



**Submission to Attorney-General's Department on NDIS Reviews and Appeals**  
**Administrative Review Reform Issues Paper**

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## About Us

The Law Futures Centre was established in 2015 to produce outstanding scholarship that anticipates, innovates, and meets pressing emerging challenges for law and legal institutions in Australia and internationally. Bringing together researchers from law, environmental sciences, international relations, business, health, criminology and humanities, Law Futures Centre members are committed to outstanding collaborative research that harnesses law as a key melioristic tool for shaping a better, more just future.

The Hopkins Centre, established in 2017 and co-located at Griffith University and Metro South Hospital and Health Service, is Queensland's premier research agency examining rehabilitation and resilience for people with disability. With over 200 research affiliates, including both academics and clinicians, The Hopkins Centre's approach to research involves a distinctive coupling of the voice of lived experience with systems and policy analysis. The Hopkins Centre's work transcends traditional disciplinary boundaries to investigate how to drive improved outcomes for people with severe disability through translating research into effective policies and practice.

Established in May 2016, the Policy Innovation Hub sits within the Griffith Business School and provides insights and analysis that helps to shape the future of Queensland, Australia and the Asia-Pacific. The Policy Innovation Hub forms relationships with governments, international institutions, and policymakers to assist informed decision-making and involvement in the delivery of transformational projects; and solve policy problems through evidence-based collaboration with multidisciplinary experts.

As academics and researchers from these three Griffith University centres, in drafting this submission we have drawn upon both our individual expertise and our preliminary work on a current research project, *Adjudicating Rights for a Sustainable NDIS* (2020-2023), which is funded by an Australian Research Council (ARC) Discovery Project (ARCDP2001100742) grant. The project is described more fully in the Appendix to this submission.

## Summary of Submissions

Our submission focusses on issues related **to administrative review and appeal of National Disability Insurance Scheme ('NDIS') decisions**, currently undertaken in the NDIS Division of the administrative Appeals Tribunal ('AAT'). In preparing this submission we have also considered, to the extent possible, the current pilot of the Independent Expert Review Program within the National Disability Review Agency ('NDIA') and overseen by the Oversight Committee.<sup>1</sup>

Our research and engagement with a broad array of NDIS stakeholders suggests that any new review/appeal body or mechanisms concerning NDIS decisions should include the following design principles:

- recognise the unique and beneficial nature of the NDIS as embedded in the objects and principles of the NDIS legislation.<sup>2</sup>
- enhance the rights of people with disability and accord with the Convention on the Rights of Persons with Disability ('CRPD').
- co-design with NDIS participants.
- a collaborative, non-adversarial process which engages participants directly in the resolution process.

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<sup>1</sup> <https://www.ndis.gov.au/about-us/legal-matters/improved-approach-dispute-resolution>.

<sup>2</sup> See s 3 and 4 *National Disability Insurance Act 2013* (Cth) .

- adequate advocacy and legal support for all NDIS participants/applicants.
- direct involvement by NDIA decision-makers in resolution of appeals.
- active facilitation of the gathering of all evidence necessary to make the best decision.
- transparency about how and why decisions are made.
- timely decision-making.
- decisions consistent with the legislative framework.
- consistency with the principles of administrative justice.

In summary, our **responses to the Issues Paper are:**

- There should be a broader overriding statutory object of any new administrative review body that indicates that it is intended to give effect (in conjunction with other laws) to Australia's obligations under the CRPD particularly Articles 12, 13 and 21.
- Objects of any new body should also include transparency and engendering and promoting public trust in administrative decisions by government bodies more broadly (including in the NDIS).
- There should be reinstatement of an Administrative Review Council ('ARC') body as an oversight mechanism that could play a particular role in ensuring that applicants with a disability achieve administrative justice by identifying systemic challenges and trends in NDIS cases and ensuring the NDIA adequately implements administrative review outcomes into its policies, procedures and decisions. An ARC body could also play an important role in gathering research and data to improve the system of review of NDIS decisions on an ongoing basis.
- There should be a specialist division for NDIS appeals. Any new body should have decision-makers who have been specially trained regarding disability rights and the needs of applicants with disability and who have developed special expertise in NDIS matters. Processes and procedure should be rights promoting, trauma informed and co-designed. In principle, we support a two- tier external administrative review process for NDIS appeals, based on current evidence.
- Legally qualified decision-makers should be appointed to determine NDIS reviews and appeals in the 'final' tier within any administrative review body. Decision makers should include people with disability and people with a background in disability advocacy, disability legal support or human rights.
- There should be an open and transparent merits based appointment process. Legislative criteria for appointment should have regard to the need for people with a disability to be considered for appointment.
- More legally complex NDIS cases should be allocated to more senior members with greater legal expertise. We support tribunal appointed experts in some NDIS cases.

- There should be a two- tier expert external review process for NDIS appeals following NDIA internal review. The ultimate model for that two- tier system should be the subject of further consultation and co-design work and should also reflect the findings of the Independent Expert Review pilot evaluation and the NDIS Review report. We do not have a concluded view on whether the first tier of external review should be a separate NDIS Review Board or a first tier inside the body that replaces the AAT. There may be some advantages in a separate NDIS Review Board as the first tier. A hurdle between the first and second tier stage of review, such as leave only for cases with significant legal or complex factual issues to proceed to the second tier of administrative review, should be further considered.
- A process should be developed, for example guidance decisions or test cases, that could be utilized to refer matters to the Federal Court to determine unresolved legal issues with systemic importance to the NDIS relating to the application and construction of NDIS legislation. Any process to refer general unresolved legal issues to the Federal Court for systemic advantage, should not disadvantage or harm an individual NDIS participant or occur against their will.
- There should be funding for advocacy and legal representation for all NDIS participants (who wish to have it) in reviews and appeals both at internal and external review.
- All lawyers involved in any external review process should be required to receive CRPD training and training in relation the needs and rights of people with disability.
- The NDIA and NDIA lawyers should uphold obligations under the Commonwealth Model Litigant obligations and in addition there should be new and more specific practice directions applicable specifically to NDIS matters which respond to the matters we have raised in our submission.
- There should be provision in legislation and funding for a dedicated support service and a liaison officer to support people with a disability seeking administrative review. There should be a positive obligation in legislation, consistent with the CRPD, which ‘encourages the provision of wrap around services and promotes a culture of support’ and accessibility for people with disability.
- Processes and procedures utilized in any new administrative review body should proactively provide and result in accessibility for people with disability. We also suggest evidence- based guidance material (such as a Benchbook) for decision-makers about the nature and presentation of particular disabilities during review and appropriate support and responses by a decision-maker.
- There should be a public registry of information pertaining to NDIA settlement outcomes that are reached within the new administrative review body.

### Our Submission

We welcome the opportunity to provide our submission on the *Administrative Review Reform: Issues Paper*, in the particular context of **NDIS decision review and appeals**.

Our submission is based on our current research data relating to NDIS reasonable and necessary support decisions, as well as broader project engagement with NDIS stakeholders, and review of public submissions to many previous government inquiries relating to the NDIS which have included

commentary on review and appeals processes. The 31 stakeholders who participated in qualitative interviews in our project were representatives from across state and federal government, professional bodies, legal organisations, and advocacy agencies. In addition, 43 stakeholders engaged in a recent workshop in November 2022 convened by the research team, including people with disability, disability advocates, lawyers, public policy and legal academics and government agency representatives. Further detail about the research data and workshop engagement are included in the Annexures. We also draw upon our analysis of all AAT and Federal Court reported decisions on reasonable and necessary supports in the NDIS up to 30 June 2022.

Our research and engagement about decision making for funded supports, including at review and appeal stages, highlights problems such as decision-making processes are not always rights compliant; lack of transparency and a lack of explanation for decisions contrary to what is required of administrative justice, which in turn drives external administrative review processes; and overly adversarial review and appeal processes. For further elaboration on the above points, Annexure A documents findings from our qualitative interview data to date, and Annexure B summarises the recent stakeholder workshop convened by the research team.

We acknowledge positive steps towards change in the implementation and administration of the NDIS have recently been taken, notably with the Labor Government and the Minister for the NDIS, the Hon. Bill Shorten, including stronger efforts in engagement and consultation with people with disability and the disability sector, improved representation of people with disability within the NDIA including on the board, announcement of an Independent Review of the NDIS and appointment of panel members with lived experience of disability, and efforts to reduce the backlog of NDIS appeal cases at the AAT through a pilot Independent Expert Review program and through early resolution by the NDIA. We also acknowledge the efforts of the AAT to date to improve review processes for NDIS participants.

## Issues Paper

### **Questions 1 and 2: Principles that should guide the approach to a new federal administrative review body and Objectives of the new body**

**Our research supports the critical importance of including objects such as transparency of decision-making.** We broadly agree that objectives such as those referred to in Section 2A of the current legislation are appropriate for an administrative review body. However, a particular concern is the well-known ‘trust deficit’ participants have in relation to NDIS decision making which has also been reflected in the findings of our own research. Any new body should have an objective of greater transparency which relates to engendering and promoting trust in administrative decisions by Government bodies more broadly rather than only the tribunal or administrative review body.

**There should be a broader overriding statutory object of any new administrative review body that indicates that it is intended to give effect (in conjunction with other laws) to Australia’s obligations under the Convention on the Rights of Persons with Disabilities (‘CRPD’).**<sup>3</sup> We support the need for accessibility in relation to processes, outcomes and delivery of decisions by any new administrative review body. However, an object which merely refers generally to being ‘accessible’ is manifestly inadequate to take account of the needs and rights of people with disability who access administrative review of government decisions. The CRPD obligations include Article 12 of the CRPD which provides for equal recognition before the law, encompassing taking appropriate measures to provide access for people with disability to support to exercise their legal capacity; Article 13 which

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<sup>3</sup> See for example s 3 (1) (a) *National Disability Insurance Scheme Act 2013* (Cth).

provides for access to justice measures including necessary accommodations and providing appropriate training for those who work in administration of justice; and Article 21 which refers to accessibility in relation to information and expression. This will benefit not only people with disability who appeal in NDIS cases, but all people with disability including those who are applicants in social security and compensation appeals. It would also make the objects of any new administrative review body congruent with the National Disability Insurance Scheme Act 2013 (Cth) ('NDIS Act'). The NDIS Act is designed to bring the principles and obligations of the CRPD into Australia's domestic legislation in substance (ie disability support funding), process (including reviews of decision) and form.<sup>4</sup>

In late 2019, the UN Committee published its findings and recommendations on its most recent review of how Australia is meeting its obligations under the CRPD.<sup>5</sup> Some of the Committee's recommendations for Australia included Australia should make the NDIS application and review processes easier for people with a disability to use and make sure that all information is accessible. There was significant concern expressed by more than 75% of stakeholders in our qualitative interviews that CRPD obligations were not being realised within the Scheme, including in reviews and appeals. Some leading concerns of stakeholders were:

- The rights of people with disability are not reflected in decisions or decision-making processes;
- The social model of disability as expressed in the CRPD and in the NDIS Act was in practice being repealed and replaced with a medical deficit model;
- Adversarial and legally complex processes, especially at review and appeals stages, were not consistent with a rights-based approach; and
- Current processes and practices of review and appeal are neither disability, human rights nor trauma informed, and this can result in causing more harm, especially psychological harm, to people with disability and their families.

***Recommendations:***

- That there should be a statutory object in any new administrative review legislation that indicates that it is intended to give effect (in conjunction with other laws) to Australia's obligations under the Convention on the Rights of Persons with Disabilities ('CRPD') including Articles 12, 13 and 21.
- Objects should also include transparency and engendering and promoting public trust in administrative decisions of government bodies more broadly including in the NDIS.

**Questions 3 and 4: Administrative Review Council (ARC) and Requirements of Government Agencies**

Our research, including our stakeholder research and our content analysis of NDIS cases, suggests that there are systemic issues which are emerging in NDIS AAT and Federal Court appeals about both legal matters and the behaviour of the NDIA and NDIS participants. We discuss these further below. We note the discussion in the Issues Paper concerning the reinstatement of the ARC (or similar body) as

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<sup>4</sup> See s 3 and 4 NDIS Act.

<sup>5</sup> Concluding Observations: UN Report on Australia's Review of the Convention on the Rights of Persons with Disability (CRPD), 24 September 2019. Available at <https://www.afdo.org.au/wp-content/uploads/2019/09/UN-Outcomes-Report-on-Australia.pdf>

an oversight mechanism to ensure that any new administrative review body meets its objectives and to report on systemic issues.

We believe there would be significant value in an ARC body. An ARC could monitor how the new administrative review body implemented the CRPD to ensure the rights of applicants with a disability are being considered in administrative review processes; could produce reports in relation to outcomes of NDIS appeals (including settlements) which would promote transparency and aid NDIS participants and advocates more broadly; could produce guidelines about matters such as the CRPD rights of people with a disability; and produce evidence based guidance material (such as a Benchbook) for decision-makers about the nature and presentation of particular disabilities<sup>6</sup> during review and appropriate support and responses by a decision-maker.<sup>7</sup> A further issue which has often been raised by our stakeholders and in the many NDIS inquiries is the failure of the NDIS to adequately implement the outcomes of NDIS AAT appeals either systemically or in relation to future plans of an individual participant. We would see value in the NDIA being required to report on an annual basis to an ARC on how the outcomes of administrative review decisions have been implemented by the NDIA including in its policies (such as operational guidelines), internal decision-making systems, training, IT systems and decision-making tools such as typical support packages.

We also suggest that an ARC body could make significant contribution if it contained research capacity to capture and consider relevant data or could commission external research. For example, there are particular issues emerging in NDIS AAT appeals which should be investigated further as they reveal some potentially very significant access to justice issues for people with disability. Of the closed AAT cases, less than 2.4% went to substantive hearing stage;<sup>8</sup> and more information could be provided about the decisions in the vast majority of cases that are 'resolved before hearing'. Of those cases that are 'resolved before hearing', 64% of cases are 'resolved by agreement' without any public reasons for settlement and 31% of cases are 'withdrawn by the applicant or dismissed by the AAT'.<sup>9</sup>

### **Recommendations:**

- An ARC body should be reinstated as an oversight mechanism to monitor how the new administrative review body implemented the CRPD to ensure the rights of applicants with a disability are being considered in administrative review processes. It could play a role in identifying systemic challenges and trends in NDIS cases and could ensure the NDIA adequately implements administrative review outcomes into its policies, procedures and decisions. An ARC could play a particular role in ensuring that applicants with a disability achieve administrative justice. An ARC body could make significant contribution if it contained research capacity or could commission external research.

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<sup>6</sup> For example, this could include discussion of the particular needs of applicants with intellectual impairment, autism or a psycho-social disability; the needs of applicants with a disability who also identify as a First Nations or CALD; or the needs of people with disability who require assistive technology to communicate or utilise Auslan.

<sup>7</sup> For example, see the migration guidelines <<https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/guidelines-on-vulnerable-persons>>.

<sup>8</sup> NDIS Quarterly report to disability ministers, 31 December 2022, Q2 2022-2023, p74.

<sup>9</sup> Ibid.

### ***Questions 5, 6 and 7 Structure of the New Administrative Review Body***

We do not express a concluded view on the overall structure of a new administrative review body. However, we believe that there is significant justification for a specialist division which deals with NDIS appeals staffed by decision-makers who have been specially trained regarding disability rights and the needs of applicants with disability and who have developed special expertise in NDIS matters. Our research would also support processes and procedure which are rights promoting and trauma informed for dealing with NDIS matters which may differ from those adopted in other administrative decision reviews.<sup>10</sup> There is a need for the process in NDIS reviews and appeals to be co-designed with people with disability and those in the disability and advocacy sector, particularly those with experience of AAT appeals. As we also discuss below, in principle we support a two-tier external administrative review process for NDIS appeals, based on current evidence.

#### **Recommendations:**

- There is a significant justification for a specialist division for NDIS appeals staffed by decision-makers who have been specially trained regarding disability rights and the needs of applicants with disability and who have developed special expertise in NDIS matters. Our research also supports processes and procedure which are rights promoting, trauma informed and co-designed. We support, in principle, a two-tier external administrative review process for NDIS appeals, based on current evidence.

### ***Questions 16, 17 and 22 Qualifications and Appointment of Decision-Makers***

Our current content analysis of all finally determined AAT and Federal Court Appeals in relation to reasonable and necessary support decisions from the commencement of the NDIS until 30 June 2022 includes 98 AAT and Federal Court decisions. Several preliminary themes are identified from our initial analysis of NDIS cases:

- A complicated legal framework for determining whether supports are reasonable and necessary under the NDIS legislation (objects, principles, s 33, s 34, rules, operational guidelines). Access decisions are also subject to a complicated legal framework.
- Some cases concern very 'technical' legal analysis of provisions of the NDIS legislation including applying the principles of statutory interpretation.
- There are a number of important legal matters in the NDIS legislation that are still unsettled- for example the role of financial sustainability and whether there is a general discretion to refuse funding of an otherwise reasonable and necessary support.
- There is limited appreciation by decision-makers of the role of the CRPD in the NDIS legislation and how this might impact decision-making.
- Some AAT cases indicate an inadequate understanding by decision makers of the nature of disability (including the social model) and of intersectional matters which may impact people with disability and the capacity of carers- for example domestic violence contexts.

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<sup>10</sup> Although we would note that all reviews of government decisions concerning people with disability should be rights and trauma informed, not just those in a NDIS matter.



We believe that due to the complexity of the NDIS legislation, legally qualified decision-makers should be appointed to determine NDIS reviews and appeals in the 'final' tier within any administrative review body. Ideally, those decision makers would include people with disability and people with a background in disability advocacy, disability legal support or human rights. We support an open and transparent merits-based appointment process. We support explicit legislative criteria that would have regard to the need for people with a disability to be considered for appointment, particularly given that the new administrative review body will include a growing and substantial NDIS jurisdiction. We support the allocation of more legally complex NDIS cases (eg cases where there is an unresolved or difficult issue of statutory interpretation relating to access or reasonable and necessary support criteria) to more senior members with greater legal expertise. In addition, we see value in a tribunal appointed expert in some NDIS cases. This is particularly important as the NDIS is a unique legislative scheme which is intended to be beneficial and to actively support participants to assert their rights to access and support. Our research has revealed AAT cases where a NDIS applicant, often unrepresented, has been unsuccessful as they have not been able to provide sufficient evidence. This may be because of cost barriers or a lack of understanding about the nature of evidence that is acceptable to the AAT. In addition, there are cases where expert witnesses for the applicant or NDIA have conflict of interest or provide unreliable evidence. These cases may benefit from the appointment of a tribunal expert witness. A tribunal expert witness may also be valuable in cases concerning whether a particular support is evidence based or accepted within the relevant discipline. Appropriate expertise in these cases would have additional value as it could be drawn upon in later cases and in decision-making by the NDIA and participants.

#### **Recommendations:**

- Legally qualified decision-makers should be appointed to determine NDIS reviews and appeals in the 'final' tier within any administrative review body. Decision makers should include people with disability and people with a background in disability advocacy, disability legal support or human rights.
- Appointments processes should be open, transparent merits- based. Legislative criteria for appointment should also include explicit regard to the need for people with a disability to be considered for appointment.
- We support the allocation of more legally complex NDIS cases to more senior members with greater legal expertise. There would be value in a tribunal appointed expert in some NDIS cases.

#### ***Questions 45, 46 and 58: Dispute Resolution Mechanisms, Tiers of Review, the AAT and the IER Interim Report***

Our research, many submissions to previous government inquiries, and the findings of previous inquiries have found that for many people with a disability the current NDIS review and appeals process including the AAT process has not worked well.<sup>11</sup> It has been experienced by many people

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<sup>11</sup> It should be noted there have been significant improvements in recent times instituted by the NDIA and in the AAT as part of the new Government's priorities to improve review processes. See 'Interim Report on long-term options for dispute resolution under the National Disability Insurance Scheme', p16-17

with disability as too legalistic, too complex, inaccessible, insufficiently trauma informed and adversarial. Many AAT cases involve voluminous documentation and evidence as part of standard pre-hearing and hearing processes. Our workshop stakeholders raised the question of whether the AAT is the most appropriate jurisdiction and the right fit to review NDIS cases. There was general agreement at our workshops that people with disability considered there was a need for a better review process which was co-designed. There were comments that current processes in the AAT may be unsuited to the NDIS because they are not trauma and human rights informed. As we note above, a considerable percentage of NDIS applicants withdraw their AAT appeals prior to resolution by settlement or decision and a significant reason for this may be that the process is not user friendly, is stressful, causes trauma to applicants and is difficult to navigate without legal representation. Many NDIS applicants in AAT appeals are not legally represented nor represented by a disability advocate. In our research of AAT reasonable and necessary support cases which reached a substantive decision, the NDIA was always legally represented (most often by both a law firm and barrister) while around 30% of applicants had no representation either by an advocate or by legal representation. Our research has also identified a category of AAT NDIS cases, typically involving unrepresented applicants, where the applicant had unrealistic expectations of obtaining support which was never available under the NDIS legislative framework.<sup>12</sup>

At this time, the NDIS Independent Expert Review Panel is still in pilot stage and no evaluation of the pilot has been released. Little information is publicly available about the cases that have been resolved and the learnings from the pilot. The NDIS Review<sup>13</sup> is ongoing and will not report until later in the year. Both these reports should inform the final design of the NDIS external review processes including any levels of NDIS Review within the 'new' administrative review body which replaces the AAT. We have considered the 'Interim Report on long-term options for dispute resolution under the National Disability Insurance Scheme' by the Oversight Committee.<sup>14</sup> Due to the tight deadlines under which that report was concluded, it did not have the opportunity to seek broader public feedback but there was select consultation with the advocacy and community legal sector. The Oversight Committee has indicated there should be further consultation prior to the final determination of external review processes for the NDIS. We agree in principle with the Oversight Committee that there is value in the adoption of a two- tier external review for NDIS decisions following NDIA internal review, which is constituted in the NDIS legislation:

*There is merit in introducing a tier of independent review of NDIA decisions following the NDIA conducting an internal review but prior to a review proceeding to the AAT. This would promote a positive participant experience and provide an efficient and effective pathway to reduce the number of matters that progress to the AAT. Such a process should be built upon five principles: independent, informal, timely, inquisitorial and accessible. Any new model of independent review, or any change to existing review processes, should also be co-designed with, and led by, people with disability with lived experience of the NDIS. It should also be accompanied with*

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<sup>12</sup> For example, see *HRZI and National Disability Insurance Agency* [2023] AATA 481 where there was a claim for IVF funding and legal support.

<sup>13</sup> <https://www.ndisreview.gov.au/>.

<sup>14</sup> <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-ndis-appeals/interim-report-on-long-term-options-for-dispute-resolution-under-the-national-disability-insurance-scheme>.

*an appropriate investment in case management within the NDIA, provision of independent advocacy and legal support and initiatives to promote supported decision-making.<sup>15</sup>*

Guiding principles suggested by the Oversight Committee, which we also support, include:

*a set of principles that provide a pathway to avoiding the problems of the past and underpin best practice approaches to empowering people with disability. It should also take a rights-based approach consistent with the principles of the Convention on the Rights of Persons with Disabilities 2006, and provide an accountability mechanism to ensure it promotes independence, neutrality, transparency, trustworthiness and has the capacity to support and recognise the voice of people with disability.<sup>16</sup>*

While such a body should not be 'legalistic' in process, it will however be important that the legal complexity of decisions is recognised, and clear guidance is given in resolved cases as to application of the NDIS legislation. Publication of outcomes and reasons for outcome would also be important as a matter of transparency.

We believe further consultation and co-design work is necessary to determine the most appropriate form of a two-tier external review process for NDIS matters following NDIA internal review.<sup>17</sup> It will be important to consider the evaluation of the current Independent Expert Review pilot. We do not, at this stage, have a conclusive view as to whether the first, more informal, tier of expert review should be a separate entity (eg NDIS Review Board) or an initial tier inside any new administrative review body which replaces the AAT. The adoption of a separate NDIS Review Board model as the initial external expert review may have advantages such as better tailoring of processes and procedures for people with disability seeking support under a scheme intended to be beneficial<sup>18</sup> with a rights-based focus. This may not be achieved within a broader administrative review body model with processes which must apply to all categories of administrative review. A NDIS Review Board model may also allow for more flexibility in constituting multi-member decision-making panels including those with legal expertise, those with disability expertise or lived experience, and those with other relevant experience such as allied health professionals. Given that there has unfortunately been significant dissatisfaction by some NDIS participants with the process of AAT appeals, a separate NDIS Review Board may also allow for rebuilding of trust within the disability community and sector. At this stage, we would see some value in a hurdle between the first and second tier stage of external review such as leave only for cases with significant legal or complex factual issues to proceed to the second tier of administrative review. However, this should be considered once further evidence of the current IER pilot and the NDIS Review report are available.

#### **Recommendations:**

- There should be a two- tier expert external review process for NDIS appeals following NDIA internal review. The ultimate model for that two- tier system should be the subject of further

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<sup>15</sup> Ibid, 3-4.

<sup>16</sup> Ibid, 20.

<sup>17</sup> See for example the need to consider the parameters of the model at ibid, 33-34 as to such matters as governance, evidence gathering, dispute resolution processes, how to assist in the gathering of evidence including as to functional capacity at no cost to the applicant etc.

<sup>18</sup> This form of legislative scheme may be quite different from other legislative schemes such social security and migration.

consultation and co-design work and should also reflect the findings (when made available) of the Independent Expert Review pilot evaluation and the NDIS Review report. We do not have a conclusive view as to whether a first tier of review should be a separate NDIS Review Board or a first tier inside the body that replaces the AAT. There may be some advantages in a separate NDIS Review Board as the first tier. A hurdle between the first and second tier stage of review, such as leave only for cases with significant legal or complex factual issues to proceed to the second tier of administrative review, should be further considered.

### ***Question 56: Referral of Questions of Law to Federal Court***

Our research of AAT and Federal Court ‘reasonable and necessary support’ cases has revealed that there are a range of unresolved legal issues in relation to the application and construction of the NDIS legislation which are of critical importance to all NDIS applicants, to the NDIA and to operation and policy design of the NDIS. Resolution of these legal issues could reduce NDIS appeals and improve NDIA decision-making and NDIA conduct during appeals. Unlike other kinds of AAT matters (eg migration matters) there have been relatively few Federal Court decisions about NDIS matters over the decade since the scheme commenced. Where important unresolved legal issues concerning interpretation of the NDIS legislation have been raised in NDIS Federal Court appeals, the Federal Court has sometimes found it inappropriate to resolve the legal questions on the basis they were not raised by the NDIA during the original AAT hearing.<sup>19</sup> Significant unresolved NDIS legal issues include whether there is a discretion for the NDIA (under s 33 of the NDIS Act) to refuse to fund supports which otherwise meet reasonable and necessary criteria under s 34 NDIS Act; the meaning and role of financial sustainability in NDIS decisions; and whether financial sustainability arguments (at scheme level) can be used to reject a supports for an individual which would otherwise be considered to meet reasonable and necessary criteria under s 34 NDIS Act. While these matters could be resolved by the government by legislative amendment, nevertheless we consider that there would be value in a more streamlined process to identify NDIS legal issues within the new administrative review body which could be referred to the Federal Court for resolution and guidance. One way to do this would be to provide for guidance decisions or steps could be taken to identify and resource test cases. We would add the caveat that if test cases were to be used in NDIS matters, it would be necessary to ensure that a relevant NDIS participant received adequate support funding pending the test case; was fully funded and supported to be involved in a test case; and that an NDIS participant did not become involved in a test case against their will or in a way that become traumatic.

### **Recommendations:**

- We support the development of a process, for example guidance decisions or test cases, that could be utilised to determine unresolved legal issues relating to the application and construction of NDIS legislation in the Federal Court. Any process to refer general legal issues to the Federal Court for systemic advantage, should not disadvantage or harm an individual participant or occur against their will.

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<sup>19</sup> For eg see *National Disability Insurance Agency v WRMF* [2020] FCAFC 79.

***Questions 61, 62, 63 and 64 Support Services, Codes of Conduct, Legal and Advocacy Support and Accessibility***

As we discuss above our research, multiple government inquiries about the NDIS and submissions to those inquiries, have all made clear that many people with disability have found the current process of appeal and review for NDIS decisions, including in the AAT, inaccessible and unsupportive. Stakeholders interviewed in our research were concerned that model litigant obligations were not always observed by the NDIA or their legal representatives. The general perception was that current processes, especially at appeals, are confrontational, adversarial, and overly legal, and not appropriate for engaging people with disability and vulnerable population groups. There was a strong sentiment that reviews and appeals especially are a 'legalistic game' likely designed to deter people. Adding to concerns was the lack of specialist legal and disability advocacy support to enable participants to navigate through the processes. NDIS processes including AAT appeals assume participant capability to navigate decisions, reviews, and appeals. Stakeholders interviewed in our research reported that poor information and communication and lack of clear processes could deter NDIS participants from enacting their rights to reviews and appeals. There was a view that people with cognitive or psychological disabilities and people from CALD backgrounds could experience greater barriers to accessing the review and appeal process. This could partially explain why many NDIS participants withdraw their AAT appeals.

Our analysis of AAT and Federal Court cases has also raised several matters which we believe raise concern including:

- Some cases indicate a critique by the AAT or Federal Court of adversarial tactics or overly legalistic approach taken by the NDIA, NDIA lawyers or NDIS experts. In addition, rhetorical questioning styles (widely used by lawyers and barristers in range of contexts including in the AAT) which suggest to a witness that they are lying, exaggerating, are giving inconsistent evidence or lack credibility may be particularly inappropriate for vulnerable participants or their family members in the context of a rights based beneficial scheme such as the NDIS.
- A range of cases involve litigation over very small amounts of support funding which would have been swamped by legal costs of the NDIA and applicant. In some of these cases the long delay in determining these relatively low cost supports due to extended litigation also had major implications

As we argue above, an important overriding objective of any new administrative review body should be that it fulfills (in conjunction with other legislation) Australia's CRPD obligations. This requires there should be advocacy and legal representation for all NDIS participants to enact and support their rights to reviews and appeals both at internal and external review. Applicants for review in NDIS matters should not be self-represented, unless they wish to decline representation. All lawyers involved in any external review process should be received CRPD training and training in relation the needs and rights of people with disability. The NDIA and NDIA lawyers should uphold obligations under the Commonwealth Model Litigant obligations and in addition there should be new and more specific practice directions applicable specifically to NDIS matters. There should be provision in legislation and funding for a dedicated support service and a liaison officer within the new administrative review body to support people with a disability seeking administrative review. There should be positive obligations in any new legislation, consistent with the CRPD, which 'encourages the provision of wrap around services and promotes a culture of support' and accessibility for people with disability. It is critical that

the processes and procedures utilised in any new administrative review body proactively provide and result in accessibility for people with disability. This includes matters such as physical accessibility, appropriate IT support, support for communication, and the use of accessible adapted versions of documents appropriate for people with cognitive or intellectual impairment.

As matter of transparency and to assist NDIS participants and advocates there should be a public registry of NDIA settlement outcomes reached at the new administrative review body.

***Recommendations:***

- There should be funding for advocacy and legal representation for all NDIS participants (who wish to have it) in reviews and appeals both at internal and external review.
- All lawyers involved in any external review process should be required to receive CRPD training and training in relation the needs and rights of people with disability.
- The NDIA and NDIA lawyers should uphold obligations under the Commonwealth Model Litigant obligations and in addition there should be new and more specific practice directions applicable specifically to NDIS matters which respond to the matters we have raised in our submission.
- There should be provision in legislation and funding for a dedicated support service and a liaison officer to support people with a disability seeking administrative review. There should be a positive obligation in legislation, consistent with the CRPD, which ‘encourages the provision of wrap around services and promotes a culture of support’ and accessibility for people with disability.
- Processes and procedures utilised in any new administrative review body should proactively provide and result in accessibility for people with disability. We suggest evidence- based guidance material (such as a Benchbook) for decision-makers about the nature and presentation of particular disabilities during review and appropriate support and responses by a decision-maker .
- There should be a public registry of NDIA settlement outcomes reached at the new administrative review body.

We stand willing to provide further information that would assist.

Kind regards,

Kylie Burns, Michele Foster, Susan Harris Rimmer and Eloise Hummell

## APPENDIX

### **About the ARC Project *Adjudicating Rights for a Sustainable National Disability Insurance Scheme (ARCDP2001100742)***

By enhancing the visibility and transparency of decision-making processes and priorities, and promoting informed public discussion, this project will contribute to making the National Disability Insurance Scheme a fair and sustainable scheme, and an international exemplar. The study involves three phases conducted over three years (2020 – 2023) and employs a multidisciplinary, translational design incorporating analysis of social, policy and legal frameworks, qualitative interviews, analysis of administrative data and qualitative case study methods to develop both a broad national understanding of dominant frames surrounding the administrative justice decisions and concepts of justice; and a more nuanced understanding of administrative justice as experienced by participants.

The project will highlight the power and justice effects of the administration of the NDIS, including what principles and values serve as dominant justifications for reasonable and necessary support, areas of contestation with choice and control, and the discrepancies in how administrative justice is viewed. The findings will contribute to a better understanding of which participants the NDIS is failing and contribute to a critical debate about the values guiding funded support decisions and fairness outcomes.

*Evidence informing this submission:*

#### Qualitative Interviews

Interviews were conducted between July 2021 and February 2022 with 31 NDIS stakeholders from across government statutory, professional bodies, legal organisations, and advocacy agencies. Interview questions asked about: original intentions of the NDIS and subsequent changes since implementation in relation to funded supports; reasoning and justifications behind decisions about funded supports; challenges associated with decision-making; and current Scheme performance and improvements to ensure fair process and fair outcomes for NDIS participants.

Stakeholder	Interviews (n=31)
Bureaucracy	8
Professional	8
Legal	7
Advocacy	8

#### Appeal Case Reports

Overview summary analysis of 98 cases taken to the Administrative Appeals Tribunal (n=95) and to the Federal Court of Australia (n=3) where a NDIS participant is appealing the NDIA decision on reasonable and necessary supports. Cases were included from the first NDIS appeal case in the AAT in June 2014 until June 2022. The 98 cases are currently subject to an in-depth content analysis using a coding framework .

## Workshop

The aims of the workshop were to:

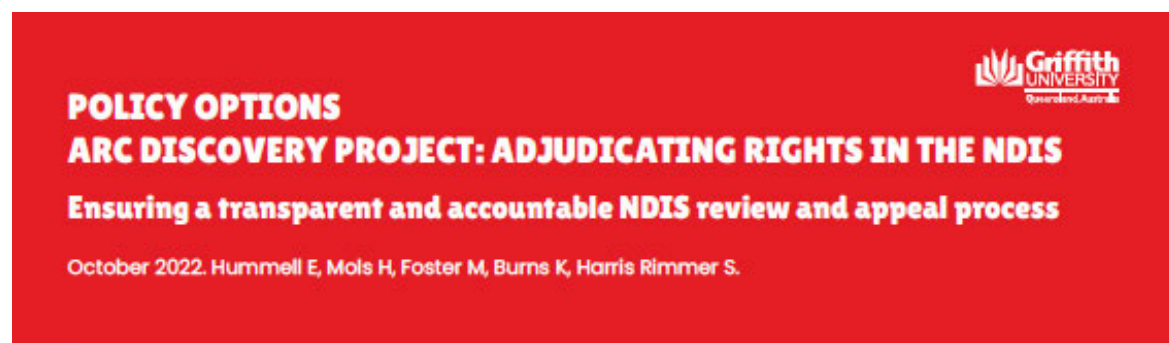
1. Exchange critical perspectives and knowledge on known tensions in NDIS review and AAT appeal processes and decisions pertaining to reasonable and necessary funded supports, including where and how procedural fairness working and failing.
2. Contribute to NDIS reforms by identifying policy priorities that will improve procedural fairness, administrative justice and rights entitlements in review and appeal decision-making on reasonable and necessary supports.

Excluding the research team and support staff, 43 people participated in the workshop, with approximately half attending in-person in Brisbane, Queensland and half participating online through MS Teams. Attendees included people with disability, disability advocates, lawyers, public policy and legal academics and government agency representatives.



## ANNEXURE A

[https://www.dropbox.com/s/16oo82ln6znk1d4/ARC%20Adjudicating%20Rights%20in%20the%20NDIS\\_Policy%20Options\\_Transparency%26Accountability\\_24Oct22.pdf?dl=0](https://www.dropbox.com/s/16oo82ln6znk1d4/ARC%20Adjudicating%20Rights%20in%20the%20NDIS_Policy%20Options_Transparency%26Accountability_24Oct22.pdf?dl=0)



### Policy context

The NDIS Scheme seeks to enable people with disability to exercise choice and control over the planning and delivery of their supports. To ensure that the scheme truly works to secure choice and control for people with disability, NDIA decision-making processes need to be accessible, explainable and understandable. The ARC Discovery Project Adjudicating rights for a sustainable NDIS aims to contribute to this objective by exploring the mechanisms and challenges for current review and appeal processes using interview data and document analyses.

This brief includes four key findings with recommendations, informed by interview data, to assist the NDIA and the Australian Government to ensure NDIS participants understand decisions, how these are made in relation to their supports, and how to access review and appeal processes where desired.

### Key findings

#### 1. 'Reasonable and necessary' is a sound principle, but its application is poorly explained and understood

In general, stakeholders agree that 'reasonable and necessary' is an appropriate principle, though it is challenging to apply in practice and there is poor communication of decisions by the NDIA. The impact of the perceived hidden nature of decision-making is twofold: producing a negative impact on public trust and confidence about decisions and the transparency of decision-making processes; and hindering NDIS participants to exercise their rights to review and appeal processes.

##### Policy guidance:

- Reasons for both original decisions and for any internal review decisions should be **communicated effectively and appropriately** to NDIS participants, their legal and advocacy representatives
- Reasons provided by the NDIA should **clearly explain the evidence the decision is based upon** and not just the technical legal grounds
- Ideally, the decision-making process, from planning to review and appeal, should be **redesigned to meet the objectives of being individualised and collaborative**

#### 2. NDIA learning process through feedback mechanisms is unclear

There is significant uncertainty about how internal review and external appeal outcomes inform improved decision-making practices. A lack of transparency about review outcomes, especially appeals settled prior to AAT hearing, contributes to a perception that the NDIA is not instituting a learning and change process.

**Policy guidance:**

- As per commendations made by the Tune Review and the Australian National Audit Office, it should be made public how data from settlement outcomes and early resolution outcomes is reported and used by the NDIA to improve the consistency of intentional decision-making
- **Creating a public registrar of NDIA settlement outcomes** (de-identified summaries) will support transparency and accountability of decision-making

**3. Lack of clear processes and information can hinder rights to review and appeal**

NDIA processes assume individual capability to navigate decisions, reviews, and appeals. Stakeholders interviewed reported that poor information and communication and lack of clear processes could deter NDIS participants from enacting their rights to reviews and appeals. There was a view that people with cognitive or psychological disabilities and people from CALD backgrounds could experience greater barriers to accessing the review and appeal process. Advocacy support was perceived as essential for fair processes and outcomes but chronically underfunded and therefore not readily available. NDIS participants needed to be more clearly informed about their right to appeal and to how to action that right.

**Policy guidance:**

- Accessible information requires that **all communication is meaningful to the person and should be tailored to their preferred mode and style of communication**
- Internal decision-making processes should be clear to NDIS participants and the public, including the right to request reviews and appeals
- **Provide greater funding for supported advocacy and legal representation to assist NDIS participants enact their rights to reviews and appeals**

**4. External appeal processes and behaviour can be adversarial**

Stakeholders interviewed reported that model litigant obligations were not always demonstrated by the NDIA or their legal representatives. The general perception is that current processes are confrontational, adversarial and overly legal, and not appropriate for engaging people with disability and vulnerable population groups.

**Policy guidance:**

- The NDIA and its lawyers must **uphold their obligations under the Commonwealth Model Litigant Policy** and develop specific guidelines to exact a standard of fair dealing to be expected from government litigants
- **Lawyers used by the NDIA need to be trained to engage appropriately with people with disability** and adhere to accessibility considerations
- In the face of adversarial processes, **funded advocacy and legal representation is critical to appropriately advise and support NDIS participants**



## Response to Proposed Alternative Dispute Resolution Mechanism

The NDIS Minister Bill Shorten has recently announced a proposed alternative dispute resolution mechanism to be designed and implemented by a panel chaired by Graeme Innes AM. This proposed process will deal with the current large backlog of AAT appeals cases and will supplement the current internal and AAT review process. Our research suggests that design principles for this process should include co-design with participants; a collaborative non adversarial process which engages participants directly in the resolution process; adequate advocacy and legal support for participants; direct involvement by NDIA decision-makers; facilitation of the gathering of all evidence necessary to make the best decision; transparency about how and why decisions are made; timely decision-making; and decisions consistent with the legislative framework for reasonable and necessary support.

## Methods

Interviews were conducted with 31 NDIS stakeholders from across government statutory, professional bodies, legal organisations, and advocacy agencies. Interview questions asked about: original intentions of the NDIS and subsequent changes since implementation in relation to funded supports; reasoning and justifications behind decisions about funded supports; challenges associated with decision-making; and current scheme performance and improvements to ensure fair process and fair outcomes for NDIS participants.

Stakeholder	Interviews (n=31)
Beurocracy	8
Professional	8
Legal	7
Advocacy	8

## Acknowledgements

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## ANNEXURE B

<https://www.dropbox.com/s/xn1k2dwt791cdzq/Adjudicating%20Rights%20NDIS%20Decision-Making%20Workshop%20Summary%2030Nov22.pdf?dl=0>



### Background

Since 2013, the NDIS has recognised people with disability as rights holders. However, the NDIS presents a social equity dilemma, seeking to balance fair and equitable administration with efficiency and economic viability. The Australian Research Council (ARC) Discovery Project, *Adjudicating Rights for a Sustainable NDIS*, seeks to appraise the decision-making frameworks for reasonable and necessary funded supports. The intention is to examine the value priorities and areas of contestation in decisions and appeals related to funded supports; and to critically assess the notion of 'rights holders' and who the NDIS might be failing. Ideally, the initial decision pertaining to reasonable and necessary funded supports should be the right one. Inevitably and importantly, however, reviews and appeals of decisions are a crucial avenue for NDIS participants to ensure just and fair entitlements.

To foster critical dialogue with key stakeholders, the research team convened a day-long workshop in Brisbane with invited speakers and panel discussions (details below). This was an opportunity to explore and discuss the current state of decision-making in review and appeal processes for NDIS reasonable and necessary funded supports; and key policy priorities and reform opportunities to ensure review and appeal decisions are administratively just, rights-based and deliver justice in both outcome and process. The research team also circulated a [policy options document](#) based on four key findings from interview data.



### Major developments in NDIS policy (September 2021–October 2022)

As backdrop to the workshop and ongoing work of the research project, developments in the past year are shown in table 1, in particular the NDIS Review (commenced Oct 2022) and the Independent Expert Review program to address the backlog of NDIS appeals at the Administrative Appeals Tribunal (AAT) (commenced Oct 2022).

Date	Major development
Sep 2021	<ul style="list-style-type: none"> <li>NDIA Co-Design Workshops</li> <li>Independent Advisory Council (IAC) to the NDIS Annual Report</li> </ul>
Oct 2021	<ul style="list-style-type: none"> <li>Joint Standing Committee (JSC) report on inquiry into independent assessments</li> <li>DSS Response to NDIS JSC Workforce Interim Report</li> </ul>
Nov 2021	<ul style="list-style-type: none"> <li>JSC report on Inquiry into NDIS Quality &amp; Safeguards Commission</li> <li>New JSC Inquiry into Scheme Implementation &amp; Forecasting</li> </ul>
Dec 2021	<ul style="list-style-type: none"> <li>New Australian Disability Strategy (2021–2031) released</li> <li>NDIS Ordinary Life Consultation Report</li> <li>NDS State of Disability Sector Report</li> </ul>
Jan 2022	<ul style="list-style-type: none"> <li>Taylor Fry Review of NDIA Scheme Cost Forecasting</li> <li>Leah Van Poppel appointed Principal Member for NDIA IAC</li> </ul>
Feb 2022	<ul style="list-style-type: none"> <li>JSC report on Inquiry into NDIS Workforce</li> </ul>
Mar 2022	<ul style="list-style-type: none"> <li>JSC reports on Inquiries into Scheme Implementation &amp; General Issues</li> </ul>
May 2022	<ul style="list-style-type: none"> <li>Labor Win Federal Election &amp; Bill Shorten becomes NDIS Minister</li> <li>IAC Children, Young People and Families Reference &amp; Home and Living &amp; Equity and Inclusion Groups Meet</li> </ul>
Jun 2022	<ul style="list-style-type: none"> <li>NDIS Pricing Report</li> <li>AAT Review Preliminary Report Tabled</li> </ul>
Jul 2022	<ul style="list-style-type: none"> <li>Resignation of NDIA CEO Martin Hoffman</li> <li>NDIS Amendment Bill comes into effect</li> <li>Acting NDIS CEO Lisa Studdert appointed</li> </ul>
Aug 2022	<ul style="list-style-type: none"> <li>NDIS Jobs and Skills Forum</li> <li>National Disability Summit</li> <li>Libby Coker elected new Chair of JSC and Hollie Hughes appointed JSC Deputy Chair</li> </ul>
Sep 2022	<ul style="list-style-type: none"> <li>New JSC Inquiry into Capability and Culture of the NDIA</li> <li>Announcement of new NDIS alternative dispute resolution mechanism</li> </ul>
Oct 2022	<ul style="list-style-type: none"> <li>NDIS Review announced</li> <li>Independent Expert Review program pilot commenced</li> </ul>

Table 1: Major NDIS developments (September 2021 – October 2022)



The interface between legal processes and people who are vulnerable - this often happens through a formal letter full of legal terminology and it sets the scene for the rest of the interaction ...What is the solution? Can the nature of legal interactions be changed?





## Key messages from the workshops

### Current state of NDIS decision-making at review and appeal

- A significant increase in the proportion of decisions at internal review confirming the original decision as opposed to varying or setting aside decisions. Speculation that this is partly due to administrative pressure from the legislated reduction in timeframe for internal review decisions (90 days to 60 days).
- In 97% of AAT appeals to date, resolution was reached prior to a hearing. Those decisions reached by agreement (approximately 61%) are unpublished, raising concerns about the transparency and accountability of the system. This also leaves gaps in understanding about legal representation of NDIS participants and the NDIA; contentions and negotiation occurring in relation to section 34 criteria; and evidence sought.
- 33% of closed AAT appeal cases to date have been withdrawn by the applicant or dismissed by the AAT, however the reasons why are unknown. The receipt of highly formal letters from lawyers representing the NDIA could be perceived as intimidating for NDIS participants and impact reasons for withdrawal. The legal formality of proceedings could also have greater impact on people who are neurodiverse or have intellectual disability, First Nations people, and CALD populations.
- There appears to be little discernment or strategy involved in which cases the NDIA decides to pursue through the AAT, including whether there are particular principles or section 34 criteria being tested.
- A concerning aspect is the use by the NDIA of 'social facts' in arguing for denying or removing support, such as expectations about parental or partner's roles in care.
- Reviews and appeals have become more of a battleground rather than a collaborative discussion of what people's needs are.
- Is the AAT the most appropriate jurisdiction and the right fit to review NDIS cases? There was general agreement that this is a critical question for further debate and discussion. There were comments that processes in the AAT may be unsuited to the NDIS because they are not trauma and human rights informed; and there is a need to review other systems that are designed to meet the needs of a specific situation, e.g. Queensland's Domestic and Family Violence Specialist Court, and the Murri Court.



People with disability who have intersectional backgrounds, such as from culturally and linguistically diverse backgrounds, often struggle in appeal and review processes to be heard in the same way.



#### **Reforming review and appeal decision-making processes for justice and rights**

- Priority consideration should be given to the impact on the people that go through the review and appeal process. Must ensure processes are not doing more harm.
- As decisions in relation to NDIS funded supports are fundamentally based on what evidence is before the decision-maker, the importance of the quality of the evidence provided is fundamental. A suggestion to improve the quality of evidence, including medico-legal reports required for AAT appeals, is to ensure those preparing the reports, for example General Practitioners (GPs) and Allied Health Professionals (AHPs), understand the information the NDIS require to assess against section 34. This could include training and/or templates to better guide report writing.
- At the same time as quality evidence, the assessment of the evidence against section 34 requires highly skilled decision-makers, especially in complex situations and complex support needs, who are able to engage directly with NDIS participants and their families. There was strong support for involvement of disability advocates at planning and plan reviews, especially to advise and assist on obtaining the required evidence.
- There was robust discussion about the role of legally and non-legally trained disability advocates at various stages within the processes of plan review, internal review of reviewable decision, and external AAT appeal. Consensus that advocacy is an underfunded yet crucial area of justice and support for NDIS participants.
- Agreement that NDIS participants need availability of funded legal representation at the AAT as currently there is a significant power and expertise imbalance between the applicant and NDIA.
- The NDIA's argument against an appealed support should remain consistent at the AAT and not shift to 'test' other arguments, which can enhance uncertainty and prolong the burden on the NDIS participant to source additional evidence.
- Important to have published information on decision-making of AAT cases that are settled prior to hearing. Considerations include how to maintain confidentiality; the sorts of cases to publish to give people a better idea; the criteria to guide publications about decisions; and who would produce that documentation.
- Technology, including automated decision-making and the use of Typical Support Packages (TSP), shapes decision-makers and underpins internal decision-making, however, this is not transparent. There was concern expressed regarding how TSPs fit into the NDIS legislation and whether automated decisions are appealable. The role of automated decision-making and law need to be aligned. Reform of current automated decision-making could include software created to put ethics at the forefront.



Article 19 of the CRPD enshrined the right of a person with disability to have preference over how they choose to live and that preference should be listened to...the policy issues and the attitudes within the Agency need to actively recognise the human rights basis of the NDIS because it's all there in Section 3 and Section 4 of the Act...and this would assist in a lot of better decision making to reduce appeals.





### Action items

Based on workshop presentations and discussions, the following are 'action items' to help ensure justice and rights are reinserted within review and appeal processes. However, framing change must be the consideration of the psychological and physical impacts that systems can have on people with disability and their families to ensure that further harm is not caused; and, designing change must be done in consultation with people with disability, their families, and disability advocacy organisations.

#### Transparency

- Data needs to be captured and made public about the reasons why 33% of closed AAT appeals that were 'resolved before hearing' were withdrawn either by the NDIS participant or dismissed by the AAT.
- Summary information of the approximately 61% of closed AAT appeals that were resolved by agreement prior to a hearing should be published.
- NDIA must release data that underpins the use of Typical Support Packages and any other algorithms that guide key decision-making of funded supports.

#### Advocacy

- Funded legal representation for all NDIS participants who appeal a NDIS decision at the AAT. This could include legally trained advocates, legal aid lawyers and community legal centres. Within the current AAT appeal processes, this is critical to ensure NDIS participants and their families receive appropriate legal expertise and regain some power within the current imbalance against NDIA legal representation ("equality of arms"). This would not negate the inclusion of non-legally trained disability advocates.
- A comprehensive flexible funding model for disability advocacy must be developed. Funding for NDIS advocacy, legal and non-legally trained, must be increased to support NDIS participants to understand and participate in the NDIS decision-making processes, including at planning, plan review, internal review of a reviewable decision, and external appeal. Importantly, including access to disability advocates during the planning stages would help to ensure the quality of primary decision-making, and therefore reduce the need for both internal and external review. NDIS participants and their families must have access to advocacy immediately rather than join lengthy waitlists.

#### Communication at appeal

- NDIA lawyers, whether internal or from an external law firm, should complete disability training. This will assist with disability, trauma, and rights-informed approaches to engaging respectfully with people with disability and their families.
- Whilst it is acknowledged that lawyers can perceive they write in a neutral legal tone, there should be awareness that those receiving the letters may perceive them as confusing and complicated, even threatening and intimidating. Care should be taken to ensure methods of communication are accessible and understandable to the recipient. This is also where the role of advocacy, especially legally trained



advocates, play a vital role in bridging gaps in understanding of legal process, terminology, and conventions.

### Workshop details

The aims of this workshop were to:

1. Exchange critical perspectives and knowledge on known tensions in NDIS review and AAT appeal processes and decisions pertaining to reasonable and necessary funded supports, including where and how procedural fairness working and failing.
2. Contribute to NDIS reforms by identifying policy priorities that will improve procedural fairness, administrative justice and rights entitlements in review and appeal decision-making on reasonable and necessary supports.

46 people participated in the workshop, with approximately half attending in-person at The Ship Inn, South Bank, Brisbane and half participating online through MS Teams. Attendees included people with disability, disability advocates, lawyers, public policy and legal academics and government agency representatives.

### Sessions and speakers

Session	Speakers
Human Rights and the NDIS	Dr Ben Gauntlett (Australian Human Rights Commission)
Current state of NDIS decision-making at review and appeal	Andrea de Smidt (Queensland Advocacy for Inclusion, QAI) Dr Gary Allen (Enabled.vip; Griffith University; & NDIS participant) A/Prof Kylie Burns (Griffith University)
Reforming review and appeal decision-making processes for justice and rights	Belinda Kochanowska (Speaking Up For You, SUFY) Terri Thompson (NDIS participant) Dr Darren O'Donovan (La Trobe University) Prof Paul Henman (University of Queensland)

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More information about the project can be found [here](#).

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