

A photograph of a person in a wheelchair on a sandy beach. The person is wearing a white shirt and dark pants. The wheelchair has large, treaded tires. The background shows the ocean and a bright sky. The text is overlaid on the left side of the image.

Helping people with disability respond to NDIS funding decisions

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Acknowledgement of Country

I begin today by acknowledging the Traditional Custodians of the land on which I come to you from today and pay my respects to their Elders past and present. I acknowledge the stories, traditions and living cultures of Aboriginal and Torres Strait Islander peoples on this land and commit to building a brighter future together.



NDIS Appeals – help required!

- Demand for help to access NDIS funded supports far outweighs capacity of LAQ and advocacy organisations funded to assist.
- The NDIS has created a new client group – with a legally enforceable right to supports – and they need your help.
- The NDIA is always represented by a lawyer (who is either employed by the NDIA, the Australian Government Solicitors or an external law firm)
- **Polls – have you been asked to help?**
- Significant majority of people have meritorious cases. See QAI's [recent analysis](#) of NDIS Appeals for more detail.



Overview – learning objectives

By the end of this session, you'll know:

1. The relevant legislation and case law
2. How to navigate the AAT NDIS appeals process to achieve the earliest possible resolution
3. How to access QAI's resources to help you fill evidentiary gaps in your client's case
4. Where to refer a client who needs more help than you're able to provide

The Law – NDIS Act

- The NDIS and the Agency (NDIA) responsible for administering the Scheme are established under the *National Disability Insurance Scheme Act 2013* (NDIS Act)
- The NDIS Act sets out the criteria for:
 - Access to the Scheme, and
 - Once a person has access, the supports that will be funded

ACCESS => PLANNING MEETING => NDIS PLAN => PLAN PERIOD => REVIEW



The Law – NDIS Act

- Reviewable decisions (listed in s99 of the NDIS Act)
- Two key hurdles have review rights associated with them:
 1. **Becoming a participant** – a decision that a person does not meet the access criteria is reviewable (“**access decision**”)
 2. **Securing funding supports** – a decision to include some, but not other, funded supports in a person’s NDIS plan (“**supports decision**”)

The Law – NDIS Rules

- Rules established under the Act, including:
 - [National Disability Insurance Scheme \(Becoming a Participant\) Rules 2016](#) (rules for people applying)
 - [National Disability Insurance Scheme \(Supports for Participants\) Rules 2013](#) (rules about what the NDIA will fund)
- Others dealing with specific aspects/supports, e.g.
 - [NDIS \(Specialist Disability Accommodation\) Rules 2020](#)
 - [NDIS \(Nominees\) Rules 2013](#)
- [NDIS Operational Guidelines](#) – not as important as the law! Policy is to be followed but only if not inconsistent with the law. Some aspects of the guidelines are inconsistent with the law (e.g. transport funding caps, but costs of supports must be funded in full: *McGarrigle v National Disability Insurance Agency* [2017] FCA 3086).

The Law – the cases

- Federal Court decisions:
 - [QDKH v NDIA \[2021\] FCAFC 189 – 29 October 2021](#)
 - [Mulligan v National Disability Insurance Agency \[2015\] FCA 544 – 3 June 2015](#)
 - [McGarrigle v NDIA \[2017\] FCA 308 – 28 March 2017](#) (and [NDIA v McGarrigle \[2017\] FCAFC 132 – 21 August 2017](#))
 - [National Disability Insurance Agency v Davis \[2022\] FCA 1002 – 29 August 2022](#)
 - [National Disability Insurance Agency v Foster \[2023\] FCAFC 11 \(17 February 2023\)](#)
- Approximately 350 reported AAT decisions – access, supports, jurisdiction, other

AAT – jurisdiction and powers

- A person aggrieved by a decision has 28 days from receipt of the internal review decision to appeal to the AAT (s29(2) AAT Act):
 - TIP:** get history (dates and events) to confirm the AAT will have jurisdiction to review the decision
- S 43(1) of the AAT Act empowers the Tribunal to exercise all the powers and discretions conferred upon the original decision maker: [*Negi and National Disability Insurance Agency* \[2022\] AATA 1453 \(2 June 2022\)](#).
- In supports cases, it is open to an applicant to request additional supports not considered by the original decision-maker or on internal review: [*QDKH v National Disability Insurance Agency* \[2021\] FCAFC 189 – 29 October 2021](#)

AAT – object and guidelines

- Both parties must use their best endeavors to assist the Tribunal to meet its objective of providing a mechanism of review that:
 - Is accessible,
 - Is fair, just economical, informal and quick, and
 - Is proportionate to the importance and complexity of the matter,
 - Promotes public trust and confidence in the decision making of the Tribunal.
- Appendix B of the [Legal Services Directions 2017](#) – sets out the Commonwealth’s obligation to act as a model litigant.

AAT – object and guidelines

Most relevant Practice Guidelines are:

1. [General Practice Guideline](#) - includes obligations on parties to work to achieve Tribunal objectives.
2. [Review of National Disability Insurance Scheme Decisions Practice Direction](#) - now quite outdated and under review
3. [Persons Giving Expert and Opinion Evidence](#) – Must give this to all experts (e.g. allied health professionals, GPs etc) who will prepare a report for the Tribunal.

TIP: If you think the NDIA are not acting in accordance with their obligation to assist the Tribunal, not complying with the general practice guideline, or model litigant rules, raise your concerns with the NDIA and Tribunal, identifying non-compliance.

Tips and tricks – evidence gathering

- Decisions made by the NDIA to refuse a person access to the NDIS or refuse funding for certain supports are based on available evidence.
- Significant part of an advocate/lawyer's job is to help person with disability identify evidentiary gaps and fill them.
- Evidence needs to address criteria and relevant rules:
 - **Access criteria** (ss21-25 NDIS Act, Becoming a Participant Rules 2016)
 - **Supports criteria** (s34 NDIS Act, Supports for Participants Rules 2013)

Filling the gaps in evidence in supports cases

- Evidence must show how the support meets the s34 criteria. That it is:
 - **Goal oriented** – the support must assist the person to pursue their goals
 - **Facilitates participation** – the support must assist the person to undertake activities which facilitate their social and/or economic participation
 - **Value for money** – the costs of the support must be reasonable, relative to the benefits achieved and the cost of alternative supports;
 - **Effective and beneficial** – the support must be likely to be effective and beneficial;
 - **Beyond what is reasonable for informal supports** – the support must not be something that could be expected to be provided by family and/or friends;
 - **Responsibility of the NDIS** – support must be most appropriately funded by the NDIS.
- Evidence must show the support meets the general criteria in the [Rules](#). That it:
 - Is safe,
 - Is related to the participant's disability,
 - Does not duplicate other supports, and
 - Does not relate to day-to-day living costs.

Filling the gaps in evidence in supports cases

Difficulties usually arise in evidencing a support is:

1. Value for money, see e.g. [PPFQ and NDIA \[2019\] AATA 1092](#)

➔ Usually requires report by qualified expert regarding cost:benefit analysis and comparisons with alternative supports.

2. Effective and beneficial

➔ Usually requires professional reports about the effectiveness of the requested support, and professional reports and statements by participants and/or their carers about the benefits experienced by, and/or expected for, the participant.

3. Beyond what is reasonable to expect of family/friends, see e.g. [JQJT and NDIA \[2016\] AATA 478](#)

➔ Usually requires a detailed carer's statement about disability-related needs, risks to person and carer/s of no paid support etc.

Filling the gaps in evidence in supports cases

Difficulties usually arise in evidencing a support is:

4. The responsibility of the NDIS see e.g. [Young and NDIA \[2014\] AATA 401](#) and [Burchell and NDIA \[2019\] AATA 1256](#)

➡ Usually requires information about alternative sources of support through other services/systems (e.g. health).

5. Related to a person's disability see e.g. [Milburn and NDIA \[2018\] AATA 4928 \(20 December 2018\)](#) and [McKenzie and NDIA \[2019\] AATA 3275 \(5 September 2019\)](#)

➡ Usually requires professional reports about the person's disability and how the support is required as a result of impairments associated with the disability

Filling evidentiary gaps with an independent medical assessment

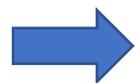
- Can be helpful in both access and supports decisions cases
- The Tribunal cannot compel a person to undergo an independent medical examination but may stay proceedings until the required assessment is done.
 - See [LPSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs \[2021\] FCA 1563 \(15 December 2021\)](#) and [Andrews and NDIA \[2022\] AATA 1532 \(9 June 2022\)](#)
- Each request for an IME should be considered in light of the evidence you already have and the difficulty in obtaining evidence (particularly access).
- Consider whether you have any conditions for a consent to an IME. Does the proposed expert have qualifications relevant to the question being asked? (Check background Google/[AHPRA](#).) Do you have questions you would like covered by the IME?

AAT – Process

- Matters last between 6 to 18 months.
- The process usually involves a series of case conferences where issues are narrowed to a point where:
 - an agreement by consent is reached between the parties,
 - a conciliation is held to try and resolve any final issues, or
 - a hearing is conducted by the Tribunal.
- **Most matters are resolved by consent**
Of the 5,679 AAT cases closed since the commencement of the Scheme only 145 went to a final hearing (31 December 2021 NDIS Quarterly Report)
- Case details (NDIA representative, dates of ADR processes, hearings and material filed) can be found at: <https://www.aat.gov.au/ecase-search>
Note: matters subject to confidentiality orders, including those involving children, aren't searchable.

AAT first steps – be proactive!

- **Lodgement** – notify the Tribunal of any urgency associated with a person's application (e.g. risks) so their application can be triaged with priority
- **Before the first case conference** – the time to the first case conference is now a number of months, not weeks. Use this time to:
 - Analyse all available evidence and identify any gaps;
 - Communicate with the NDIA and Tribunal to clarify issues in dispute (narrow issues in access cases and clarify supports in supports cases), evidence relied upon and proposed additional evidence;
 - Send additional documents (missing from T-docs or acquired since)



This approach should inform a better prepared statement of issues by the NDIA and set the case on the right track from the outset

AAT – Case Conference

- Conference is usually held by phone, runs for about an hour and is facilitated by a Registrar. The NDIA is always represented by a lawyer and their instructor from the NDIA should also be present.
- **Before:** Have the T Documents and the Statement of Issues ready before the case conference.
- **During:** Discuss sufficiency of evidence and propose ways in which gaps may be addressed (via further assessment, reports etc). Agree on a time-table (directions preferably) for next steps.
- **After:** We generally wait until the first case conference before gathering any further evidence. This is because the Statement of Issues will be more specific about the questions that need to be addressed. Multiple reports (which can be costly) may otherwise be required. Appointments with specialists can be lined up in anticipation of further assessments and reports being requested.

AAT directions hearings and agreements

- When next steps for progress of case need to be revised propose directions by consent with NDIA representative. Don't let a matter languish!
- Changing a plan, renewing a plan or adding a support to a plan (supports are generally approved in sequence and not concurrently) while a participant is at the Tribunal:
 - ⇒ Check whether a variation may be done by the NDIA under s47A of the NDIS Act (jurisdictional issues may arise for applications lodged pre 1 July 2022).
 - ⇒ If not, changes to the plan must be done via a remittal to the CEO of the NDIA under **section 42D** of the AAT Act.
- Once agreement is reached, in either an access or supports decision case, the Tribunal proceeding ends via a 'S42C Agreement' made under **section 42C** of the AAT Act.

AAT – common issues

- 1. Person with disability running out of supports funds** – particularly if funds being used at rate faster than anticipated due to participant accessing support which is not yet approved by NDIA as reasonable and necessary
 - **Request re-issue of plan, emphasising risk to participant and/or their family/friends**
- 2. Person with disability relying on support coordinator for advocacy support at Tribunal appearances** (e.g. case conference)
 - There is a conflict of interest where support coordination or other supports which may financially benefit the support coordinator are in dispute.
 - However, **a support coordinator can represent an applicant so long as they act on a pro bono basis.** See: [QAI fact sheet](#).

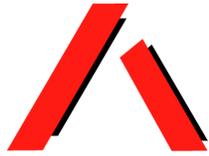
AAT – common issues

- 3. NDIA narrowly construing a person’s disability to limit funded supports to only those supports that relate to a ‘primary’ disability listed in the NDIA’s system**
 - Prepare submissions with reference to [McLaughlin and National Disability Insurance Agency \[2021\] AATA 496 \(12 March 2021\)](#) regarding the preferred interpretation of rule 5.1(b) of the Supports Rules.

- 4. NDIA requesting further evidence and/or the issuing of summonses**
 - It is a decision of the Tribunal whether to issue a summons (see 40A of the AAT Act and part 4 of the [AAT Regulation](#)).
 - Summonses must only be issued for a legitimate forensic purpose.
 - Draft submissions regarding sufficiency of evidence already filed, referring to specific details (page/paragraph number), burden on health system and/or trauma to applicant should more evidence be required.

Helpful resources

- **QAI NDIS fact sheets and tools/templates**
<https://qai.org.au/ndis-appeals-support/> (scroll to bottom of page)
- **Villamanta Disability Rights Legal Service Inc** – Victorian based Community Legal Centre with significant experience in NDIS Appeals:
<https://villamanta.org.au/news/category/legal-assistance/ndis/>
- **Disability Services Consulting** – targeted at services providers but regularly publishes interesting articles and updates to which you can subscribe:
<https://teamdsc.com.au/resources>



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