litigant

RECOMMENDATION 5

The NDIA co-design a document which stipulates the way AAT Appeals will be conducted, and what participants can expect from the Agency irrespective of who is acting on their behalf, including timeframes, standards, conduct and approach.

RECOMMENDATION 6

The NDIA apply minimum standards for anybody acting on their behalf at the AAT, including understanding model litigant obligations, training on disability rights and awareness, and training on communicating with people with cognitive impairment, and from CALD and First Nations backgrounds.

RECOMMENDATION 7

The NDIA ensure adequate staffing and resourcing to comply with stipulated timeframes, and ensure a decision maker is available for all stages at the AAT.

Address the power imbalance

RECOMMENDATION 8

Both the NDIA and the AAT reconsider the approach where the Agency is legally represented against a disabled person who is not.[28]

RECOMMENDATION 9

The government rectify the disparity of resources applied to the parties at the AAT.

RECOMMENDATION 10

The AAT seek participant feedback about the experience of conferencing so that they can understand and address the issue of registry staff being perceived as "being on the side of" the Agency.

RECOMMENDATION 11

The AAT takes a more active role in educating participants about their processes and what they can expect.

Ensure safeguards exist

RECOMMENDATION 12

The NDIA publish the required standards of conduct for their representatives at the AAT, in order that participants have clarity on what they should expect.

RECOMMENDATION 13

Parliament require the NDIA to report on model litigant complaints, including timeframes for responses, and the nature of complaints.

RECOMMENDATION 14

The Commonwealth Ombudsman is authorised to take and handle model litigant complaints about the NDIA, as an external and objective body

RECOMMENDATION 15

The government determine the most appropriate mechanism for the AAT being authorised to sanction unacceptable conduct, including but not limited to costs orders and enforcement powers.

RECOMMENDATION 16

The Disability Royal Commission, the Joint Select Committee on the NDIS and the NDIA 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, in particular to address the deficiencies of the NDIA as a model litigant.

[28] During the endorsement process, it was brought to the attention of the authors that there had been occasions where an AAT conference or other proceeding was disability inaccessible (eg no Auslan translators etc) and went forward. Clearly disability discrimination is absolutely unacceptable and we strongly recommend that both the Tribunal and the Agency take immediate action to clarify this with all relevant staff.

Appendices

Appendix 1

List of signatories

- Deaf Victoria
- Disability Advocacy and Complaints Service of South Australia (DACSSA)
- Disability Advocacy, NSW (DANSW)
- Disability Justice Australia
- Ideas
- Independent Advocacy in the Tropics INc (IaT Inc)
- Leadership Plus
- People with Disability WA
- Queensland Advocacy for Inclusion (QAI)
- Rights Information and Advocacy Centre (RIAC)
- Speaking Up For You (SUFY)
- Villamanta Disability Rights Legal Service Inc
- VMIAC
- Your Say Advocacy Tasmania

Appendix 2

List of supporting agencies

- Disability Advocacy Network Australia (DANA)
- Disability Advocacy Victoria Inc.
- Every Australian Counts
- Speak Out Advocacy
- Spinal Cord Injuries Australia (SCIA)