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Office of the CEO

Senator Jordon Steele-John

Via email:

Dear Senator

I am writing to provide further evidence following the Senate Community Affairs Legislation Committee during its examination of the National Disability Insurance Agency in relation to Outcome 3 on 15 February 2023.

I refer to the below extract from page 70, of the transcript from 15 February 2023, where Mr Matthew Swainson, Chief Counsel, provided information relating to the Independent Expert Review Program (IERP).

Senator STEELE-JOHN: *In terms of reviewers themselves, could you table for us the standard operating procedure that expert reviewers follow?*

Mr Swainson: *Yes. There are a range of documents that we've produced to support independent expert reviewers in their decision-making process. Some of this is available online. We've got a dedicated webpage for the independent expert review program, so some material is available online. We've recently updated that material. But we're happy to make whatever information available.*

Senator STEELE-JOHN: *If you could table the material that isn't available online, that would be useful.*

Mr Swainson: *More than welcome.*

In response to your request for the material provided to Independent Experts not available online, the following documents are attached:

- Independent Expert Induction Material November 2022
- Guidelines for Independent Experts January 2023
- Article by Ron McCallum titled "The National Disability Insurance Scheme and Administrative Decision-Making: Unique Challenges and Opportunities"



Delivered by the
National Disability
Insurance Agency



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The materials have been approved for use following consideration by the Oversight Committee and the Agency will continue to review the training and guidelines as the IERP evolves and ongoing feedback is received.

A copy of this letter has been provided to the Senate Community Affairs Legislation Committee Chair. I hope this is of assistance to you and the Committee.

Yours sincerely

Rebecca Falkingham
Chief Executive Officer
National Disability Insurance Agency

29 March 2023

Independent Expert Review

Induction Material

November 2022

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IER Project Team

Deputy Chief Counsel

EL2 IER Project Legal

- EL1 Lawyer IER
- EL1 Lawyer IER
- APS 4 IER Legal Administrative Support

EL2 IER Project Admin support

- APS 6 IER Administrative Support
- APS 5 IER Administrative Support

EL2 IER Project Referrals

- EL1 IER Project
- EL1 IER Project
- EL1 IER Project

EL2 IER Project Referrals

- EL1 IER Project
- EL1 IER Project
- EL1 IER Project

Introduction

Development of the Independent Expert Review (IER) program of work and model

- Pilot commenced 4 October 2022 with approximately 30 matters
- Phase 2 commenced 12 December 2022
- Phase 3 to commence from March 2023.

Role and membership of the Oversight Committee.

Independent Experts (IEXs)

- 13 Experts
- Various backgrounds and experience
- Criteria on our NDIS website.

AAT Process Map

These steps apply where:

- The AAT appeal relates to an NDIA internal review decision (Section 100)

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- Extensions of time are not required
- No other jurisdictional issues exist.

Any further appeals are outside of this process.

Step 1: Individual makes application to AAT.

- (1) Administrative Appeals Tribunal (AAT) notifies NDIA of application.
- (2) NDIA prepares Tribunal documents.
- (3) NDIA allocates a case manager.

Step 2: Early Assessment

NDIA conducts an early assessment of the application to consider case complexity, any gaps in information and the process for gathering more information from either the individual, the NDIA or both.

Step 3: First case conference

The individual and NDIA along with any representatives attend a meeting conducted by the AAT Registrar to identify gaps in information and steps to acquire this, and any issues that have emerged or that can be resolved.

- If the dispute is resolved – NDIA implements an agreed plan.
- If the dispute is not resolved – further information is needed from the participant and/or NDIA.

Step 4: Further information

The individual and NDIA collect and provide additional information as agreed at the first case conference and identify any issues resolved and/or remaining.

- If the dispute is resolved – NDIA implements an agreed plan.
- If the dispute is not resolved:

Continue to [Step 5: Additional case conference\(s\)](#), or [New pathway – Expert review](#).

New pathway – Expert review

NDIA and the individual requests the Expert Reviewer to provide a non-binding recommendation to assist in resolving the issues in dispute.

- If the dispute is resolved – NDIA implements an agreed plan.
- If the dispute is not resolved – go to [step 7](#), Hearing at AAT.

Step 5: Additional case conference(s)

The individual and NDIA or their representatives, and a representative from the AAT meet to identify steps to prepare for the full hearing.

Step 6: Prepare for hearing

Individual and participant provide final evidence and submissions for hearing.

Step 7: Hearing at AAT

A full AAT hearing is conducted by an AAT Member and a decision is given.

- NDIA implements the plan in accordance with AAT decision
- Appeal the AAT decision.

Participant Journey Map

Independent Expert Review (IER) program participant journey map.

Step 1: Enter IER program.

- (1) A participant is invited or requests to take part in the IER program, FAQs provided.
- (2) Agency prepares IER Agreement.
- (3) Participant seeks advice 1 from the Department of Social Services (DSS) hotline and/or advocacy/legal support.

Step 2: IER referral prepared.

- (1) Agency prepares material for referral to Independent Expert (IEX).
- (2) Participant seeks advice 2 from DSS hotline.

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(3) Participant elects whether to have direct contact with IEX.

Step 3: IEX reviews material.

- (1) IEX reviews material and contacts participant.
- (2) Participant may have support if required.
- (3) IEX may seek clarification of matters raised from Agency.

Step 4: IEX recommendation provided.

IEX provides written recommendation, sent to participant and their representative and to Agency.

Step 5: Decision to accept or not accept.

- (1) Agency informs participant if it accepts the recommendation.
- (2) Participant seeks advice 3 and decides whether to accept recommendation.

Step 6: Outcome.

If parties accept, settlement agreement is signed and filed with the Administrative Appeals Tribunal (AAT), NDIS plan is updated.

If parties do not accept, AAT matter continues.

IER Model

(1) Matter identified for IER – Participant is invited or requests to take part in IER.
If accepted, IER agreement is signed between participant, Agency and IEX.

- Participant representatives nominate matters to be referred for IER.
- In future, the Agency or AAT may also initiate the process to nominate matters for IER.
- The Agency is currently developing prioritisation criteria for the referral of matters.

(2) Matter referred to Independent Expert – Agency provides information to the Independent Expert for review on the papers, or may confer with the participant and clarify information with the Agency.

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- IEX reviews the matter on the papers.
- IEX may meet with the participant (if they agree) in person or online. IEX may clarify or seek additional information from the Agency in relation to matters raised by the participant.
- IEX may invite the participant and Agency to attend a discussion of the matter, where the IE considers that this may assist resolution of the matter, and the participant agrees.
- IEX may contact witnesses in proceedings to clarify evidence provided in reports, with consent of participant.
- Agency respects participant's choice as to how they wish to engage with the IER process.

(3) Independent Expert review and recommendation – Independent Expert provides non-binding written recommendation which is sent to the participant and Agency.

- Provide a non-binding confidential independent written recommendation on the appropriate outcome of issues that are before the Tribunal, within the legislative framework.
- Exercise professional judgement based on the material provided to the IEX.
- Act independently of both parties in making recommendation.
- Written recommendation should be 5-6 pages.

4a. Parties accept recommendation – Recommendation implemented by consent orders, and filed with the AAT.

- Where both parties accept the recommendation, the Agency will prepare consent orders to be signed and filed with the AAT to dispose of the proceedings – usually s24C orders (may also be s42A orders dismissing the proceedings).
- The Agency will implement recommendation/orders by issuing a new plan.

4b. Parties do not accept recommendation – Matter continues in AAT; other dispute resolution pathways may be explored to resolve or narrow issues.

- Where both parties do not accept the recommendation, the matter continues in the AAT with no loss of priority or delay.

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- Where appropriate, the Agency and participant may explore additional pathways to resolve the matter such as by narrowing the issues for hearing or engaging in conciliation.
- Where the participant does not accept the recommendation, it cannot be used in the AAT proceedings without the participant's consent.
- Where the Agency does not accept the recommendation, participant may use the recommendation in the AAT proceedings, together with any reasons given by the Agency.

IER documentation

- Referral to Independent Expert – plan information and matter documents.
- Matter documents.
 - T-documents.
 - All other evidence provided by the participant in the Tribunal.
 - All documents obtained by the Agency that are *relevant to issues for review* by IEX (summons documents, expert reports).
 - IER Agreement.
- Indicative timeframes.
 - 2 weeks from initiation to referral to IEX.
 - 2 weeks for IEX review and to provide recommendation.
 - 2 weeks for acceptance by the Agency (no time limit for participant).

NDIS legislative framework

- [Administrative Appeals Tribunal Act 1975](#)
- [National Disability Insurance Scheme Act 2013](#)

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- [National Disability Insurance Scheme Rules](#)
- [Our Operational Guidelines](#)

Operational Guidelines do not have legislative force:

- To the extent they are consistent with the NDIS Act and NDIS Rules, they should be applied as being government policy.

[Administrative Appeals Tribunal Act 1975](#)

- **Section 2A - Tribunal's objective:** 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.
- **Section 43 AAT Act - Tribunal's decision on review:** (1)...the Tribunal may exercise all the powers and discretions conferred on the person who made the decision and shall make a decision in writing: affirming...varying...or setting aside the decision under review and making a decision in substitution [or remitting].

AAT undertakes a merits review which involves taking a fresh look at the facts, law and policy relating to that decision. The AAT can look at new information that was not available to the original decision-maker, and decide what the legally **correct decision** is or, if there can be more than one correct decision, **the preferable decision**. (AAT website).

AAT has jurisdiction to review 'reviewable' decisions of the NDIA:

- **Section 100(6) NDIS Act – Review of reviewable decisions:** The reviewer must make a decision: (a) confirming the reviewable decision; or (b) varying the reviewable decision; or (c) setting aside the reviewable decision and substituting a new decision.
- **Section 103 NDIS Act - Applications to the Administrative Appeals Tribunal:** Applications may be made to the Administrative Appeals Tribunal for review of a decision made by a reviewer under subsection 100(6).

[National Disability Insurance Scheme Act 2013](#)

Types of reviewable decisions which may be submitted for IER:

- Access
- Planning

Planning – Principles relating to plans

Section 31 - Principles relating to plans: 'The preparation, variation, reassessment and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

- a. be individualised; and
- c. where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and
- ca. where relevant, recognise and respect the relationship between participants and their families and carers; and
- d. strengthen and build capacity of families and carers to support participants who are children; and
- da. if the participant and the participant's carers agree - strengthen and build the capacity of families and carers to support the participant in adult life; and
- e. consider the availability to the participant of informal support and other support services generally available to any person in the community; and
- f. support communities to respond to the individual goals and needs of participants; and
- g. be underpinned by the right of the participant to exercise control over his or her own life; and
- h. advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations; and

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- i. maximise the choice and independence of the participant; and
- j. facilitate tailored and flexible responses to the individual goals and needs of the participant; and
- k. provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider’.

Planning decisions

Assessing supports to be included in a plan involves:

- Considerations in section 34 and section 33(5) NDIS Act and NDIS Rules relevant to each criterion (including but not limited to the NDIS Rules - Supports for Participants)
- General criteria for supports in the Rules (e.g. duplication, every day living costs, disability related)
- Operational Guidelines – general re criteria, and also about specific types of supports (e.g. home modifications, assistance animals).

Independent Experts will be provided with the relevant legislation and operational guidelines as part of the documents before the Tribunal.

Planning – relevant matters

Section 33 (1) - Provides for the Participant’s statement of goals and aspirations.

- (1) A participant’s plan must include a statement (the **participant’s statement of goals and aspirations**) prepared by the participant that specifies:
 - (a) the goals, objectives and aspirations of the participant; and
 - (b) the environmental and personal context of the participant’s living, including the participant’s:

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- (i) *living arrangements; and*
- (ii) *informal community supports and other community supports; and*
- (iii) *social and economic participation’.*

Section 33 (2) - Provides for the Participant’s statement of participant supports.

(2) A participant’s plan must include a statement (the **statement of participant supports**), prepared with the participant and approved by the CEO, that specifies:

- (a) the general supports (if any) that will be provided to, or in relation to, the participant; and
- (b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and
- (c) the date by which, or the circumstances in which, the Agency must reassess the plan under Division 4; and
- (d) the management of the funding for supports under the plan (see also Division 3); and
- (e) the management of other aspects of the plan’.

Section 33 (5) - Provides the considerations for the CEO when deciding whether or not to approve a statement of participant supports.

‘In deciding whether or not to approve a **statement of participant supports**, ... the CEO must:

- a. have regard to the participant’s statement of **goals and aspirations**; and
- b. have regard to relevant **assessments** conducted in relation to the participant
- c. be satisfied as mentioned in section 34 in relation to the **reasonable and necessary supports** that will be funded **and the general supports** that will be provided; and
- d. apply the National Disability Insurance Scheme **rules** (if any) made for the purposes of section 35; and

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- e. have regard to the principle that a participant should manage his or her plan to the extent that he or she wishes to do so; and
- f. have regard to the operation and effectiveness of any **previous plans** of the participant'.

Planning – reasonable and necessary

Section 34- Reasonable and necessary supports

- (1) For the purposes of specifying, in a statement of participant supports, the **general supports** that will be provided, and the **reasonable and necessary** supports that will be funded, the CEO must be satisfied of **all** of the following in relation to the funding or provision of **each such support**:
- (a) the support will assist the participant to pursue the **goals, objectives and aspirations** included in the participant's statement of goals and aspirations;
 - (b) the support will assist the participant to undertake activities, so as to facilitate the participant's **social and economic participation**
 - (c) the support represents **value for money** in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
 - (d) the support will be, or is likely to be, **effective and beneficial** for the participant, having regard to current good practice;
 - (e) the funding or provision of the support takes account of what it is reasonable to expect **families, carers, informal networks and the community** to provide;
 - (f) the support is **most appropriately funded or provided through the National Disability Insurance Scheme**, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - (i) *as part of a universal service obligation; or*

- (ii) *in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.*

Planning – NDIS Supports for Participants Rules

- Rule 3.1 - Value for money
- Rules 3.2–3.3 - Effective and beneficial and current good practice
- Rule 3.4 - Reasonable family, carer, and other support
- Rules 3.5-3.6 - Supports appropriately funded or provided through the NDIS

Planning – value for money

Section 34(1)(c) support represents **value for money** in that the **costs of the support are reasonable**, relative to both the **benefits achieved** and the **cost of alternative support**.

Rule 3.1 provides mandatory considerations which include:

- a. whether there are comparable supports which would achieve the same outcome at a substantially lower cost;
- b. whether there is evidence that the support will substantially improve the life stage outcomes for, and be of long-term benefit to, the participant;
- c. whether funding or provision of the support is likely to reduce the cost of the funding of supports for the participant in the long term (for example, some early intervention supports may be value for money given their potential to avoid or delay reliance on more costly supports);
- d. for supports that involve the provision of equipment or modifications:
 - i. the comparative cost of purchasing or leasing the equipment or modifications; and

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- ii. whether there are any expected changes in technology or the participant's circumstances in the short term that would make it inappropriate to fund the equipment or modifications;
- e. whether the cost of the support is comparable to the cost of supports of the same kind that are provided in the area in which the participant resides;
- f. whether the support will increase the participant's independence and reduce the participant's need for other kinds of supports (for example, some home modifications may reduce a participant's need for home care).

Planning – effective and beneficial

Section 34(1)d the support will be, or is likely to be, **effective and beneficial** for the participant, having regard to current good practice.

Rule 3.2 provides - ... the CEO is to consider the available evidence of the effectiveness of the support for others in like circumstances. That evidence may include:

- a. published and refereed **literature** and any consensus of **expert opinion**;
- b. the **lived experience** of the participant or their carers; or
- c. anything the Agency has **learnt through delivery** of the NDIS.

Rule 3.3 in deciding whether the support will be, or is likely to be, effective and beneficial for a participant, having regard to current good practice, the CEO is to take into account, and if necessary seek, **expert opinion**.

Planning – informal supports

Section 34(1)e the funding or provision of the support takes account of what it is **reasonable to expect families, carers, informal networks and the community** to provide.

Rule 3.4 considers criteria such as:

- Suitability to provide support

- Level of support required
- Risks to carers/participants
- Independence
- Desirability of developing the potential contributions of informal supports and networks within their communities.

Planning – other systems of service delivery

Section 34(1)f the support is **most appropriately funded** or provided through the National Disability Insurance Scheme, and is **not more appropriately funded or provided through other general systems of service delivery** or support services offered by a person, agency or body, or systems of service delivery or support services offered: i- as part of a universal service obligation; or, ii- in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

Rule 3.5 Schedule 1 sets out the criteria under the categories of:

- Health (excluding mental health)
- Mental health
- Child protection and family support
- Early childhood development
- School education
- Higher education and vocational education and training
- Employment
- Housing and community infrastructure
- Transport

- Justice.

Planning – Considerations for whether a support most appropriately funded by NDIS – Health

Schedule 1 - NDIS Supports for Participants Rules.

Health (excluding mental health)

7.4 - The NDIS will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living, including maintenance supports delivered or supervised by clinically trained or qualified health practitioners where these are directly related to a functional impairment and integrally linked to the care and support a person requires to live in the community and participate in education and employment.

1.5- The NDIS will not be responsible for:

- a. the diagnosis and clinical treatment of health conditions, including ongoing or chronic health conditions; or
- b. other activities that aim to improve the health status of Australians, including general practitioner services, medical specialist services, dental care, nursing, allied health services (including acute and post-acute services), preventive health, care in public and private hospitals and pharmaceuticals or other universal entitlements; or
- c. funding time-limited, goal-oriented services and therapies:
 - i. where the predominant purpose is treatment directly related to the person's health status; or
 - ii. provided after a recent medical or surgical event, with the aim of improving the person's functional status, including rehabilitation or post-acute care; or

- d. palliative care.

Planning – Considerations for whether a support most appropriately funded by NDIS – Mental Health

Schedule 1 - NDIS Supports for Participants Rules.

Mental health

7.6 - The NDIS will be responsible for supports that are not clinical in nature and that focus on a person's functional ability, including supports that enable a person with a mental illness or psychiatric condition to undertake activities of daily living and participate in the community and social and economic life.

7.7 - The NDIS will not be responsible for:

- a. supports related to mental health that are clinical in nature, including acute, ambulatory and continuing care, rehabilitation/recovery; or
- b. early intervention supports related to mental health that are clinical in nature, including supports that are clinical in nature and that are for child and adolescent developmental needs; or
- c. any residential care where the primary purpose is for inpatient treatment or clinical rehabilitation, or where the services model primarily employs clinical staff; or
- d. supports relating to a co-morbidity with a psychiatric condition where the co-morbidity is clearly the responsibility of another service system (e.g. treatment for a drug or alcohol issue).

Planning – Considerations for whether a support most appropriately funded by NDIS – Early childhood development

Schedule 1 - NDIS Supports for Participants Rules.

7.8 - The NDIS will be responsible for personalised supports, specific to a child's disability (or developmental delay), which are additional to the needs of children of a similar age and beyond the reasonable adjustment requirements of early childhood development service providers.

7.9 - The NDIS will be responsible for early interventions for children with disability (or developmental delay) which are:

- a. specifically targeted at enhancing a child's functioning to undertake activities of daily living, but not supports which are specifically for the purpose of accessing a universal service such as school readiness programs that prepare a child for education; and
- b. likely to reduce the child's future support needs, which would otherwise require support from the NDIS in later years, including through a combination and sequence of supports.

7.10 - The NDIS will not be responsible for:

- a. meeting the early childhood education and care needs of a child with a developmental delay or disability required by children of a similar age including through inclusion supports that enable children to participate in early childhood education and care settings; or
- b. supports, which are clinical in nature provided in the health system, including acute, ambulatory or continuing care; or

- c. new-born follow-up provided in the health system, including child and maternal health services.

Planning – Considerations for whether a support most appropriately funded by NDIS – Child protection and family support

Schedule 1 - NDIS Supports for Participants Rules.

7.11 - The NDIS will be responsible for:

- a. supports for children, families and carers, required as a direct result of a child's disability, that enable families and carers to sustainably maintain their caring role, including community participation, therapeutic and behavioural supports and additional respite and aids and equipment; and
- b. where a child is in out-of-home care—supports specific to the child's disability (or developmental delay), which are additional to the needs of children of similar ages, in similar out-of-home care arrangements. The diversity of out-of-home care arrangements is recognised and the level of reasonable and necessary supports will reflect the circumstances of the individual child.

7.12 The NDIS will not be responsible for:

- a. statutory child protection services required by families who have entered, or are at risk of entering, the statutory child protection system; or
- b. general parenting programs, counselling or other supports for families, which are provided to families at risk of child protection intervention and to the broader community, including making them accessible and appropriate for families with disability; or

- c. funding or providing out-of-home care or support to carers of children in out-of-home care where these supports are not additional to the needs of children of similar age in similar out-of-home care arrangements.

Planning – Considerations for whether a support most appropriately funded by NDIS – Education

Schedule 1 - NDIS Supports for Participants Rules.

School education

7.13 The NDIS will be responsible for supports that a student requires that are associated with the functional impact of the student's disability on their activities of daily living (that is, those not primarily relating to education or training attainment), such as personal care and support, transport to and from school and specialist supports for transition from school education to further education, training or employment that are required because of the student's disability. Any supports funded by the NDIS will recognise the operational requirements and educational objectives of schools.

7.14 The NDIS will not be responsible for personalising either learning or supports for students that primarily relate to their educational attainment (including teaching, learning assistance and aids, school building modifications and transport between school activities).

Higher education and vocational education and training

7.15 The NDIS will be responsible for supports that a student requires which are associated with the functional impact of the student's disability on their activities of daily living (that is, those not primarily relating to education or training attainment), such as personal care and support, transport to and from the education or training facility and specialist supports for transition from education or training to employment that are required because of the person's disability.

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- 7.16 The NDIS will not be responsible for the learning and support needs of students that primarily relate to their education and training attainment (including teaching, learning assistance and aids, building modifications, transport between education or training activities and general education to employment transition supports).

Planning – Considerations for whether a support most appropriately funded by NDIS – Housing

Schedule 1 -NDIS Supports for Participants Rules.

7.19- The NDIS will be responsible for:

- a. supports to assist a person with disability to live independently in the community, including by building their capacity to maintain a tenancy, and support for appropriate behaviour management; and
- b. home modifications for accessibility for a person in private dwellings; and
- c. home modifications for accessibility for a person in legacy public and community housing dwellings on a case-by-case basis but not to the extent that it would compromise the responsibility of housing authorities to develop, maintain and refurbish stock that meets the needs of people with disability; and
- d. user costs of capital in some situations where a person requires an integrated housing and support model and the cost of the accommodation component exceeds a reasonable contribution from individuals.

7.20 The NDIS will not be responsible for:

- a. the provision of accommodation for people in need of housing assistance, including routine tenancy support and ensuring that appropriate and accessible housing is provided for people with disability; or

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- b. ensuring that new publicly-funded housing stock, where the site allows, incorporates Liveable Housing Design features; or
- c. homelessness-specific services including homelessness prevention and outreach, or access to temporary or long term housing for participants who are homeless or at risk of homelessness; or
- d. the improvement of community infrastructure, i.e. accessibility of the built and natural environment, where this is managed through other planning and regulatory systems and through building modifications and reasonable adjustment where required.

Planning – Considerations for whether a support most appropriately funded by NDIS – Transport

Schedule 1 - NDIS Supports for Participants Rules.

7.21 - The NDIS will be responsible for:

- a. supports for a person that enable independent travel, including through personal transport-related aids and equipment, or training to use public transport; and
- b. modifications to a private vehicle (i.e. not modifications to public transport or taxis); and
- c. the reasonable and necessary costs of taxis or other private transport options for those not able to travel independently.

7.22- The NDIS will not be responsible for:

- a. ensuring that public transport options are accessible to a person with disability, including through the funding of concessions to people with disability to use public transport; or

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- b. compliance of transport providers and operators with laws dealing with discrimination on the basis of disability, including the *Disability Standards for Accessible Public Transport 2002*; or
- c. transport infrastructure, including road and footpath infrastructure, where this is part of a universal service obligation or reasonable adjustment (including managing disability parking and related initiatives).

Planning – Considerations for whether a support most appropriately funded by NDIS – Justice

Schedule 1 - NDIS Supports for Participants Rules.

7.23- See for definitions for 'person not in custody, person in custody and transition supports'

7.24- The NDIS will be responsible for:

- a. in relation to a person not in custody—reasonable and necessary supports on the same basis as all other persons; and
- b. in relation to a person in custody:
 - i. reasonable and necessary supports other than those mentioned in paragraph 7.25(a), to the extent appropriate in the circumstances of the person's custody; and
 - ii. transition supports.

7.25- The NDIS will not be responsible for:

- a. the day-to-day care and support needs of a person in custody, including supervision, personal care and general supports; or
- b. ensuring that criminal justice system services are accessible for people with disability including appropriate communication and engagement mechanisms,

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adjustments to the physical environment, accessible legal assistance services and appropriate fee waivers; or

- c. general programs for the wider population, including programs to prevent offending and minimise risks of offending and re-offending and the diversion of young people and adults from the criminal justice system; or
- d. the management of community corrections, including corrections-related supervision for offenders on community based orders; or
- e. the operation of secure mental health facilities that are primarily clinical in nature.

Access – Disability requirement

Section 24 (1) - A person meets the disability requirements if:

- (1) A person meets the disability requirements if:
 - (a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or the person has one or more impairments to which a psychosocial disability is attributable; and
 - (b) the impairment or impairments are, or are likely to be, permanent; and
 - (c) the impairment or impairments result in substantially reduced functional capacity to undertake one or more of the following activities:
 - (i) *communication;*
 - (ii) *social interaction;*
 - (iii) *learning;*
 - (iv) *mobility;*
 - (v) *self-care;*
 - (vi) *self-management; and*
 - (d) the impairment or impairments affect the person's capacity for social or economic participation; and
 - (e) the person is likely to require support under the National Disability Insurance Scheme for the person's lifetime.

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- (2) For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the National Disability Insurance Scheme for the person's lifetime, despite the variation.
- (3) For the purposes of subsection (1), an impairment or impairments that are episodic or fluctuating may be taken to be permanent, and the person may be taken to be likely to require support under the National Disability Insurance Scheme for the person's lifetime, despite the episodic or fluctuating nature of the impairments.
- (4) Subsection (3) does not limit subsection (2).

See **Becoming a Participant Rules**.

Access – Early Intervention requirements

Section 25 (1) - A person *meets the early intervention requirements* if:

- a. the person:
 - i. has one or more identified intellectual, cognitive, neurological, sensory or physical impairments that are, or are likely to be, permanent; or
 - ii. has one or more identified impairments to which a psychosocial disability is attributable and that are, or are likely to be, permanent; or
 - iii. is a child who has developmental delay; and
- b. the CEO is satisfied that provision of early intervention supports for the person is likely to benefit the person by reducing the person's future needs for supports in relation to disability; and
- c. the CEO is satisfied that provision of early intervention supports for the person is likely to benefit the person by:

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- i. mitigating or alleviating the impact of the person's impairment upon the functional capacity of the person to undertake communication, social interaction, learning, mobility, self-care or self-management; or
- ii. preventing the deterioration of such functional capacity; or
- iii. improving such functional capacity; or
- iv. strengthening the sustainability of informal supports available to the person, including through building the capacity of the person's carer.

1A - For the purposes of subparagraph (1)(a)(i) or (ii), an impairment or impairments that are episodic or fluctuating may be taken to be permanent despite the episodic or fluctuating nature of the impairments.

3 - Despite subsections (1) and (2), the person does not meet the early intervention requirements if the CEO is satisfied that early intervention support for the person is not most appropriately funded or provided through the National Disability Insurance Scheme, and is more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or through systems of service delivery or support services offered:

- (a) as part of a universal service obligation; or
- (b) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

Evidence based decision making

“The heart of evidence-based practice is the idea that good decision-making is achieved through critical thinking and drawing on the best available evidence.

Evidence-based practice leads to decisions and actions that are more likely to have the desired effect and are less reliant on anecdotes, received wisdom and personal experience – sources that are not trustworthy on their own.”

[Chartered Institute of Personnel and Development](#)

Planning pathway

Pre-planning

- Scheduled planning meeting is scheduled
- Participant will be asked to complete booklets to support the discussion at the meeting.

Planning

- Planner considers evidence from participant to build draft plan
- Draft plan is approved by a delegate
- Implementation conversation to provide new plan and explanation of plan supports.

NDIS plan, budget and support categories

Summary of Core budget

- Consumables, Daily Activities and Social, Community and Civic Participation support categories are flexible with each other.
- Supports for activities of daily living, community access, some employment supports.
- Transport is generally periodic payments to a nominated bank account.

Summary of Capacity Building budget

- Nine support categories.
- Common support categories: Choice and Control, Daily Activities, Health and Wellbeing, Relationships and Support Coordination.
- Support categories are not flexible with each other.

Summary of Capital budget

- Only two support categories.
- Support categories are not flexible with each other.
- 'Quote Required' line items will be \$0 in the participant plan until a quote is provided to be implemented.

Ways to manage plan funding

Self-management.

- Participant manages the plan budget themselves and makes direct payments to providers through the MyPortal.
- Participants can engage NDIA registered or non-NDIA registered providers.

Plan-management.

- A third party Plan Manager pays invoices to providers on behalf of the participant.
- The Agency will fund the cost of the Plan Manager in the participant plan.
- Participants can engage NDIA registered or non-NDIA registered providers.

NDIA/Agency-management.

- The Agency pays providers directly through service bookings.
- Participants can only engage NDIA registered providers.

Additional Resources

Links:

- Participants share their stories
 - [Alberto's Story](#)

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- [Lucille and Doreen's Story](#)
- [William's Story](#)
- [NDIS AAT Cases](#)
- [AAT NDIA Decision Digest](#) - La Trobe University
- [Episode 1 Reasonable and Necessary Podcast](#) - Dr George Taleporos
- [IER FAQs](#)

Attachments:

- IER Agreement Template
- **Article 1** - The National Disability Insurance Scheme and administrative decision-making: Unique challenges and opportunities. AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW, 26(4), 191–205.

National Disability Insurance Agency

Contact Information

Contact number: 1800 800 110

Website: ndis.gov.au

Email:

Find us on Facebook/NDISAus

Follow us on Twitter @NDIS

For people with hearing or speech loss

Text telephone: 1800 555 677

Speak and Listen: 1800 555 727

For people who need help with English

Translating and Interpreting Service: 131 450

Independent Expert Review Program

Guidelines for Independent Experts

Purpose of the Independent Expert Review

- 1) The Independent Expert Review (**IER**) is voluntary and free to participants. It is designed to provide a quicker, fairer and easier environment for participants to seek resolution of their Administrative Appeals Tribunal (**AAT**) matters.
- 2) IER is available to Participants who have proceedings in the AAT seeking external review of a delegated decision of the CEO of the National Disability Insurance Agency (**Agency**), which has not been heard.

The role of the Independent Expert

- 3) The role of the Independent Expert is to:
 - a) consider the facts based on:
 - i) the material provided to the Independent Expert in the referral received from the Agency; and
 - ii) any additional material or information provided to the Independent Expert in accordance with these guidelines
 - b) consider the law and policy relating to the decision under review based on:
 - i) the *National Disability Insurance Scheme Act 2013* (**NDIS Act**);
 - ii) applicable NDIS rules made under the NDIS Act (**NDIS Rules**);
 - iii) applicable NDIA Operational Guideline(s) and publicly available policies; and
 - iv) relevant case law;
 - c) provide a recommendation on the appropriate supports to be included in the Participant's plan considering the matters in subparagraphs a) and b) above.¹
- 4) The Independent Expert will act independently of both parties in making their recommendation.

The Independent Expert Review process

- 5) The Agency has agreed to provide the opportunity to Participants to take part in the IER program provided it will not delay any hearing date. Eligibility and prioritisation criteria have been developed and are under regular review.
- 6) The Agency will provide a referral to the Independent Expert for each matter that includes:
 - a) the Participant and Agency contact details, details of the Participant's representatives and whether they wish to be contacted directly by the Independent Expert during the IER;
 - b) a summary of details about the Participant and the supports included in the Participant's current plan;
 - c) the Tribunal docs (**T-Docs**) filed in the AAT;

¹ If the matter is heard by the AAT, a merits review is conducted to make the correct and preferable decision: see <https://www.aat.gov.au/about-the-aat/learn-more/what-type-of-decisions-can-the-aat-make> and *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589

- d) all other material filed with the AAT (**S-docs**), other than summons material, unless directly relevant to the supports in dispute, and SOIs and other material provided in the context of without prejudice discussions;
 - e) a list that identifies any material not provided (if the Agency reasonably considers the material not relevant for the IER); and
 - f) a summary of the Agency's understanding of:
 - i) the supports requested by the Participant that have been agreed by the Agency through ADR processes conducted to date
 - ii) the supports requested by the Participant that have not been agreed by the Agency
 - iii) the issues in dispute for each those supports
 - iv) where relevant, the details of previous Participant plans.
- 7) The Independent Expert **must**:
- a) contact the Participant and any identified representative, unless the Participant has requested not to be contacted
 - b) identify the supports requested by the Participant that have not been agreed by the Agency including those set out in the referral and any other supports the Participant says they have requested (**Requested Supports**)
 - c) consider any written or verbal submissions that the Participant wishes to provide
 - d) consider **whether it is appropriate** to make a recommendation, taking into account the supports requested, issues to be determined, and the available evidence.
- 8) For the purpose of clarifying material provided, the Independent Expert may request further information from:
- a) the Participant
 - b) the Agency
 - c) any person that has provided a written report or other evidence in the AAT proceedings (provided the Participant consents to the Independent Expert contacting them).
- 9) If new material or information is provided to the Independent Expert after the referral that may have a material impact on the Independent Expert's recommendation, the Independent Expert must advise the Participant (and their representative) and the Agency and invite them to respond to that information within a reasonable period.
- 10) Where the Independent Expert considers that it may assist in resolving the matter, they may invite both the Participant and the Agency to attend an informal discussion. The Participant has no obligation to attend the informal discussion, and the Independent Expert must not make any adverse findings if the Participant chooses not to attend an informal discussion.

Independent Expert Recommendation

- 11) The Independent Expert must provide their written recommendation on the appropriate outcome of the matter and a brief summary of their reasons for each of the Requested Supports.

- 12) For each Requested Support, the Independent Expert may recommend that the Requested Support:
- a) be provided in full in the Participant's plan
 - b) be provided in part in the Participant's plan
 - c) not be provided in the Participant's plan.
- 13) The Independent Expert may recommend that the Independent Expert Review is not appropriate to assist in determining the supports to be included in a Participant's plan in relation to any one or more of the Requested Supports, and that the matter should be determined by the AAT. The Independent Expert should explain the reason for this recommendation, for example, if there is insufficient evidence for the Requested Support, evidence needs to be assessed and evaluated, the Requested Supports do not address the Participant's needs, or a legal issue needs to be determined where existing AAT decisions do not provide sufficient guidance.
- 14) To assist the Participant and the Agency to decide whether to accept the recommendation, the Independent Expert should briefly explain the reasons that their recommendation is the preferable decision including:
- a) the key evidence that the Independent Expert considered;
 - b) the relevant parts of the NDIS Act and relevant rules that the Independent Expert considered
 - c) the Operational Guidelines that the Independent Expert considered and any exceptions that the Independent Expert considered were relevant to the circumstances of the Participant;
 - d) the key decisions of a Court or the AAT that the Independent Expert considered.
- 15) The recommendation should be provided within 10 business days of receiving the referral from the Agency. The Independent Expert must inform the Participant and the Agency when additional time is needed to provide their recommendation and the reason.
- 16) The Independent Expert's recommendation must reflect the Independent Expert's view on the appropriate supports to be provided to the Participant, based on the matters outlined in these guidelines.
- 17) The Independent Expert must provide the recommendation to the Participant, their representative (if any) and the Agency.
- 18) The Independent Expert may correct any errors in the recommendation identified by the Participant or the Agency after the recommendation has been issued.

Publication and Evaluation

- 19) The Independent Expert may provide feedback to the Agency on the process and outcomes of the IER to assist the Agency to engage in continuous improvement of the IER process.
- 20) The Independent Expert's recommendation and information about the Participant's matter may be published in de-identified and summarised format (subject to the Participant's consent).

The National Disability Insurance Scheme and Administrative Decision-Making: Unique Challenges and Opportunities

Louise P Bygrave, Ron McCallum

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Abstract

The National Disability Insurance Scheme provides financial support to persons with disabilities. The NDIS Division of the Administrative Appeals Tribunal was established to review certain decisions, including whether a person meets the access criteria for the Scheme or the reasonable and necessary supports in a participant's plan. This article examines challenges and opportunities for administrative decision-making within the framework of the Scheme. Key themes from decisions made by the Tribunal and the Courts emerge, such as the inherent tension between the objects in the legislation with the requirement to ensure the financial sustainability of the Scheme. Many applicants to the Tribunal have had a difficult history of seeking supports for their disabilities. Traversing these issues requires Tribunal Members to be legally accurate and culturally competent. Statistics from the Tribunal show a clear trend towards parties settling prior to hearing, raising questions about the effect of adversarial hearings on persons with disabilities and transparency of outcomes.

Introduction

The National Disability Insurance Scheme (“the NDIS” or “the Scheme”) is a unique jurisdiction with particular challenges and distinct opportunities for administrative decision-making. As Members at the Administrative Appeals Tribunal (AAT), we grapple with hearing the extraordinary and emotional stories of NDIS participants and their families, and the nuances of interpreting legislation and policies in a jurisdiction that is both “young” and complex.

This article is based on our experiences as Members assigned to the NDIS Division at the AAT. It represents our thinking about some of the challenges *and* the opportunities for administrative decision-making within the “new” NDIS jurisdiction.

To understand the NDIS jurisdiction, it will assist to briefly review the history of the Scheme.

The events leading to the creation of the NDIS have been extensively described elsewhere.

¹ For the purposes of this article, it is sufficient to set out that the Australian Government in 2010 requested the Productivity Commission to initiate a public inquiry into the establishment of a long-term scheme to assist persons with disabilities to lead fulfilling lives through the provision of services. In August 2011, the Government released the Productivity Commission’s report titled *Disability Care and Support*, which recommended the establishment of the NDIS to:

- cost-effectively minimise the impacts of disability, maximise the social and economic participation of people with a disability, create community awareness of the issues that affect people with disabilities and facilitate community capacity building. These measures should be targeted at all Australians;
- provide information and referral services, which should be targeted at people with, or affected by, a disability; and
- provide individually tailored, taxpayer-funded support, which should be targeted at people with significant disabilities who are assessed as needing such support (but excluding those people with newly-acquired catastrophic injuries covered by the National Injury Insurance Scheme (Recommendation 18.1).²

This report was received positively and generated strong community support – both within and outside the disability sector – in its approach to supporting and enabling persons with disabilities to achieve their goals. There was bipartisan support for the NDIS with both the Australian Government and the Opposition agreeing to raise the Medicare levy from 1.5% to 2% to pay for the Scheme.³

After the Parliament of Australia passed the *National Disability Insurance Scheme Act 2013* (Cth) (the *NDIS Act*),⁴ the rollout of the NDIS to persons with disabilities commenced on 1 July 2013. The NDIS was initially limited to the “launch sites” of Newcastle in New South Wales, Barwon in Victoria, children under the age of 14 years in South Australia, and designated young persons aged 15 to 24 years in Tasmania. The NDIS subsequently launched in the ACT on 1 July 2014. From 1 July 2016, the NDIS has been available throughout Australia, although it has taken time for the National Disability Insurance Agency (“the NDIA” or “the Agency”)⁵ to establish offices and services across the country.⁶

In her second reading speech to the NDIS Bill on 29 November 2012, Prime Minister Julia Gillard pithily explained the purpose of the NDIS in the following words:

The current funding model based on historical budget allocations will be replaced by an insurance approach, based on actuarial analysis of need and future costs. The Scheme will respond to each individual’s goals and aspirations for their lifetime, affording certainty and peace of mind for people with disability and their carers alike. The Agency will work with people to plan, and to take account of their individual circumstances and needs. The Scheme will give people the care and support that is objectively assessed as being reasonable and necessary over the course of their lifetime. It will give people real choice and control over these supports, including the ability to manage their own funding, if they wish. It will offer early intervention therapies and supports, where it will improve a person’s functioning, or slow or prevent the progression of their disability over their lifetime.⁷

The NDIS provides three tiers of financial support.

Under the first tier, the NDIA may provide general supports to people with disability who are not participants in the Scheme.⁸ These general supports include activities which are in the nature of co-ordination, a strategic or referral service or activity.⁹

The second tier of support enables the NDIA to provide funding for the purposes of enabling persons or entities to assist persons with disabilities to realise their potential for

physical, social, emotional and intellectual development, and to participate in social and economic life.¹⁰

The third tier of support is the most important: it empowers the NDIA to fund individuals to participate in the NDIS.¹¹

This history of the NDIS over the past decade, and the potential for participants to access financial support provided by the Scheme, goes some way towards explaining the hope and expectations the Scheme has generated for persons with disabilities. The Scheme seeks to give a voice to the aspirations of all Australians with disabilities. Its primary task is to select approximately 450,000 persons with significant disabilities for direct financial assistance from the more than four million Australians who have disabilities.¹²

As we shall discuss, this history of the NDIS provides context to the administrative decision-making process by the AAT. This history and its effect on the expectations of NDIS participants and their families, of the NDIA, and of organisations involved in the disability sector, plays a part in the process of administrative decision-making. This is because the NDIS has been expected to provide a panacea of opportunities for persons with disabilities; where these expectations are not met, there is a higher likelihood that participants will seek review (and resolution) through the process of administrative decision-making.

The AAT is empowered to hear appeals from 33 classes of decisions under the *NDIS Act*.¹³ However, the decisions which have taken up the vast bulk of AAT appeals over the last half dozen years concern whether a person meets the access criteria for the Scheme, and reviewing the reasonable and necessary supports in participants' plans. More recently, there have been some decisions regarding jurisdiction because the Tribunal is limited in most instances to hearing appeals from reviewable decisions.

To explain administrative decision-making within the NDIS jurisdiction, this article examines:

- the statutory framework governing the NDIS;
- the process of seeking merits review of NDIS decisions within the AAT; and
- themes arising from decisions by the AAT and Federal Court to date.

We conclude with our thoughts about future opportunities, potential reforms and innovative approaches for administrative decision-making within the NDIS jurisdiction.

The NDIS Statutory Framework

The NDIS statutory framework is somewhat unusual. It comprises the *NDIS Act* and “rules” made by the Minister prescribing matters under the Act, which also form part of the legislation.¹⁴ Supporting policy is set out in “operational guidelines” and fact sheets produced by the Agency.

The objects and principles in the *NDIS Act* provide guidance on the interpretation of the statute. Section 3 sets out the objects of the *NDIS Act*, which include:

- giving 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);
- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports for participants in the NDIS;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
- promoting the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community.

Section 4 outlines the general principles guiding actions under the *NDIS Act*. These principles include affirming that people with disability should be supported to exercise choice in the pursuit of their goals and the planning and delivery of their supports; and acknowledging and respecting the role of families, carers and other significant persons in the lives of people with disability.

Under s 209 of the *NDIS Act*, the Minister may make “rules” prescribing matters required by the Act or giving effect to the Act. Rules commonly considered in matters before the AAT are the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013 (Cth)* and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth)*.

“Operational guidelines” have been drafted by the CEO of the NDIA to assist staff to make decisions and perform functions under the *NDIS Act*. These operational guidelines represent government policy and should be applied by the AAT unless there is good

reason not to do so.¹⁵ The guidelines must also be interpreted in a way that is consistent with the *NDIS Act* and the applicable rules.

It is also worth noting that the Agency has produced “fact sheets” that are occasionally referred to in hearings before the AAT. However, these documents have no legal status and are used solely to disseminate information.

We make the following general observations about this NDIS statutory and policy framework.

First, as will become apparent in this article, the statute, rules (forming part of the legislation) and operational guidelines are intertwined and repetitious. This creates a lack of clarity in the legal framework, as well as potential inconsistencies, that can be difficult to navigate in the application of the statute.

Second, the NDIS statutory and policy framework is inherently hierarchical in its design, with the *NDIS Act* and rules at the pinnacle. We note that it is unusual to see a hierarchical array of provisions in a scheme that is designed to be beneficial.

Third, while the objects and the general principles set out in the *NDIS Act* are well-meaning and provide an overarching benevolence to the statutory framework, the interpretation of these objects and principles within the context of administrative decision-making is often subjective. For example, it is difficult to quantify what is meant by aspirational goals such as the provision of “high quality and innovative supports to enable persons with disability to maximise their independence and full inclusion in the community”. The objects and principles set out in the *NDIS Act* also seem to be in conflict with the high bar of evidence potential participants are required to provide to the NDIA to access the Scheme and/or participants must demonstrate to receive supports under the NDIS.

Finally, there is an inherent tension between the principles and objects of the *NDIS Act* and the requirement that, in giving effect to the objects of the Act, regard is to be had to the need to ensure the financial sustainability of the NDIS.¹⁶

It is our observation that there has been a significant emphasis by the NDIA to date on the financial sustainability of the Scheme. While this emphasis on the financial structure of the Scheme is understandable in view of the importance of its long-term sustainability, there has been limited analysis about what “financial sustainability” actually means in the context of administrative decision-making. The NDIA, for the purpose of public AAT hearings, has generated actuary reports for some matters. However, it has been our experience that

actuary reports underpinned by broad factual assumptions create problems for the AAT Member conducting the merits review to accurately consider any financial implications of their decision.

This emphasis on financial sustainability is a key fault line in the context of administrative decision-making in the NDIS jurisdiction because there is no clear explanation in the NDIS statutory or policy framework about *how* financial sustainability should be weighted in the myriad of circumstances we need to consider for participants of the NDIS.

Review of NDIS Matters within the AAT

The AAT commenced operation on 1 July 1976. It conducts independent merits review of decisions of Ministers and public servants under more than 400 federal statutes and legislative instruments.¹⁷

In its blueprint for the Scheme, the primary recommendation of the Productivity Commission was for an independent Office of the Inspector-General to be created within the NDIA to hear complaints and review contested decisions on a merit basis.¹⁸ The Productivity Commission was concerned that a separate external merits review tribunal could adversely impact on the financial sustainability of the Scheme, noting that:

[A]ppeals processes that are unduly “soft” can create costly precedents, leading to an unplanned and problematical redrawing of the rules and boundaries of the scheme. This can lead to additional unanticipated costs, and demands on revenue, over the long-term... [which] may also undermine the motivation for assessors or other NDIA staff to continue to make hard-headed objective decisions.

Moreover, appeals and complaints processes can be very costly to provide, and there is the reality that not all people make well-founded complaints.¹⁹

In the alternative, the Productivity Commission recommended the Government create a specialist arm of the AAT to hear appeals on the merits about the NDIA’s decisions, advising that significant additional resources should be set aside to fund this specialist arm and include a larger reserve for the NDIS to take account of the higher risks of this approach.²⁰

The Government accepted the alternative recommendation and the National Disability Insurance Scheme Division (the “NDIS Division”) was established as a division of the AAT to hear NDIS appeals on the merits.²¹

As an interesting note, the NDIS Quality and Safeguards Commission (led by a NDIS Quality and Safeguards Commissioner) commenced operation on 1 July 2018.²² In brief, the functions of this Commission are to register and to resolve complaints concerning disability providers, relating particularly to the quality and safety of services. This has shades of the role of the Inspector-General that was originally recommended by the Productivity Commission.²³

The NDIS Division of the AAT

The NDIS Division of the AAT operates in the same manner as the General Division of the Tribunal: that is, the NDIS Division conducts independent merits reviews of certain decisions of the NDIA. It is required to make the correct and preferable decision on the material before the Tribunal.²⁴ It is not bound by Government policy, but will generally apply it, unless this would lead to injustice in an individual case.²⁵ While the NDIS Division of the AAT operates an adversarial model of adjudication, it is exhorted to act with expedition and with informality²⁶ and it is not bound by the rules of evidence.²⁷ It must operate in an accessible manner,²⁸ be fair and just,²⁹ and promote public trust and confidence.³⁰

The NDIS Division of the AAT is empowered to review certain NDIA decisions stipulated in the *NDIS Act* and is required to make a decision in writing either affirming,³¹ varying,³² or setting aside the decision under review.³³ Where the Tribunal sets aside a decision, it must either make a fresh decision,³⁴ or remit the matter back to the NDIA with directions.³⁵ Of course, the AAT is required to give reasons for its decisions.³⁶

If an applicant or respondent party is dissatisfied with a decision by the NDIS Division of the AAT, an appeal on a question of law can be brought before the Federal Court of Australia.³⁷

Unusually for AAT proceedings, the Government was concerned about the potential for a power imbalance to arise in matters being heard in the NDIS Division between unrepresented persons with disabilities and lawyers acting for the NDIA. Consequently, the Government established the National Disability Advocacy Program (NDAP), which is administered by the Commonwealth Department of Social Services and provides persons with disabilities access to the assistance and support of an independent disability

advocate.³⁸ In cases that raise complex or novel legal issues, funding is given to the State legal aid commissions to ensure that applicants have legal representation.³⁹

The support of the NDAP is essential to assisting persons with disabilities (and often, their families) through the process of merits review at the AAT. However, we have observed instances where a participant is solely supported by a disability advocate without legal representation. In these situations, despite good intentions, lay advocates may steep submissions in emotion rather than provide an objective examination of the facts and legislation. This emotive approach can have two detrimental repercussions in administrative decision-making: first, it can unfairly set unrealistic expectations for the applicant; and second, it is a distraction from the statutory framework and the actual facts of the matter before the Tribunal Member.

The NDIS Division of the AAT comprises the President, who is a judge of the Federal Court of Australia⁴⁰ and the Deputy-Presidents, who are able to sit in all divisions of the AAT.⁴¹ Senior Members and Members of the AAT must be assigned to divisions.⁴²

Section 17E of the *AAT Act* prescribes that the Minister administering the *NDIS Act* must be consulted prior to Members and Senior Members being assigned to the NDIS Division, and the Member or Senior Member must either have training, knowledge or experience relating to disability; or other relevant knowledge or experience that will assist the member in considering matters relating to the NDIS.

Other Divisions have similar requirements for Members and Senior Members.⁴³

The Process of Administrative Review of NDIS Applications in the AAT

Matters heard in the NDIS Division are uniquely complex and require Members to have and/or to develop particular skills. It is our observation that applicants to the NDIS Division of the AAT often have had a long and difficult history of seeking assistance and supports for their disabilities. Applicants (and their family members) have usually navigated health systems and/or education systems over extensive periods. They also may have accessed supports and systems under previous State schemes. Considering and traversing these issues requires Members to not only be legally accurate, but also to be culturally competent when engaging with persons with disabilities in the process, and to utilise their skills of compassion and flexibility. Clearly, appropriate training about persons with disability for all AAT Members is desirable to develop these skills.

After lodging an application and prior to a Member hearing a matter in the NDIS Division, applicants to the AAT have the opportunity to participate in alternative dispute resolution processes through a case conference and/or conciliation with the Agency. Case conferences are informal, private meetings arranged to talk about the facts of the application and, if the case is not resolved, a written case plan is prepared to set out how the application will proceed. The case plan may involve conciliation, which is a further informal, private meeting to help the applicant and NDIA consider options to reach an agreement.⁴⁴

The AAT has seen a dramatic increase in lodgements, particularly over the past two years. Applications on hand across Australia at 30 June 2017 were 151; by 30 June 2019, this number had soared to 668. Additionally, the number of applications finalised by the Tribunal in 2016–2017 were 89; in 2018–2019, this number significantly increased with the Tribunal finalising 1,052 applications.

Almost half of the applications to date have been to the Sydney registry of the AAT, with the remaining applications made mainly to Melbourne, Brisbane, Canberra and Adelaide Registries. Tribunal statistics reports show the majority of applications to the NDIS Division of the AAT are settling prior to hearing by an AAT Member.

Some of the more pertinent trends show that in 2016–2017, 9% of applications to the AAT were resolved by a decision made by a Member, 24% were resolved by consent between the parties and 45% of applications were resolved by the applicant withdrawing their application. By contrast, in 2018–2019, only 2% of NDIS applications to the AAT were decided by a Member, 60% of applications were finalised by consent with parties reaching agreement to vary or set aside the decision under review in accordance with s 42C of the *AAT Act*, and 32% of applications were resolved by the applicant withdrawing their application. These statistics show a clear trend towards settlement by the parties prior to hearing.

These statistics highlight particular challenges for the bureaucracy involved with administrative decision-making at the AAT. The rapid increase in the number of applications in the NDIS jurisdiction has meant that AAT public service staff have had to quickly understand the review process for NDIS applications and become competent in engaging appropriately with persons with disabilities and their advocates/lawyers. Additionally, the substantial numbers of matters that have been finalised prior to hearing has been extremely resource intensive for conference registrars at the AAT conducting case conferences and/or conciliations.

The settlement of a substantial number of applications in the NDIS jurisdiction prior to hearing has created a mix of outcomes for the disability sector.

Clearly, there are benefits for applicants to not be involved in a potentially adversarial hearing. We have found that, even with the assistance of the NDAP and legal aid commissions, the process of hearings are inevitably adversarial. In view of the vulnerabilities of many persons seeking review by the AAT and the intention of the NDIS to be beneficial, it is preferable for matters to be dealt with by conciliation rather than in the context of administrative decision-making.

However, the settlement of applications prior to an AAT hearing has resulted in minimal information in the public domain about what the terms are of these settlements. There has been no transparency about the types of “reasonable and necessary” support the Agency is providing to participants who settle their matters by consent. This inevitably leads to anecdotal stories in hearings along the lines of “I know someone who is getting X support and so therefore I should receive X support!”

The relatively few public decisions made by the NDIS Division of the AAT to date has critical relevance for persons with disability and people working in the disability sector who look to published AAT decisions as examples of interpreting the statute, good practice, and whether the NDIS is achieving its objectives.

Themes Arising from Decisions of the AAT and the Federal Court

As outlined in the introduction, the first two tiers of NDIS financial support are designed to assist persons with disabilities whether or not they are participants in the NDIS.⁴⁵

However, the major focus of the *NDIS Act* concerns two aspects of the third tier of funding to participants in the NDIS. These are the access criteria to the Scheme, and the reasonable and necessary supports that may be granted to participants. This has meant that decisions made by the AAT and Federal Court have largely focused on determining whether an applicant meets the criteria to access the NDIS, or whether a participant’s supports are reasonable and necessary.

The legislative criteria concerning access to the NDIS, and reasonable and necessary supports are detailed and complex. As we shall explain, some of the criteria are subjective in nature, meaning that much will depend upon the specific facts of individual cases and the evaluation of these facts.

Access Criteria

To access the NDIS, all participants must satisfy age and residence requirements. While there is capacity to vary the age requirements (which occurred during the launch phase of the Scheme)⁴⁶ the general rule is that applicants must be aged under 65 years on the day the access request was made.⁴⁷ Once a person is a participant, they may remain in the NDIS beyond the age of 65 years. A general principle that has been applied by the Commonwealth and State/Territory Australian governments is that aged care schemes should cover persons aged 65 years and over, and younger Australians should be dealt with by various health and disability processes. While the Australian Government is developing aged care schemes, none currently have the depth and scope of the NDIS.

In relation to residence requirements, persons who reside in Australia and are citizens, permanent residents or special category visa holders will meet the residence requirements of the Scheme.⁴⁸ To date, the AAT has not had to determine questions concerning the age or residence requirements of applicants.

Where a person meets the age and residency requirements, she or he then have to pass the primary access criteria of either the disability requirements or the early intervention requirements of the Scheme. Alternatively, a person may qualify as a participant in the NDIS if they meet the alternative access criteria as set out in the *NDIS Act* and supplemented by the Prescribed Programs Rules. Described simply, the legislation provides that a person may be able to access the NDIS if they were receiving supports from a “qualifying program” during the relevant “qualifying period”.⁴⁹

Section 24 of the *NDIS Act* sets out the disability requirements a person must meet to access the Scheme. First, applicants must have a disability “that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition.”⁵⁰ “Disability” is not defined in the *NDIS Act*. The concept of an “impairment” also is not directly defined in the statute, although in a somewhat circular way, a “participant’s impairment” is defined as “an impairment in relation to which the participant meets the disability requirements, or the early intervention requirements, to any extent.”⁵¹

Further explanation is set out in the *Operational Guideline – Access to the NDIS*, which state:

For the purposes of becoming a participant in the NDIS the focus of “disability” is on the reduction or loss of an ability to perform an activity which results from an impairment.

The term “impairment” commonly refers to a loss of, or damage to, a physical, sensory or mental function.

The narrower definition of “disability” employed by the NDIS seeks to target those people with disability who have a significant impairment to their functional capacity. This functional definition of disability focuses on outcomes for people with disability that are in the most need (Explanatory Statement to the Becoming a Participant Rules).

Even where an applicant has a disability, it must be shown that the impairments which give rise to the disability are, or are likely to be permanent,⁵² and that the applicant is likely to require support under the NDIS for their lifetime.⁵³ Given the fluctuating nature of some disabilities,⁵⁴ particularly mental health conditions, medical evidence becomes critical to determining the criterion of permanency. The requirement of lifetime support is necessarily vague, but the AAT has accepted that this is primarily designed to differentiate between disabilities that are the province of State/Territory health programs from those that are appropriately funded under the NDIS.

The disability requirements include that the applicant’s disability affects their economic or social participation; most applicants have no problems in passing this criterion.

The most difficult element of the disability requirements is the condition for applicants to show that their impairments result in substantially reduced functional capacity in undertaking any one of the following activities: communication, social interaction, learning, mobility, self-care and self-management.⁵⁵ If an applicant can show that she or he has a substantially reduced capacity to undertake say communication, then she or he fulfils this aspect of the disability requirement. This can be a complex area as the capacity of applicants to undertake each of these activities is tested.

The early intervention requirements to access the Scheme are contained in s 25 of the *NDIS Act*. These requirements are primarily designed for children with impairments, such as autism spectrum disorder, who need early intervention programs to facilitate their treatment. The early intervention requirements also reflect the issue that the disability requirements in s 24 are not workable where applicants are young children. This is not to say that adults may also seek to enter the NDIS via meeting the early intervention requirements. For example, diseases like motor neurone disease, which generally manifests itself in adults, may also require early intervention.

Section 25 is complex; however, its essence is that the CEO of the NDIA must be satisfied that the provision of early intervention supports for the applicant is likely to benefit the

applicant by reducing their future needs for supports in relation to disability,⁵⁶ and is likely to benefit the applicant by mitigating or alleviating the impact of the impairment upon the functional capacity of the person.⁵⁷ However, even where an applicant meets these requirements, early intervention will not be granted where the CEO of the NDIA forms the view that the early interventions are more appropriately funded by another system, such as the health or education systems.

The following decisions demonstrate some of the diverse issues that need to be considered by AAT Members in administrative decision-making in the NDIS jurisdiction.

*Mulligan and NDIA*⁵⁸ was the first matter to come before the AAT in June 2014. The question before the Tribunal was whether Mr Mulligan met the access criteria to become a participant in the NDIS. He met the residence and age requirements, so the issue for decision was whether he fulfilled the disability requirements set out in s 24 of the *NDIS Act*.

Mr Mulligan's major disabilities were chronic ischaemic heart disease and sciatica.⁵⁹ The parties agreed, and the AAT was satisfied on the evidence, that Mr Mulligan's impairments were permanent.⁶⁰

Therefore, the central issue before the Tribunal was whether Mr Mulligan's disabilities resulted in a "substantially reduced" functional capacity to undertake activities of communication, social interaction, learning, mobility, self-care or self-management (the substantially reduced functional capacity test).⁶¹ If Mr Mulligan had a substantially reduced capacity to perform any one of these activities, he would comply with the requirements in s 24(1)(c) of the *NDIS Act*.

The AAT held that Mr Mulligan did not have a substantially reduced capacity to perform any of the activities. Mr Mulligan successfully appealed to the Federal Court of Australia arguing that the Tribunal had committed an error of law.⁶²

Mortimer J found that, in making a global finding with respect to the substantially reduced functional capacity test, the AAT had failed to properly review whether Mr Mulligan had a substantially reduced capacity in each of the six activities that are required by the test.⁶³ Her Honour remitted the matter back to the AAT for reconsideration according to law.

Mortimer J explained the importance of the substantially reduced functional capacity test in the access criteria in the following passage. Her Honour said:⁶⁴

Using the concept of impairment enables assessment of the severity and permanency of a person's condition, and of the effects of that condition through not only the evidence of an applicant, but also medical and clinical evidence. The legislative scheme contemplates a relatively high degree of precision by decision-makers (see, for example, the six activities in s 24(1)(c)) in assessing what a person can or cannot do. The assessment to be undertaken is avowedly functional, and multi-faceted...

Critically, the scheme makes detailed provision for that assessment, and it is sufficient for a person to have substantially reduced functional capacity in relation to one activity.

The lesson learned by the Tribunal is that it must separately examine each of the activities in the substantially reduced functional capacity test to fairly determine whether an applicant satisfies this element of the accessibility criteria.

When the matter was re-heard by the AAT,⁶⁵ further evidence was given by Mr Mulligan. He recounted that in 2014 his car was hit from behind. Mr Mulligan said that after the car accident he consulted with two neurosurgeons who both made a recommendation that Mr Mulligan should undergo a spinal disc decompression.⁶⁶

The AAT then decided that it could not be satisfied that Mr Mulligan's impairment of sciatica was permanent within the meaning of s24(1)(b) of the *NDIS Act* until the outcome of surgery was known. It was for this reason that he did not meet the access criteria.

Determining whether or not impairments that constitute disabilities within the meaning of the legislation are permanent has remained a difficult issue for the Tribunal. Much depends on the medical evidence which is available to the Tribunal.

An illustrative decision is *McFarlane and National Disability Insurance Agency*.⁶⁷ Mr McFarlane suffered from fibromyalgia and chronic pain. The Tribunal held that the medical evidence showed there may be treatments to remedy these impairments and so Mr McFarlane's impairments were not permanent within the meaning of s 24(1)(b) of the *NDIS Act*. More recently, the AAT's decision in *MHZQ and National Disability Insurance Agency* found the applicant's condition of borderline personality disorder was permanent because the evidence of a psychiatrist was that this condition was "permanent, chronic and has been long-standing over three decades".⁶⁸

From AAT decisions to date, it is our observation that meeting the requirements of permanency and substantial functional impact are the most difficult hurdles for applicants seeking access to the NDIS.

Some of the issues that have been considered by AAT Members in relation to permanency include the extent to which it is reasonable to expect applicants to undergo further treatment. For example, applicants may tell the Tribunal that they have been told by disability service providers that they cannot access particular treatments or supports unless they are a participant with the NDIS. There has also been some desire of applicants to consider their disability is permanent because they receive the disability support pension and so have met the requirements in the *Social Security Act 1991* (Cth) that their condition is permanent.⁶⁹ Alternatively, applicants may rely on a determination of Whole Person Impairment pursuant to Workers' Compensation legislation. This confusion between the requirement in the *NDIS Act* that an impairment is permanent, and the definitions of permanency in other schemes, demonstrates the points we made in the introduction to this article – that there are substantial expectations from the disability sector about what the NDIS can deliver, despite the Scheme's focus on persons with significant disabilities.

Reasonable and Necessary Supports

The most intractable matters which have come before the AAT concern the services and supports to assist persons with disabilities that will be paid for by the NDIA. In the language of the *NDIS Act*, the issue is whether or not a service or form of assistance, usually from a disability provider, is a "reasonable and necessary support". The criteria of reasonable and necessary supports, which is at the centre of participants' plans, requires some unpacking.

The CEO of the NDIA is required to facilitate the preparation of individual plans for NDIA participants.⁷⁰ Every NDIS plan must contain a review date,⁷¹ and although no time limit is specified in the *NDIS Act*, these plans usually operate for twelve months. From our experience, it is a pity that plans for some younger children do not operate for two or three years to provide greater certainty for parents. Before the review date, the CEO is required to review each plan⁷² and to replace it with a new plan.⁷³

Each plan must contain a statement of the goals and aspirations of the participant, and also set out any general supports,⁷⁴ and any reasonable and necessary supports which will enable the participant to receive services and assistance.⁷⁵

Section 34(1) of the *NDIS Act* is the key provision regarding both general supports and reasonable and necessary supports; these supports will only be funded under the NDIS where the CEO is satisfied the support meets each of the six elements below:

- (a) will assist the participant to pursue their goals;
- (b) will assist the participant to undertake social and economic activities;
- (c) represents value for money;
- (d) is likely to be effective having regard to good practice;
- (e) takes account of what is reasonable for families, networks and the community to provide; and
- (f) is most appropriately provided for by the NDIS.

Under the NDIS, flesh has been placed on the bones of these six paragraphs by the *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth)*.⁷⁶ Furthermore, these Rules have been refined by various operational guidelines.

In most of the AAT decisions to date, participants have been able to show the support they are seeking will further their goals and aid their social and economic participation. However, paras (c), (d) and (e) have proved to be more contentious. Put another way, participants must show that the support they are seeking is reasonable and necessary because it represents value for money, amounts to good practice and takes account of what families are expected to do. These three paragraphs enunciate tests which contain subjective elements because the facts and circumstances of each participant vary greatly from one another.

The decision in *PNFK and National Disability Insurance Agency*⁷⁷ concerned a two-and-a-half-year-old child who has multiple disabilities. The Tribunal was required to determine how many hours of daily care should be funded by the NDIS and how many days of respite care should be provided having regard to the needs of the child's parents and three older siblings.

Similarly, the Tribunal's decisions in *FRCT and National Disability Insurance Agency*⁷⁸ and *WKZQ and National Disability Insurance Agency*⁷⁹ related to twin brothers aged three years and 11 months who were diagnosed with autism spectrum disorder requiring substantial support (level 2). Having regard to the circumstances of the brothers and their family, the Tribunal made a determination about the number of hours of applied behaviour analysis therapy and speech therapy that was "reasonable and necessary" in accordance with the *NDIS Act*.

Another illustrative decision concerning para (e) is *JQJT and National Disability Insurance Agency*,⁸⁰ which concerned a 13-year-old child with autism, severe intellectual and language delay, and attention deficit hyperactivity disorder. The child lived with his parents in rural NSW and his behaviour required that he was restrained with a harness when he was travelling in a car. His NDIS plan provided funding for him to access community, social and recreational activities. The Tribunal held that the NDIS should also cover his transport costs on weekends to these activities because having regard to the family's circumstances, the provision of transport assisted the parents to have some respite time.

Paragraph (f) perhaps provides the most concern to participants with ongoing medical problems. Put briefly, para (f) and its attendant rules and operational guidelines seek to draw a line between the medical services and forms of assistance that should be provided by the NDIS, and the medical treatments that are the province of State/Territory health schemes. The rules give detailed prescriptions⁸¹ but broadly, medical treatments that are clinical in nature are the responsibility of health departments, while medical and related supports that seek to enable participants to lead fuller and richer lives is covered by the NDIS. Understandably, the Commonwealth, State and Territory governments do not wish participants to "double dip"; nor see a government passing off expensive treatments to another government in the polity.

In *Young and National Disability Insurance Agency*,⁸² the Tribunal made it clear that deficiencies in the programs of State/Territory health departments do not mean that the NDIS should take responsibility for the treatment if it is otherwise encompassed by general health programs. Mr Young suffered from emphysema and type 1 diabetes. He requested the NDIS fund a portable oxygen concentrator and an insulin pump. Neither request was accepted by the Tribunal as it was held the insulin pump was more appropriately funded by the relevant state health system.

The matter of *McGarrigle and National Disability Insurance Agency*,⁸³ in which the AAT affirmed a decision by the NDIA to only fund 75% of the cost of taxi fares for an NDIS participant, has had a critical influence for AAT Members considering whether supports are reasonable and necessary. The AAT decision was successfully appealed to the Federal Court of Australia⁸⁴ and a further appeal to a Full Bench of the Federal Court of Australia was dismissed.⁸⁵

The facts of the application before the Tribunal were that Mr McGarrigle was 20 years old, diagnosed with autism spectrum disorder and an intellectual disability, and travelled by taxis between his home and external programs for five days each week.

The AAT held that the taxi fares were a reasonable and necessary support as this mode of transportation complied with the six paragraphs of s 34(1) of the *NDIS Act*. However, the arguments focused on the words of para (e) of s 34(1), which provides that “the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide”.

The AAT took into account that the objects and principles of the *NDIS Act* that emphasised the requirement to ensure the financial sustainability of the Scheme,⁸⁶ although it appears from the written decision that the NDIA did not proffer any detailed economic analysis about how these transport costs would impact on the financial sustainability of the NDIS.

The AAT also considered NDIA policy as outlined in a “Participant transport fact sheet”, which outlined three levels of transport funding. This fact sheet set out that not all transport costs are the responsibility of the NDIS, and families and support networks needed to also contribute. The Tribunal said that it was not persuaded that “a policy by which a substantial part of the cost of transport is met, rather than the full cost, is inconsistent with the objects of the Act.”⁸⁷ In other words, the AAT held the policy was lawful.

The AAT decided to affirm the decision of the NDIA to pay 75% of Mr McGarrigle’s taxi costs.

On appeal to the Federal Court, Mortimer J set aside the Tribunal’s decision, holding that the *NDIS Act* required the NDIA to pay the full costs of reasonable and necessary supports.⁸⁸ Her Honour said that once the NDIA decided that a support was a reasonable and necessary, “the scheme requires and contemplates that support ‘will’ be funded. In my opinion, that can only mean wholly or fully funded.”⁸⁹

The NDIA unsuccessfully appealed to a Full Bench of the Federal Court.⁹⁰

We note that this may lead to greater emphasis on considering financial sustainability of the Scheme in relation to deciding reasonable and necessary supports, and subsequently, an increased role for the Scheme Actuary to provide reports to AAT hearings.

Jurisdiction

More recently, there have been some decisions in the AAT regarding issues of jurisdiction.

Persons may seek review by the AAT where it has been decided that they do not meet the access criteria.⁹¹ These applications for review are straightforward and tricky jurisdictional issues usually do not arise.

However, a number of jurisdictional issues have arisen where applicants have requested a review by the AAT because they are dissatisfied with some aspect of the reasonable and necessary supports set out in their plans.⁹² It is important to appreciate that the jurisdiction of the AAT is confined to reviewing what are called “reviewable decisions”.⁹³ In relation to plans, this means the AAT usually cannot step in until the NDIA has completed an internal review of the plan and made a reviewable decision. Where a participant is dissatisfied with an aspect of her or his plan, they are required to request that the CEO of the NDIA review the plan.⁹⁴ If, after reviewing the plan, the CEO or their delegate decides not to alter or review the plan, then the person can seek review of that decision because it is deemed a reviewable decision.⁹⁵ Of course, it is also sensible for decisions to be internally reviewed by the NDIA before an external review is available in the AAT. However, the complex process of statutory appeals is often difficult to comprehend by dissatisfied participants. As Deputy-President Forgie explained in *LQTF and National Disability Insurance Agency*, the administrative review process is “too complex for a participant to navigate with any ease” and is “not conducive to the NDIA’s being able to respond quickly to the needs of participants”.⁹⁶

Conclusion

In conclusion, we outline the following thoughts gleaned from what we have written above and our experiences as Tribunal Members who have presided over NDIS hearings.

First, the concern outlined by the Productivity Commission, that merits review of NDIA decisions in the AAT would result in “soft” outcomes, has not occurred. It is apparent from the AAT decisions made to date that the Tribunal has taken seriously the need for the NDIS to be financially sustainable. This is despite the fact that the NDIA has not, to the best of our knowledge, presented detailed economic and actuarial arguments in matters that could risk the financial viability of the Scheme. Nonetheless, the AAT has seriously considered the submissions made by the NDIA about possible financial outcomes of applicants’ requests for support that are asserted to be reasonable and necessary.

Second, from our above analysis of AAT statistics, the vast majority of NDIS applications are settled at, or just after, the conciliation. Indeed, it is our experience that many matters settle in the week before the date of the substantive hearing! All AAT NDIS decisions are published and, from these decisions, it is possible to determine the reasons why the Tribunal has held that applicants either do or do not meet the access criteria, and whether their requests for support are or are not reasonable and necessary ones.

Thus, administrative review by the AAT has placed the NDIS in the public sphere in a way that would not have otherwise occurred. Independent and transparent decision-making by the Tribunal contributes to robust public policy. However, given the high rate of settlements whose outcomes are unknown to us, it is not possible to determine the nature of the outcomes of all matters in which applicants have sought review from the AAT.

In view of the substantial numbers of matters settling at or just after conciliation, it is incumbent upon the Agency to publish information to enable transparency, equity and accountability. We suggest that the NDIA publish in de-identified form the outcomes of settlements to which it has agreed. Even if this material was released in a statistical format, this would give policy makers, persons with disabilities, the Tribunal and the general public a clearer idea of the results of AAT applications. It would also aid in the fine tuning of Agency policies which are always necessary as the Scheme evolves.

Third, we are of the view that the AAT has lessons to learn from the substantive hearings before it. This includes how adversarial administrative decision-making processes can be adapted to ensure persons with disabilities are able to give clear and cogent evidence to the Tribunal Member. AAT Members require applicants to be comfortable with these processes because their evidence is critical to the process of administrative decision-making. It may be that AAT Members consider options such as halting hearings and either suggesting an informal conference or referring matters back for further conciliation.

Fourth, there has been a significant emphasis by the NDIA to date on medical evidence. We note that, at times, an applicant seeking to access the NDIS or a Scheme participant seeking particular support under their NDIS plan has had their medical records summonsed by the NDIA. Applicants have also been required to undergo multiple assessments by non-treating “experts” such as occupational therapists or medical specialists. This has been particularly evident in matters where there are questions about the permanence of a disability or to endorse the requirement for a particular “reasonable and necessary” support. We have found ourselves in situations in which the Agency has sought hearings to be adjourned so that further medical evidence can be sought. It is often difficult to determine in these circumstances whether this information is relevant to the proceedings. We wonder, however, whether the process has become too medicalised.

Finally, we are disturbed by the continuing and serious power imbalance between, on the one hand, applicants with disabilities, and on the other hand, the NDIA that almost always hires lawyers (and often highly experienced counsel) to appear on its behalf. We commented above on the establishment of the NDAP. We further noted that funding has been provided to State legal aid commissions to assist applicants when their matters raise

complex or novel legal issues. From our experience, lay disability advocates under the NDAP are often “out-gunned” by experienced legal counsel. We suggest that further training be given to disability advocates to enable them to better represent and support applicants.

It is also the case that when matters before us raise complex or novel legal issues, some applicants have been unable to access representation by State legal aid commissions. This places them and their lay disability advocates in extremely difficult positions. In our view, at the very least, when matters involve detailed medical and especially psychiatric evidence, applicants should always be provided with legal assistance. Where these imbalances exist, it is more difficult for the AAT Member to hand down fair and just decisions that are able to contribute to the creation and adaption of NDIS policies, and benefit both applicants and the NDIA in this important and innovative Scheme.

References

- ¹ For a brief history, see NDIS: About us <<https://www.ndis.gov.au/about-us/history-ndis>>. Also see Toohey J, The National Disability Insurance Scheme: A New Challenge in Administrative Decision-Making (Legal Aid Summer Series, February 2015, Civil Law Workshop, Perth).
- ² Productivity Commission 2011, Disability Care and Support, Report No 54, Canberra (31 July 2011) (the *Productivity Commission Report*).
- ³ See Tony Abbot prepared to consider modest increase to medicare levy for NDIS <<https://www.news.com.au/national/tony-abbott-prepared-to-consider-modest-increase-to-medicare-levy-for-ndis/news-story/e0f952af7c8f775cbc75f75a263c16f0>>.
- ⁴ National Disability Insurance Scheme Act 2013 (Cth).
- ⁵ The National Disability Insurance Agency was established in Ch 6 of the *National Disability Insurance Scheme Act 2013* (Cth) (*NDIS Act*) as the National Disability Insurance Scheme Launch and Transition Agency. “Agency” is defined in s 9 of the *NDIS Act*. The Agency is now known as the NDIA.
- ⁶ Western Australia began to roll-out the NDIS in April 2018. See <<https://www.ndis.gov.au/understanding/ndis-rollout/western-australia>>.
- ⁷ Parliament of Australia, House of Representatives, Second Reading Speech to the NDIS Bill, 29 November 2012.
- ⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 13(1).
- ⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 13(2).
- ¹⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 14.
- ¹¹ *National Disability Insurance Scheme Act 2013* (Cth) Ch 3.
- ¹² In 2015, there were 4.3 million Australians with disability. See Australian Bureau of Statistics, Catalogue 4430.0 – Disability, Ageing and Carers, Australia: Summary of Findings, 2015 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4430.0Main%20Features452015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>>>.

¹³ *National Disability Insurance Scheme Act 2013 (Cth)* s 99(1). See also s 99(2) of the *National Disability Insurance Scheme Act 2013 (Cth)* s 99(2) for reviewable decisions made under the NDIS Rules.

¹⁴ *National Disability Insurance Scheme Act 2013 (Cth)* s 209(1).

¹⁵ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; [1979] AATA 179.

¹⁶ *National Disability Insurance Scheme Act 2013 (Cth)* s 3(3)(b).

¹⁷ The AAT was established with the passage of the Administrative Appeals Tribunal Act 1975 (Cth). For details, see <<http://www.aat.gov.au>>.

¹⁸ Productivity Commission, n 2, Vol 1, 79–80, recommendation 9.14.

¹⁹ Productivity Commission, n 2, Vol 1, 454.

²⁰ Productivity Commission, n 2, Vol 1, 80, recommendation 9.15, p 466.

²¹ The NDIS Division of the AAT was created when para (ba) was inserted into *Administrative Appeals Tribunal Act 1975 (Cth)* (AAT Act) s 19(2) as it then stood by the *National Disability Insurance Scheme Legislation Amendment Act 2013 (Cth)* Sch 2. See now, AAT Act s 17A(c).

²² The Commission and the Commissioner were established when the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017 (Cth)* inserted Ch 6A into the *National Disability Insurance Scheme Act 2013 (Cth)*.

²³ Amendments to the *National Disability Insurance Scheme Act 2013 (Cth)* also provide the AAT with further decisions to review. For example, where a disability services provider has been deregistered by the Commission, the provider may appeal to the AAT.

²⁴ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J). See also *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31 and M Allars, “*The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal*” (2013) 41 *Federal Law Review* 197.

²⁵ *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1980) 2 ALD 634, 644–645 (Brennan J).

²⁶ *Administrative Appeals Tribunal Act 1975 (Cth)* s 33(1)(b).

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- ²⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c).
- ²⁸ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(a).
- ²⁹ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(c).
- ³⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(d).
- ³¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(a).
- ³² *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(b).
- ³³ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(c).
- ³⁴ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(c)(i).
- ³⁵ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(c)(ii).
- ³⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2).
- ³⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 44.
- ³⁸ See NDIA <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/nationaldisability-advocacy-program-ndap>>.
- ³⁹ See <<https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-appeals>>.
- ⁴⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1).
- ⁴¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 17C. This provision requires the Minister who is usually the Attorney-General to assign all non-presidential members to divisions, that is, all Members and Senior Members must be so assigned. By implication, this provision makes it clear that the President and all Deputy-Presidents may sit in all divisions.
- ⁴² *Administrative Appeals Tribunal Act 1975* (Cth) s 17C.
- ⁴³ *Administrative Appeals Tribunal Act 1975* (Cth) s 17CA (Freedom of Information Division) and s 17D (Migration and Refugee Division).
- ⁴⁴ For further detail about alternative dispute resolution processes, see <<https://www.aat.gov.au/steps-in-a-review/national-disability-insurance-scheme-ndis/what-happens-after-lodgement>>.

⁴⁵ *National Disability Insurance Scheme Act 2013* (Cth) ss 13, 14.

⁴⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 22(1)(b) and (2); and for age variations during the launch phase, see *National Disability Insurance Scheme (Becoming A Participant) Rules 2013* (Cth) Pt 3. For example, at the launch of the Scheme, the South Australian launch site only accepted child applicants.

⁴⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 22(1)(a).

⁴⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 23; and see also *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (Cth) Pt 4 that sets out details about what is meant by residence in Australia.

⁴⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 21(2).

⁵⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(a).

⁵¹ *National Disability Insurance Scheme Act 2013* (Cth) s 9(1).

⁵² *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(b).

⁵³ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(e)

⁵⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 24(2).

⁵⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(c) paras I–VI.

⁵⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 25(1)(b).

⁵⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 25(1)(c).

⁵⁸ *Mulligan and National Disability Insurance Agency* [2014] AATA 374. The Tribunal comprised Senior Member Toohey and Member McCallum.

⁵⁹ *Mulligan and National Disability Insurance Agency* [2014] AATA 374, [1] the Tribunal detailed his disabilities as “...chronic ischaemic heart disease, cardiomyopathy, Conn’s Syndrome, and sciatica from two ruptured discs in his lower back as a result of a work injury in 1983.”

⁶⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(b).

⁶¹ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(c).

⁶² Mr Mulligan appealed pursuant to *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

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- ⁶³ *Mulligan v National Disability Insurance Agency* [2015] FCA 544, [57]–[58].
- ⁶⁴ *Mulligan v National Disability Insurance Agency* [2015] FCA 544, [55]–[56].
- ⁶⁵ The same two members constituted the Tribunal for the re-hearing.
- ⁶⁶ *Mulligan and National Disability Insurance Agency* (2015) 149 ALD 408; [2015] AATA 974, [66].
- ⁶⁷ *McFarlane and National Disability Insurance Agency* [2018] AATA 4727 (Member Bygrave).
- ⁶⁸ *MHZQ and National Disability Insurance Agency* [2019] AATA 810 (Member Bygrave).
- ⁶⁹ See *Social Security Act 1991* (Cth) s 94(1) and *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth) s 6(4).
- ⁷⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 31.
- ⁷¹ *National Disability Insurance Scheme Act 2013* (Cth) s 33(2)(c).
- ⁷² *National Disability Insurance Scheme Act 2013* (Cth) s 48(5)-(6).
- ⁷³ *National Disability Insurance Scheme Act 2013* (Cth) s 49.
- ⁷⁴ General supports are provided by the NDIA and that they are in the nature of co-ordination, strategic or referral services or activities: *National Disability Insurance Scheme Act 2013* (Cth) s 13(2).
- ⁷⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 33.
- ⁷⁶ *National Disability Insurance Scheme Act 2013* (Cth) ss 34(2), 33; *The National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth).
- ⁷⁷ *PNFK and National Disability Insurance Agency* [2018] AATA 692 (Member McCallum).
- ⁷⁸ *FRCT and National Disability Insurance Agency* [2019] AATA 1478 (Member Bygrave).
- ⁷⁹ *WKZQ and National Disability Insurance Agency* [2019] AATA 1480 (Member Bygrave).
- ⁸⁰ *JQJT and National Disability Insurance Agency* [2016] AATA 478 (Senior Member Toohey, Member McCallum and Member Bygrave).

⁸¹ *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth)* Sch 1.

⁸² *Young and National Disability Insurance Agency* (2014) 140 ALD 694, [41] (Senior Member Toohey and Senior Member Handley); [2014] AATA 401, [41]. See also *BBMC v National Disability Insurance Agency* [2018] AATA 386 (Member Bygrave).

⁸³ *McGarrigle and National Disability Insurance Agency* [2016] AATA 498 (Senior Member Toohey).

⁸⁴ *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121 (Mortimer J); [2017] FCA 308.

⁸⁵ *National Disability Insurance Agency v McGarrigle* (2017) 157 ALD 458 (Kenny, Robertson and Ker JJ); [2017] FCAFC 132.

⁸⁶ *National Disability Insurance Scheme Act 2013 (Cth)* ss 3(3)(b), 4(17)(b).

⁸⁷ *McGarrigle and National Disability Insurance Agency* [2016] AATA 498, [60].

⁸⁸ *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121; [2017] FCA 308.

⁸⁹ *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121, [94]; [2017] FCA 308.

⁹⁰ *National Disability Insurance Agency v McGarrigle* (2017) 157 ALD 458; [2017] FCAFC 132.

⁹¹ *National Disability Insurance Scheme Act 2013 (Cth)* s 99(1) table 2 Item 1 provides that persons who fail to meet the access criteria may appeal to the AAT.

⁹² *National Disability Insurance Scheme Act 2013 (Cth)* s 99(1) table 2 Item 4.

⁹³ *National Disability Insurance Scheme Act 2013 (Cth)* s 99(1) table 2 Item 6.

⁹⁴ *National Disability Insurance Scheme Act 2013 (Cth)* s 48.

⁹⁵ *National Disability Insurance Scheme Act 2013 (Cth)* s 48(2).

⁹⁶ *LQTF and National Disability Insurance Agency* [2019] AATA 631, [2].