



NDIS AAT Appeals- trends and observations from an individual disability advocacy perspective

Introduction

The National Disability Insurance Scheme (NDIS) is one of the largest social reforms in Australian history. Currently supporting over 500,000 Australians with permanent and significant disability, the primary function of the NDIS is the provision of funding to participants to access individually tailored supports. To access individual funding (known as an “NDIS plan”), prospective participants must first be assessed as eligible to access the NDIS, and then engage in a planning meeting with a representative from either the National Disability Insurance Agency (NDIA) or a partner organisation in the community that is funded to deliver the NDIS.

Decision-making processes around access and participant supports are enshrined in NDIS legislation (*NDIS Act 2013*) and other operational instruments. Despite this, sometimes participants and prospective participants do not agree with decisions made by NDIA that affect their lives. If, after exhausting the internal review mechanisms of the NDIS, the Administrative Appeals Tribunal (AAT) is available to people who seek out an independent decision-maker who has authority to vary or set aside the NDIS decision.

Advocacy WA provides individual advocacy to people who request reviews of NDIS decisions, including those related to access and the provision of funding for supports. Advocacy WA supports people who are participating in external merits reviews of NDIS decisions with the AAT. This paper identifies patterns that have been observed among AAT external merits reviews in a six-month period from January 2022 to June 2022.

Literature Review

The processes of reviewing and appealing National Disability Insurance Scheme (NDIS) decisions have garnered significant attention in recent years. Perceived rigidity and inflexibility in helping NDIS participants and people with disability seeking to become participants access reasonable and necessary support has been exposed by Tune (2019), the Joint Standing Committee on the NDIS (2020), the Commonwealth Ombudsman (2018), disability advocacy organisations and others. The

responsiveness of the review process has also been acknowledged by the NDIA (Australian Government 2020; 2021) and members of the NDIS division of the Administrative Appeals Tribunal (AAT) (2020). Existing public access literature was reviewed to identify systemic issues within NDIS reviews and appeals. Findings from this review are compared with trends identified among people with disability utilising Advocacy WA individual advocacy services.

The *NDIS March 2022 Quarterly Report to disability ministers* identifies that there were 1,583 new AAT cases in the quarter, relating to 1,548 participants. NDIA statistics show a decrease since the December 2021 quarter, however, determine that the number of cases proportionate to active participants remains above the historical average (2022: 67). The NDIA propose that the increase in planning-related AAT cases is due to their “continuing to make fair and equitable decisions about reasonable and necessary support” which sees more cases “seeking to test and clarify the concept of ‘reasonable and necessary’ under section 34 of the *NDIS Act 2013*” (2022: 68).

The NDIA do not provide data about AAT case outcomes for the March 2022 quarter, however, provide data on cases closed since the scheme’s commencement, indicating that 97% (n=6,284) of closed cases were closed prior to a substantive hearing, and the remaining 3% (n=182) progressed to substantive hearing. Of the 182 matters that went before a Tribunal member, 58% (n=105) matters were set aside or varied, compared with 42% (n=77) that affirmed the NDIA’s original decision.

The NDIA state that reasons the AAT find in favour of applicants include that applicants make new requests and provide new evidence while the AAT matter is at hand. The NDIA does not provide concession or accountability for decision-making processes that are eventually overturned by an independent decision-maker (2022: 69). The NDIA also make this claim at the internal review stage, stating that decisions to overturn the original decision are because often “...further evidence is obtained during the review process” (2022: 67). In a media statement released in December 2021, the NDIA clarified its position that not only do AAT applications represent a small number of participants, but the increase in cases is also due to the continued growth of the scheme (NDIA 2021).

The Joint Standing Committee on the NDIS was appointed in July 2019 and lead an ongoing inquiry exploring general issues around the implementation and performance of the NDIS. Findings from *General Issues 2021* and the *NDIS Planning Final Report* (2020) are discussed in this review. Referring to submissions to the inquiry from stakeholders in the disability community, the Joint Standing Committee find that participants and other stakeholders believe that the need for internal and AAT

reviews “would decrease with planner competency, more involvement of participants in planning, and if NDIA were to provide participants with reasons for decisions.” (Planning Final Report 2020: 23).

On transparency, the committee found that the “concept of reasonable and necessary support” is inconsistently interpreted by planners, and that reliance on this ambiguous term enables planners to make decisions without providing valid reasons (2020: 40). The 2019 Tune Review echoes this sentiment, indicating that participants “seeking to test and clarify the concept of ‘reasonable and necessary’” are motivated by experiences of rushed planning decisions and a lack of clarity about why certain supports have or have not been included (2019: 133). In *Witsen and National Disability Insurance Agency* (AATA 2205), the applicant indicated that their requested support was escalated to the AAT as the finding from the internal review officer was “inadequate and does not explain to the Applicant why she received an adverse decision- namely, that it was not clear how the reviewer formed a view, for example, as to what constituted value for money, whether the reviewer used some type of calculation, or relied upon an expert opinion, or relied on an inclusive synthesis as to what constitutes value.” (*Witsen and National Disability Insurance Agency* 2022: par. 20). The Applicant posited that had sufficient reason for denying the requested support been given, they would have been able to make an informed decision about managing their issue, including avoiding escalating it to the AAT (2022: par. 36). This case reiterates that NDIS participants are not seeking to test and clarify the concept of “reasonable and necessary” but are highlighting the inconsistencies in the interpretation and application of the term by the NDIA.

In a review of AAT administrative decision-making in the NDIS division, members Dr Louise Bygrave and Member Emeritus Professor Ron McCallum review the unique challenges and opportunities of this jurisdiction. They find that the lack of clarity and transparency is embedded in the design of the Scheme with its “intertwined and repetitious” statutory framework that relies on legislation, rules, operational guidelines, and non-legal participant fact sheets (2020: 191). The authors find that the onus of demonstrating the appropriateness of NDIS funded support falls on people with disability and their supports to provide evidence that meets complex legislative requirements which are often ill-defined (for example, “disability” is not defined in the *NDIS Act 2013*, nor is “impairment” directly defined in any statutory instrument) (2020: 199). Consistent with findings from submissions to the Joint Standing Committee inquiry, Bygrave and McCallum find that the determination of “reasonable and necessary” is the result of subjective decision-making by planners and review officers, informed by their individual understanding of the ambiguous legislative and policy landscape (2020: 191). The members find that the high bar of evidence required adversely impacts people with disability, and

that applicants to the AAT “often have had a long and difficult history of seeking assistance and supports for their disabilities.” (2020: 197). Exacerbating this issue is the lack of transparency caused by AAT matters being resolved under section 42(C) of the *AAT Act 1975* (Cth). Non-publication of the outcome of many external merits reviews is not conducive to consolidating an understanding of what “reasonable and necessary” means for all parties as the NDIS matures. While Bygrave and McCallum’s sample excludes Western Australian representation, findings from the Advocacy WA NDIS Appeals database are consistent with trends identified by the members, in that most matters are resolved via confidential settlement, the specificity of evidence requested by the NDIA is often unobtainable, and all parties continue to grapple with defining “reasonable and necessary” (Bygrave and McCallum 2020; Advocacy WA 2022).

In a submission to the Legal and Constitutional Affairs References Committee 2022 inquiry ‘the performance and integrity of Australia’s administrative review system’, People with Disability Australia (PWDA) submitted that 95% of its Queensland appeals were settled in conciliation (2022: 35). PWDA indicated that this outcome showed the prevalence of incorrect decision making by the NDIA at the internal stage and argued that the “AAT should not replace a robust NDIA internal review process” (2022: 36). Interim findings by the committee support PWDA’s submission, stating that the “fact that the AAT is setting aside the decisions of departments at consistently high levels indicates problems with the decision-making process in the departments themselves. This is exemplified by the National Disability Insurance Scheme (NDIS) Division, where more than half of the relevant agency’s decisions have been changed by the Tribunal” (2022: 92).

The committee opines that the work of the AAT will not diminish while departments continue to make incorrect decisions. In this 2022 submission, PWDA indicate that NDIS AAT appeals were taking an average of seven months to resolve, directly impacting participant’s and prospective participant’s access to NDIS supports (2022: 36). Although this is so, there has been some uptake on remittals of decisions back to the CEO where partial supports have been determined reasonable and necessary under section 42(D) of the *AAT Act 1975* (Cth) (Advocacy WA 2022), enabling applicants to access these supports while other requests remain before the tribunal.

The significant power imbalance that characterises the NDIS Division of the AAT has been noted by many stakeholders in the disability and legal communities (Joint Standing Committee 2021; Tune 2019; Bygrave and McCallum 2020). Despite the re-establishment of the internal early resolution team by the NDIA (Joint Standing Committee 2021: 216), spending on external legal representation for

matters before the AAT has increased twofold since 2018-19. In response to questions on notice put forward by the Senate Community Affairs Legislation Committee in April 2022, the NDIA identified that expenditure on external legal fees had exceeded \$41 million in an eight-month period from July 2021-April 2022 (Senate Community Affairs Legislation Committee 2022; appendix 1).

In comparison, as of April 2022, the Morrison Government announced the provision of \$30.4 million in grants over three years distributed to 50 providers of advocacy and legal support (Department of Social Services 2022) to support people with disability and ensure that the external merits review process is accessible and as non-adversarial as possible. Specifically, in response to question on notice, the NDIA confirmed that funding provided to Legal Aid Commissions for the 2021-2022 financial year was \$5.1 million (appendix 2).

The Department of Social Services *Operational Guidelines for the NDIS Appeals Program* (2021) is explicit in communicating the role of NDIS Appeals advocacy and legal services. The guidelines advise that a primary focus is on “non-legalistic, self-advocacy services” and that:

“The majority of NDIA decisions that are subject to review are likely to relate to the application of eligibility criteria to individual circumstances (entailing questions of fact rather than the law) or to decisions about the content of participants’ plans (entailing subjective assessment of individuals’ circumstances rather than complex or novel legal questions).”

(2021: 4)

Outlining the scope of advocacy and legal services, it is evident that the onus of representation remains on the AAT applicant. The NDIS Appeals advocate’s duty is to “provide assistance and advice to applicants who wish to put their own cases forward” and to “...refer to relevant Legal Aid Commission where legal issues are highlighted, for a determination to be made as to whether legal services are warranted.” (2021: 5). The legal services provider may “provide legal counsel throughout the AAT process for applicants eligible...” and “provide advice for AAT applicants and their advocate...upon referral from an advocate.” (2021: 5). Legal representation by legal services for applicants is reserved for those who experience significant disadvantage, and/or cases where there is a wider community benefit (DSS 2021: 3; Legal Aid WA 2022). These guidelines suggest an intention that legal and advocacy support is reserved for the most complex of matters relating to reviews, rather than a readily accessible support for all NDIS participants and people with disability seeking access to the NDIS. Submissions to the Joint Standing Committee highlight experiences of people attempting to

engage advocacy and legal services with responses suggesting that overwhelming demand, reduced funding, and extensive waitlists among services are barriers to people with disability accessing support for their AAT appeals (2021: 66). The above factors combined create a landscape among AAT external merits reviews that indicates a significant power imbalance weighted against people with disability.

AAT applicant experiences with NDIS external merits reviews have been described as “overwhelming,” “a colossal waste of funds, time, and energy...,” a “slow and very expensive process,” with many participants identified as not having “the capacity, strength or resources to continue” (Joint Standing Committee 2020: 221). This is reinforced by the high percentage of withdrawals by applicants- 27% in 2019-20 (AAT 2020: 155). Withdrawal data for 2021-22 is not yet available, however in the NDIS March quarterly report, the NDIA identify that 35% of AAT reviews have been withdrawn by the applicant or dismissed by the AAT since the commencement of the NDIS (NDIS 2022: 69). The reality of the AAT experience for applicants (NDIS participants or people with disability seeking access to the NDIS) is outlined in reporting from Spinal Cord Injuries Australia:

“The participant must negotiate with the NDIA, who is always represented by a lawyer.

The NDIS legislation is regularly cited, discussed, and analysed.

Further evidence must be produced, including expert reports and medical records.

The NDIA provides formal statements of fact, ‘sometimes many pages in length and written in legalese’.”

(cited in Joint Standing Committee 2020: 220)

The above is consistent with the experiences of AAT applicants who access NDIS Appeals advocacy support. Even with disability advocacy support, as per operational guidelines, applicants are required to self-represent to all present in proceedings which can include a conference registrar or AAT member, the NDIS AAT case manager, and frequently, two representing solicitors on behalf of the Respondent. Consistent with Advocacy WA findings, negotiations are generally centred on the question of law, placing applicants and advocates at a significant disadvantage when reviewing NDIA decisions (Bygrave and McCallum 2020). The experience of AAT applicants and supporting advocates directly contradicts the position of the Department of Social Services that reviews NDIA decisions to questions of fact, rather than the law or complex or novel legal questions. If, as DSS understands, NDIA reviews rest on the question of facts and subjective assessment of individuals’ circumstances (DSS 2021: 4), it is uncertain how the NDIA expenditure on external legal representation can be rationalised.

The NDIA have obligations under the *NDIS Act 2013* (Cth), the United Nations *Convention on the Rights of Persons with Disabilities* (CPRD), *Legal Services Direction* (2017) and the *AAT Act 1975* (Cth) to act fairly and to support the self-determination of people with disability. Principles underpinning NDIA actions are built around supporting people with disability to exercise choice and control and decision-making in areas that affect their lives (*NDIS Act 2013*: s. 4).

The prevalence of NDIA decisions being escalated to the AAT secondary to poor planning experiences, the unattainable standard of evidence required to demonstrate appropriateness of requested supports and meet “reasonable and necessary” requirements, and the need to self-represent against external legal representatives through external merits reviews suggests that structural mechanisms of the NDIS are perpetuating disadvantage for an already marginalised cohort of the Australian community.

External merit review processes are a resource intensive exercise for all parties involved and present a risk to NDIS participants and prospective participants who may not have access to much needed supports.

This discussion provides initial insights into how NDIS external merits reviews are operating currently and highlights some factors that have been identified by people with disability and other stakeholders as contributing to the exponential increase in decisions being escalated to the AAT and issues occurring in this space. The risk of harm to participants through denial of requested supports and restricted access to necessary advocacy and legal support, compounded with the overwhelming taxpayer-funded expenditure on external legal representation suggests that the current model is not a sustainable operation.

Sample

The Advocacy WA (AWA) database was reviewed for the six-month period January 2022 to June 2022. Issues listed under the funding body “NDIS Appeals” which included Types “NDIS-Internal Review” and “Other.” “Other” is defined as NDIS external merits review (EMR) with the Administrative Appeals Tribunal (AAT).

Results

This search scope yielded 51 results from the AWA database. That is, 51 issues registered for advocacy assistance with a NDIS review.

Referral source

41% (n=21) of referrals were self-referrals from clients seeking advocacy assistance for themselves. Of these 21 self-referrals, 76% (n=16) were clients who had used advocacy assistance previously. Thus, 9% (n=5) of all (n=51) referrals were self-referrals from people with disability who were accessing disability advocacy services for the first time.

The second most represented referral source was from NDIS-registered providers- 25% (n=13). Support coordinators and specialist support coordinators were responsible for all incoming referrals from NDIS-registered providers. The 13 referrals were represented by seven organisations, with 38% (n=5) of incoming referrals coming from one organisation that is based in an AWA outreach location.

Referrals from the primary caregiver/informal support of a person with disability made up 21% (n=11) of incoming NDIS Appeals referrals. Parents of children with autism spectrum disorder and/or intellectual disability represented 90% (n=10) of referrals from primary caregiver/informal support. The remaining case was a parent of a child with acquired brain injury.

Four incoming referrals were from mainstream services, represented by an external disability advocacy organisation, a fee-for-service counselling organisation, Department of Health, and Child & Adolescent Mental Health (CAMHS).

Two incoming referrals were from legal guardians and/or plan nominees for people with disability, a sibling in one case and a spouse in the other.

Inclusion/Exclusion Criteria

Cases were included in further analysis if they met the criteria of:

- Issues that have received an outcome from S100 review of a reviewable decision (RORD) and have escalated to external merits review (EMR) before the AAT or have been in the time period.
- Accessed AWA individual advocacy for assistance with the EMR before the AAT.

16 cases were excluded from analysis for the following reasons:

- No further contact from client: (n=5)
- Information provision supported self-advocacy: (n=1)
- Client missed NDIA deadline to lodge review: (n=1)
- Client reported no capacity to engage in AAT process: (n=2)
- Client engaged in internal S48 or S100 review: (n=6)

- Client accessed My Aged Care via early ACAT instead of pursuing AAT: (n=1)

The remaining sample size for further thematic analysis is n=35.

Requested Supports

There were 61 requested supports across 35 cases before the AAT.

The most requested support was provision of funding for capacity building (therapy), representing 26% (n=16) of the requested supports. Following that were flexible core supports and assistive technology/consumables, each representing 21% (n=13) of requests for provision of funding. Home and living related requests, including short term accommodation (STA), specialist disability accommodation (SDA), supported independent living (SIL) and home modifications comprised of 8% (n=5) of cases that AWA supported for the six-month period January-June 2022. Requests for funding for employment support including School Leaver Employment Supports (SLES) and Finding and Keeping a Job (FAKAJ) represented 6% (n=4) of cases, and plan administration matters such as adding a new disability or changing plan duration represented 5% (n=3) of cases before the AAT.

11% (n=7) of EMRs before the AAT for the six-month period were access decisions.

Outcomes from S100 Review of a Reviewable Decision

There are three possible outcomes from an S100 review:

- 1) The review officer may affirm the original decision
- 2) The review officer may vary the original decision
- 3) The review officer may set aside the original decision and make a new decision.

The scope of this exploration indicates that for all 35 cases, the outcome from the internal S100 review was either affirmation of the original decision, or variation for parts of a NDIS participant's statement of participant supports.

The most prevalent reason provided by the NDIA to refuse provision of funding for requested supports was that the requested support was not considered "value for money" (28%; n=15). 20% (n=11) of requested supports were not considered "effective and beneficial," 11% (n=6) indicated that the requested support "duplicates existing supports." 15% (n=8) of requested supports were considered by the NDIA to be more appropriately funded by another system. 3% (n=2) indicated that the requested supports were reasonable for families/carers/informal supports to provide, and one case stated that the requested support represented a risk of harm to the participant. 54 reasons were identified in response to 61 requested supports. This number may be explained by the understanding

that the NDIA may refuse to fund multiple requested supports for the same reason, or that some consumables/low cost-low risk assistive technology requests fall under the category of core supports.

In the seven access related decisions, 66% (n=6) responses from the NDIA determined that the prospective participants impairment was not considered permanent as evidence did not indicate it was fully treated. In 20% (n=2) of access related decisions, the NDIA considered that the prospective participant was more appropriately supported by another system, and in one case, the prospective participant's functional impairment was not considered severe. Nine reasons were identified in response to seven cases, indicating that more than one reason was provided for some cases.

Reasons for requesting an External Merits Review (NDIS AAT Appeal)

In a review of available AAT applications and de-identified data, 41 reasons for requesting an EMR were identified for 35 cases.

The dominant reason for requesting an EMR was the perception from the participant that supporting evidence provided was not taken into consideration by the NDIA during the planning process and internal review process. 41% (n=17) of cases indicated this. Five existing NDIS participants indicated that their plan review meeting experience was poor (12%).

Participants reflected that they did not feel listened to, the planner did not show an understanding of their circumstances, and that the meeting was rushed. All participants who expressed a poor planning experience also believed that their supplied evidence was not taken into consideration. In a thematic analysis of review requests provided to the AAT, the theme "misrepresented circumstances" was generated, and six (15%) cases were found to be characterised by this. Further exploration of this phenomenon is provided below. Other reasons for requesting an EMR include that health professionals have confirmed permanence (in access related decisions), belief that requested supports are reasonable and necessary, provided funding is not sufficient to meet stated goals, and in three cases, people were not given an opportunity to submit additional evidence while the S100 review was underway.

"Misrepresented circumstances" captures cases whereby participants have found that their plan statements are not updated to reflect their circumstances. This is prevalent for children and young people who transition through major life stages rapidly. For example, two parents of participants expressed dissatisfaction with their children's plans as they did not reflect that their child had left school in the twelve months since their last plan review. This had implications on their statement of supports as the NDIA refused to fund requested supports with the rationale that the participant was "more appropriately supported by the Education system." The reality for the participants is that they

were no longer able to access support through the Education system as they had finished school. Not updating the descriptive aspects of a participant's NDIS plan significantly influences the provision of funding.

"Misrepresented circumstances" also captures instances where the capacity of families/carers/informal supports is overstated. In one case, a participant was denied funding for a requested support with the NDIA indicating that the participant lives with a similar-aged sibling who may assist them in activities of daily living and social and community participation. The participant expressed that the plan did not reflect their circumstances accurately in that their sibling has a significant disability and does not have capacity to support the participant in the way the NDIS plan had articulated.

In access related decisions, the dominant response from people seeking access to the NDIS was that their treating health professionals had confirmed permanence of their condition. The NDIA require confirmation of permanence of a person's impairment caused by the condition, not confirmation of permanence of condition (diagnosis). Further exploration into this phenomenon would be valuable as it appears to present a barrier for people with disability attempting to access the NDIS.

AAT Outcomes/Progress (as at 21/06/2022)

51% (n=18) of matters are currently engaged in Alternative Dispute Resolution (ADR) with the NDIA. 11% (n=4) of cases have been resolved via section 42C of the *AAT Act 1975* (Cth), which provides for resolution or part resolution of the dispute via agreement between parties. 5% (n=2) of cases have been partially settled via section 42D of the *AAT Act 1975* (Cth), which provides for requested supports under review to be remitted back to the original decision maker for reconsideration. This is generally initiated by the NDIA representatives who have determined that some requested supports meet the reasonable and necessary criteria, but that others have not met these criteria and must remain before the tribunal. Of the two cases partially resolved by section 42D, in one case, the remaining requested supports are being negotiated via ADR. The other matter is scheduled for a hearing as it has been determined that parties are not likely to reach agreement via ADR.

In 14% (n=5) of cases, the participant (or prospective participant in access related decisions) has withdrawn their application for review by the AAT. Reasons provided by the participant for their withdrawal includes participant reporting that they do not have capacity to pursue the matter, that they will instead lodge an internal S48 Change of Circumstances review, and that they had no capacity to obtain the evidence requested by the Respondent. One participant withdrew their application before the AAT in favour of pursuing an early aged care assessment.

Summary of findings

NDIS External Merits Reviews are a resource intensive exercise for all parties, most significantly for participants and prospective participants. AWA is seeing that carers and informal supports play a substantial role in advocating for people with disability, evident through the number of referrals from these people and the overreliance of NDIA on informal supports to reduce scheme expenditure. The prevalence of reviewable decisions being escalated to the AAT has foundations in participant perceptions that their provided evidence is not being adequately considered in planning meetings and consultations, and poor experiences with planning meetings.

Participants report feelings of not being heard by planners, resulting in circumstances being misrepresented when a plan is issued some weeks later. Minor administrative responsibilities of the NDIA that are not being seen to, such as updating a participant's "About Me" has had implications for participants supported by AWA. Implications were identifiable in matters involving young people who had left school and who were no longer able to access support through the education system. Not updating descriptive aspects of a participant's plan impacted the provision of funding in the statement of participant supports as the participants were considered to still be at school, thus eligible for support through the Department of Education.

Capacity building (therapy) was the most requested support before the AAT, and the most frequent reasoning for refusal to fund requested supports from the NDIA at internal review was that requested supports did not represent value for money, nor were they considered effective and beneficial despite evidence suggesting otherwise. In three of the four cases resolved under section 42C of the *AAT Act 1975* (Cth), the funding requested for capacity building (therapy) was determined to meet reasonable and necessary criteria.

Advocates play a significant role in supporting people and their families living with disability who are engaged with the NDIA and the AAT. They assist people to source evidence that supports their position, and to source evidence that is requested by the NDIA as part of AAT proceedings. Advocates support AAT applicants to articulate their position in case conferences and other interactions with NDIA representatives where a noticeable power imbalance is present. Advocates also support people with disability to make informed decisions about their options when they are considering withdrawing their matters before the AAT.

Recommendations

Based on the findings from Advocacy WA individual advocacy services and the broader review of literature commenting on NDIS reviews and appeals, Advocacy WA makes the following recommendations:

- 1) The Australian Government through Medicare make available to general practitioners and other relevant health professionals a provision to bulk bill for time spent preparing supporting evidence for NDIS applicants.**

Data collected suggest that attaining appropriate evidence to demonstrate the need for requested supports is difficult and sometimes impossible for people with disability. Providing additional support/incentives to health care professionals to provide appropriate evidence may expedite access and planning processes, while preventing a need to escalate matters to the AAT. A function such as provision to bulk bill for time spent preparing supporting evidence may potentially be useful for people with disability engaging with other government systems requiring evidence of disability including Services Australia.

- 2) NDIS participant plans reflect the region that they live in and the services available.**

Matching NDIS participants with a planner with an understanding of service availability in the participant's location may contribute to appropriate plan utilisation and mitigate the need to review supports. This is integral in regional areas where the service landscape and provider capacity may be limited or offered as a satellite service where provider travel costs consume participant budgets.

- 3) Carers of people with disability are adequately supported to sustain their caring role.**

Advocacy WA NDIS Appeals cases show that informal supports account for approximately 20% of incoming referrals to Advocacy WA and a theme generated from the data analysis showed that participants circumstances were overwhelmingly misrepresented in their plans, placing great emphasis on the level of care to be provided by informal supports. A mechanism that assesses carer capacity to provide the support that that NDIA direct may prevent participants seeking additional funding for support through reviews processes to meet the gaps created by assumptions of carer capacity.

- 4) The NDIA to make available to NDIS participants draft plans for review prior to approval and implementation.**

Draft plans provide people with disability and their supports the opportunity to decide whether the plans built on their behalf are adequate to meet their needs. A function to make changes to a

participant plan prior to its final approval would certainly reduce the number of review requests and subsequent escalation to the AAT. The mechanism to provide draft plans is endorsed sector wide, including by Tune (2019), the Joint Standing Committee on the NDIS (2021) and the Commonwealth Ombudsman (2018).

5) The NDIA to provide comprehensive and accessible explanation for refusal of funding at the initial planning stages (i.e. after plan approval and prior to an internal review).

This paper acknowledges that outcomes from AAT external merits reviews are almost balanced between favourable to the applicant (NDIS participant/prospective participant) and favourable to the NDIA. This suggests that refusal of funding for supports is often legitimate and that requests do not meet legislative requirements, even when tested by an external decision maker. To mitigate engagement in such a resource intensive process like an AAT appeal, ensuring people with disability and their supports are fully informed throughout their engagement with NDIS planning could benefit all stakeholders.

6) The NDIA improve engagement opportunities between the NDIS participant and the internal reviewer during the internal review to facilitate a more consultative process.

Making the internal review process a more consultative process where the participant or prospective participant has opportunity to engage in depth with the internal review officer supports informed and supported decision-making. As articulated in *Witsen and National Disability Insurance Agency* (2022), the applicant determined that greater dialogue between them and the NDIA may have mitigated their need to escalate their matter to the AAT.

7) The Department of Social Services provide equitable funding to legal and advocacy services that is proportionate to the NDIS external legal expenditure for AAT external merits reviews.

Continuing the NDIA practice of funding external legal representation for external merits reviews is unsustainable and systematically disadvantages a marginalised cohort of the Australian community. Provision of funding to legal and advocacy services to support people with disability pursue an external merits review must be proportionate and equitable to that of NDIA external legal expenditure. If the NDIA has legal representation in matters before the AAT, all applicants should be able to expect that they can access equivalent support. Adequately resourced legal and advocacy services can contribute to the assurance that people with disability will be afforded procedural fairness before the AAT and that the NDIA will be held accountable to their model litigant and participant service obligations.

The recommendations proposed advocate for equity, transparency and accessibility of NDIS reviews and appeals. Mechanisms that facilitate ongoing consultation between NDIS participants, prospective

participants and NDIA decision-makers may mitigate the need to escalate decisions to the review channels. Further, supporting those who support people with disability and their families (health professionals, lawyers, advocates) will contribute to realising the vision of an efficient and sustainable NDIS.

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Appendix 1

Question on notice no. 49

Portfolio question number: NDIA SQ22-000042

2022-23 Budget estimates

Community Affairs Committee, Social Services Portfolio

Senator Stirling Griff: asked the National Disability Insurance Agency on 26 April 2022—
(5

() How much has been spent by the Department or NDIA on legal costs related to NDIS funding decisions each year over the past 3 years?

Answer —

Please see attached answer.

Senate Community Affairs Legislation Committee
 Budget Estimates – 7 April 2022
ANSWER TO QUESTION ON NOTICE
 Social Services Portfolio
 National Disability Insurance Agency

Topic: NDIA legal costs

Question reference number: NDIA SQ22-000042

Outcome Number: 3

Senator: Stirling Griff

Type of Question: Written

Date set by the Committee for the return of answer: 20 May 2022

Question:

5) How much has been spent by the Department or NDIA on legal costs related to NDIS funding decisions each year over the past 3 years?

Answer:

The following tables set out the requested information.

Table 1: AAT Legal Spend (Excl. GST)

Year	2019-2020	2020-2021	2021-2022 YTD as at 30 April*
Legal costs	\$13,466,056	\$17,342,578	\$41,483,620

* 2021-2022 YTD data subject to end of financial year quality review.

The Department of Social Services funds access to both disability advocacy providers and Legal Aid Commissions in each state and territory as part of the NDIS Appeals Program. The table below shows the funding provided to the Legal Aid Commissions over the past 3 years under the NDIS Appeals Program:

2019-2020	2020-2021	2021-2022
\$2,581,047.65	\$3,509,635.78	\$5,103,786.62

*All figures are GST Exclusive

Appendix 2

Question on notice no. 50

Portfolio question number: NDIA SQ22-000043

2022-23 Budget estimates

Community Affairs Committee, Social Services Portfolio

Senator Anne Urquhart: asked the National Disability Insurance Agency on 1 April 2022 —

Senator URQUHART: In relation to the AAT cases, can you tell me how many NDIS appeals have been lodged with the AAT in the three months from January to March 2022?

[...]

Senator URQUHART: No problem. Can you tell me how much in total has been spent on external legal fees during that time?

Mr Hoffman: I can tell you how much has been spent for the eight months to February for this year, yes.

Senator URQUHART: Are you able to break it down into months?

Mr Hoffman: Month by month?

Senator URQUHART: Yes.

Mr Hoffman: Yes, I can. I don't have that data there, and it depends when it gets billed and when it gets recorded in the system, so it's going to not be smooth, in that sense, or particularly related to the level of activity-

Senator URQUHART: Within that month-yes, I understand.

Answer —

Please see attached answer.

Senate Community Affairs Legislation Committee
Budget Estimates – 1 April 2022
ANSWER TO QUESTION ON NOTICE
Social Services Portfolio
National Disability Insurance Agency

Topic: Legal Spend

Question reference number: NDIA SQ22-000043

Outcome Number: 3

Senator: Anne Urquhart

Type of Question: Spoken Hansard Page/s: 104, 105

Date set by the Committee for the return of answer: 20 May 2022

Question:

Senator URQUHART: In relation to the AAT cases, can you tell me how many NDIS appeals have been lodged with the AAT in the three months from January to March 2022?

.....

Senator URQUHART: No problem. Can you tell me how much in total has been spent on external legal fees during that time?

Mr Hoffman: I can tell you how much has been spent for the eight months to February for this year, yes.

Senator URQUHART: Are you able to break it down into months?

Mr Hoffman: Month by month?

Senator URQUHART: Yes.

Mr Hoffman: Yes, I can. I don't have that data there, and it depends when it gets billed and when it gets recorded in the system, so it's going to not be smooth, in that sense, or particularly related to the level of activity—

Senator URQUHART: Within that month—yes, I understand.

Mr Hoffman: But I can certainly get that. I'm happy to tell you that the amount for the eight months to February was \$31 million.

Senator URQUHART: I take it that that is starting end of June last year?

Mr Hoffman: Yes, 1 July.

Answer:

As per page 183 of the March 2022 quarterly report to disability ministers there were 1,583 applications received in the 3 months of January to March 2022.

The quarter 3 report is available on the NDIS website here: www.ndis.gov.au/about-us/publications/quarterly-reports

External legal spend for the Financial Year 2021-22 to April 2022 is set out in table 1 below. Please note: this data is reflective of the timing of billing and invoice recording, and is not an indication of when work was undertaken.

Table 1: AAT External Legal Spend Financial Year 2021-22 Year to Date

Month	Spend (Excl. GST)
Jul-21	\$1,606,282
Aug-21	\$2,816,995
Sept-21	\$3,279,382
Oct-21	\$1,870,396
Nov-21	\$6,304,308
Dec-21	\$3,603,135
Jan-22	\$3,719,209
Feb-22	\$8,033,742
Mar-22	\$4,593,623
Apr-22	\$5,656,548