



Data Update

NDIA Decision-Making Timeframes on
Specialist Disability Accommodation Funding
September 2023



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Data Update

NDIA Decision-Making Timeframes on Specialist Disability Accommodation Funding

Housing Hub

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Acronyms

AAT	Administrative Appeals Tribunal
IER	Independent Expert Review program
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
PIAC	Public Interest Advocacy Centre
PSG	Participant Service Guarantee
RAC	Residential Aged Care
SDA	Specialist Disability Accommodation
TMS	Tenancy Matching Service

Executive summary

Suitable housing is essential for stability, dignity and quality of life; but many people with disability have specific housing needs that cannot be met by the general housing market. Recognising this, the National Disability Insurance Scheme (**NDIS, the Scheme**) provides funding for Specialist Disability Accommodation (**SDA**), which is housing specifically-designed to maximise independence or improve delivery of regular supports for people who need it.

SDA funding is vital to ensuring that NDIS participants with an extreme functional impairment or very high support needs have affordable and accessible housing, which in turn allows them to achieve their goals for social and economic participation and independence. SDA housing enables people with disability to transition away from living environments including group homes, hospital, Residential Aged Care (**RAC**) and living with ageing parents, to more appropriate models of housing.

Since 2021, the Public Interest Advocacy Centre (**PIAC**) and the Housing Hub have worked in partnership to provide people with advice and assistance throughout the SDA funding process, including legal support for appeals to the Administrative Appeals Tribunal (**AAT**).

In mid-2022, we released our *Housing Delayed and Denied* report setting out data on outcomes and timeframes for participants requesting SDA funding with the help of the Housing Hub's Tenancy Matching Service (**TMS**), and described the systemic issues people faced when applying for funding or appealing a funding decision.¹ The report revealed serious concerns with the National Disability Insurance Agency's (**NDIA, the Agency**) approach to SDA decision-making. In particular:

- the data showed participants faced extensive wait times for NDIA initial funding decisions, internal reviews, and at the AAT; and
- case studies and participant experiences showed the NDIA's approach to decision-making had contributed to these delays and led to unfair and inappropriate SDA decisions.

More than a year on, this report updates the findings from *Housing Delayed and Denied* by analysing and comparing new data and assessing the NDIA's responses to these systemic problems.

The NDIA's most recent Quarterly Report shows 94% of Home and Living applications for which data was available were finalised within 90 days.² In the same quarter in 2022, only 68% of such applications were finalised within 90 days.³

However, our report shows many participants continue to experience frustrating and damaging delays; and these are often compounded by persisting poor planning and decision-making processes within the NDIA. This report compares TMS data collected between June 2017 to February 2022 (2017-22) with data collected between March 2022 and February 2023 (2022-23).

Analysis of TMS data reveals:

- **Initial funding decision** – In 2022-23, **26%** of participants received the SDA funding they had requested, compared with **22%** from 2017-22. There was also a significant drop in the proportion of people receiving initial funding decisions that did not align with their request,

¹ Skipsey, M., Winkler, D., Cohen, M., Mulherin, P., Rathbone, A., & Efstathiou, M. (2022). *Housing delayed and denied: NDIA decision-making on Specialist Disability Accommodation*. Public Interest Advocacy Centre and Housing Hub. <<https://apo.org.au/node/317588>> ('Skipsey et al. (2022), *Housing Delayed and Denied*').

² National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2022-23* (Report, 31 March 2023) 66.

The Quarterly Report notes timeframes for 25% of all resolved applications could not be captured; these were said to predominantly relate to cases where applicants cancelled their request for home and living supports.

³ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2021-22* (Report, 31 March 2022) 64.

from **55%** in 2017-22 down to **26%** in 2022-23. The median wait time for initial funding decisions also dropped, from at least **97** days down to **71**.

- **Internal review** – In 2022-23, **33%** of participants received the SDA funding they had requested after an internal review, compared with **21%** in 2017-22. While **3%** of internal reviews found people ineligible for funding in 2017-22, by 2022-23 **no one** was ineligible for funding. The median wait time for internal review decisions fell significantly, from at least **99** days in 2017-22, down to **55** days by 2022-23.
- **External review** – For participants who received an external review outcome in 2017-22, 92% received the funding they had originally requested from the NDIA, and the median wait time for these decisions was 205 days. Of the 12 participants who had concluded the AAT process and reached an outcome in 2022-23, 11 participants received the SDA funding decision they had initially requested, after months (or years) of delay. This indicates decision-makers at this stage – whether the NDIA's lawyers offering settlements, or the independent Tribunal members – typically found participants' SDA requests were reasonable and supported by evidence.

Recommendations

Recommendation 1

The NDIA urgently overhauls its internal processes and policies to eliminate critical administrative errors and the delivery of incorrect advice to participants. The NDIA should consider conducting a top-down audit of processes, policies, and service delivery by staff at all levels.

Recommendation 2

The NDIA ensures decision-makers review and consider all evidence provided by the applicant, in line with legal principles regarding administrative decisions. This should include preparation of appropriate policies, introducing review and quality-control mechanisms for decision-makers. The NDIA should implement training and accountability processes for decision-makers who fail to meet minimum standards.

Recommendation 3

Ministerial and Agency leaders direct NDIA planners and those on the Home and Living Panel to give greater weight to:

- the importance of maintaining social connection and informal supports;
- the consequences of various SDA models for participant's health, wellbeing, lifetime care costs and social and economic participation, when making decisions about SDA funding for participants; and
- a participant's preferences, as described by the legislation when making decisions about SDA funding for participants.

Recommendation 4

The NDIA revises the SDA Operational Guideline to ensure the policies and guidance for decision-makers it contains are appropriate and comply with the law. This revision should occur in close consultation with participants, representative groups, and disability and legal experts.

Recommendation 5

The planned NDIS Rules implementing the Participant Service Guarantee be prepared and implemented as a matter of priority, and ensure the Guarantee operates effectively to:

- set specific standards for Home and Living Panel/SDA and housing-related support decisions, distinct from other types of plan. These standards should require urgent decisions (e.g. young people at risk of RAC, NDIS participants in hospital or living in precarious housing) to be made within 10 days of a participant's request, and all SDA and support decisions to be made in under 50 days;
- assess the total time taken from the time a request for support was made by a participant, until the time a binding decision on that support was made and communicated to the participant; and provide clear avenues for individual participants to report their experience to the Commonwealth Ombudsman charged with overseeing the implementation of the Guarantee.

Recommendation 6

The NDIA urgently prioritise decisions relating to people seeking SDA who are in hospital awaiting discharge, living in RAC as a younger person, and/or facing homelessness. In these cases participant choice, needs, and the potential for SDA to maximise independence and create a pathway back to community living should be given even greater weight in decision-making.

Recommendation 7

The NDIA adopts systems to provide full and detailed reasons for all funding and internal review decisions as required by law. The reasons provided should allow a participant to properly assess whether the information they provided to the NDIA has been considered, and make an informed decision about whether to seek review.

Recommendation 8

The NDIA publishes information regarding AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates, and should take into account the information published in the Australian Human Rights Commissioner's Conciliation Register.

Recommendation 9

The NDIA continues to implement reforms to policies governing lawyers acting for the Agency in AAT matters, such that:

- all external lawyers receive training regarding disability rights and awareness;
- settlement offers are made as early as possible;
- additional reports and evidence are only requested where they are clearly necessary and will not cause undue delay or stress to the applicant; and
- compliance with model litigant obligations is proactively monitored by the Agency.

Recommendation 10

The NDIA develop policies for case managers to include a standard amount of funding for assistive technology with any AAT settlement offers that involve funding for SDA.

1. Introduction

Access to suitable housing is crucial to a person's overall quality of life, but many people with disability have housing needs that cannot be met by the general housing market. SDA is housing specifically designed to meet the needs of people who have an extreme functional impairment and/or very high support needs resulting from their disability. SDA properties might include wider doorways and corridors, a hoist in the bedroom or bathroom, reinforced walls and windows, or integrated assistive technology.⁴

The NDIS provides funding to participants who need SDA, to live independently in a property that meets their needs and gives them access to the right supports. Funding for SDA is provided through participants' NDIS plans. This gives participants a budgeted sum of money which they can use to choose and pay for an SDA property and any needed support provider(s). The amount of money given to each participant is determined by the Agency, applying the legal framework of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) which sets out who is eligible for SDA funding and how much money they should be given. For participants assessed as eligible to receive SDA funding, the NDIA must determine the building type, design category and location of the SDA that is reasonable and necessary to support the participant.

By 2025, the NDIA estimates that 30,000 participants will have SDA in their plans.⁵ However, as of 31 March 2023 only 22,680 were receiving SDA payments.⁶

The Housing Hub's Tenancy Matching Service (TMS) worked with SDA providers to identify potential tenants for new SDA projects in the pipeline. As part of this work, the TMS supported participants who had applied for these projects through the SDA application process. The TMS has extensive experience with and understanding of the legislated SDA eligibility criteria.⁷ It employed a rigorous process to consider and advise on the likelihood of SDA eligibility for participants, to ensure participants applied for a level of SDA corresponding with their housing and support needs and preferences. Where participants were unlikely to be eligible for SDA funding, the TMS would direct them to other forms of appropriate housing.

In addition to supporting participants with their *initial request* for SDA funding, the TMS supported participants to request an *internal review* of the initial decision in cases where that initial decision did not align with the participants' evidenced need. If the outcome of the internal review still did not fund participants for SDA in accordance with their evidenced need, the TMS offered to assist participants with an *external review* by the AAT.

Since 2021, PIAC and the Housing Hub have worked together to provide advice and assistance to participants seeking SDA funding. In mid-2022, we released *Housing Delayed and Denied*, setting out data on outcomes and timeframes for participants requesting SDA funding from the NDIS.⁸ This report updates the 2022 report with TMS data collected between March 2022 and February 2023, and reviews the progress made by the NDIA in the last 12 months to address identified problems.

⁴ National Disability Insurance Agency, 'SDA Design Standard', *National Disability Insurance Scheme* (Published standards, Edition 1.1, 25 October 2019), <<https://www.ndis.gov.au/media/1868/download?attachment>>.

⁵ Commonwealth (2021). 'Senate Community Affairs Legislation Committee: Answers to Questions on Notice.' Social Services Portfolio, Estimates. Question No: NDIA SQ21-000118.

⁶ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2022-23* (Report, 31 March 2023) 98.

⁷ *National Disability Insurance Scheme Act 2013* (Cth), *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (Cth).

⁸ Skipsey et al. (2022), *Housing Delayed and Denied*.

1.1 Processes for requesting SDA funding

Broadly, a request for SDA funding through the NDIS will involve one or more of:

1. **An initial funding decision:** Participants submit a request to the NDIA for funding for housing or support to be allocated in their NDIS plan and the NDIA makes a decision. The Agency's current Participant Service Guarantee (**PSG, Guarantee**) policy sets a target of 56 days to make an initial funding decision and communicate the outcome to the participant.⁹
2. **An internal review:** If participants believe the NDIA's initial decision is unreasonable, they may request an internal Agency review. The NDIA must reconsider the original funding request, and make a decision to confirm, vary, or set aside and substitute the initial decision. Participants have three months from receiving a decision to request an internal review.¹⁰ The PSG policy sets a target of 60 days for the Agency to conduct the review and communicate the outcome to the participant.
3. **An external review:** If participants believe the decision following the internal review is still inappropriate, they may apply for an external review by the AAT. Participants have 28 days in which to request an external review of the Agency's decision.¹¹

These three stages are depicted in Figure 1, with SDA funding as the example.

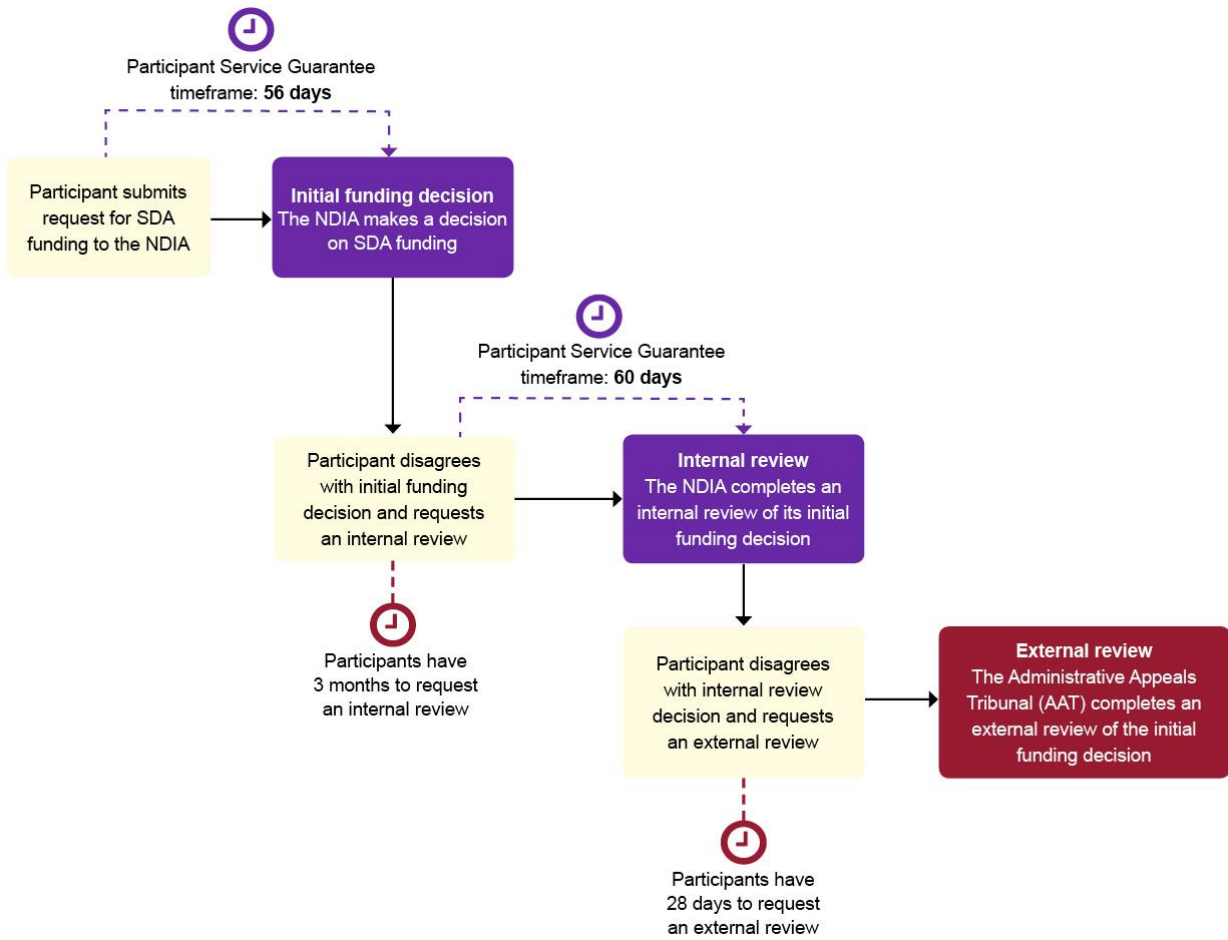
Figure 1 – The SDA funding request, decision, and review process

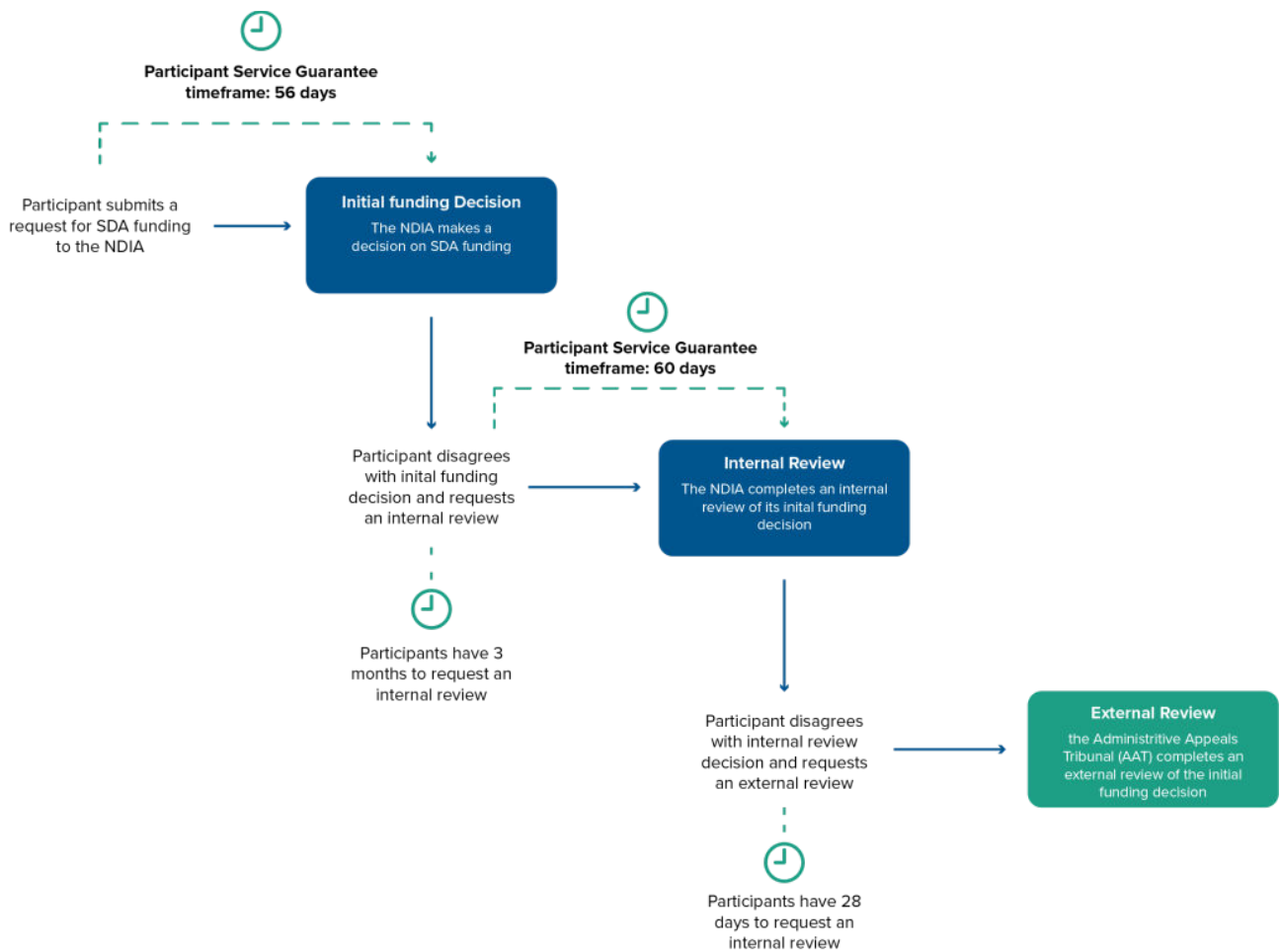
⁹ National Disability Insurance Agency, 'Participant Service Guarantee', *National Disability Insurance Scheme*, (Web Page, 23 May 2023), <<https://www.ndis.gov.au/about-us/policies/service-charter/participant-service-guarantee>>.

This 56 day figure reflects a total PSG period of 21 days for the NDIA to decide whether to undertake a plan review requested by a participant; 28 days to conduct that review; and 7 days to provide the participant with a copy of the plan approved as a result.

¹⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 100(2).

¹¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 29(2).





2. Comparing decision timeframes

Since mid-2017, the Housing Hub’s TMS has supported over 950 NDIS participants to explore their housing options, including by supporting participants to request funding to live in SDA. The TMS supported participants at all stages of the SDA funding process.

The TMS primarily worked with tenants with high support needs and/or specific requirements for housing. This meant clients assisted by the TMS to request SDA funding were:

- more likely to require SDA where they could live alone in an apartment, and have good reasons why they could not accept shared SDA in another building type; and
- more likely to require more expensive SDA features and design categories;

than a typical SDA applicant. Each of these factors could increase the cost of the SDA capital supports a person needed, which may have contributed to many TMS clients having to pursue internal and external review processes before receiving appropriate SDA funding.

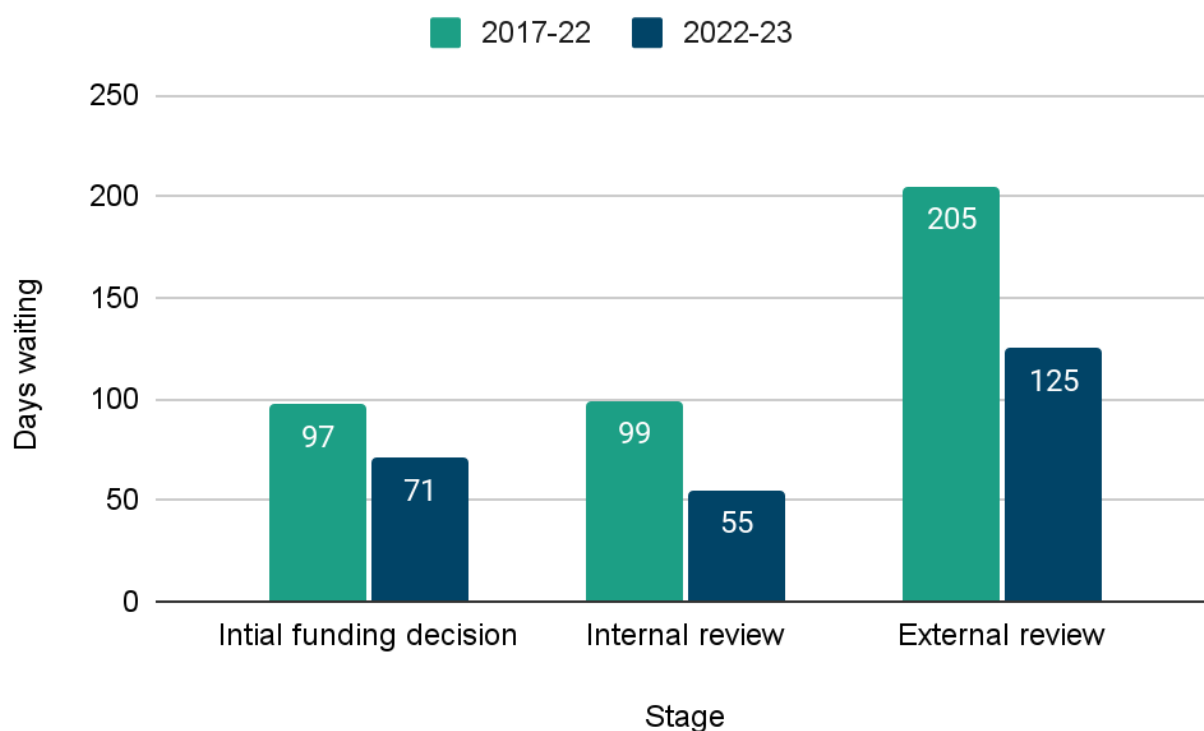
This report presents data on participants supported by the TMS across the initial funding request, internal review, and external review stages between March 2022 and February 2023, comparing it with data presented in the previous report (collected between June 2017 and February 2022) (see Table 1).

Table 1 – Number of participants for each stage of the SDA funding request pathway

Stage	<i>n</i>	
	Jun 2017 – Feb 2022	Mar 2022 – Feb 2023
Initial funding decision	172	35
Internal review	92	48
External review	48	31

As shown in Table 2 in Appendix A, the entire process from submitting an initial SDA request to receiving the level of funding requested can take many months. At February 2023, a person requesting both an internal and external review of an initial funding decision could expect the entire process to take more than 250 days based on median wait times at each stage.

Figure 1 – Median wait times for SDA funding request stages



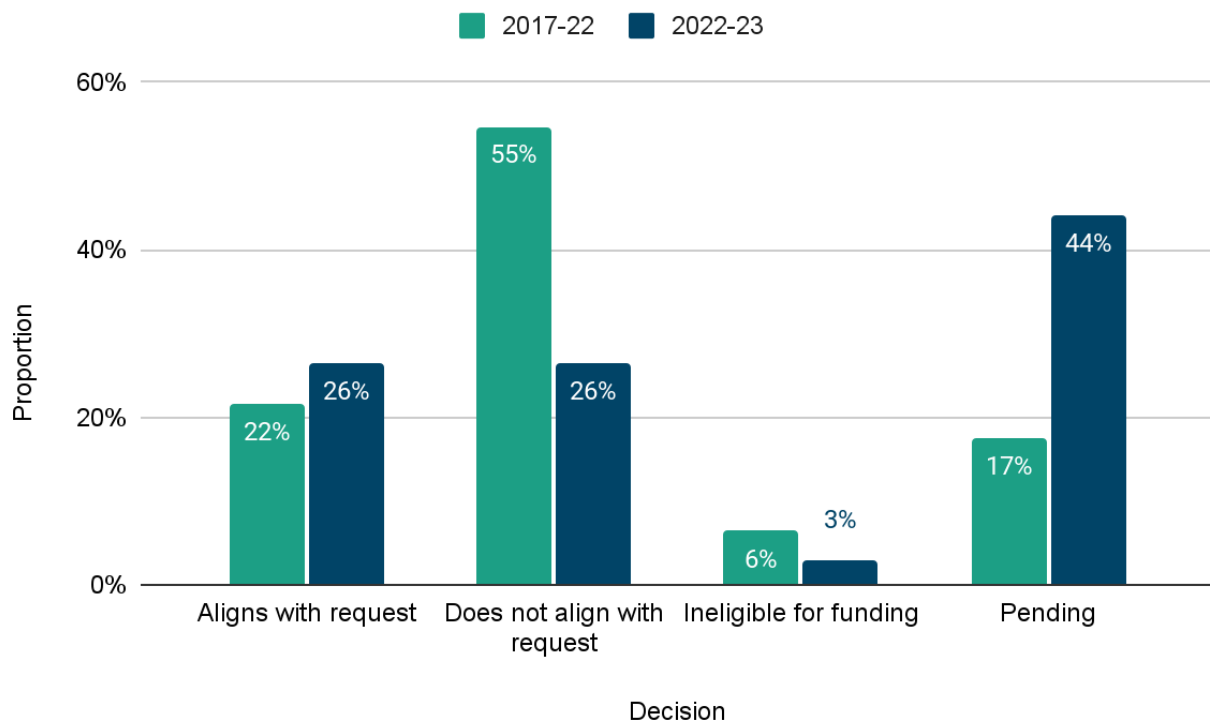
2.1 Initial funding decision

The TMS tracked participants’ initial requests for SDA funding and categorises outcomes and decisions by the NDIA according to the following criteria:

- **Aligns with participant’s requested SDA:** the Agency decided to fund the participant for the design category, building type and occupancy participant has requested;
- **Does not align with participant’s requested SDA:** the Agency decided not to fund the participant for the design category, building type and occupancy participant has requested;
- **Ineligible for funding:** the Agency decided that the participant is ineligible for any SDA funding;
- **Pending:** the Agency had not yet communicated a decision to the participant.

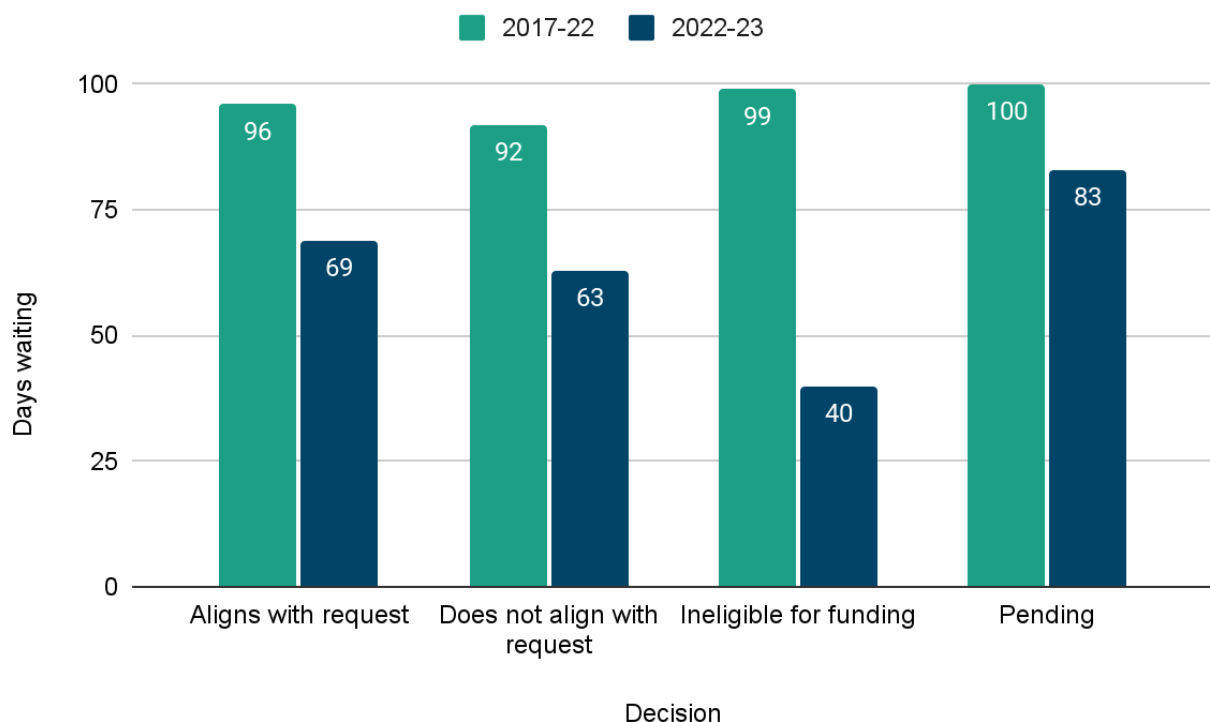
In the 12 months from March 2022 - February 2023, 26% of participants received a decision from the Agency that aligned with their request for SDA funding; a small increase from 22% in the period of mid-2017 to February 2022. For 55% of participants 2017-22 the NDIA made a decision that did not align with the participants’ request and their submitted evidence; however, by 2022-23 this had dropped to 26%. In total, 6% of participants received a decision that they were ineligible for funding between 2017-22, compared with 3% 2022-23. The proportion of participants awaiting a funding decision from the NDIA was higher (44%) between 2017-22 than 2022-23 (17%) (see Figure 2).

Figure 2 – Outcomes for initial funding decisions



For all decision outcomes, the median number of days waiting fell significantly during the 12 months to February 2023. This included decisions aligned with the participant’s requested SDA, with the median wait time falling from 96 days in 2017-22 to 69 days in 2022-23 (see Figure 3). This is still a shortfall in compliance with the PSG target, which commits the NDIA to complete requests for a plan review within 56 days.

Figure 3 – Timeframes for initial funding decisions



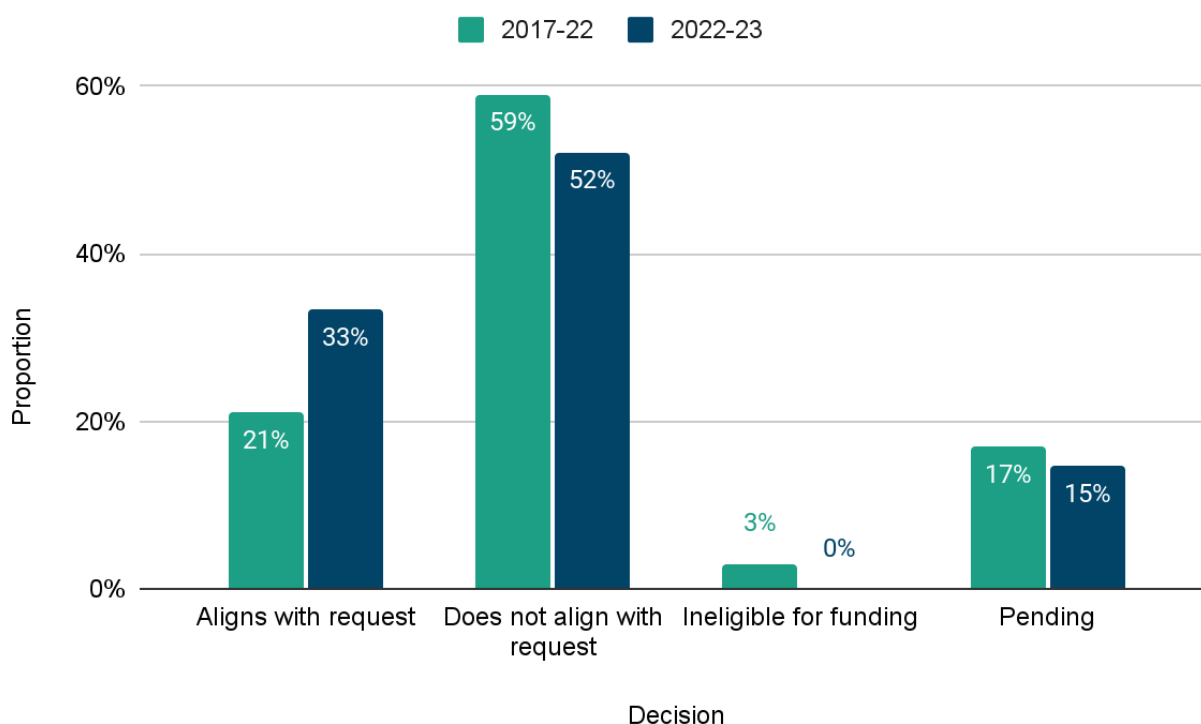
2.2 Internal review of the initial funding decision

For requests made for an internal review, the TMS tracked participants' requests and recorded outcomes according to the following criteria:

- **Aligns with participant's requested SDA:** the Agency decided to set aside or substitute its initial decision, and fund the participant for the design category, building type and occupancy they have requested;
- **Does not align with participant's requested SDA:** the Agency decided to confirm its initial decision, or to vary its initial decision but where the new decision still did not align with the design category, building type and occupancy the participant had requested;
- **Ineligible for funding:** the Agency decided that the participant is ineligible for SDA funding;
- **Pending:** the Agency had not yet communicated a decision to the participant.

Of the participants who requested an internal review between 2017-22, 21% received a decision that overturned the initial NDIA decision and funded participants for their requested SDA, in contrast to 33% in 2022-23. In total, 59% of participants in 2017-22 received a decision that did not align with their requested SDA, which fell slightly to 52% in 2022-23. While 3% of participants were found to be ineligible for SDA funding between 2017-22, this had fallen to 0% by February 2023 (see Figure 3).

Figure 3 – Outcomes for internal reviews of initial funding decision

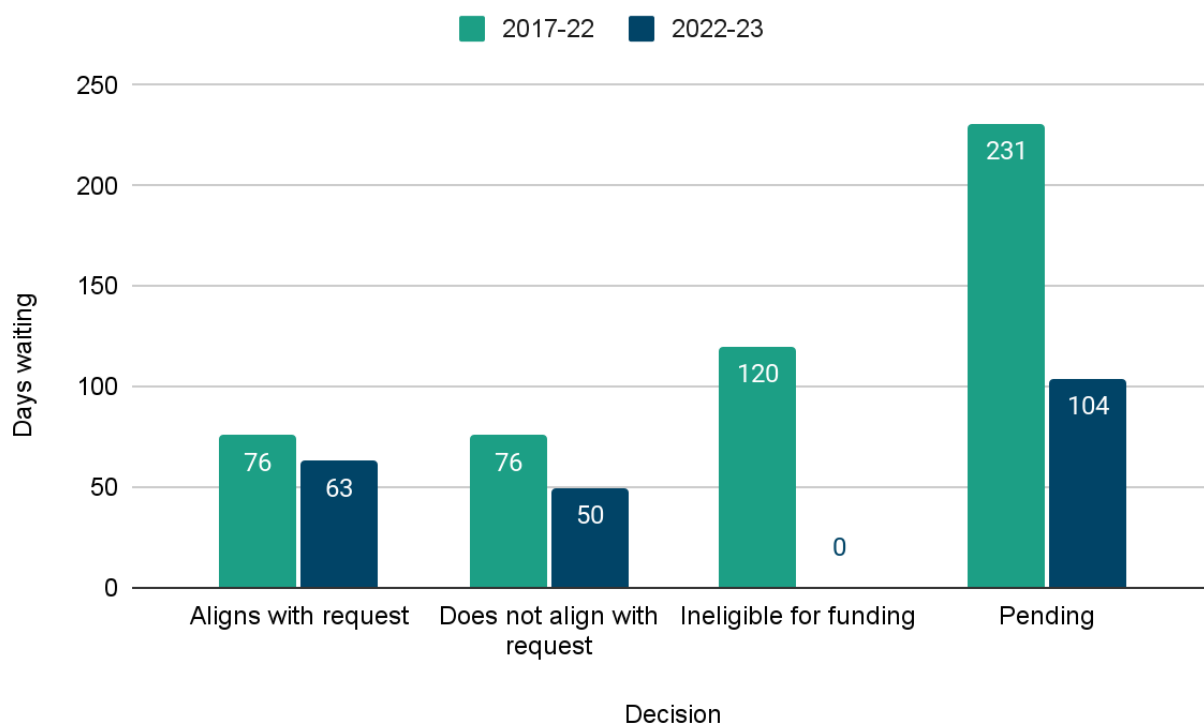


PSG policy commits the NDIA to complete internal reviews within 60 days.¹² For TMS-supported participants requesting internal review, the median wait time was 99 days in 2017-22, but down to 55 days in 2022-23. The wait time for individual outcomes was again considerably higher than the

¹² National Disability Insurance Agency, 'Participant Service Guarantee', *National Disability Insurance Scheme*, (Web Page, 23 May 2023), <<https://www.ndis.gov.au/about-us/policies/service-charter/participant-service-guarantee>>.

Agency’s own guarantee during 2017-22, but fell across all outcomes in the 12 months to February 2023 (see Figure 5).

Figure 5 – Timeframes for internal reviews of initial funding decision



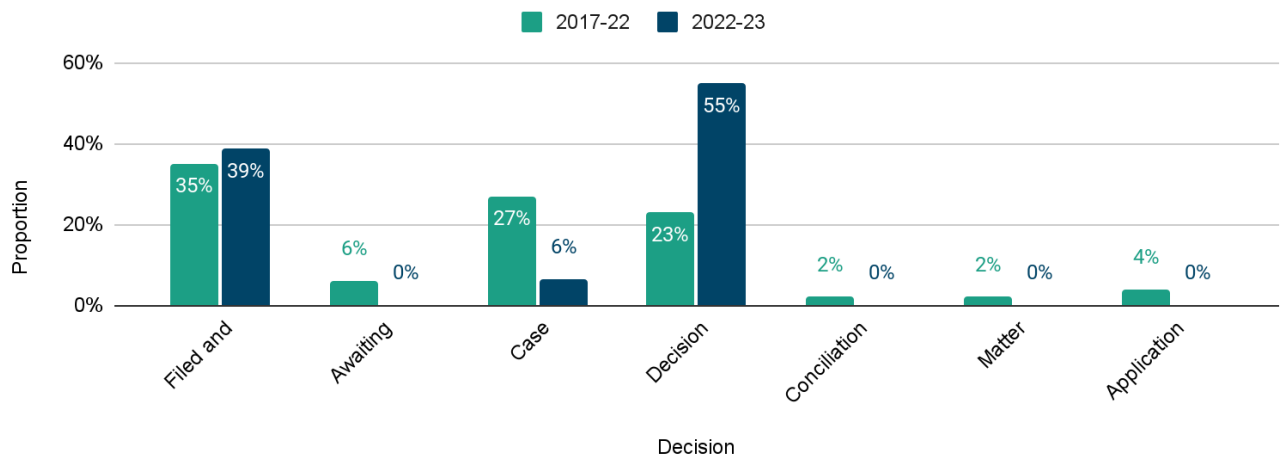
2.3 External review of the initial funding decision

For requests made for an external review by the AAT, the TMS tracked participants’ requests and recorded outcomes and steps in the process according to the following criteria:

- **Filed and awaiting first case conference:** participants who had filed their forms and were commencing the AAT process;
- **Case conference(s) in progress:** participants who were negotiating with the NDIA about the timetable of the AAT case, and what evidence needed to be provided;
- **Conciliation in progress:** participants who were in negotiations with the NDIA about whether their case can be settled by agreement, without going to an AAT hearing;
- **Decision varied or set aside by consent:** participants who had ended/settled their AAT case after reaching an agreement with the NDIA regarding SDA funding. This agreement may be what the participant requested in their initial SDA request, or a variation of it;
- **Awaiting hearing:** participants who had not reached an agreement to settle the case with the NDIA and were waiting for the AAT to hold a final hearing to decide their case;
- **Matter determined by AAT:** participants whose case had gone to a hearing before the AAT, and the AAT had made a final decision on their case;
- **Application withdrawn by applicant:** participants who had decided not to continue with their AAT case.

The percentage of participants for whom a decision was varied or set aside by consent more than doubled, from 23% in 2017-22 to 55% by 2022-23 (see Figure 6).

Figure 6 – Stages for external review of initial funding decisions



For participants in the external review process, the median number of days waiting for a decision to be varied or set aside by consent fell considerably from 202 days in 2017-22, to 76 days in 2022-23. However, median wait times for those who had filed their appeal and were awaiting their first case conference increased to 138 days in 2022-23, compared with 70 days for participants between 2017-22.

Figure 7 – Timeframes for external review of initial funding decisions

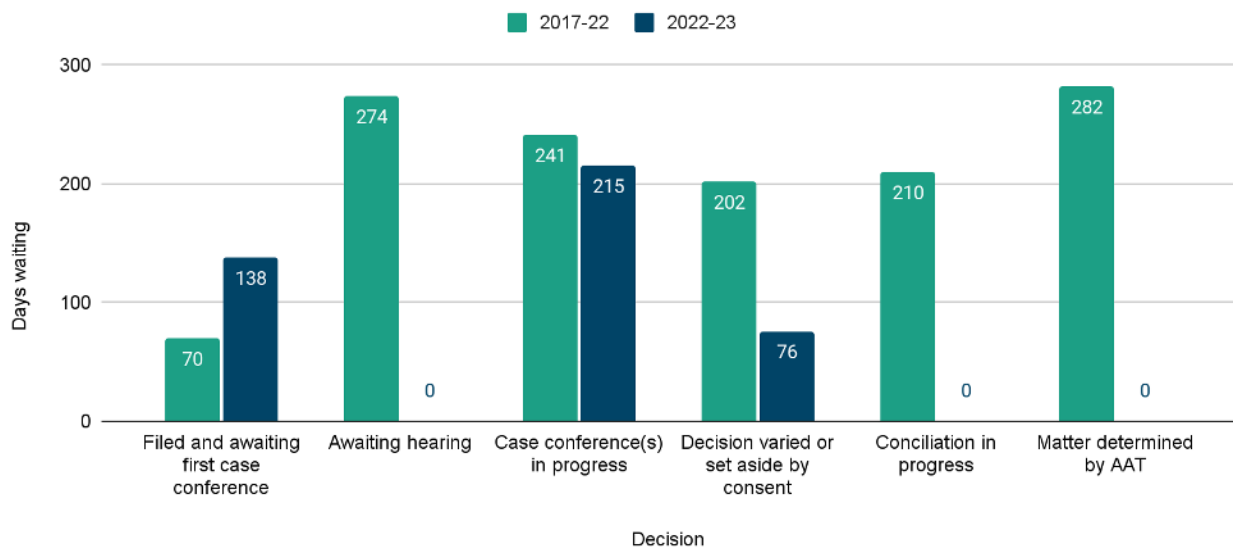


Figure 8 summarises the outcomes for participants included in the TMS dataset who asked for SDA funding, and/or requested (internal and/or external) review of the initial funding decision. In each case, the SDA requested by participants was based on advice from the TMS team, supported by expert evidence and reports, and aligned with the legislative framework and previous funding decisions for participants with a similar level of function and support needs.

The TMS data reveals the rate of initial funding decisions where the NDIA agreed to fund a participant for their required SDA rose from 26% to 47% in the last 12 months, and wait times

dropped from 96 to 69 days.¹³ Similarly, the proportion of participants receiving a funding decision that did not align with their request dropped, from 74% to 52%.

Many participants report feeling stressed, discouraged, or intimidated by the SDA planning process, and do not proceed with an internal review of the initial funding decision. For participants who did request an internal review, only 25% received an outcome that aligned with their requested funding in 2017-2022; this rate rose to 39% in 2022-23. Wait times for these decisions dropped from 76 days in 2017-22, to 63 days in the 12 months to February 2023. In contrast, the proportion of those who did not receive an outcome that aligned with their request fell from 75% (2017-22) to 61% (2022-23).

Many NDIS participants who receive an unfavourable internal review decision about their SDA funding do not request an external review, which can be stressful, time-consuming and complicated. However, most participants who do proceed are ultimately successful in receiving funding for their required SDA. TMS data reveals from 2017-22 92% of participants received their requested SDA funding through the AAT review process. From 2022-23, all 17 participants supported by the TMS to reach a final outcome at the AAT received the SDA funding determination that they had originally requested. Wait times for these outcomes also dropped significantly between these periods: from 205 days between 2017-22, down to 76 days in 2022-23.

Across *all* years of collecting data related to SDA decisions from mid-2017 to early 2023, the TMS supported 78 participants with an external review of their initial funding decision. Of these, 71 (91%) received a favourable outcome, by obtaining the SDA funding which they had requested. Only 1 (1%) received an unfavourable outcome, while 6 (8%) chose to withdraw their applications before receiving a final determination. This demonstrates that participants who are willing and have the means to continue advocating for their needs are highly likely to receive the SDA funding they originally requested.

However, there are many challenges participants face during the AAT process.¹⁴ Participants describe external reviews as being very complex and intimidating. It is often difficult for participants to obtain legal advice and representation throughout this process, leaving many having to proceed self-represented.

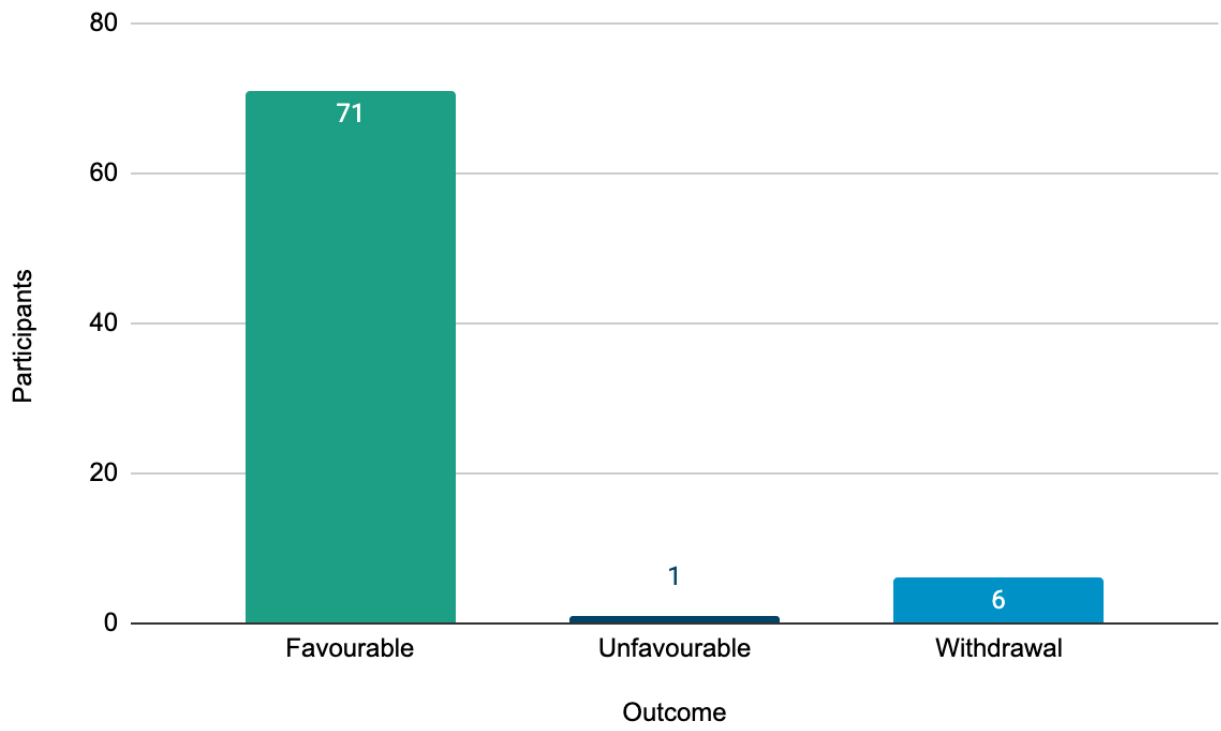
AAT cases can also take a long time to be resolved, during which period the NDIA's initial decision stands. During this time, the participant is likely to be living in an unsustainable or unsuitable housing arrangement, such as in a hospital, RAC, or with ageing parents.

These difficulties for participants mean that many are deterred from seeking an external review of a funding decision.

Figure 8 – Outcomes for all external reviews supported by the TMS (2017-23)

¹³ These statistics exclude funding requests for which a decision is still pending.

¹⁴ Skipsey et al. (2022), *Housing Delayed and Denied*.



3. Developments over the past year

The above data shows that since the release of *Housing Delayed and Denied* in May 2022, the NDIA has improved some aspects of SDA decision-making for TMS clients. This has included reducing wait times for decisions, and rates of inappropriate SDA funding decisions. However, the data above also shows that many of these improvements have been modest.

Over the same period the Federal Government has made a number of relevant reform commitments, particularly around the 2022 federal election. These commitments are welcome but are yet to address many of the issues raised by *Housing Delayed and Denied*. In some instances, this is because they have not yet been fully implemented; in others, wider structural changes to NDIS planning processes are needed to address the underlying issues affecting participants who request SDA funding. As this chapter sets out, progress from the 2022 report has been encouraging, but uneven.

3.1 What has changed?

3.1.1 Improved NDIA decision timeframes

The NDIA decision-making times for SDA funding have meaningfully improved. For initial funding decisions, average wait times for TMS clients dropped from 97 days to 71 days to receive an initial plan (see figure 3). There was also a significant reduction in the average number of days TMS clients waited for the outcome of their internal review request, with this number dropping from 99 days to 55 days (see figure 5).

Across the whole NDIS, the NDIS Quarterly Report to Disability Ministers details the duration of the entire process from receipt of a request for Home and Living supports (which includes SDA and other housing/home supports), through to plan implementation. In the March 2022 Quarterly Report, 68% of Home and Living funding requests for which data was available were finalised within 90 days; 38% were finalised after 90 days.¹⁵ For the same period in 2023, these numbers have improved, with 94% of Home and Living applications being finalised within 90 days and only 6% finalised after 90 days.¹⁶ These are very welcome improvements.

These better wait times reflect improved processes by the NDIA. We understand the NDIA has increased the number of Home and Living panels that assess and decide SDA requests, as well as the number of staff available to sit on these panels. Additionally, the NDIA says it has continued to work on streamlining the application process for Home and Living supports to minimise the number of hand-offs and reduce wait times.¹⁷

The NDIA has also begun to address the issue of participants being stranded in hospitals awaiting funding for Home and Living supports in order to be discharged. In June 2022, the NDIA implemented an operational plan to improve the hospital discharge process for NDIS eligible participants in hospital. The NDIA increased the number of dedicated Hospital Discharge staff

¹⁵ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2021-22* (Report, 31 March 2022) 64.

The Quarterly Report notes timeframes for 18% of all resolved applications could not be captured.

¹⁶ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2022-23* (Report, 31 March 2023) 66.

As with the previous report, timeframe data for 25% of all resolved applications was not available; these were said to predominantly concern cases where applicants cancelled their request for home and living supports.

¹⁷ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2021-22* (Report, 31 March 2022) 64.

across the country, increased the delegation of those staff and streamlined decision making. The Agency also committed to contact every NDIS participant (or their authorised representative or nominee) within four days of being notified of their admission to hospital and approve an NDIS discharge plan within 30 days of the participant being medically ready for discharge.¹⁸ As of March 2023, 89% of such NDIS participants were contacted within this four day period and the average time between a participant being medically ready for discharge and being discharged was 30 days.¹⁹

These measures have significantly impacted the length of stay in hospital for NDIS-eligible participants who are medically ready for discharge. Before the operational plan was implemented, there were 1,433 NDIS eligible patients in public hospitals waiting to be discharged, with patients waiting approximately 160 days for discharge from hospital due to delays in obtaining the NDIS supports they needed.²⁰ A February 2023 report by the Australian Medical Association found the operational plan had already begun to show results by November 2022; by that date, there were 1,224 NDIS eligible patients in hospitals waiting to be discharged, while patient wait times had dropped to only 36 days. This reduction in the number of days has led to an estimated saving of \$205.0 to \$548.8 million since it was implemented in June 2022.²¹

3.1.2 Many AAT cases have been settled more quickly

One important initiative by the NDIA has been to identify AAT cases that can be settled, and resolve them more quickly and proactively. This has reduced the time that participants with strong cases are forced to wait during the AAT process before receiving the appropriate SDA funding.

Case Study 1: Katrina*

Katrina is a woman in her early 40s who wanted to live alone in SDA for reasons relating to her health, mental wellbeing, work requirements, and privacy and independence. We referred to her case in our last report, when it was at the AAT.

The NDIA appointed lawyers to run its case in May 2022. These lawyers actively sought to minimise further delays in the case, and were willing to have frank and practical conversations about the best way to resolve the case promptly. The NDIA ultimately agreed to fund her requested SDA, and worked constructively to implement this settlement.

Once the case was finalised, some of the lawyers involved agreed to a discussion with PIAC to hear feedback about how the process could be more supportive of participants like Katrina in the future. While Katrina was frustrated at the overall time it had taken for her SDA funding to be resolved, the way the NDIA's representatives had handled her AAT case seemed to reflect a more considerate and engaged attitude than we had seen in previous cases.

*Name has been changed

¹⁸ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q1 2022-23* (Report, 30 September 2022) 16.

¹⁹ National Disability Insurance Agency, *NDIS Quarterly Report to Disability Ministers: Q3 2022-23* (Report, 31 March 2023) 9.

²⁰ Australian Medical Association, *Hospital Exit Block, a Symptom of a Sick Health System* (Report, February 2023) 5.

²¹ *Ibid*, 6.

One welcome development has been the reinstatement of the NDIA's Early Resolution Team. This Team contacts participants shortly after they file an appeal with the AAT to see if the matter can be easily resolved. This is particularly effective where the NDIA's earlier decisions include clear mistakes, or where a disagreement has stemmed from poor communication.²²

Representatives of the NDIA's Appeals Branch have also told advocates and interested parties, such as PIAC and the TMS, that they have been instructed to proactively seek to settle AAT cases. This includes having the NDIA's legal representatives work with applicants to identify and produce any necessary evidence, and reconsidering whether the NDIA should maintain its objections to funding disputed supports. None of these approaches are entirely new, but in the past year many advocates have observed NDIA lawyers using them more frequently and deliberately.

These steps have yielded some results. As noted by the data above, for TMS clients whose cases resolved by consent, the average wait time at the AAT dropped from 202 days at March 2022, to 76 days at March 2023. However, this dramatic improvement should be seen in the context of a surge in settlements late 2022, with the incoming NDIS Minister Bill Shorten directing the expedited settlement of outstanding AAT cases by the NDIA.²³ It remains to be seen whether these improvements reflect durable shifts in NDIA practice, or simply a one-off effort by an incoming government.

Additionally, the improvements in NDIA settlement practices have not been uniform. PIAC has seen several cases that have taken many months to resolve, even where the outstanding disputes between an applicant and the NDIA are minimal. One example of this is set out in the case study below.

Case Study 2: Hyun Mee*

Hyun Mee wanted to live alone in SDA so she could choose support staff who could speak her first language, as she had previously had dangerous miscommunications about her care needs with English-speaking staff. Hyun Mee also wanted to arrange her home and lifestyle to reflect her own cultural background and allow her children and friends to visit her more easily to help with her care needs. The NDIA refused to fund this SDA, and on 5 April 2022 Hyun Mee applied to the AAT to review the NDIA's decision.

On 29 September 2022, a NDIA planner called Hyun Mee's daughter and plan nominee. The planner said they had re-evaluated the evidence provided during the planning and internal review processes, and determined the Agency had 'made a mistake' in preparing the plan. They now wanted to fund Hyun Mee for her preferred SDA.

Despite the NDIA agreeing with us on the appropriate level of SDA funding, Hyun Mee's case took a further nine months to settle. These delays were partially caused by:

- the significant time between the conversation with Hyun Mee's daughter and the NDIA confirming with the Tribunal they were willing to fund Hyun Mee's preferred SDA; and

²² Notably, in either case such issues could and should have been addressed by better internal decision-making processes by the NDIA.

²³ Katina Curtis, 'Just blitz that waiting list': Shorten eyes NDIS legal blowouts', *Sydney Morning Herald* (online, 3 June 2022) <<https://www.smh.com.au/politics/federal/just-blitz-that-waiting-list-shorten-eyes-ndis-legal-blowouts-20220601-p5aqf1.html>>.

- the NDIA only agreeing to fund the support hours and assistive technology Hyun Mee needed to live safely in her new SDA after further evidence was provided.

Hyun Mee also wanted the NDIA to acknowledge in writing that they had agreed with her about some key facts about why her preferred SDA was appropriate to fund. Hyun Mee wanted this to confirm that she had been 'heard', and to form a basis for future discussions with the NDIA. This acknowledgement was only agreed some time after the in-principle agreement had been reached to settle the case.

Hyun Mee was eager to move into her new SDA, and was frustrated that the NDIA had not had better procedures to resolve the case quickly even after reaching an agreement about the main issue in dispute.

*Name has been changed

3.1.3 The NDIA has engaged with advocates and responded to their concerns

Senior staff from the NDIA's Appeals Branch and Chief Counsel's Office have conducted regular scheduled engagement with disability advocates and others from the sector, including as guests at a Working Group for NDIS Appeals Advocates. This has improved communication between the NDIA and disability advocates, and is a positive step toward rebuilding trust in the NDIA and its representatives at the AAT.

A further area of improvement is in the implementation of the NDIA's model litigant obligations. As we outlined in our previous report:

'...the NDIA is required by law to act as a 'model litigant', and held to a higher standard of honesty and fairness as the representative of the government in a case against an individual.'²⁴

We observed the NDIA had often failed to meet these standards in AAT cases, and recommended that the NDIA adopt policies requiring lawyers representing it to comply with these obligations.²⁵ Other organisations in the sector had made similar observations and suggestions.²⁶

In March 2023 the NDIA published its 'Model Litigant Guidelines', outlining its understanding of how the model litigant obligations practically apply in its AAT cases.²⁷ It also published clear guidance for how people with disability and their representatives can complain if they think the NDIA has not been a model litigant in its case. This is an important step by the NDIA towards improving the way it conducts AAT cases.

3.1.4 Some transparency issues have been addressed

Our previous report identified the needs for improved transparency about how the NDIA makes decisions, and greater disclosure of the reasons for those decisions. While many of these issues remain, there have been some moves towards greater transparency and disclosure by the NDIA.

One such area is in the publication of increasingly detailed NDIA Operational Guidelines (**OGs**). For some time, the NDIA has been working to update and consolidate its internal policies into published OGs, to provide greater accessibility and clarity on how the NDIA makes decisions. Over the past

²⁴ Skipsey et al. (2022), *Housing Delayed and Denied*.

²⁵ Ibid, 43.

²⁶ See Disability Advocacy NSW, Your Say Advocacy Tasmania and Villamanta Disability Rights Legal Service Inc, *National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal* (Public Submission, 3 June 2022).

²⁷ National Disability Insurance Agency, 'Our model litigant guidelines', *National Disability Insurance Scheme* (Web Page, 14 March 2023), <<https://ndis.gov.au/about-us/legal-matters/our-model-litigant-guidelines>>.

year, the NDIA has steadily released further OGs, along with useful information such as ‘Would We Fund It?’ scenarios to map how the NDIA might apply the OGs to different types of supports. Publishing these policies gives people with disability a better sense of what to expect from the NDIA. Further, where the OGs contain policies that NDIS participants and their advocates consider misguided or legally doubtful, publication allows these policies to be scrutinised and the NDIA to receive suggestions for improvements.

A further improvement has been the document bundle the NDIA must provide to the AAT and participant at the start of a Tribunal case (known as the ‘T-documents’). At the time of our previous report, we had regularly seen vital materials omitted from the T-documents. Over the past year PIAC has seen, and heard from other advocates and lawyers, that such omissions have been significantly reduced.

For example, the NDIA’s specialist ‘Home and Living Panel’ makes all SDA planning decisions. However, the Panel’s decision and findings were frequently omitted from T-document bundles. The Agency is now routinely including these Panel materials, providing much greater transparency for NDIS participants appealing decisions at the AAT.

3.1.5 Decisions by the AAT have confirmed principles

Since our previous report, there have been several further AAT decisions concerning SDA. Prior to December 2021 there had been no published decisions by the AAT about SDA funding; by the time of *Housing Delayed and Denied*, 30 April 2022, there had only been four.²⁸ Now, there are eight.²⁹ Taken together this body of decisions has helped clarify the law around SDA, and appropriate principles for SDA decision-making. While each decision reflects the unique facts of its case, some strong common themes emerge from the AAT’s findings.

Six of the cases concerned disputes over which building type of SDA should be funded.³⁰ Of these, three involved a person who wanted SDA funding to live alone rather than in shared SDA;³¹ a further two cases concerned a person who requested a second bedroom in their SDA home for work, study and family relationship purposes.³² The applicants in all six ‘building type’ cases were successful, with the AAT acknowledging they had good reasons to request their preferred SDA.

In these cases, the AAT generally placed less weight on ‘value for money’ than the NDIA. In one matter, the NDIA called the Scheme Actuary to give evidence that funding everybody for their preferred SDA would be more expensive than compelling them to share SDA.³³ The Tribunal Members commented that this evidence did not help them to decide the individual case in front of them or how best to meet the individual participants’ support needs.³⁴

Instead, the AAT’s decisions in all six ‘building type’ cases stressed the need to consider the unique circumstances of each person, and their reasons for wanting to live in their chosen SDA.³⁵ In making

²⁸ *LWVR and National Disability Insurance Agency* [2021] AATA 4822 (‘LWVR’), *Boicovitis and National Disability Insurance Agency* [2022] AATA 204 (‘Boicovitis’), *Kennedy and National Disability Insurance Agency* [2022] AATA 265 (‘Kennedy’), *Barrett and National Disability Insurance Agency* [2022] AATA 445 (‘Barrett’).

²⁹ *Charrington and National Disability Insurance Agency* [2022] AATA 1160 (‘Charrington’), *Paterno and National Disability Insurance Agency* [2022] AATA 3908 (‘Paterno’), *QKNJ and National Disability Insurance Agency* [2023] AATA 794 (‘QKNJ’), *Woolf and National Disability Insurance Agency* [2023] AATA 1312 (‘Woolf’).

³⁰ *LWVR, Boicovitis, Kennedy, Paterno, QKNJ and Woolf*.

³¹ *LWVR, Boicovitis, Woolf*.

³² *Kennedy, Paterno*.

³³ *Woolf*, [95]-[98], [237].

³⁴ *Ibid*, [99]-[103], [237].

³⁵ *LWVR*, [12]-[13] and [16]-[18]; *Boicovitis* at [24]-[36]; *Kennedy* at [121]-[127]; *Paterno* at [46]-[71]; *QKNJ* at [69]-[71]; *Woolf* at [115], [133], [148], [185]-[187], [191], [198], [236], [245]-[246].

its decisions, the AAT has predominantly relied on evidence given by the person with disability, as well as their Occupational Therapist and other healthcare professionals.³⁶ As people with disability are experts on their own lives, the AAT's approach appropriately acknowledges that they, together with their treating teams, are best-placed to understand what supports they need.

In some cases, the AAT appeared critical of the NDIA's approach to the applicant's funding request. Some decisions suggested that the NDIA was unduly inflexible in applying guidelines and policies.³⁷ In others, the AAT has commented that the NDIA's decision-making appeared inconsistent between circumstances and cases.³⁸

The two cases that did not concern building type were about the appropriate SDA design category,³⁹ and whether the participant was eligible for SDA at all.⁴⁰ In each of these cases, the participant was unsuccessful. In deciding in favour of the NDIA, the AAT expressed concern that some of the evidence the participants provided did not help it to assess whether the case met the relevant legal criteria.⁴¹

While AAT decisions are not legally binding precedents for future cases, they are persuasive for future AAT cases considering similar issues. The lessons and trends from these decisions should give guidance to applicants requesting SDA funding on how they can prepare their SDA applications, or run an external appeal at the AAT.

The decisions should also provide valuable guidance to NDIA planners making decisions on SDA. As former AAT President Garry Downes described:

'Government departments and agencies treat themselves as bound by the decisions and the reasoning of the Administrative Appeals Tribunal. This is, in part, because they know that on review the Tribunal will make the same decisions it has previously made on the same issues. The sensible course for government departments and agencies is to make the decision they know the Tribunal will make.'⁴²

We do not know whether the NDIA will adjust its planning practices (such as by amending its Operational Guidelines) to reflect the above AAT decisions.

3.1.6 An Independent Expert Review Process has been trialled

From 4 October 2022 until 30 June 2023 the NDIA conducted an Independent Expert Review (IER) program. This aimed to reduce a backlog of cases for external review by the AAT, which had built up due to high rates of participants challenging NDIA decisions at the AAT and AAT cases taking a long time to resolve.

The IER was monitored by an Oversight Committee made up of people with disability and with relevant backgrounds in disability advocacy and administrative law. The program was intended to be a quick, informal process that adopted a practical and common sense approach to settling disputes. Independent experts were selected based on criteria designed by the Oversight Committee, and funded by the NDIA to review the materials and evidence in the case and make a recommendation about how the matter should be settled. The NDIA promised to consider these

³⁶ *Ibid.*

³⁷ *LWVR* at [12]-[13]; *QKNJ* at [69]-[70].

³⁸ *Kennedy* at [51]-[52]; *QKNJ* at [64]-[70] and [79]-[80].

³⁹ *Barrett*.

⁴⁰ *Charrington*.

⁴¹ See, for instance, *Barrett* at [141]-[145]; *Charrington* at [55], [57]-[59].

⁴² Justice Garry Downes AM, 'The Implementation of the Administrative Courts' Decisions' (Speech, International Association of Supreme Administrative Jurisdictions VIIIth Congress, 26-28 April 2004).

recommendations in good faith, and to accept the recommendation unless there was a good reason not to (such as if the reviewer had made a clear error of fact or law). PIAC and the Housing Hub supported several participants to take their cases through the IER process.

PIAC and the Housing Hub have heard from participants in the IER who thought it was an accessible, and sensitive process. The opportunity to have informal and direct conversations with a reviewer about their life circumstances and cases meant these participants felt comfortable telling their story and explaining what they needed. Several participants have told PIAC they thought the IER made reasonable and well-considered recommendations in their cases. One such example is case study 3, below.

Case Study 3: Stuart*

Stuart was diagnosed with a serious degenerative and life-limiting disease in 2016; by 2022, he was no longer able to live at home and required funding to move into SDA. He provided the NDIA with several reports from his treating professionals explaining the medical reasons he needed to live alone; Stuart needed to precisely control the temperature of his home, and to reduce the risk of catching an infection from a co-resident or their visitors and support workers as much as possible. Stuart also wanted to live alone for privacy, and so his daughters could visit him regularly.

The NDIA decided to fund Stuart for shared SDA. After it confirmed this decision in internal review, Stuart applied to the AAT, and requested his case be considered by the IER program, to avoid the stress and length of AAT litigation.

The IER reviewer considered the documents Stuart had provided and met with Stuart and his daughters to discuss his case. Stuart and his family felt this conversation was sensitive, informal, and helped to 'get to the point' of the case quickly and efficiently. The next day, the reviewer recommended Stuart be funded for his preferred SDA, explaining this outcome is consistent with existing AAT case law and made good sense in light of the reasons Stuart had provided.

The NDIA accepted this recommendation, and the case settled quickly, providing Stuart with the SDA he needed. He and his family felt the process had been effective and appropriate, and described the IER's informal and common-sense manner as making them feel 'heard'.

*Name has been changed

The IER process has not resolved as many cases as hoped. The program was initially intended to have over 1,000 participants by 30 June 2023,⁴³ but ultimately only accepted around 150 matters.⁴⁴ While the NDIA has suggested this largely reflects the many cases being resolved through other Agency case resolution initiatives (as described above), it has also noted a lower-than-expected acceptance of invitations to the IER by participants.⁴⁵

⁴³ Independent Expert Review Program Oversight Committee, *Interim Report on Long Term Options for Dispute Resolution under the National Disability Insurance Scheme*, (Report, 7 December 2022), 8.

⁴⁴ Update provided by NDIA Deputy Chief Counsel Andrew Ford (NDIS Appeals Systemic Working Group, 21 June 2023).

⁴⁵ National Disability Insurance Agency, 'Independent Expert Review Oversight Committee communique - January - March 2023', *National Disability Insurance Scheme*, (Web Page, 1 May 2023),

<<https://www.ndis.gov.au/news/9094-independent-expert-review-oversight-committee-communique-january-march-2023>>

We also understand the NDIA has only fully accepted around 80% of IER recommendations.⁴⁶ PIAC has spoken with several participants and/or their representatives in whose cases the NDIA had rejected all or part of the supports recommended by the IER reviewer. Each described feeling dissatisfied with the reasons given by the NDIA for rejecting the recommendation, and considered the IER process a waste of their time and effort. An example of this issue is outlined at Case Study 4.

Case Study 4: Jeremy*

Jeremy asked for SDA that would let him live alone, with a second bedroom for a carer or his son to stay overnight, or to use as an office and workout room. The NDIA decided to only fund him for shared SDA.

After his matter had been in the AAT for nearly one year, Jeremy asked for an IER. The IER reviewer considered Jeremy's evidence and the NDIA's position, and spoke with Jeremy twice to understand his circumstances. The reviewer then wrote a recommendation explaining why she believed Jeremy should be funded for his preferred SDA.

After four weeks, the NDIA rejected the IER recommendation. The NDIA gave a very brief explanation for why they had rejected it, which Jeremy did not agree with. In Jeremy's opinion, the NDIA's response did not line up with their promise to accept reasonable recommendations made by the IER.

Jeremy was left dismayed and frustrated by the time and effort spent engaging with the IER process without it resolving his case. Jeremy's case has not settled and remains ongoing at the AAT.

*Name has been changed

The IER program provides one possible model that can be used to resolve future NDIS appeals. The NDIA has been conducting an evaluation of the program, and will release a report assessing the program in the coming months.

We consider the program has shown that participants welcome a more informal and approachable method of dispute resolution, within which they can feel 'heard'. However, in order to maintain participant confidence, any similar future program must be entirely independent of the NDIA (in contrast to the NDIA's selection and funding of the IER program experts). It must also be as transparent as possible about the way the program operates, and should contain mechanisms to incentivise the NDIA to accept reasonable recommendations.

3.2 What has not changed?

3.2.1 Poor planning decisions are still being made

Our previous report identified that regular errors and poor-quality decision-making from the NDIA had led to particularly extensive delays in obtaining SDA and other supports, as they lead to

⁴⁶ Update provided by NDIA Deputy Chief Counsel Andrew Ford (NDIS Appeals Systemic Working Group, 21 June 2023).

participants needing to review erroneous decisions.⁴⁷ Housing Hub has continued to see such errors from the NDIA. Consequently, in March this year the Parliamentary Joint Standing Committee on the NDIS recommended:

‘...the government invest in training NDIA staff and updating systems to improve the quality and transparency of decision-making, and to ensure that decisions consistently meet the requirements of the NDIS Act, so participants do not have to tell their stories again and again to multiple people.’⁴⁸

While the NDIA has made quicker decisions for participants in hospital, it does not report on whether these decisions met participants’ housing needs and preferences. Unfortunately, the Housing Hub continues to see cases where the NDIA has disregarded participant preference and the recommendations of health professionals when making decisions about SDA and support funding for these participants.

These funding decisions present participants with a difficult choice between remaining in hospital through a further review process; or accepting the inadequate housing and support arrangement offered by the NDIA. In the face of this choice, and pressure from the hospital system to discharge patients, the Housing Hub has seen many participants compelled to accept inappropriate SDA and support funding packages. This has led to serious consequences including:

- risk of injury or harm to the participant, their support workers and co-tenants;
- eventual breakdown of those housing and support arrangements; and
- later readmission to hospital.

Further to this, Housing Hub continues to see cases where the NDIA has provided incorrect advice or guidance to participants. For example, a TMS client was told by the NDIA they only had 60 days to request an internal review - when they in fact had 90 days. Another client was incorrectly told that they could not submit new evidence to support a request for an internal review. Such errors cause confusion and delay, and can deny participants their procedural rights leading to unfair decisions being made. There remains a need for urgent reform to eliminate these mistakes.

Recommendation 1

The NDIA urgently overhauls its internal processes and policies to eliminate critical administrative errors and the delivery of incorrect advice to participants. The NDIA should consider conducting a top-down audit of processes, policies, and service delivery by staff at all levels.

We have also continued to see high rates of participants being denied funding for their preferred SDA, and instead forced to accept SDA home and living environments that do not suit their needs. The high success rate for participants challenging SDA funding decisions at the AAT suggests that the NDIA is getting the initial decisions wrong.

As illustrated by the data above, all 17 of the Housing Hub’s clients whose AAT case was resolved between March 2022 and March 2023 were successful in being granted their preferred SDA; but only after a protracted and stressful appeal process. Across *all* years of collecting data related to SDA decisions from mid-2017 to early 2023, the TMS supported 78 participants with an external, AAT review of their initial funding decision. Of these, 71 (91%) received a favourable outcome, by obtaining the SDA funding which they had requested. Only 1 (1%) received an unfavourable outcome,

⁴⁷ Skipsey et al. (2022), *Housing Delayed and Denied*, 36-37, 39-41.

⁴⁸ Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Capability and Culture of the NDIA Interim Report* (Interim Report, March 2023) xii.

while 6 (8%) chose to withdraw their applications. These figures demonstrate that for participants who are willing and have the means to persist in advocating for their needs, they are highly likely to receive the SDA funding they originally requested.

Our previous report outlined the way in which NDIA planners and internal reviewers regularly failed to properly consider key information and evidence provided to them. We also identified that the NDIA regularly failed to give proper consideration and weight to the valid reasons participants had for wanting to live alone, and instead would only fund them to live in shared homes with housemates they did not know and had not chosen. We have continued to see examples of both of these issues in NDIA decision-making.

Recommendation 2

The NDIA ensures decision-makers review and consider all evidence provided by the applicant, in line with legal principles regarding administrative decisions. This should include preparation of appropriate policies, introducing review and quality-control mechanisms for decision-makers. The NDIA should implement training and accountability processes for decision-makers who fail to meet minimum standards.

Recommendation 3

Ministerial and Agency leaders direct NDIA planners and those on the Home and Living Panel to give greater weight to:

- the importance of maintaining social connection and informal supports;
- the consequences of various SDA models for participant's health, wellbeing, lifetime care costs and social and economic participation, when making decisions about SDA funding for participants; and
- a participant's preferences, as described by the legislation when making decisions about SDA funding for participants.

Case Study: Grace*

Grace is 51 years old and has multiple disabilities and medical conditions, including vision impairment, epilepsy and nerve damage in her lower body. She lives in a privately rented home with her 16 year old son, Max. Grace is the sole carer for Max. Grace's home does not have sufficient space for Grace to use her prescribed mobility aids or equipment, which places her at significant risk of falling and limits her independence.

Grace asked for SDA that would allow Max to continue to live with her, but was instead funded by the NDIA to live in SDA with two other people. When she spoke to an SDA provider about living in a shared home with Max, the SDA provider said that there wasn't room for Max in the home. The SDA provider was also concerned they could not meet their duty of care to a child living in a house with adults he and his mother didn't know and hadn't chosen, as well as their visitors and support staff. This showed that it would not be feasible for Grace and Max to live in a home with people they do not know and haven't chosen to live with, and highlighted the inappropriateness of the NDIA funding decision.

Grace is contesting the SDA decision through the review process.

*Name has been changed

One important tool to improve decision making is to implement better policies to guide decision-makers. Many current NDIA policies are inadequate; and, in some cases, even establish inappropriate or misleading assumptions for decision-makers.

For example, when the NDIA updated its Operational Guideline for SDA on 25 July 2022 it added a new section that imposed inappropriate restrictions on participant funding. This amendment outlined when a person would be funded to live alone with shared onsite support – where ‘a group of participants have their own home on the same site and share onsite support for a limited number of hours a day’.⁴⁹ Relevantly, the Guideline said:

‘We’ll also need to make sure:

- you can use technology to call for assistance
- you need an average of at least 1.25 hours (daytime) and 1 hour (overnight) ad hoc supports, in addition to any extra rostered 1:1 hours
- you can usually wait up to 60 minutes for unplanned support without this becoming a risk to your safety and wellbeing
- you understand the risks of living alone.’⁵⁰

The Guideline seems to impose four mandatory requirements to receive this kind of funding to live alone in SDA, restricting who can live alone. These requirements appear to impose additional tests for funding beyond what is in the *NDIS Act*; unless there is a good reason to impose these tests, the policy may therefore be inconsistent with the *Act* and therefore invalid.⁵¹

Despite this, no evidence has been shown to support any of the first three requirements; and by contrast, the TMS is aware of many participants who have lived safely and happily with shared onsite supports in the past but would not meet these requirements. We consider that these Guidelines are inappropriate and may be unlawful.

This Operational Guideline should be reviewed to ensure that they do not inappropriately block funding for appropriate supports, but instead give appropriate weight to participants choice and control, and to individual needs and circumstances. This reform could significantly improve the NDIA’s internal decision-making.

Recommendation 4

The NDIA revises the SDA Operational Guideline to ensure the policies and guidance for decision-makers it contains are appropriate and comply with the law. This revision should occur in close consultation with participants, representative groups, and disability and legal experts.

3.2.2 There continue to be significant delays in decision-making

While some indicators of the speed of SDA decision-making have improved, others remain poor. As seen above at Part 2, many decisions continue to fail to meet even the minimum standards of timeliness promised by the current PSG.

⁴⁹ National Disability Insurance Agency, *Operational Guideline – Specialist Disability Accommodation*, (Web Page, 25 July 2022), <<https://ourguidelines.ndis.gov.au/media/1668/download?attachment>>, 11-12.

⁵⁰ *Ibid*, 11-12.

⁵¹ See *Green v Daniels* (1977) 51 ALJR 463; *Drake v Minister for Immigration and Ethnic Affairs* (1979) FCAFC 39; *Minister for Home Affairs v G* [2019] FCAFC 79.

This partly reflects the fact that, despite the PSG having been legislated over a year ago, the Government has still not developed *NDIS Rules* to complete its implementation.⁵² Because of this, the PSG remains a policy and not law, with limited scope for enforcement. These *Rules* should be implemented; and, as recommended by our previous report, they should establish standards that address the unique nature and importance of SDA:

‘It is important that the standards and statistics for SDA decisions consider the total wait time for a participant of all of the steps involved in their request for SDA, so that they take into account the total time that a person is left waiting for a fair decision about where they are to live. For instance, the NDIA reports that on average, the Home and Living Panel takes 32 days to make a funding decision. However, the Agency also notes that this is how long it takes for just one of several internal steps in the ‘end to end planning process’ of requesting SDA funding. It seems likely that the time taken by NDIA planners to communicate a participant’s request to the Panel, and then communicate a decision from the Panel back to the participant, is not accounted for in the 32 days, nor publicly reported.

Unfortunately, the Guarantee legislation does not prescribe time limits for the NDIA to consider and decide most requests for SDA. It does not contain specific provisions for SDA, and it is understood that decisions on SDA may even be excluded from this general framework – meaning that the NDIA could continue to make decisions on requests for SDA very slowly without being held accountable. The Guarantee would therefore hold the NDIA to a *lower* standard for SDA than for other decisions. This would not address the issues identified in this report, or meet the needs of participants for timely decisions.⁵³

Recommendation 5

The planned NDIS Rules implementing the Participant Service Guarantee be prepared and implemented as a matter of priority, and ensure the Guarantee operates effectively to:

- set specific standards for Home and Living Panel/SDA and housing-related support decisions, distinct from other types of plan. These standards should require urgent decisions (e.g. young people at risk of RAC, NDIS participants in hospital or living in precarious housing) to be made within 10 days of a participant’s request, and all SDA and support decisions to be made in under 50 days;
- assess the total time taken from the time a request for support was made by a participant, until the time a binding decision on that support was made and communicated to the participant; and
- provide clear avenues for individual participants to report their experience to the Commonwealth Ombudsman charged with overseeing the implementation of the Guarantee.

Our previous report highlighted the particularly damaging impact of delays where they affect vulnerable groups seeking SDA, including people in hospital, younger people in residential aged care, and people facing homelessness. In that report, we recommended that the NDIA prioritise these requests for SDA, and ensure these decisions are made appropriately and without errors. Although Housing Hub has seen the NDIA developing improved processes for hospital discharges, we are yet to see evidence of the NDIA introducing similar practices for other vulnerable people to date. We are aware of many participants in highly inappropriate living situations who continue to face long waits for SDA funding decisions.

⁵² We understand the development of these *Rules* is likely to include involvement from both the NDIA and the Department of Social Services, and/or input from the ongoing NDIS Review.

⁵³ *Housing Delayed and Denied*, p31.

Recommendation 6

The NDIA urgently prioritise decisions relating to people seeking SDA who are in hospital awaiting discharge, living in RAC as a younger person, and/or facing homelessness. In these cases participant choice, needs, and the potential for SDA to maximise independence and create a pathway back to community living should be given even greater weight in decision-making.

3.2.3 There is still a need for greater transparency from the NDIA

Our previous report pointed to the need for the NDIA to promote transparency by providing further reasons for its decisions, and publishing the (de-identified) outcomes of cases it settles. Unfortunately, these reforms are yet to occur.

The NDIA has a legal obligation to provide detailed reasons for its decisions, including all the Agency's findings about relevant facts, the evidence they used to make those findings, and the way that those findings have informed their final decision. Unfortunately, as we observed in our previous report, the NDIA often does not comply with this obligation and provides most decisions in template correspondence containing only one or two sentences of reasons for refusing a participant's specific request.⁵⁴ Such incomplete reasons fail to explain how the NDIA has evaluated the evidence presented to it, the points on which it has not agreed with the participant, or how it has weighed up arguments for and against funding a support. This makes it very difficult for participants to understand and have confidence in NDIA decisions, or to prepare additional evidence for a review process.

Over the past year, the AAT has raised concerns with the NDIA's practices. In the case of *HGLS and National Disability Insurance Agency*, the applicant requested full reasons for the NDIA's internal review decision to decline her request for supports.⁵⁵ The NDIA declined to provide these reasons; and the Tribunal later observed:

'What is clear from the Applicant's helpful and comprehensive written submission is that she would have benefitted greatly from better communication from the Respondent at the time she was deciding whether to exercise her review rights...

The Tribunal does not have any general or supervisory jurisdiction with respect to the Respondent's conduct, but simply notes that dealing adequately with a request [for reasons for a decision] under section 28(1) of the AAT Act, when it is made, would best serve the interests of the parties, discharge the Respondent's statutory function, and obviate the need for an Applicant to escalate such requests to the Tribunal.⁵⁶

In the case of *Sharp*, the AAT referred to the obligation in s 100(1)-(1A) of the *NDIS Act* to provide participants with a statement of reasons for any reviewable decision - including a decision to provide a participant with a plan that does not fund all of the supports they have requested.⁵⁷ The Tribunal said:

'It is a matter of concern that an Agency of the Commonwealth with responsibility for administering the NDIS appears to have failed to adhere to the requirements of the legislation it administers, as well as the basic tenets of contemporary procedural fairness and administrative decision-making, which requires an administrative decision-maker provide reasons for a decision to a person whose rights,

⁵⁴ Skipsey et al. (2022), *Housing Delayed and Denied*, 41.

⁵⁵ *HGLS and National Disability Insurance Agency* [2022] AATA 2774.

⁵⁶ *Ibid* at [23]-[24].

⁵⁷ *Sharp and National Disability Insurance Agency* [2023] AATA 1323 at [31]-[33].

entitlements or reasonable expectations are adversely affected by it. One might expect this is especially important in respect of government administrative decision-making for people with disability, when making a decision about supports for a participant in the NDIS. Otherwise, how is an NDIS participant to understand or even to know the matters decided, positively and negatively, in respect of reasonable and necessary supports, including any limits in respect of disability or impairments for which supports will not be funded, if they are not given a decision setting out such matters?

...[T]he seriousness of the apparent failure of the Agency to comply with the legal obligation to provide reasons for the SOPS decision in this case would be elevated if the failure to provide reasons for such a decision is systemic. Providing a participant with a formulaic plan setting out supports that will be provided or funded does not satisfy the requirement to inform the person of supports that will not be provided or funded and the reasons for this. A systemic failure to provide reasons for administrative decisions made under s 33(2) of the NDIS Act would be a matter of serious concern one would expect the CEO to promptly address.⁵⁸

Despite these comments, we have not seen any changes in practice by the NDIA to provide more complete reasons for its planning or internal review decisions.

Recommendation 7

The NDIA adopts systems to provide full and detailed reasons for all funding and internal review decisions as required by law. The reasons provided should allow a participant to properly assess whether the information they provided to the NDIA has been considered, and make an informed decision about whether to seek review.

Case Study 6: Samuel*

Samuel has a psychosocial disability with serious symptoms, that mean he needs to have his own space and live alone in SDA. However, the NDIA only provided him with funding for shared SDA. Samuel and his family asked for an internal review of this decision, providing several expert reports, letters from Samuel's family and support workers, and detailed reasons why Samuel could not live in shared SDA.

The NDIA's internal review decision refused to fund Samuel for his preferred SDA. The NDIA's decision did not address many of Samuel's reasons for needing to live alone; and evidence provided by Samuel was left off the list of materials the NDIA said it had reviewed.

Samuel was disappointed with this decision, and the lack of explanation from the NDIA. He and his family wrote to the NDIA asking for more detailed reasons to help them decide whether to appeal to the AAT.

The NDIA did not reply to this email request. However, about a month later, the NDIA called Samuel's family to say they had reconsidered the case and would now provide Samuel with a new plan containing funding for his requested SDA. Samuel was satisfied with this outcome; despite never receiving detailed reasons for the initial decision. His request for these further reasons may have motivated the NDIA to reconsider the compelling evidence and arguments he had provided.

*Name has been changed

⁵⁸ Ibid, at [34]-[35].

As identified by our previous report, multiple government reports have recommended the NDIA publish summaries of AAT cases that have settled.⁵⁹ Such summaries would include the nature of the dispute between the Agency and the participant, the terms of the final settlement, and types of evidence provided that helped to lead to the settlement. By making this information public, the NDIA's internal decision-making could be scrutinised and improved, and participants could better understand whether to appeal a decision and how best to engage with the Agency during an appeal.

To date, no such publication has occurred. Notably, early in the IER program the NDIA 'committed to publish the outcomes of matters considered' within the program, subject to determination of the proper format and mode of such publication.⁶⁰ As at December 2022, the IER Oversight Committee expected this process would be 'well embedded in time for', the phases of the rollout scheduled for the first months of 2023.⁶¹ The IER program concluded on 30 June 2023 and, as at the date of this report, no IER recommendations or outcomes have yet been published.

Recommendation 8

The NDIA publishes information regarding AAT settlement outcomes in a manner which balances confidentiality and privacy obligations with the need for transparency and accountability. In determining the information to be published, the NDIA should consult with participants and advocates, and should take into account the information published in the Australian Human Rights Commissioner's Conciliation Register.

3.2.4 The external review process still needs reform

Despite the improvements in resolving AAT cases outlined above, the most recent statistics available still show there were 2,861 NDIS cases on hand at the AAT at the end of May. Each such case represents a distressing and lengthy appeals process for a participant and their supporters. As at the above date, 19% of NDIS cases at the AAT had been ongoing for over a year, with a median case duration of 31 weeks. These statistics show that more remains to be done to resolve AAT cases quickly.⁶²

Delays in some cases continue to reflect unproductive approaches to litigation by the NDIA. Our previous report referred to cases where the NDIA's representatives made unnecessary requests for extra evidence from the participant, failed to meet deadlines set by the AAT, and made last-minute settlement offers just before the hearing.⁶³ While less frequent in recent months, Housing Hub still sees these practices in participants' cases.

As noted in Case Study 2, PIAC has seen matters delayed from settling for months where the NDIA had agreed to fund a participants' preferred SDA but continued to resist funding the assistive technology they needed to actually move into that home. By prolonging the matter, these disputes further increase both the Agency and participant's legal costs and compound participants'

⁵⁹ Joint Standing Committee on NDIS, *NDIS Planning Interim Report* (December 2019), [3.96], Recommendation 6; Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (December 2020), [2.81]-[2.84], [10.85]-[10.87], Recommendation 34; Australian National Audit Office, *Decision-making Controls for NDIS Participant Plans* (Report, 29 October 2020), [3.84], Recommendation 2.

⁶⁰ Independent Expert Review Program Oversight Committee, *Interim Report on Long Term Options for Dispute Resolution under the National Disability Insurance Scheme*, (Report, 7 December 2022), 27.

⁶¹ *Ibid.*

⁶² Additionally, 77% of all the AAT cases resolved from 1 July 2022 to 31 May 2023 involved the NDIA's decision being changed. This further highlights the need for better initial planning decisions by the NDIA to get the decision right the first time, and so reduce the number of cases that need to be appealed.

⁶³ Skipsey et al. (2022), *Housing Delayed and Denied*, 42.

frustration. This issue could be resolved in many cases by the NDIA issuing specific guidance for case managers to include a standard amount of assistive technology funding in any SDA settlement offer, in recognition of typical move-in and fit-out costs - which could then be adjusted further in cases where participants can present evidence they need higher than usual funding for assistive technology.

Significantly, the Government has announced that the AAT will be abolished and replaced in late 2023 by a new administrative review body.⁶⁴ It is important the new model for reviewing NDIS decisions by the AAT body resolves matters quickly and fairly, and holds the NDIA's representatives to account for any inappropriate conduct.

Recommendation 9

The NDIA continues to implement reforms to policies governing lawyers acting for the Agency in AAT matters, such that:

- all external lawyers receive training regarding disability rights and awareness;
- settlement offers are made as early as possible;
- additional reports and evidence are only requested where they are clearly necessary and will not cause undue delay or stress to the applicant; and
- compliance with model litigant obligations is proactively monitored by the Agency.

Recommendation 10

The NDIA develop policies for case managers to include a standard amount of funding for assistive technology with any AAT settlement offers that involve funding for SDA.

3.3 What is likely to come?

3.3.1 The NDIA will continue to face calls for changes to its practices

While meaningful improvements to SDA decision-making have been made there is still a need for further reforms by the NDIA. Many suggestions by people with disability, and the disability advocacy sector, were reflected in the Interim Report from the Parliamentary Joint Standing Committee's Inquiry into the Capability and Culture of the NDIA. The Interim Report observed:

- Many reports and stakeholders have recommended that the NDIA provide participants with a draft plan for review during the planning process, to allow participants to correct errors and omissions. The Interim Report expressed disappointment that draft plans have not been implemented.⁶⁵
- The NDIA's performance had been affected by staffing caps, which had led to insufficient staff numbers and high turnover. The Report recommended the staffing caps be lifted.⁶⁶
 - To address this issue, the NDIA announced in May 2023 that the 2023-204 Budget included an allocation of \$56.4 million to strengthen supported independent living decisions. This includes the introduction of a home and living panel with highly trained staff to improve consistency across decisions and updating guidelines for

⁶⁴ 'A new system of federal administrative review', *Attorney-General's Department*, (Web Page, 2023), <<https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>>.

⁶⁵ Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Capability and Culture of the NDIA Interim Report* (Interim Report, March 2023) 34.

⁶⁶ *Ibid*, 25.

planners to improve participants' ability to live independently.⁶⁷ It is too early to determine the impact of this strategy on the NDIA's performance in this area.

- Greater training was needed for planning staff in disability awareness and anti-discrimination, and to eliminate mistakes and harmful interactions during the planning process.⁶⁸

The NDIA has not yet formally responded to the Interim Report's recommendations. Until these issues are addressed, along with the long decision wait-times and backlogs for appeals, it will continue to face calls for change.

3.3.2 The NDIS Review is expected to recommend significant reforms

On 16 October 2022, the NDIS Minister Bill Shorten announced a detailed and extensive review of the NDIS (**NDIS Review**). This Review will make findings and recommendations about matters including 'ways to improve and make more timely decision making in relation to home modification, assistive technology and accommodation';⁶⁹ which includes most of the issues discussed in this report.

The NDIS Review is due to provide its final report to Government by October 2023. It is expected to recommend major changes, with impacts across the NDIS. Both Minister Shorten, and the Co-Chairs of the NDIS Review, have discussed the Review as leading to 'NDIS 2.0', and 'systemic reform' to 'reboot' the Scheme.⁷⁰ We have been engaging with the Review to provide recommendations for change to fix the ongoing issues with SDA decision-making.

3.3.3 A new review body will be introduced to replace the AAT

The AAT will be abolished and replaced with a new review body by the end of 2023. The only details announced for this new body to date have been the appointment guidelines, to set up a 'transparent and merit-based process for the appointment (and reappointment) of members.'⁷¹ An Expert Advisory Group is developing the other details of the new body, including what its powers will be, how it will ensure that it is accessible for applicants, and how it will make decisions.

The Oversight Committee for the IER program produced an interim report in November 2022, assessing the approach of the IER and whether it should be replicated in the future.⁷² This report made suggestions about possible new models for NDIS appeals, including:

- Having a 'two-tier' system of external review, where NDIS decisions are initially appealed to a relatively informal 'first tier' review. The outcomes of that first tier could then be appealed by the applicant and/or the NDIA to a more formal second tier, that operated more like the current AAT.
- Adopting an 'inquisitorial' approach (where the review body conducts its own investigations and asks its own questions before coming to a decision) for NDIS appeals, as opposed to the

⁶⁷ 'Media Release from the Minister: Getting the NDIS back on track', *National Disability Insurance Scheme*, (Web Page, 2023), <<https://www.ndis.gov.au/news/9151-media-release-minister-getting-ndis-back-track>>.

⁶⁸ Ibid, 49.

⁶⁹ 'Terms of Reference: Building a strong, effective NDIS', *NDIS Review* (Web Page, 2023), <<https://www.ndisreview.gov.au/about/terms-of-reference>>.

⁷⁰ The Hon. Bill Shorten MP, 'NDIS 2.0: A new hope', *Ministers for the Department of Social Services*, (Media Release, 18 October 2022), <<https://ministers.dss.gov.au/speeches/10911> <https://ministers.dss.gov.au/media-releases/9436>> Interview with Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM, NDIS Review Co-Chairs (Dr George Taleporos, *Reasonable and Necessary* podcast, 30 May 2023), <<https://assets.summerfoundation.org.au/app/uploads/2023/05/30102846/NDIS-review-podcast-transcript.docx>>

⁷¹ 'A new system of federal administrative review', *Attorney-General's Department*, (Web Page, 2023), <<https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>>.

⁷² Independent Expert Review Program Oversight Committee, *Interim Report on Long Term Options for Dispute Resolution under the National Disability Insurance Scheme*, (Report, 7 December 2022).

current 'adversarial' approach (where both parties - the NDIA and the applicant - present evidence and make arguments before a neutral decision-maker).

New models could affect SDA funding appeals, and NDIS decision-making more generally, in complex ways. PIAC made a detailed submission to a consultation about this new review body, which [can be viewed on the PIAC website](#).⁷³

⁷³ Public Interest Advocacy Centre, Submission to Attorney-General's Department, *Administrative Review Reform Issues Paper* (12 May 2023), <<https://piac.asn.au/2023/06/10/submission-to-attorney-generals-department-administrative-review-reform-issues-paper/>>.

4. Conclusion

Our previous report concluded that:

‘Despite the life-changing potential of the NDIS, many participants who request funding for SDA experience opaque decision-making and long delays from the NDIA.’

and

‘The delays and issues with NDIA decision-making on SDA funding reflect a lack of adequate oversight and accountability, and require action from the federal government.’

Further work is required to design and implement systems that reflect the needs and experiences of NDIS participants requesting SDA. More transparency and consistency is needed from the NDIA when making funding decisions.’

While some welcome progress has been made since that report, the above statements still apply. As this report has shown:

- The NDIA has been making quicker decisions about SDA, yet many decisions are still not being made within acceptable time frames. This includes decisions for urgent cases, such as for participants in RAC or hospital, which are not being adequately prioritised. There is still an urgent need for the NDIA to set specific decision time frames for housing-related support decisions, as distinct from general planning decision standards. In particular, these standards should require urgent decisions (e.g. young people in, or at risk of being admitted to, RAC; NDIS participants in hospital; or participants living in precarious housing) be made within 10 days of a participant request, and all SDA and support decisions to be made in under 50 days.
- Serious errors continue to be made in planning processes, leading to participants being refused funding for the SDA they need. This is reflected by the high success rate for participants at the AAT, showing that where participants are prepared to appeal their cases they are typically vindicated - but only after spending significant time, effort and cost.
- The NDIA’s policies and practices require reform to increase transparency, and ensure decisions are being made in line with the law and guidance provided by previous AAT decisions.

As the case studies in these reports show, persistent issues create huge barriers for NDIS participants seeking housing that meets their needs. The delays and poor decision-making take a personal toll on people with disability, along with their families and support networks, by forcing them to spend months and years in unsafe and/or inappropriate living situations.

There remains an urgent need for change. As ongoing review processes seek to overhaul the NDIS, and replace the AAT with a new external review body, the recommendations in this report show how the Government can ensure people with disability are supported to live an ordinary life at home.

Appendix A: Participant data

Table 2 – Wait times for SDA funding request stages

	Initial funding decision		Internal review		External review	
	2017-22 ⁷⁴	2022-23	2017-22	2022-23	2017-22	2022-23
Median number of days waiting	97	71	99	55	205	125
Range of number of days waiting	6-624	20-267	6-396	16-204	103-513	20-234

Table 3 – Outcomes and wait times for initial funding decisions

Decision	<i>n</i>		%		Median days waiting	
	2017-22	2022-23	2017-22	2022-23	2017-22	2022-23
Aligns with request	37	9	22%	26%	96	69
Does not align with request	94	9	55%	26%	92	63
Ineligible for funding	11	1	6%	3%	99	40
Pending	30	15	17%	44%	99.5	83
Total	172	34	100%	100%	97	71

Table 4 – Outcomes and wait times for internal review of funding decision

Decision	<i>n</i>		%		Median days waiting	
	2017-22	2022-23	2017-22	2022-23	2017-22	2022-23
Aligns with request	19	16	21%	33%	76	63
Does not align with request	54	25	59%	52%	76	50
Ineligible for funding	3	-	3%	0%	120	-
Pending	16	7	17%	15%	231	104
Total	92	48	100%	100%	99	55

Table 5 – Outcomes and wait times for external review of funding decision

⁷⁴ Data for the previous report was collected between June 2017 and February 2022 (2017-22), and for this update report between March 2022 to February 2023 (2022-23)

Decision	<i>n</i>		%		Median days waiting	
	2017-22	2022-23	2017-22	2022-23	2017-22	2022-23
Filed and awaiting first case conference	17	12	35%	39%	70	138
Awaiting hearing	3	-	6%	-	274	-
Case conference(s) in progress	13	2	27%	6%	241	215
Decision varied or set aside by consent	11	17	23%	55%	202	76
Conciliation in progress	1	-	2%	-	210	-
Matter determined by AAT	1	-	2%	-	282	-
Application withdrawn by participant	2	-	4%	-	-	-
Total	48	31	100%	100%	-	-