**Thematic Analysis Of Administrative Appeals Tribunal (AAT) Decisions Involving Claiming And Reviewing The Disability Support Pension**

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Contents

[I Introduction 5](#_Toc532371531)

[II Outline of Relevant Commonwealth Law 6](#_Toc532371532)

[*A Eligibility criteria for the Disability Support Pension (DSP)* 6](#_Toc532371533)

[*B Review of decisions to deny or cancel an individual’s access to the DSP* 9](#_Toc532371534)

[III INTRODUCTION TO THE CRPD 11](#_Toc532371535)

[*A The social model of disability* 11](#_Toc532371536)

[*B Article 28* 12](#_Toc532371537)

[*C Article 13* 13](#_Toc532371538)

[IV Analysis of Recent Victorian AAT Decisions: Key Themes and Issues 14](#_Toc532371539)

[*A Scope of the analysis of AAT cases* 14](#_Toc532371540)

[*B Access of different social groups to AAT appeals process* 15](#_Toc532371541)

[*C Reasons for decisions and key evidence* 19](#_Toc532371542)

[*D The decisions reflect the medical model and neglect the social model* 22](#_Toc532371543)

[*E Decisions indicate that DSP does not afford disability-inclusive social protection* 29](#_Toc532371544)

[*F Decisions indicate access to justice issues in the application, review and appeal process* 33](#_Toc532371545)

[V CONCLUSION AND RECOMMENDATIONS 42](#_Toc532371546)

[BIBLIOGRAPHY 44](#_Toc532371547)

**Thematic Analysis Of Administrative Appeals Tribunal (AAT) Decisions Involving Claiming And Reviewing The Disability Support Pension**

# I Introduction

The Disability Support Pension (DSP) is a form of financial support available to people who are deemed to be unable to support themselves through paid work due to the impact of their impairment.[[1]](#footnote-1) This report’s aim is to assess the extent to which the DSP eligibility criteria, particularly as they are applied by the Administrative Appeals Tribunal when reviewing Centrelink decisions, raise issues or concerns regarding the provisions of the *Convention on the Rights of Persons with Disabilities* (*CRPD*).

Recent evidence has indicated that changes to the eligibility criteria have led to an increasing number of people with disabilities being denied access to the DSP.[[2]](#footnote-2) The Australian Federation of Disability Organisations (AFDO) was concerned about the decreasing number of people with disabilities being found eligible for the DSP. AFDO also had concerns regarding people with disabilities’ access to the process of seeking review by the Administrative Appeals Tribunal (ATT) of DSP-related Centrelink decisions. Consequently, AFDO requested that the Disability Human Rights Clinic prepare a report summarising the legal issues that arise before the Australian Administrative Tribunal in DSP-related decisions. Additionally, AFDO asked us to research the characteristics and experiences of applicants who appeal Centrelink decisions to the AAT. Finally, AFDO requested that we analyse the AAT decisions in order to identify whether the Commonwealth policy regarding eligibility – and its application by the AAT – raises human rights issues under the *CRPD.* We undertook to analyse Victorian AAT decisions relating to the DSP in the timeframe November 2017 to present a ‘case study’ of the issues arising in AAT appeals over the last 12 months.

This report will firstly outline the eligibility criteria for the DSP and the law regarding the appeals process for review of decisions to deny or discontinue an individual’s access to the DSP. Then it will identify and analyse key themes in recent Victorian AAT decisions and explain their implications for Australia’s obligations under the *CRPD*. Finally, it will provide some recommendations for the future.

This report will argue that there are indications that the eligibility requirements for the DSP are inconsistent with the right to social protection and an adequate standard of living guaranteed under article 28 of the *CRPD*. Further, it will contend that there is a need for further steps to ensure that the right of people with disabilities to access to justice guaranteed under article 13 of the *CRPD* is upheld in relation to the review of DSP-related Centrelink decisions by the AAT. Ultimately, we recommend that the DSP eligibility criteria and the AAT review process be re-evaluated in order to ensure compliance with Australia’s obligations under the *CRPD*.

# II Outline of Relevant Commonwealth Law

## *A Eligibility criteria for the Disability Support Pension (DSP)*

A series of legislative changes in recent years have tightened the eligibility requirements for the DSP, making fewer people with disabilities eligible.[[3]](#footnote-3) Eligibility depends on an applicant proving they have impairments which limit functional capacity (that is, the ability to do certain everyday activities), demonstrating a continuing inability to work, and satisfying residency and age requirements.[[4]](#footnote-4) Two requirements under the current law were often determinative in the analysed AAT decisions. These were: the requirement that an applicant has functional impairment(s) and the requirement that they have a continuing inability to work.

1 *Impairment*

Under s 94(1)(a) of the *Social Security Act 1991*, a person must have ‘a physical, intellectual or psychiatric impairment’ in order to be qualified to receive the disability support pension.[[5]](#footnote-5)

(a) *20 points*

Further, for someone to be eligible, their impairment(s) must be ‘of 20 points or more under the Impairment Tables’.[[6]](#footnote-6) The Impairment Tables are found in a legislative instrument – the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*. Their purpose is to enable decision-makers to assign an ‘impairment rating’.[[7]](#footnote-7) This is expressed in terms of a number of ‘points’ – based on the extent of ‘functional impact’ arising from a medical condition.[[8]](#footnote-8)

(b) *Permanency of impairment – a precondition for assigning points*

Under s 6(3) of the *Impairment Tables*, an impairment rating can only be assigned if the condition which causes an impairment is ‘permanent’.[[9]](#footnote-9) In order to be considered permanent, the condition must have been ‘fully diagnosed’ by ‘an appropriately qualified medical practitioner’, ‘fully treated’, and ‘fully stabilised’ and be likely to persist for 2 years.[[10]](#footnote-10)

Whether a condition is fully stabilised can depend on whether the individual has ‘undertaken reasonable treatment’ and whether further treatment is ‘unlikely to result in significant functional improvement’ to the extent that they would be able to work within two years.[[11]](#footnote-11) Alternatively, it could be proved that the person would not experience ‘functional improvement’ allowing them to work within two years or that ‘there is a medical or other compelling reason’ which prevented the person pursuing ‘reasonable treatment’.[[12]](#footnote-12) The cost, location, risks, reliability, and availability of treatment are relevant to determining whether it was ‘reasonable’.[[13]](#footnote-13)

(c) *Functional impairment: the basis for assigning points:*

The Impairment Tables draw attention to ‘what the person can, or could do’, that is, their ‘functional capacity’.[[14]](#footnote-14) Each Impairment Table relates to a specific kind of function [See Box 1].[[15]](#footnote-15) Under each Table, an impairment can be assessed to cause:

- ‘no functional impact’, leading to 0 points being assigned.

- ‘mild functional impact’, leading to 5 points being assigned.

- ‘moderate functional impact’, leading to 10 points being assigned.

- ‘severe functional impact’, leading to 20 points being assigned.

- ‘extreme functional impact’, leading to 30 points being assigned.

The level of functional impairment is assessed by reference to particular examples of activities or tasks which a person can or cannot perform.[[16]](#footnote-16)

|  |
| --- |
| **Box 1: List of Impairment Tables:** |
| * Table 1 - Functions requiring Physical Exertion and Stamina * Table 2 – Upper Limb Function * Table 3 – Lower Limb Function * Table 4 – Spinal Function * Table 5 – Mental Health Function * Table 6 – Functioning related to Alcohol, Drug and Other Substance Use * Table 7 – Brain Function * Table 8 – Communication Function * Table 9 – Intellectual Function * Table 10 – Digestive and Reproductive Function * Table 11 – Hearing and other Functions of the Ear * Table 12 – Visual Function * Table 13 – Continence Function * Table 14 – Functions of the Skin * Table 15 - Functions of Consciousness |

2*Continuing inability to work*

Under s 94(1)(c) of the *Social Security Act 1991*, in addition to proving an impairment that can be assigned 20 or more points, the applicant for the DSP must show that they have ‘a continuing inability to work’ for 15 or more hours per week.[[17]](#footnote-17) Previously, people could be eligible if they were unable to work for 30 or more hours per week.[[18]](#footnote-18)

Under s 94(2)(a)-(b), a ‘continuing inability to work’ can be proven if ‘the impairment is of itself sufficient to prevent the person from doing any work independently of a program of support’ and either the impairment would ‘of itself’ prevent participation in a training activity or the impairment would mean that a training activity would be unlikely to facilitate independent work outside of a program of support.[[19]](#footnote-19) This is assessed by looking at the predicted impact of the impairment within the next two years.[[20]](#footnote-20)

However, if the person’s impairment does not satisfy s 94(2)(a)-(b), and cannot be assigned 20 points under a single Impairment Table,[[21]](#footnote-21) then a ‘continuing inability to work’ can only be proven if the person has ‘actively participated’ in a Commonwealth-funded program of support.[[22]](#footnote-22) That is, a program ‘designed to assist persons to prepare for, find or maintain work’.[[23]](#footnote-23) More specifically, a program of support is administered by a ‘designated provider’[[24]](#footnote-24) such as a Disability Employment Services provider and can involve activities such as education, training and work experience.[[25]](#footnote-25) Under the relevant legislative instrument, active participation in a program for at least 18 months could be required.[[26]](#footnote-26)

In assessing someone’s inability to work, the decision-maker must *not* consider the availability of training activities nor ‘the availability to the person of work in the person’s locally accessible labour market.’[[27]](#footnote-27)

3*Other requirements*

Other requirements include age and Australian residency. The person must be between 16 and the age at which they would become entitled to the age pension.[[28]](#footnote-28)

The applicant must have been an Australian resident for at least 10 years, unless they are granted an exemption or are the dependent child of an Australian resident.[[29]](#footnote-29)

## *B Review of decisions to deny or cancel an individual’s access to the DSP*

If someone’s access to the DSP is denied or cancelled, they can challenge that decision.

1 *Internal review*

Firstly, someone whose DSP application was rejected or whose DSP was cancelled can seek a review of that decision within Centrelink.[[30]](#footnote-30) An Authorised Review Officer[[31]](#footnote-31) (ARO) will then review the decision and decide whether to affirm, vary, or set aside that decision.[[32]](#footnote-32)

If the ARO affirms the original decision, finding the person ineligible for the DSP, the person can then apply to the AAT for a review.[[33]](#footnote-33)

2 *AAT first review*

If the affected person is unsatisfied with the outcome of internal review, they can apply to have a Centrelink ARO’s decision reviewed by the AAT.[[34]](#footnote-34) Applications can be submitted to the AAT online, by phone, or in person at an AAT registry[[35]](#footnote-35) and there are no associated fees.[[36]](#footnote-36) Further steps in the review process include the provision of documents by Centrelink, informal conferences in which Tribunal staff meet with the parties to discuss the case, collect more information, and discuss whether the parties can agree to a resolution without progressing to a hearing.[[37]](#footnote-37) If no agreement is reached, the case will proceed to a first review hearing before one or more Tribunal Members.[[38]](#footnote-38) First review hearings regarding the DSP take place in the Social Services and Child Support Division of the AAT[[39]](#footnote-39) and are heard in private.[[40]](#footnote-40) At any stage, applicants can opt to have a lawyer represent them, or they can choose to be represented by a family member, disability advocate, or another person.[[41]](#footnote-41) Alternatively, they can represent themselves.[[42]](#footnote-42)

The Tribunal conducts an independent, external merits review – it applies the law to the facts to assess whether Centrelink’s original decision was correct.[[43]](#footnote-43) The Tribunal makes the decision as if it was ‘in the shoes’ of the original decision-maker.[[44]](#footnote-44) If the Tribunal decides the original decision to deny or cancel the DSP was incorrect, that finding will override Centrelink’s decision.[[45]](#footnote-45)

3*Second AAT review*

Next, the individual whose DSP claim was rejected or whose DSP was cancelled can apply for a second review by the AAT, if the first AAT review did not lead to a favourable outcome.[[46]](#footnote-46) A second review could lead to the result of the first review being set aside and substituted with a finding that the person was eligible for the DSP. Alternatively, if the Social Services and Child Support Division found that the person was eligible for the DSP, the Department of Social Services can seek a second review to have that finding overturned.[[47]](#footnote-47) Second review hearings are heard in the General Division of the AAT.[[48]](#footnote-48)

4 *Appeal to Federal Court*

If the person affected by refusal or cancellation of the DSP is held not to be eligible at the second review stage, they may be able to appeal that decision to the Federal Court of Australia. The Federal Court has the power to set aside second-tier decisions of the AAT.[[49]](#footnote-49) However, the appeal must relate to a ‘question of law’ rather than a question of fact.[[50]](#footnote-50)

# III Introduction to the CRPD

The Convention on the Rights of Persons with Disabilities (*CRPD*) is an international human rights treaty which enunciates the rights of people with disabilities.[[51]](#footnote-51) It serves to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’[[52]](#footnote-52) Australia has signed and ratified the *CRPD*, which means it has accepted the obligations that it sets out.[[53]](#footnote-53) It must therefore uphold the rights of people with disabilities as enshrined in the *CRPD*.[[54]](#footnote-54)

## *A The social model of disability*

The social model of disability, which emerged in the 1970s, posits that disability arises from social factors such as discrimination and marginalisation.[[55]](#footnote-55) That is, as Mike Oliver writes, the social model emphasises that people are disabled by ‘disabling barriers’ which exist in society, rather than by their impairments.[[56]](#footnote-56) It highlights the need for society to change the way that it views disability.[[57]](#footnote-57)

The activists and theorists who developed the social model also identified and critiqued dominant ideas around disability.[[58]](#footnote-58) They argued that these ideas constituted a ‘medical model’ of disability. The medical model focuses on a person’s condition as something that needs to be fixed.[[59]](#footnote-59) As a result, the medical model pursues the treatment or cure of impairment[[60]](#footnote-60) and ignores the possibility of social change which could facilitate the participation and empowerment of people with disabilities.[[61]](#footnote-61)

The social model of disability is adopted by the *CRPD*, which emphasises that disability arises from impairments which ‘in interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.’[[62]](#footnote-62) In the *CRPD*, the social model forms the foundation for a new human rights model of disability, which not only recognises that social barriers contribute to disability, but emphasises that people with disabilities are the subjects of human rights.[[63]](#footnote-63) Therefore, the social model informs the obligations set out in the *CRPD*. The social model of disability should be reflected in policies which affect the lives of people with disabilities.[[64]](#footnote-64)

## *B Article 28*

Article 28 of the *CRPD* stipulates that people with disabilities have the rights to ‘an adequate standard of living’ and to ‘social protection’.[[65]](#footnote-65)

Under article 28, state parties to the *CRPD* – including Australia – must ‘take appropriate steps to safeguard and promote the realization’ of these rights.[[66]](#footnote-66) This imposes the obligation to take positive steps to implement these rights, by providing services to people with disabilities. Notably, countries must ‘ensure access by persons with disabilities…to social protection programs’[[67]](#footnote-67) and ensure access to people with disabilities who are living in poverty to ‘assistance from the State with disability-related expenses’.[[68]](#footnote-68) According to Rosemary Kayess and Phillip French, these aspects of article 28 make the right to social protection ‘significantly broader than the traditional right to social security’.[[69]](#footnote-69)

Countries must progressively implement measures which ensure that individuals’ rights to an adequate standard of living and to social protection are upheld.[[70]](#footnote-70) However, article 28 also emphasises that these rights must be protected and promoted ‘without discrimination on the basis of disability’.[[71]](#footnote-71) The requirement that countries do not discriminate in providing access to social protection and to an adequate standard of living must be immediately enforced.[[72]](#footnote-72) That is, in international law, Australia does not merely have to progress towards non-discrimination but was obliged to refrain from discrimination as soon as the *CRPD* came into force.[[73]](#footnote-73)

Article 28(2) is relevant to the DSP, because the DSP is a program which forms part of the Commonwealth-administered social security system. The broader Commonwealth social security system includes other forms of government assistance, such as Newstart unemployment benefits and the age pension.[[74]](#footnote-74) Further, article 28(1) is also implicated, as the DSP may be essential to ensure an adequate standard of living for people with disabilities who are not receiving sufficient income through paid employment.

## *C Article 13*

Article 13 of the *CRPD* is also relevant to the access and review processes surrounding the DSP. Access to justice is a human right.[[75]](#footnote-75) It is a comprehensive concept that includes people’s access to the administration of justice systems, procedures, information and locations.[[76]](#footnote-76) A person cannot be fully integrated in society if they are not socially and legally included.[[77]](#footnote-77)

Access to justice contributes to the realisation of other human rights and determines whether the person can enjoy their other rights.[[78]](#footnote-78) Article 13 is closely linked to article 12, which provides for an equal recognition before the law.[[79]](#footnote-79) For example if a person is discriminated against in the workplace, but does not have access to justice, they cannot enforce their right to equality and non-discrimination. In the context of applying for the DSP, a person who could not appeal the decision to reject their application would not have access to justice. In turn, this may have implications for the right to social protection under article 28.

The social model of disability that underpins the *CRPD* holds that societies must change to include persons with disabilities, including in terms of ensuring equal access to justice.[[80]](#footnote-80)

Hence, the *CRPD* creates a positive obligation on the part of states to provide access to justice. Reasonable adjustments may be necessary so that everyone can access the same services.

# IV Analysis of Recent Victorian AAT Decisions: Key Themes and Issues

## *A Scope of the analysis of AAT cases*

In this study, we analysed 45 AAT second review decisions in Victoria. The written reasons for these decisions were located by conducting a search of the AustLII legal database[[81]](#footnote-81) for Administrative Appeals Tribunal decisions between the 1 November 2017 and 20 November 2018, cross-referenced against a search of another legal database, Jade. The search was limited to written reasons which included the phrase ‘disability support pension’. We limited the analysis to Victorian decisions, in order to provide a ‘case study’ that could guide further, more in-depth national research in the future. Consequently, only written reasons for hearings in the Melbourne registry were analysed. Further, the analysis was confined to reasons regarding decisions to refuse or cancel access to the DSP. Cases involving other issues related to DSP claims were excluded.

It must be noted that this report is limited in the scope of its analysis. In 2017-18, Australia-wide, there were 3,610 lodgements for first review of DSP-related Centrelink decisions,[[82]](#footnote-82) whereas there were 911 second reviews relating to the DSP.[[83]](#footnote-83) Written reasons for first reviews by the AAT Social Services & Child Support Division are not available to the public. Hence, this report only analyses the results of the published second review decisions from Victoria that were publicly available. Case examples are included to illustrate some important points.

In the analysis, we identified key demographic data about the applicant and the broad themes and issues arising in the reasons for decision. We assessed the AAT process and the application of the DSP eligibility requirements in light of the provisions of the *CRPD* outlined above.

## *B Access of different social groups to AAT appeals process*

An analysis of the demographic characteristics of the applicants in the 45 cases was conducted, where such information was stated in the Tribunal’s written reasons. Charts representing the results of this analysis can be found in Appendix 1. This analysis indicates the need for further research regarding the access of certain social groups to the appeals process. There were few young people or people with intellectual or sensory disabilities among the applicants in the cases. It is unclear whether this is due to barriers to access or whether there are alternative explanations – for example, it is possible that Centrelink more readily accepts the claims of people with certain types of disabilities. Further, the small number of cases under review means it is not possible to generalise, indicating that further statistical research and analysis is needed. At AFDO’s request, our predominant focus in the analysis was exploring the involvement of Aboriginal and Torres Strait Islander applicants in the AAT appeal process.

1 *Aboriginal or Torres Strait Islander applicants*

In the written reasons of the 45 analysed cases, no applicants were identified as Aboriginal or Torres Strait Islander. A search of all cases heard in the Administrative Appeals Tribunal regarding the DSP was therefore conducted, broadening out the search to hearings held in other states and territories from 1 November 2017 to 28 November 2018. This did not uncover any written reasons in which the applicant was identified as Aboriginal or Torres Strait Islander.[[84]](#footnote-84) This does not rule out the possibility that applicants who appealed to the General Division of the AAT – either in Victoria or other states and territories – were in fact Aboriginal or Torres Strait Islander.

The AAT amended its application form in 2014-15, in order to enable applicants to identify as Aboriginal and/or Torres Strait Islander.[[85]](#footnote-85) The collected information does not seem to be publicly available. However, on request, the AAT provided statistical information regarding the number of applicants to the AAT who identify as ‘Indigenous’.[[86]](#footnote-86) Data regarding the number of applicants who proceed to the second review stage was not available, but the AAT provided statistics regarding applications for first review of a DSP-related decision by the Social Services and Child Support Division. These statistics relate to all applications across Australia. In 2017-18, 91 people who lodged applications for first review of decisions regarding entitlement to the DSP identified as Indigenous.[[87]](#footnote-87) There were a total of 3,610 lodgements in relation to the DSP in 2017-18.[[88]](#footnote-88) Applicants who identified as Indigenous therefore represented 2.5% of people seeking review by the Social Services & Child Support Division of DSP-related Centrelink decisions.[[89]](#footnote-89) Aboriginal and Torres Strait Islander people comprise an estimated 3% of Australia’s total population.[[90]](#footnote-90) However, the prevalence of disability among Aboriginal and Torres Strait Islander people has been estimated to be twice as high as other Australians.[[91]](#footnote-91) This data therefore points to the possibility that Aboriginal and Torres Strait Islander people are under-represented among applicants who seek AAT review of DSP-related Centrelink decisions. However, further research is needed to explore this.

2 *Secondary research that may explain this finding*

When a person belongs to more than one marginalised social group, they may experience multiple, intersecting forms of discrimination.[[92]](#footnote-92) Aboriginal and Torres Strait Islander people with disabilities are subject to numerous forms of exclusion,[[93]](#footnote-93) based on disability, race and other factors such as rurality.[[94]](#footnote-94) This leads to ‘double disadvantage’.[[95]](#footnote-95) There are indications, emerging from academic and legal research, that Aboriginal and Torres Strait Islander people with disabilities may be disproportionately excluded from access to the DSP due to intersecting social barriers.[[96]](#footnote-96) Indeed, Karen Soldatic argues that legislative changes which have restricted the availability of the DSP have ‘uniquely affected’ Indigenous Australians.[[97]](#footnote-97)

*(a) Barriers to access to the DSP*

*(i) Remoteness*

The Commonwealth Ombudsman examined the accessibility of the DSP to Indigenous Australians with disabilities who live in remote areas.[[98]](#footnote-98) The Ombudsman identified that remote Indigenous Australians face barriers when it comes to obtaining the medical evidence required to successfully apply for the DSP.[[99]](#footnote-99) Particular barriers to accessing the DSP emerge from the lack of services in remote communities.[[100]](#footnote-100) Health services;[[101]](#footnote-101) disability support services;[[102]](#footnote-102) and Centrelink offices at which aspects of the DSP application process (such as Job Capacity Assessments) can be conducted in person[[103]](#footnote-103) may not be geographically accessible.[[104]](#footnote-104)

*(ii) Language and cultural barriers*

The Commonwealth Ombudsman highlights that ‘language and cultural barriers’ may impede Aboriginal and Torres Strait Islander Australians from communicating to medical professionals regarding the functional effects of their health conditions.[[105]](#footnote-105) This may mean that medical reports do not convey the information required under the DSP eligibility requirements.[[106]](#footnote-106) This is arguably consistent with a broader lack of ‘culturally sensitive or appropriate’ disability services.[[107]](#footnote-107)

*(iii) Colonisation, racism and oppression*

Racism in the provision of medical services and the dispensation of social security may impede access to the DSP.[[108]](#footnote-108) Fitts and Soldatic note that instances of discrimination and racism in healthcare ‘can prevent Aboriginal and Torres Strait Islander Australians seeking medical advice and treatment, a process that is central to building a body of evidence for a DSP application’.[[109]](#footnote-109) Indeed, Scott Avery has highlighted that individual Aboriginal and Torres Strait Islander people with disability can come to have ‘a rational expectation of discrimination’, leading to avoidance of situations in which further discrimination could occur.[[110]](#footnote-110)

More broadly, David Hollinsworth notes that the fact that the ‘administrative location for disability services’ is commonly within ‘welfare agencies’ can elicit aversion among Aboriginal and Torres Strait Islander people with disabilities.[[111]](#footnote-111) This is due to Australia’s violent history of colonisation and racism, including the forced separation of Aboriginal and Torres Strait Islander children from their parents.[[112]](#footnote-112) Given that the DSP is administered by the Commonwealth government agency Centrelink, this could deter applications to the DSP.

3 *Potential barriers to access to the appeals process*

It is possible that many of the same factors which inhibit access to the DSP in the first instance also prevent Indigenous Australians with disabilities from appealing claims which were rejected by Centrelink. That is, the barriers posed by remoteness, linguistic and cultural inaccessibility, racism and discrimination may constitute hurdles to appealing the rejection or cancellation of the DSP. Even if rejected applicants apply for internal review by an ARO, it is possible that they may not have access to the further steps of applying for review of the decision by AAT1 or, if unsuccessful in their first AAT hearing, appealing to AAT2. Further research is needed to investigate whether Indigenous Australians with disabilities face barriers to appealing Centrelink decisions to the AAT.

4 *Human rights implications*

The *CRPD* recognises the concept of intersectionality,[[113]](#footnote-113) acknowledging that people experience discrimination not only in relation to disability but in relation to other identities such as gender and race.[[114]](#footnote-114) However, while article 6 is a ‘binding intersectionality clause’ foregrounding women with disabilities,[[115]](#footnote-115) the intersection between race and disability is only highlighted in the *CRPD*’s preamble[[116]](#footnote-116) and is not binding. Nevertheless, addressing intersecting discrimination is integral to the transformative equality approach adopted by the *CRPD*[[117]](#footnote-117) and can be seen as part of the purpose of the Convention.[[118]](#footnote-118) Transformative equality seeks ‘to overcome structural, institutional, as well as direct and indirect discrimination by introducing positive duties to transform society’.[[119]](#footnote-119)

Having the DSP refused or retracted may deny Aboriginal and Torres Strait Islander people the right to social protection under article 28 of the *CRPD*,[[120]](#footnote-120) as other social benefits may be inadequate to cover disability-related costs.[[121]](#footnote-121) Disability-inclusive social protection systems must account for ‘multiple and aggravated forms of discrimination’[[122]](#footnote-122) The evidence that Aboriginal and Torres Strait Islander people – especially those who live in remote areas – face barriers to accessing the DSP[[123]](#footnote-123) suggests that Australia’s social protection system is failing to address intersectional discrimination.

Further, there is a possibility that the right of Aboriginal or Torres Strait Islander people with disabilities to have access to justice – under article 13 of the *CRPD* – is not being upheld. The apparent under-representation of Indigenous Australians among applicants to the AAT may indicate that intersectional discrimination experienced by Indigenous Australians with disabilities precludes access to review by the AAT. Overall, there is a need for further research into how the AAT appeals process can be made more responsive to intersectional discrimination.

## *C Reasons for decisions and key evidence*

1 *Key evidence*

Types of evidence which were commonly relied on in the cases include:

* ‘T documents’ - that is, material documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975*. These documents are lodged by Centrelink[[124]](#footnote-124) and include its reasons for the decision to refuse or cancel the DSP, factual findings on which that decision was based, and evidence for those findings.[[125]](#footnote-125)
* Centrelink Job Capacity Assessment reports. These are reports based on an assessment by a Centrelink-employed health professional.[[126]](#footnote-126) The assessment can be based on evidence including medical records, employment records,[[127]](#footnote-127) and an interview with the applicant.[[128]](#footnote-128)
* Medical evidence, including reports and letters from doctors and other health professionals, hospital records, and reports from tests and scans.
* Oral or written evidence from the applicant.

2 *Key reasons for decisions in cases involving rejected applications for the DSP*

In cases which related to the rejection of someone’s claim for the DSP, the reasoning often turned on whether the person’s impairments could be assigned 20 points under the Impairment Tables.[[129]](#footnote-129) Often, the preliminary requirement that the condition be permanent[[130]](#footnote-130) - that is, fully diagnosed, treated, stabilised, and likely to last for at least 2 years[[131]](#footnote-131) - was a decisive issue.[[132]](#footnote-132) In many cases, the Tribunal did not assign any points in relation to a condition because the applicant had not shown that it was permanent.[[133]](#footnote-133) For example, in one case, an applicant who had fled war in Iraq and Syria before migrating to Australia[[134]](#footnote-134) was diagnosed with mental health conditions including post-traumatic stress disorder. However, the applicant had not proven that her mental health conditions had been fully treated and stabilised,[[135]](#footnote-135) which would have been necessary in order for the Tribunal to find that they were permanent.[[136]](#footnote-136)

When one or more conditions were proven to be permanent, the result often turned on whether those conditions could, together, be assigned at least 20 points, based on the assessment of the person’s functional capacity.

The Tribunal must only look to evidence regarding the applicant’s conditions during the ‘qualifying period’ (a period starting from the date the person made their claim). This means that any ‘subsequent changes in health’ or later diagnoses are irrelevant.[[137]](#footnote-137) This requirement influenced the outcome of many hearings, with the Tribunal sometimes noting that they must not consider evidence of a decline in functional capacity that occurred after the qualifying period.[[138]](#footnote-138)

In some cases, the applicant successfully argued that their conditions warranted a total of 20 points, but the Tribunal did not assign them a ‘severe’ rating under a single impairment table. This meant that the person had satisfied the requirement of showing they had impairment(s) which warranted at least 20 points across all the Impairment Tables. However, in the absence of ‘severe impairment’, the further requirement of demonstrating a continuing inability to work is harder to satisfy.[[139]](#footnote-139) Therefore, in such cases, a major issue was whether the applicant could be found to have ‘a continuing inability to work’.[[140]](#footnote-140) This often depended on whether the applicant had undertaken a program of support.[[141]](#footnote-141) The Tribunal emphasised that it must ‘strictly enforce’ the requirement to participate in a program of support,[[142]](#footnote-142) whether or not the applicant was aware of it.[[143]](#footnote-143)

In a small number of cases, other issues, such as whether the applicant had met the residency requirements, were determinative of the outcome.[[144]](#footnote-144)

3 *Key reasons in cases involving cancellation of the DSP:*

In seven cases, Centrelink had reviewed or reassessed the person’s eligibility and deemed them to no longer be qualified for the DSP.[[145]](#footnote-145) As in cases of rejected applications, the Tribunal looked to whether the person had fully diagnosed, treated and stabilised condition(s) which could be assigned at least 20 points. Also, the Tribunal was limited to looking at whether the person qualified on the date their DSP was cancelled, rather than at the time of the hearing. In certain cases, it was found that the person was no longer eligible because their conditions could not be assigned enough points.

In two cases, the decision to cancel someone’s DSP was upheld by the AAT because they had moved to another country and were therefore no longer eligible.[[146]](#footnote-146)

## *D The decisions reflect the medical model and neglect the social model*

The analysis of AAT decisions revealed that the reasoning of the Tribunal, and the underlying law, strongly reflect the medical model of disability. In contrast, the experiences of discrimination and marginalisation emphasised by the social model – which underpins the human rights model adopted by the *CRPD* – are largely irrelevant to the eligibility requirements for the DSP, and therefore received comparatively little attention.

1 *Reliance on medical evidence regarding the impacts of conditions/impairments*

One element of the eligibility provisions which was often determinative in the analysed AAT decisions was the requirement that the applicant’s condition(s) had been fully diagnosed, treated and stabilised. This indicated the high degree of reliance on medical evidence and hence, the influence that the medical model has in this area. If an individual’s disability is not diagnosed and treated by a qualified medical professional, then the individual will not be awarded any impairment points.[[147]](#footnote-147) Therefore, applicants must ensure that they provide the relevant medical evidence to prove that they have a disability that was fully diagnosed, treated and stabilised.

Self-reporting of experiences is not sufficient even if the effect that the condition has on the individual is evident.[[148]](#footnote-148) In *McMahon*, the Tribunal asserted that although Mr McMahon’s functioning was affected by his mental health issues, they could not consider them, as they had not been diagnosed by a clinical psychologist or psychiatrist at the time of his claim.[[149]](#footnote-149)

The emphasis that is placed on diagnosis may impact upon applicants, as they are required to think of, and describe, themselves in terms of the disease they have. In *Ghattas and Secretary*, Mr Ghattas described himself as ‘a crippled mess unable to cope with life’.[[150]](#footnote-150) The medical model’s emphasis on fixing or stabilising a disease might have a disempowering effect upon some individuals with disability as it requires applicants to characterise themselves as having a problem that needs to be fixed. Further, the focus on individual diagnosis and treatment arguably reflects an assumption that it is the responsibility of individuals to manage disability and, only if they cannot, for the state to provide financial support. Paradoxically, a failure to manage disability by obtaining ‘reasonable treatment’ may itself be grounds for refusing access to the DSP, as we further explore in the next section.

The way in which eligible recipients of social protection are identified must be made consistent with the *CRPD*.[[151]](#footnote-151) Otherwise, eligibility requirements can reinforce medical models of disability through a ‘narrow medical focus’.[[152]](#footnote-152) As discussed in detail above, the DSP eligibility requirements do not uphold the social model, which is the foundation for the human rights model of disability that emerges from the *CRPD*.[[153]](#footnote-153) To uphold the social model (and by extension, the human rights model), eligibility requirements must account for the ‘contextual factors in which individuals with disabilities live and work’.[[154]](#footnote-154) As outlined above, the analysis of AAT decisions revealed a heavy reliance on medical evidence in legal determinations of eligibility, and a lack of attention to social barriers to employment. ‘Work capacity’ assessment – which is the assessment model for the DSP[[155]](#footnote-155) – is tied to medical definitions of disability.[[156]](#footnote-156) Overall, the Australian approach to eligibility for the DSP does not conform to ‘a rights-based definition of persons with disabilities’.[[157]](#footnote-157) This points to a failure to implement a disability-inclusive social protection system in line with Australia’s obligations under the *CRPD*.

2 *Implications for choice in treatments*

By hinging access to the AAT on proof that an individual has sought ‘reasonable treatment’[[158]](#footnote-158) for their condition – in order to reduce or eliminate the functional effects of their impairment – the DSP eligibility requirements adhere to the medical model assumption that disability can and must be ‘treated, cured, fixed or at least rehabilitated’.[[159]](#footnote-159) This raises questions around applicants’ autonomy in choosing – or refusing – treatments. In some cases, the Tribunal found that a condition had not been fully treated or stabilised on the basis that reasonable treatment had not been pursued.[[160]](#footnote-160) For instance, in *Ritskos*,the applicant’s PTSD and depression/anxiety were found not to have been fully treated and stabilised.[[161]](#footnote-161) The Tribunal noted that she had not followed the advice of a psychiatrist to increase dosage of antidepressants or to have follow-up consultations: ‘Neither of these recommendations were followed. This program of treatment seems rational and logical and *regrettably it was not undertaken*.’[[162]](#footnote-162) Similarly, in *Nguyen*, non-compliance with prescribed medications informed a finding that a condition had not been proven to be fully diagnosed, treated and stabilised.[[163]](#footnote-163) In this way, the eligibility requirements – and their application by the AAT – arguably make treatment an imperative.

Factors such as risks involved in treatment can be considered in assessing reasonableness.[[164]](#footnote-164) A nuanced approach is perhaps evident in *ZSYJ and Secretary*  – the Tribunal rejected the Department’s argument that the applicant should have used medication to manage her mental health conditions, as there was evidence she had received other treatment.[[165]](#footnote-165) Nevertheless, the case still illustrates that the law calls for an assessment of whether a person’s treatment of their condition – or choice not to pursue treatment – was ‘reasonable’.[[166]](#footnote-166) Therefore, an individual’s concerns around side-effects or costs of treatmentmay be second-guessed by the decision-maker in assessing eligibility for the DSP.[[167]](#footnote-167) Louise Humpage states that to ‘use medical professionals as “gatekeepers” to resources and subject people with disabilities to systems of surveillance, compliance and coercion’ perpetuates the medical model.[[168]](#footnote-168) The fact that people with disabilities are expected to comply with ‘reasonable treatment’ recommendations or potentially deal with the economic consequences of being found ineligible for the DSP, can be seen as a manifestation of a coercive medical model.

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| **Case Example regarding the need for ‘reasonable treatment’:**  ***Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018)** |
| Christopher Perkins lodged a claim for the DSP, as he was experiencing physical disability in relation to a spinal condition and mental health disability. According to Mr Perkins (as paraphrased by the Tribunal) he was living in a caravan at the time he applied for the DSP. He reported that he was experiencing difficulties in self-care and would even go three to four days without eating.[[169]](#footnote-169)  Centrelink rejected his claim, with this decision being upheld on internal review by an ARO.[[170]](#footnote-170) Mr Perkins appealed the decision to AAT1. AAT1 accepted that he was eligible for the DSP.[[171]](#footnote-171) However, the Secretary of the Department of Social Services sought a review of the AAT1 decision.[[172]](#footnote-172)  At the second-tier level, AAT2 found that Mr Perkins’ spinal condition could not be considered permanent[[173]](#footnote-173) as it had not been ‘fully stabilised’ as required under s 6(6) of the *Impairment Tables*.[[174]](#footnote-174) The issue of whether Mr Perkins had obtained ‘reasonable treatment’ was determinative – the Tribunal concluded that he had not pursued reasonable treatment for his spinal condition, meaning that the condition could not be found to have been stabilised.[[175]](#footnote-175) Evidence that Mr Perkins had not received ‘reasonable treatment’ included evidence that he had apparently failed to attend orthopaedic appointments;[[176]](#footnote-176) ‘had not continued with physiotherapy sessions and had not engaged in pain management as recommended’; and used ‘alcohol and non-prescription drugs’ in order to manage his pain.[[177]](#footnote-177) As the condition was not proven to be stabilised – and therefore, could not be found to be permanent – no points were allocated.  In regards to his mental health conditions, the Tribunal once again considered the issue of ‘reasonable treatment’ in order to assess whether the conditions had been fully stabilised.[[178]](#footnote-178) There was evidence that Mr Perkins had not attended some psychological appointments and the Secretary submitted that he did not comply with certain treatments.[[179]](#footnote-179) However, the Tribunal ultimately held that treatment had been reasonable,[[180]](#footnote-180) noting that under s 6(7), the local availability, accessibility and cost of treatment and its associated risks must be considered in assessing what constitutes reasonable treatment.[[181]](#footnote-181)  Nevertheless, Mr Perkins’ arguments were ultimately unsuccessful. Even though he provided evidence of the extensive impacts of his mental health condition, the Tribunal emphasised that under Table 5 (Mental Health Function), ‘self-report of symptoms alone is insufficient and there must be corroborating evidence of a person’s impairment’.[[182]](#footnote-182) The functional impact was therefore assessed to be moderate rather than severe, leading to the allocation of 10 points.  As Mr Perkins was only allocated 10 points in relation to his mental health conditions – and no points in relation to his spinal condition – he did not meet the 20-point threshold in s 94(1)(b) of the *Social Security Act*. Consequently, he was found to have been ineligible for the DSP in the qualifying period.[[183]](#footnote-183) This case illustrates that an applicant’s failure or refusal to undergo certain treatments can, if assessed not to be reasonable, be a hurdle to being found eligible for the DSP. |

3 *Lack of attention to social exclusion, marginalisation and discrimination*

Whereas the impacts of applicants’ impairments were at the centre of the Tribunal’s application of the relevant law, social aspects of disability were largely unmentioned. This reflects the silence of the regulatory framework on the social causes of disability. Indeed, as the *Impairment Tables* exclusively direct attention to the tasks and activities an individual is able to perform, evidence relating to the way in which social structures disable people with impairments is largely irrelevant. Evidence of marginalisation or discrimination is not the basis for the ‘award’[[184]](#footnote-184) of points under the Impairment Tables.

However, the application of the Impairment Tables sometimes revealed that the effects of impairment cannot be neatly separated from the consequences of societal barriers. That is, as Tom Shakespeare writes, ‘it is the interaction of individual bodies and social environments which produces disability.[[185]](#footnote-185) For instance, in arguing that they met the eligibility requirements, one applicant noted a lack of public transport in their area,[[186]](#footnote-186) while another stated that not only was there limited public transport available but she was unable to access buses while using a mobility scooter.[[187]](#footnote-187) Such examples illustrate that the accessibility of public transport can influence the ability of people with disability to be mobile and, by extension, to access employment.[[188]](#footnote-188) The Impairment Table relating to the functional impairment of the lower limbs, which was applied in *McMahon,* directs attention to whether a person ‘requires assistance to use public transport’.[[189]](#footnote-189) The Table implies that the inability to use public transport without assistance arises from ‘a permanent condition resulting in functional impairment when performing activities requiring the use of legs or feet’[[190]](#footnote-190). However, from the perspective of the social model, a person’s inability to use public transport can be attributed to a societal failure to provide accessible transport and to recognise that the use of public transport does not necessarily require ‘the use of legs or feet’.

The thematic analysis revealed a lack of attention to the discrimination and ableism which Australians with disabilities commonly experience in the workplace.[[191]](#footnote-191) In a case in which the Tribunal observed that the applicant had emphasised exclusion from the workplace, this did not underpin the legal reasoning or influence the Tribunal’s ultimate decision [see case study below].[[192]](#footnote-192) This reflects the fact that being excluded from employment – as opposed to being deemed to be physically, intellectually or psychologically incapable of undertaking employment – is not relevant under the current eligibility requirements.

However, research which is guided by the social model and therefore foregrounds ‘the lived experience of people with disability’[[193]](#footnote-193)indicates that that discrimination is a major barrier to employment.[[194]](#footnote-194) Indeed, submissions by people with disabilities to the National People with Disabilities and Carer Council indicated that discriminatory attitudes among employers prevent some people with disabilities from obtaining work.[[195]](#footnote-195) As a result, people with disabilities may require government assistance in the form of income replacement,[[196]](#footnote-196) despite their efforts to obtain employment.[[197]](#footnote-197)

Overall, the analysis of AAT decisions revealed that evidence of discrimination and marginalisation is absent or given little attention. This lack of attention to social exclusion flows from the eligibility requirements. Indeed, the provisions governing eligibility do not refer to negative attitudes to disability or societal barriers to participation. Further, s 94(3) of the *Social Security Act* stipulates that the local availability and accessibility of work must not be considered in assessing capacity to work. Ultimately, the eligibility requirements construe disability as ‘an individual problem’,[[198]](#footnote-198) focusing on people’s impairments rather than their social context. Therefore, the social model is not adequately reflected in the law nor in the AAT decisions which apply the law.

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| **Case Example illustrating that evidence of social exclusion is irrelevant to eligibility:**  ***Plant and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3860 (15 October 2018)** |
| Maurice Plant, a 65-year-old man,[[199]](#footnote-199) applied for the DSP.[[200]](#footnote-200) His claim was rejected by Centrelink.[[201]](#footnote-201) One of his conditions was deemed by Centrelink to warrant 10 points, indicating moderate impairment to lower limb function under Table 3 of the *Impairment Tables*. Mr Plant was found to be ineligible because his conditions did not meet the minimum threshold of 20 points.  Centrelink’s decision was affirmed by the ARO on internal review[[202]](#footnote-202) and upheld by AAT1.[[203]](#footnote-203) On appeal, AAT2 agreed with Centrelink that his lower limb condition gave rise to a moderate functional impact which could be accorded 10 points.[[204]](#footnote-204) Further, his other conditions were all deemed to have no proven functional impacts.[[205]](#footnote-205) Therefore, Centrelink’s original decision that Mr Plant could not be assigned 20 points and was therefore ineligible for the DSP was affirmed.[[206]](#footnote-206)  During the hearing, Mr Plant gave evidence regarding the impact of his disabilities.[[207]](#footnote-207) Mr Plant’s evidence included descriptions of functional impairment, as required under the *Impairment Tables*. However, his submissions also extended to issues of social exclusion and marginalisation. Mr Plant stressed that he did not think that his former employer ‘*wanted a person who could not walk or stand properly*’.[[208]](#footnote-208) He also informed the Tribunal that he had been ‘*ostracised*’ from friends and family.[[209]](#footnote-209) Mr Plant’s submissions were noted by the Tribunal. However, they did not inform the Tribunal’s legal reasoning.  Mr Plant also stated, as paraphrased by the Tribunal, that ‘he was generally dissatisfied with the whole process’,[[210]](#footnote-210) illustrating the frustration among applicants which was evident in multiple cases, as discussed below. Finally, Mr Plant affirmed that he had ‘*never shirked work*’,[[211]](#footnote-211) perhaps indicating that having had his application for the DSP rejected had caused him to feel stigmatised. |

## *E Decisions indicate that DSP does not afford disability-inclusive social protection*

The AAT decisions under review, and the eligibility criteria that they addressed, also raise concerns about the extent to which DSP affords social protection and an adequate standard of living as required under article 28 of the *CRPD*. Key features of disability-inclusive social protection systems – under article 28 and other international legal instruments – were identified by the United Nations Special Rapporteur on the Rights of Persons with Disabilities,[[212]](#footnote-212) Catalina Devandas Aguilar, in her 2015 report to the General Assembly.[[213]](#footnote-213) In this section, the eligibility requirements for the DSP, and how they are understood and applied in the reviewed AAT decisions, are assessed by reference to some of these key features.

1 *The focus on functional impact and discrimination*

Devandas Aguilar emphasises that social protection programs and benefits must be implemented in line with the principle of non-discrimination.[[214]](#footnote-214) The principle of non-discrimination does not simply require people with disabilities to be provided social protection on an equal basis with others. Rather, it also requires social protection systems to acknowledge and address people with disabilities’ lived experiences of discrimination.[[215]](#footnote-215) She explains that: ‘Systems must address the structural barriers that persons with disabilities face to participate in society, including lack of accessibility.’[[216]](#footnote-216)

As illustrated above, the analysis of AAT written reasons reveals that the eligibility requirements for the DSP largely focus on the ‘functional impact’ of individual health conditions and impairments. Evidence of exclusion and disadvantage as a result of structural barriers cannot be used to prove eligibility, even if it is those barriers which prevent a person accessing sufficient paid employment. While Australia prohibits discrimination on the basis of disability in employment,[[217]](#footnote-217) the DSP eligibility requirements do not recognise and account for discrimination on the basis of disability.

2 *Failure to encourage inclusion and participation in employment*

To be disability-inclusive, disability benefits must not reinforce the idea that people with disabilities are incapable of participating in employment[[218]](#footnote-218) nor promote the idea that all people with disabilities require welfare.[[219]](#footnote-219) Rather, they must encourage ‘inclusion and active participation’ in the workforce.[[220]](#footnote-220)

Devandas Aguilar notes that if eligibility hinges on incapacity to work, this plays into stereotypes and ‘perpetuates…dependency on the benefits by eliminating any expectation’ that people will become employed.[[221]](#footnote-221) The eligibility requirements for the DSP do not completely eliminate the expectation of participation in employment. While ‘continuing inability to work’ due to an impairment is an eligibility requirement,[[222]](#footnote-222) work is defined to mean work ‘for at least 15 hours per week’.[[223]](#footnote-223) However, if a current DSP recipient works for more than 30 hours per week, their DSP may be stopped,[[224]](#footnote-224) and reduction in the amount of their DSP will occur if they earn over $172 per fortnight.[[225]](#footnote-225)

Further, participation in a program of support – such as training – is necessary for many people with disabilities to be found eligible for the DSP. This arguably indicates an expectation that people with disabilities should enter the workforce and promotes participation in employment. However, focusing on ‘individual skills or behaviour at the expense of structural issues’ may imply that people with disabilities who apply for welfare do not want to work or lack necessary skills.[[226]](#footnote-226) A program of support may help to overcome ‘barriers to employment’ which might have arisen from lack of access to education, training or prior work experience.[[227]](#footnote-227) Nevertheless, the requirement to complete a program of support arguably reflects an assumption that it is people with disabilities who must change. It ignores the need for societal transformation, such as the elimination of workplace disability discrimination and the provision of adequate accessibility and reasonable accommodations to make employment accessible.[[228]](#footnote-228) Indeed, Rose Galvin argues that the Commonwealth has narrowed the eligibility requirements for the DSP without adequately addressing ‘actual conditions of exclusion’.[[229]](#footnote-229) Ultimately, the DSP eligibility requirements fail to acknowledge that the cause of unemployment or underemployment of many people with disabilities may be disabling barriers in society.

Further, a failure to participate in a program of support can inform a finding that someone is ineligible for the DSP – as it did in several of the analysed AAT cases.[[230]](#footnote-230) This points to a risk that eligibility requirements which purport to encourage participation in the workforce[[231]](#footnote-231) – by requiring participation in a program of support – may in fact lead to a denial of the right to social protection.

3 *Findings of ineligibility and the risk of poverty*

The outcomes in the analysed AAT decisions indicate that many people with disabilities are deemed ineligible for DSP payments because, for instance, they do not meet the minimum of 20 points under the Impairment Tables or because their condition is not fully diagnosed, treated and stabilized. In fact, 80 percent of applicants in the analysed cases were found to have been ineligible during the qualifying period after their application or at the date Centrelink cancelled their payment. This raises the possibility that Australia’s social protection system is failing to ameliorate extra costs and address poverty among those people with disabilities who are deemed ineligible for the DSP.

Devandas Aguilar explains that a disability-inclusive social protection system must address poverty among people with disabilities.[[232]](#footnote-232) Poverty can disproportionately affect people with disability,[[233]](#footnote-233) due to factors such as exclusion from employment and discrimination.[[234]](#footnote-234) Further, Devandas Aguilar emphasises that social protection programs must cover ‘disability-related extra costs’ such as costs associated with accessing health care, mobility aids, and specialised devices.[[235]](#footnote-235) They must also be sufficient to allow people with disabilities to exercise their other economic, social and cultural rights.[[236]](#footnote-236) The DSP is intended to be a substitute for income among unemployed and under-employed people with disabilities and can enable access to funding to cover extra costs stemming from disability.[[237]](#footnote-237) It is beyond the scope of this report to discuss whether the amount of financial support provided under the DSP is adequate to uphold these goals.[[238]](#footnote-238) However, Soldatic explains that when people with disabilities are moved off the DSP and onto other sources of government assistance such as the Newstart unemployment benefit, they may lose access to funding to cover extra costs associated with disability.[[239]](#footnote-239) She specifies that pension benefits available to DSP recipients include ‘highly subsidised pharmaceuticals’ and ‘rental assistance’, and that being a recipient of the DSP may be necessary to access ‘state/territory-funded disability support services such as in-home support, disability counselling, aids and equipment, subsidised taxi scheme and companion card’.[[240]](#footnote-240) Newstart recipients cannot access these additional sources of support,[[241]](#footnote-241) must comply with requirements including ‘actively looking for work’ and reporting to Centrelink every two weeks, and receive a much lower rate of payment.[[242]](#footnote-242)

Devandas Aguilar suggests that countries should ‘unbundle income security and disability-specific assistance’ in order to promote inclusion in employment.[[243]](#footnote-243) To an extent, another Commonwealth initiative, the National Disability Insurance Scheme (NDIS) conforms to this recommendation, by providing funding and support to some people with permanent impairments which ‘result in substantially reduced functional capacity’.[[244]](#footnote-244) Eligibility to access the NDIS does not depend on an inability to work.[[245]](#footnote-245) However, to participate in the NDIS, a person with disability must prove their impairment is permanent (or is likely to be) and that it results in ‘substantially reduced functional capacity’.[[246]](#footnote-246) This means that the NDIS is not accessible to all people with disabilities. In fact, it is predicted that only approximately ten percent of people with disabilities will access disability support packages under the NDIS.[[247]](#footnote-247)

Ultimately, people with disabilities who are denied access to the DSP are likely to be at a greater risk of poverty, especially if they are subject to numerous forms of disadvantage.[[248]](#footnote-248) The fact that some people with disabilities cannot access the DSP nor other sources of support that account for disability-related costs, such as the NDIS, potentially indicates that their right under article 28 to social protection is not being upheld.[[249]](#footnote-249) This suggests that the Australian social protection system cannot be considered fully disability-inclusive.

## *F Decisions indicate access to justice issues in the application, review and appeal process*

Difficulties in the application, review and appeals process were apparent in a number of the cases reviewed. These included problems with confusing and inaccessible processes and evidence requirements, lack of legal representation and the long duration of the process, all of which raise concerns under article 13 of the *CRPD*.

1 *The process is confusing and inaccessible*

An individual can only be successful in their DSP claim if they meet all the strict requirements that the law imposes. Hence, it is crucial that the applicants understand the process and do not make any mistakes. Unfortunately, the AAT decisions under analysis suggested that there might be a lack of access to information, because some applicants did not know what to expect about the process.[[250]](#footnote-250) This was linked to expressions of frustration and anxiety in certain cases. In *TDQN*, the applicant and her daughter were distressed because they did not know what was required to qualify for a DSP.[[251]](#footnote-251) In *Ritskos,* the applicant said that she believed that she did everything that was required of her, but her claim was rejected.[[252]](#footnote-252) She said that she had been ‘left in a ditch’.[[253]](#footnote-253)

While it is unclear why some applicants lacked understanding about the process, it might be because their access to information was limited. They might not have known how to request the needed information or they might not even have known of its availability.[[254]](#footnote-254) As there is evidence that some applicants may struggle financially, poverty might be an impediment in accessing information.[[255]](#footnote-255) Some applicants might live in a remote location where there is no legal centre nearby to seek advice. This might be especially an issue for Aboriginal and Torres Strait Islander applicants. [[256]](#footnote-256)

A lack of access to the internet or skills to use it would limit the information available to applicants with disabilities and also the means by which they can communicate and seek assistance. In *Jorj*, the applicant did not have access to email facilities and this made communication with the person more difficult.[[257]](#footnote-257) The Australian Digital Inclusion Index states that DSP recipients are the most digitally excluded group.[[258]](#footnote-258) Additionally, the information itself might not be in an accessible format for persons with certain disabilities.[[259]](#footnote-259)

It is arguably even harder for some people with cognitive disability to understand the process. One applicant in the AAT cases reviewed, who had a mild neurocognitive disorder, did not realise that his claim for DSP could be rejected as a result of the interview he had.[[260]](#footnote-260) Some individuals with psychosocial disabilities testified as having trouble concentrating and remembering important information.[[261]](#footnote-261) This indicates that the standard appeal process may be inaccessible or exclusionary for some applicants with disabilities.

As a result of not understanding the requirements, applicants may not have a clear understanding of why their application was refused or cancelled nor understand what evidence they need to present to the AAT. Unfortunately, even if the Tribunal believes them and sympathises with their situation, it must apply the strict legal requirements.[[262]](#footnote-262) It may be confusing to applicants that medical evidence obtained after the qualification period cannot be considered by the Tribunal,[[263]](#footnote-263) even if that same evidence may mean they could now be found eligible if they submitted a new DSP claim to Centrelink.

The application process is difficult not just because of difficulties in understanding the requirements, but also because of its duration and demands. It must be noted that certain applicants reported being in considerable pain around the time of their hearing. Mr McMahon gave evidence that he was ‘coping to an extent on pain killers’.[[264]](#footnote-264) Other individuals may not experience physical pain, but may have difficulties concentrating and remembering important information because of a psychosocial disability. In *Krol and Secretary*, the applicant became angry at the hearing because she was frustrated with the questioning process.[[265]](#footnote-265) Another applicant found the questioning process challenging, as he had difficulty concentrating and remembering the treatments he had received.[[266]](#footnote-266) Some applicants could not attend their hearing and had to give evidence over the phone.[[267]](#footnote-267) In *Mowbray,* the applicant was too anxious about the process and hence the hearing had to be cancelled.[[268]](#footnote-268) It took place at a later date but without his presence.[[269]](#footnote-269) The fact that applicants expressed their dissatisfaction and frustration with the hearing process, and were sometimes excluded from it altogether, may point to a failure to provide appropriate accommodations to people with disabilities, in order to make the review process accessible.[[270]](#footnote-270)  This suggests a lack of access to justice.

Appropriate accommodation is necessary, inclusive policies and actions are not sufficient in establishing equality.[[271]](#footnote-271) The term ‘reasonable accommodation’ involves a recognition that certain individuals might not be able to perform particular activities.[[272]](#footnote-272) It also imposes an obligation that adjustments are made, so that they can benefit from services.[[273]](#footnote-273) This ensures equality, as everyone would be able to have the same opportunities and services.[[274]](#footnote-274)

While it can be argued that the justice system already considers the person’s individualised needs by allowing evidence to be given via the phone, providing individuals with interpreters and not requiring the person to be physically present at the hearing, the analysis of AAT decisions above indicates that this may not be sufficient for all applicants.[[275]](#footnote-275) Certain applicants in the decisions we analysed had English as their second language and hence it is important that information is provided in simple English.[[276]](#footnote-276) The tribunal recognised that language barriers can present another difficulty for the applicant.[[277]](#footnote-277) The AAT has made a video which features plain-language information about the AAT, however the video does not specifically explain how to apply for review of DSP-related Centrelink decisions.[[278]](#footnote-278) Brochures written in plain English are also provided to applicants to explain the initial stages of the process.[[279]](#footnote-279) Nevertheless, the experiences of certain applicants in the analysed cases point to a potential need for further initiatives. In one case, even though a foreign language interpreter was provided, the Tribunal still noted that language was a barrier.[[280]](#footnote-280) Some applicants also seemed to encounter difficulties with the questioning process.[[281]](#footnote-281) The questioning process should be individualised to the person’s specific needs.[[282]](#footnote-282) While there is evidence that AAT staff have received disability awareness training,[[283]](#footnote-283) the potential need for further training should be explored.

Additionally, in order to avoiding discriminating against applicants or other participants with disabilities access to the building of the Tribunal must be available for all people regardless of disability.[[284]](#footnote-284) In important steps, which are consistent with the *CRPD*, ‘all AAT premises’ have been made wheelchair accessible and hearing loop systems made available at all AAT registries, as of 2017-18.[[285]](#footnote-285)

Vasilios Kontossis’ case, described below, illustrates how frustrating the process can be to someone who has multiple disabilities.

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| **Case example:**  ***Kontossis and Secretary, Department of Social Services (Social Services second review)* [2018] AATA 1846 (21 June 2018):** |
| Vasilios Kontossis is 57 years old and experiences physical, psychosocial and sensory impairments. He is divorced and lives with his parents. He described himself as ‘damaged goods and simply burnt out’. He went to numerous doctors, but none were able to cure him. He could not have physiotherapy anymore, as WorkCover was not meeting his medical expenses anymore and he could not afford it. He was wary of treatment in general, as he was afraid that it might damage his shoulders and arms more. He applied to Centrelink for a Disability Support Pension, but Centrelink wrote to him on 31 May 2017 to inform him that his DSP claim was refused. Both ARO and AAT1 affirmed Centrelink’s decision on 2 August 2017 and 1 December 2017 respectively. Unhappy about this outcome, Mr Kontossis sought review of the AAT1 decision on 20 December 2017. The date of the AAT2 hearing was 4 May 2018. Mr Kontossis found the entire process frustrating. He said that he ‘was completely fed up with having to explain his situation yet again’, but at the same time he was determined to even go to the Federal Court of Australia if he did not receive what he thought he ought to. Mr Kontossis satisfied the eligibility requirements under section 94 of the *Social Security Act*. The Tribunal found that he had completed a program of support, that his conditions accumulated 20 impairment points and he had a continuing inability to work. Therefore, the Tribunal set aside the prior decision and asserted that he was qualified to receive disability support pension. The Tribunal’s decision indicated that it was not necessary for the applicant to go through the appeal process, as he was eligible from the beginning, had all the necessary documents and had participated in a program of support. |

2*Lack of legal representation*

As the application process is relatively complex and can be stressful, applicants may benefit from having legal representation. There might be a correlation between legal representation and favourable outcomes for lay persons, as they do not necessarily have the legal knowledge and expertise that a lawyer has and therefore, might be at a disadvantage.[[286]](#footnote-286) They might also feel intimidated.[[287]](#footnote-287) Other factors, such as medication, may affect a person’s ability to represent themselves.[[288]](#footnote-288)

Applicants can receive support from a family member, friend or another non-lawyer, but having the applicant receive such assistance may not remedy the power imbalance. Assy (2015) asserts that lay assistance cannot replace legal representation and that it might only be useful in ‘subject-specific proceedings with narrowly defined legal and factual aspects’.[[289]](#footnote-289) A lay person might not have the required knowledge and expertise to guide the applicant. For example, in one of AAT cases reviewed, *GFHF and Secretary*, although the applicant was assisted by her WorkCover claims manager in completing the application form, she still incorrectly ticked a box, as she said that she did not understand it or misinterpreted it.[[290]](#footnote-290)

Out of the total of 45 cases analysed, only 8 applicants were legally represented. In contrast, the Department of Social Services - which is responsible for arguing that Centrelink’s decisions are correct - always had legal representation. Unfortunately, the Tribunal said that it ‘not uncommon’ for self-represented applicants to not understand the eligibility requirements and the role of the Tribunal.[[291]](#footnote-291) Some applicants have disabilities that may affect their concentration or memory or have English as their second language.[[292]](#footnote-292) In one case this led to the postponement of a hearing date, as the applicant failed to provide sufficient evidence.[[293]](#footnote-293) Additionally, applicants might not only make mistakes in complying with the requirements of the law. They might also present their evidence in a way that does not favour them. In *Manjunath*,the Tribunal noted that the applicant was giving lengthy answers to the questions posed and this did not assist his case.[[294]](#footnote-294)

As the way evidence is provided and presented is important, it is possible that some applicants could have secured the outcome they were seeking if they had legal assistance. In *Kroll,* the Tribunal advised Ms Kroll to seek her GP’s assistance and consult with a member of a community legal centre if she wanted to reapply.[[295]](#footnote-295)

However, even though there are benefits to having legal representation, it cannot be imposed upon anyone. Self-representation is a right that everyone has, as all people with disability are equal before the law and must have their legal capacity respected.[[296]](#footnote-296) Tests assessing a person’s mental capacity cannot be used to deny legal capacity.[[297]](#footnote-297) This would amount to an indirect discrimination against persons with cognitive impairments.[[298]](#footnote-298) Hence, the AAT is correct in not denying applicants their right to self-representation.

It must also be noted that not all applicants who lack legal representation are unsuccessful in their claim.[[299]](#footnote-299) Unfortunately, having strong arguments is not necessarily enough to win a case. In *VQFV*, the applicant and her husband ‘argued strenuously’ against the Department’s argument that she could avoid a response to an unidentified allergen by refraining from eating out.[[300]](#footnote-300) Although they persuaded the Tribunal that this imposition was unreasonable, the Tribunal still found that the condition did not warrant the award of any impairment points.[[301]](#footnote-301)

The AAT contacts self-represented individuals to provide them with additional information about how they may be able to access assistance.[[302]](#footnote-302) It is intended that the AAT staff member who reaches out to the self-represented applicant has the ‘opportunity to identify whether...the person has any particular needs because of a disability.’[[303]](#footnote-303) However, the finding that the majority of applicants in the 45 analysed cases were self-represented - and that self-representation seemed, in certain cases, to be associated with applicants experiencing difficulties with the process - indicates a need for further attention to the issue of legal representation. The above evidence indicates that legal representation may be beneficial. However, obtaining legal advice can be expensive and the applicants may not have the financial resources to afford legal representation.[[304]](#footnote-304)

Unfortunately, there is also the concern that lawyers might not have the skills or training to adequately serve clients with a disability.[[305]](#footnote-305) Article 13(2) states that personnel must be properly equipped to know how to interact with all clients. Lawyers must also be aware of the fact that a person with disability might have different experiences, needs and legal problems than a person who does not have a disability.[[306]](#footnote-306) Larson argues that training advocates might be more effective in providing access to justice than drafting new laws and regulations.[[307]](#footnote-307) Lawyers would then be able to effectively assist clients with disabilities and address their concerns.

Real change and inclusion can happen only when people with disabilities are involved in the decisions that are about them.[[308]](#footnote-308) The individuals who understand difficulties and concerns of people with disabilities the best are those who have disabilities themselves. Unfortunately, persons with disabilities also face significant barriers to becoming lawyers, jurors, administrators and adjudicators.[[309]](#footnote-309)

3*Duration of the process*

For the analysed cases, we calculated that the average time from the DSP application until the AAT2 hearing was 658 days and the average time from the DSP application until the publication of the reasons for the decision was 761 days. This evidences that the process can be long and arduous.[[310]](#footnote-310) It also creates serious practical difficulties for applicants who may not have any source of income during this time. According to data provided by the AAT, 11 appeals of second review decisions regarding entitlement to the DSP to the Federal Court were lodged in 2017-18.[[311]](#footnote-311) For applicants who appeal to the Federal Court, the process would continue over an even longer period of time.

The Tribunal can only determine whether the person was eligible at the time of the application and cannot look to the applicant’s current circumstances. Therefore, if their circumstances change, the person must reapply, meaning that they need to begin the long process again. There were certain cases in which the applicants’ condition deteriorated since their application and the Tribunal encouraged the applicant to make a new application.[[312]](#footnote-312)

Lina Jorj’s case emphasises the difficulties that the application process can entail. It shows how not providing sufficient medical evidence and not complying with all the requirements can prolong the duration of the process. The fact that the applicant was possibly not eligible during the qualification process meant that she would have to make another application, which would also be time-consuming.

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| **Case example:**  ***Jorj and Secretary, Department of Social Services (Social Services second review)* [2018] AATA 304 (19 February 2018):** |
| Lina Jorj was born on 4 March 1983. She moved to Australia in 2006 from Iraq and became an Australian citizen in 2011. Her diagnosed conditions were ankylosing spondylitis, fibromyalgia and contact dermatitis. In 2015 she had a car accident that worsened the pain in her knees, right hip, neck and back. She applied for the disability support pension on 9 May 2016, but Centrelink rejected her application on 7 July 2016. The ARO affirmed this decision on 13 October 2016. On 25 October 2016, Ms Jorj sought review of this decision. AAT1 affirmed Centrelink’s decision on 9 February 2017. On 8 March 2017, she applied to the AAT2 for review, which heard her case on 1 February 2018. Initially, the hearing was set for 8 September 2017, but unfortunately there was not enough medical evidence. At the time of her application she had five children under the age of 8 years old. Although she studied IT at university in Iraq and held a Certificate III in childcare, she could not speak nor write English. She also did not have email facilities. The reason the Tribunal determined that she was not qualified to receive DSP was because her condition was not fully diagnosed, treated and stabilised during the qualification period. However, the Tribunal recognizes that her current condition was much worse than it was when she applied and it encouraged her to re-apply and obtain a letter of confirmation from her rheumatologist that biological treatment would not be an option as it would have too many side effects. The Tribunal acknowledged that she might have been successful in her application if she had been able to prove that the treatment was too risky. The legislative requirement for treatment and stabilisation, which was strictly applied by the Tribunal, reflects the influence of a medical model approach. This precluded Ms Jorj from being found eligible for the DSP. Her other personal circumstances were completely ignored. In particular, the fact that she had to stop or limit treatment due to her pregnancies was not considered. |

Beverly Dunn’s case also emphasises the difficulties that a reapplication would entail.

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| Case example:  *Dunn and Secretary, Department of Social Services (Social Services and second review)*[2018] AATA 3777 (12 October 2018): |
| Beverly Dunn was sexually abused as a child and began taking antidepressants for her depression since she was 11 years old. When she was 15 years old, she was diagnosed with arthritis and had been receiving treatment since that time. She applied to receive Disability Support Pension on 16 October 2016, but her application was refused on the basis that she could not be assigned an impairment rating of at least 20 points for her conditions. Her case was heard by the AAT2 on 2 August 2018. In addition to her arthritis, depression and social phobia, Ms Dunn gave evidence that she had fibromyalgia, chronic fatigue, sleep apnoea and incontinence. However, the Tribunal found that there was not enough evidence to demonstrate that these conditions were fully diagnosed, treated and stabilized within the qualification period. The Job Capacity Assessment Report concluded that she was able to work. However, her medical evidence indicated otherwise. Ms Dunn stated that she could not use a keyboard because of her arthritis and hence she would not be able to have an office job or any job that would require typing. It would be extremely difficult for her to get to the workplace, as she uses a mobility scooter. She would not be able to catch a bus, as she would be unable to get up the steps of the bus. Additionally, she would only be able to drive a car if someone is with her in the car, as she found it difficult to hold the steering wheel and to turn her head from left to right. The Tribunal recognized her serious medical conditions and her honesty. However, as she did not satisfy the requirements of section 94(1)(b), as no impairment points could be awarded under the Impairment Tables. The Tribunal said it had no choice but to affirm the decision. The only option that Ms Dunn has was to reapply for DSP and go through that long process again. At the hearing, Ms Dunn gave her evidence by telephone. She consulted two general practitioners. Dr Yapa stated that her condition was likely to keep deteriorating, and Dr Singh said that her disability had a functional impact on activities requiring exertion. This suggests a number of barriers to future DSP applications. |

Overall, the potentially long and arduous process involved in obtaining AAT review of DSP-related decisions might undermine the right to access to justice under article 13, as it might deter applicants from contesting Centrelink decisions.[[313]](#footnote-313)

# V CONCLUSION AND RECOMMENDATIONS

This report included an analysis of the demographic characteristics of applicants seeking review of DSP-related Centrelink decisions by the AAT, and an analysis of the reasoning in Victorian second review decisions regarding the refusal or cancellation of the DSP. These analyses led to the identification of ways in which Australia may not be upholding the rights of people with disabilities to social protection and to access to justice. That is, this report has argued that articles 28 and 13 of the *CRPD* are implicated by the eligibility requirements for the DSP and the application of those requirements by the AAT. Ultimately, this report has raised concerns that further steps may be necessary to ensure that Australia fulfils its obligations under the *CRPD*. Therefore, while we emphasise the need for further research, we make the following preliminary recommendations.

A *Recommendations to ensure that intersectional discrimination is addressed*

* Intersecting barriers which impede the access of Aboriginal and Torres Strait Islander people with disabilities to the DSP - such as poor service provision in remote areas, lack of cultural and linguistic accessibility, and discrimination[[314]](#footnote-314) - must be addressed.
* Further research is needed to examine whether Aboriginal and Torres Strait Islander people with disabilities are under-represented among applicants who seek AAT review of Centrelink decisions regarding the DSP.
* Data regarding the number of Indigenous applicants who seek AAT review of DSP-related Centrelink decisions – including at the second review stage – should be published. This would be consistent with Australia’s obligation under article 31 of the *CRPD* to not only collect statistical data in order to be able to devise policies to give effect to the Convention,[[315]](#footnote-315) but also to disseminate disaggregated data and ensure it can be accessed by people with disabilities.[[316]](#footnote-316)

B *Recommendations to ensure the right to social protection under article 28 is upheld*

* The eligibility criteria for the DSP must be reassessed in line with Australia’s human rights obligations under article 28 of the *CRPD* - as elaborated by the Special Rapporteur on Disability[[317]](#footnote-317) - in order to ensure that the people with disabilities’ right to social protection is upheld.
* In line with article 3(4) of the *CRPD*, a review of the current eligibility requirements must involve consultation with and the active involvement of people with disabilities, including Aboriginal and Torres Strait Islander people with disabilities.
* The eligibility criteria for the DSP must be brought into line with the social model of disability, which is adopted by the *CRPD*. That is, the criteria must account for disabling barriers in society, not merely medical assessments of the impact of impairments on functional capacity.
* The recommendation of the Special Rapporteur on Disability that financial support for the extra costs associated with disability should be uncoupled from unemployment benefits - in order to encourage participation in employment without withholding necessary social protection[[318]](#footnote-318) - should be explored. While the NDIS moves some way towards this approach, Australia’s social protection system should ensure that all people with disabilities can access government assistance for disability-related costs.
* Further awareness-raising may be needed to ensure applicants are aware of the eligibility requirements for the DSP, including the potential requirement of participation in a program of support.

C *Recommendations to ensure the right to access to justice under article 13 is upheld*

* The AAT’s policies in regards to assisting self-represented applicants with disabilities should be reviewed, in order to ensure that all applicants are able to access justice on an equal basis.
* Further consultation with people with disabilities regarding the AAT review process should occur. The application process for review of a DSP-related Centrelink decision may better reflect the applicants’ needs if persons with disabilities are consulted about the way information and support should be provided.
* The possibility that lawyers, AAT staff, and Tribunal Members may benefit from further training in regard to how they can effectively assist persons with disabilities should be explored.
* In general, the participation of people with disabilities in the legal system - including in the roles of lawyers and members of the judiciary - should be further encouraged and facilitated.[[319]](#footnote-319)

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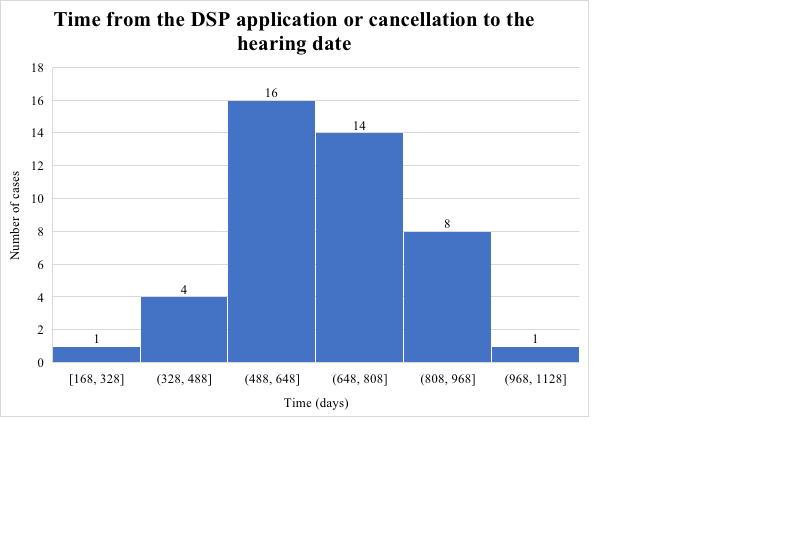
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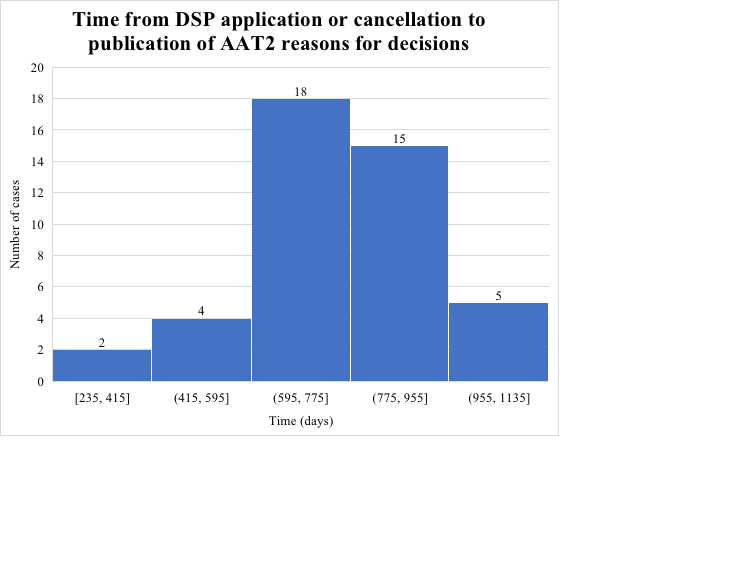
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Appendix 1: Charts with Statistical Data from 45 Victorian AAT Second Review Decisions (1 November 2017 – 20 November 2018)





|  |  |
| --- | --- |
| **Number of cases in which interpreters assisted the Tribunal:** | |
| Assistance from interpreters for spoken languages other than English | 10 cases |
| Assistance from sign language interpreter | No cases |
| Note: in one other case, an interpreter had been arranged but did not assist the Tribunal, as the applicant had no difficulty giving evidence in English. | |

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2. Michelle Fitts and Karen Soldatic ‘Disability Income Reform and Service Innovation: Countering Racial and Regional Discrimination’ (2018) 12 (1) *Global Media Journal Australian Edition* 1, 2, 10; Parliamentary Budget Office, *Disability Support Pension – Historical and projected trends*, Report No 01 (2018) vi, 10. [↑](#footnote-ref-2)
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4. *Social Security Act 1991* (Cth) s 94 (‘*Social Security Act’*). [↑](#footnote-ref-4)
5. Different eligibility requirements apply to people with permanent blindness. See *Social Security Act 1991* (Cth) s 95. [↑](#footnote-ref-5)
6. *Social Security Act 1991* (Cth) s 94(1)(b). [↑](#footnote-ref-6)
7. *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth) s 11 (‘*Impairment Table*s’). [↑](#footnote-ref-7)
8. Ibid s 11(1)-(2). [↑](#footnote-ref-8)
9. Ibid s 6(3). [↑](#footnote-ref-9)
10. Ibid s 6(4). [↑](#footnote-ref-10)
11. Ibid s 6(6)(a). [↑](#footnote-ref-11)
12. Ibid s 6(6)(b). [↑](#footnote-ref-12)
13. Ibid s 7. [↑](#footnote-ref-13)
14. Ibid s 6(1). [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. *Social Security Act* s 94 (definition of ‘work’). Alternatively, they can show that they are participating in the Commonwealth ‘supported wage system’. [↑](#footnote-ref-17)
18. Fitts and Soldatic, above n 3, 2. [↑](#footnote-ref-18)
19. *Social Security Act* s 94(2)(a)-(b). [↑](#footnote-ref-19)
20. Ibid s 94(2)(a)-(b). [↑](#footnote-ref-20)
21. Ibid s 94(2)(aa); s 94(3B). [↑](#footnote-ref-21)
22. Ibid s 94(2)(aa). [↑](#footnote-ref-22)
23. *Social Security Act* s 94(5) (definition of ‘program of support’). [↑](#footnote-ref-23)
24. Department of Social Services, *Participation in a Programme of Support Fact Sheet* (12 September 2015) <https://www.dss.gov.au/sites/default/files/documents/08\_2015/d15\_459748\_des\_-\_programme\_of\_support\_fact\_sheet\_aa\_to\_ef\_19\_aug.pdf>. [↑](#footnote-ref-24)
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27. *Social Security Act* s 94(3). [↑](#footnote-ref-27)
28. *Social Security Act* s 94(1)(d). See also Department of Human Services, *Disability Support Pension Eligibility* (20 August 2018) <https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension/eligibility>. [↑](#footnote-ref-28)
29. *Social Security Act* s 94(1)(e). [↑](#footnote-ref-29)
30. *Social Security (Administration) Act 1999* (Cth) s 129(1) (*Administration Act*). [↑](#footnote-ref-30)
31. The Secretary or CEO of Centrelink also has the power to affirm, vary or set aside decision. *Administration Act* s 135(1). [↑](#footnote-ref-31)
32. Ibid s 135(1)(b). [↑](#footnote-ref-32)
33. Ibid s 139, s 142. See also Administrative Appeals Tribunal, *Guide to the Social Services and Related Jurisdiction* (2015) <http://www.aat.gov.au/social-services-child-support-division/steps-in-a-review-of-a-decision-made-by-centrelink/guide-to-the-social-services-and-related-jurisdict>. [↑](#footnote-ref-33)
34. *Administration Ac*t s 142. [↑](#footnote-ref-34)
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37. Administrative Appeals Tribunal, *Overview of the review process* (15 January 2018) <http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process>. [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
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42. Ibid. [↑](#footnote-ref-42)
43. Michael Asimow and Jeffrey S Lubbers, ‘The Merits of “Merits Review”: A Comparative Look at the Australian Administrative Appeals Tribunal’ 67 *Australian Institute of Administrative Law Forum* 58, 59. [↑](#footnote-ref-43)
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45. Asimow and Lubbers, above n 43, 59. [↑](#footnote-ref-45)
46. *Administration Act* s 139, s 179(1). [↑](#footnote-ref-46)
47. See, eg, *Flenley; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 2872 (2 August 2018); *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018). [↑](#footnote-ref-47)
48. Welfare Rights & Advocacy Service, above n 39. [↑](#footnote-ref-48)
49. *Administrative Appeals Tribunal Act 1975* (Cth) s 44(5) (‘AAT Act’). [↑](#footnote-ref-49)
50. Ibid s 44(1). [↑](#footnote-ref-50)
51. United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities* (no date) <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext>. [↑](#footnote-ref-51)
52. *CRPD* art 1. [↑](#footnote-ref-52)
53. United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities: Signatories (5 December 2018) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=IV-15&chapter=4&clang=\_en>. [↑](#footnote-ref-53)
54. *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4. [↑](#footnote-ref-54)
55. Mike Oliver , ‘The Social Model of Disability: thirty years on’ (2013) 28(7) *Disability & Society* 1024, 1024. [↑](#footnote-ref-55)
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58. Tom Shakespeare, ‘The Social Model of Disability’ in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 4th ed, 2013) 214, 215. [↑](#footnote-ref-58)
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60. Theresia Degener, ‘Disability in a Human Rights Context’ 5 (35) *Laws* 1, 3; Shakespeare, above n 58, 216. [↑](#footnote-ref-60)
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63. Degener, above n 60, 26. [↑](#footnote-ref-63)
64. Committee on the Rights of Persons with Disabilities, *General comment No. 4*, UN Doc CRPD/C/GC/4(2 September 2016). See also People with Disability Australia, *Social Model of Disability* (2018) <https://pwd.org.au/resources/social-model-of-disability/>. [↑](#footnote-ref-64)
65. *CRPD* art 28(1)-(2). [↑](#footnote-ref-65)
66. Ibid art 28(1)-(2). [↑](#footnote-ref-66)
67. Ibid art 28(2)(b). [↑](#footnote-ref-67)
68. Ibid art 28(2)(c). [↑](#footnote-ref-68)
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70. Gerard Quinn, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’ (2009) 1 *European Yearbook of Disability Law* 89, p. 111. [↑](#footnote-ref-70)
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72. Quinn, above n 70, 111. [↑](#footnote-ref-72)
73. Ibid 111. [↑](#footnote-ref-73)
74. See Department of Human Services, *A guide to Australian Government payments* (24 October 2018) <https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/guide-australian-government-payments>. [↑](#footnote-ref-74)
75. Eilionoir Flynn, *Disabled Justice?: Access to justice and the UN Convention on the Rights of Persons with Disabilities* (London; New York: Routledge, 2016). [↑](#footnote-ref-75)
76. Stephanie Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and The Legal System’ (2011) 17(2) *ILSA Journal of International & Comparative Law* 281, 284. [↑](#footnote-ref-76)
77. Penelope Weller, ‘Legal Capacity and Access to Justice: The Right to Participation in the CRPD’ (2016) 5(1) *Laws* 1, 3. [↑](#footnote-ref-77)
78. Anna Arstein-Kerslake, Yvette Maker, Maree Ireland, Rikki Mawad, ‘Research needs in access to justice for people with disability in Australia and New Zealand’ (Scoping Paper, Disability Access to Justice Research Consortium, February 2018) 3 <https://socialequity.unimelb.edu.au/news/latest/disability-access-to-justice-research-consortium-scoping-paper>; Ortoleva, above n 76, 285. [↑](#footnote-ref-78)
79. Rosemary Kayess and Phillip French, above n 69, 28-29. [↑](#footnote-ref-79)
80. Weller, above n 77, 3. [↑](#footnote-ref-80)
81. The AAT website states that ‘AAT decisions with written reasons are published on the AustLII website’. Administrative Appeals Tribunal, *Decisions* (12 October 2018) <http://www.aat.gov.au/decisions>. [↑](#footnote-ref-81)
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83. Statistical Report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018. [↑](#footnote-ref-83)
84. The following searches were conducted:

    -AustLii search: ‘Disability support pension’ AND ‘Indigenous’ in AAT database. This generated 109 results. Ctl+f within each result revealed that in no case was the applicant identified as Indigenous, but rather, all references were to past cases in which the Secretary, Department of Families, Housing, Community Services and Indigenous Affairs had been a party, except one reference which was to an applicant having studied Indigenous Studies at university (*ZSYJ and Secretary, Department of Social Services (Social services second review) [2018] AATA 3969 (22 October 2018*).

    - AustLii search ‘Disability support pension’ AND ‘First nations’ in AAT database. This generated 0 results.

    - AustLii search: ‘Disability support pension’ AND ‘Aboriginal’ in AAT database. This generated 0 results

    - AustLii search ‘Disability support pension’ AND ‘Torres Strait’ in AAT database. This generated 0 results. [↑](#footnote-ref-84)
85. Administrative Appeals Tribunal, *Our users and our relationships* (26 October 2015) <http://www.aat.gov.au/chapter-04-our-users-and-our-relationships>. [↑](#footnote-ref-85)
86. Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018. [↑](#footnote-ref-86)
87. Ibid. [↑](#footnote-ref-87)
88. Administrative Appeals Tribunal, *Annual Report 2017-18*, above n 82, 39. [↑](#footnote-ref-88)
89. Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 5 December 2018. [↑](#footnote-ref-89)
90. Australian Institute of Health and Welfare, *Australia’s welfare 2017: in brief* (19 October 2017) <https://www.aihw.gov.au/reports/australias-welfare/australias-welfare-2017-in-brief/contents/indigenous-australians>. [↑](#footnote-ref-90)
91. Scott Avery, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-\_2.pdf>. . See also Australian Institute of Health and Welfare *Australia’s Health 2018*, Australia’s Health Series Report no 16 (2018) 313 citing ABS (Australian Bureau of Statistics), *National Aboriginal and Torres Strait Islander Social Survey, 2014–15*, ABS cat. no. 4714.0 (2016), which states that ‘In 2014–15, an estimated 45% of Indigenous Australians...had disability or a long-term health condition that restricted their everyday activities, at 1.7 times the rate of non-Indigenous Australians.’ [↑](#footnote-ref-91)
92. Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 42(6) *Stanford Law Review* 1241, 1244; Nirmala Erevelles and Andrea Minea, ‘Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality’ in Lennard J Davis (ed), *The Disability Studies Reader* (Brill, 5th ed, 2016) 381, 382. [↑](#footnote-ref-92)
93. Scott Avery, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-\_2.pdf>. ; See also King, Brough and Knox, above n 108, 739; National People with Disabilities and Carer Council, *Shut Out:The Experience of People with Disabilities and their Families in Australia*, Australian Government National Disability Strategy Consultation Report (2009), 58. [↑](#footnote-ref-93)
94. Karen Soldatic, ‘Neoliberalising disability income reform’ in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), The Neoliberal State, Recognition and Indigenous Rights (ANU Press, 2018) 131, 133. [↑](#footnote-ref-94)
95. Sara Irvine, *Vale Uncle Lester Bostock OAM*, First Peoples Disability Network <https://fpdn.org.au/vale-uncle-lester-bostock-oam/>, citing Lester Bostock, ‘Access and equity for people with a double disadvantage’ 2 *Australian Disability Review* 1. [↑](#footnote-ref-95)
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99. Ibid 4. [↑](#footnote-ref-99)
100. Soldatic,‘Neoliberalising disability income reform’ above n 94, 137. [↑](#footnote-ref-100)
101. Ibid 137. [↑](#footnote-ref-101)
102. Commonwealth Ombudsman, above n 98, 4. [↑](#footnote-ref-102)
103. Ibid 31. [↑](#footnote-ref-103)
104. Commonwealth Ombudsman, above n 98, 4; Soldatic, ‘Neoliberalising disability income reform’, above n 94, 137. [↑](#footnote-ref-104)
105. Commonwealth Ombudsman, above n 98, 31. [↑](#footnote-ref-105)
106. Ibid 31. [↑](#footnote-ref-106)
107. National People with Disabilities and Carer Council, *Shut Out:The Experience of People with Disabilities and their Families in Australia*, Australian Government National Disability Strategy Consultation Report (2009), 58. [↑](#footnote-ref-107)
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109. Michelle Fitts and Karen Soldatic, above n 3, 10. [↑](#footnote-ref-109)
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111. David Hollinsworth, ‘Decolonizing Indigenous disability in Australia’ (2013) 28(5) *Disability & Society* 601, 609. [↑](#footnote-ref-111)
112. Ibid 607. [↑](#footnote-ref-112)
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114. *CRPD* preamble, art 6; Degener, above n 60, 10. [↑](#footnote-ref-114)
115. Degener, above n 60, 19. [↑](#footnote-ref-115)
116. Ibid 10. [↑](#footnote-ref-116)
117. Ibid 18. [↑](#footnote-ref-117)
118. Saul, above n 113, 81. [↑](#footnote-ref-118)
119. Degener, above n 60, 19. [↑](#footnote-ref-119)
120. Soldatic, ‘Policy Mobilities of Exclusion’, above n 97, 153, 156. [↑](#footnote-ref-120)
121. Ibid 154. [↑](#footnote-ref-121)
122. Catalina Devandas Aguilar, ‘Social Protection and Persons with Disabilities’ 70(4) *International Social Security Review* 45, 53. [↑](#footnote-ref-122)
123. Commonwealth Ombudsman, above n 98, 4. [↑](#footnote-ref-123)
124. Administrative Appeals Tribunal, *Practice Direction: Lodgement of Documents under Sections 37 and 38AA of the AAT* (30 June 2015) <http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Lodgement-of-Documents-under-sections-37-and-38AA-of-the-AAT-Act.pdf> Point 1.1. [↑](#footnote-ref-124)
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126. Department of Human Services, *Job Capacity Assessments for Disability Support Pension* (16 August 2018) <https://www.humanservices.gov.au/individuals/enablers/job-capacity-assessments-disability-support-pension/29931>. [↑](#footnote-ref-126)
127. Australian Government, *Social Security Guide*, version 1.250 (at 5 November 2018) [1.1.J.20] <http://guides.dss.gov.au/guide-social-security-law/1/1/j/10>. [↑](#footnote-ref-127)
128. Department of Human Services, *Job Capacity Assessments for Disability Support Pension*, above n 125. [↑](#footnote-ref-128)
129. See, eg, *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018); *Hutchinson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1842 (25 June 2018); *Loh and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2598 (3 August 2018). [↑](#footnote-ref-129)
130. *Impairment Tables* s 6(3). [↑](#footnote-ref-130)
131. Ibid s 6(4). [↑](#footnote-ref-131)
132. See, eg, *Gjorsevska; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 1109 (3 May 2018); *Hughson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 89 (30 January 2018); *Shehata and Secretary, Department of Social Services (Social services second review)* [2018] AATA 747 (4 April 2018), [66], [98]. [↑](#footnote-ref-132)
133. See, eg, *Nguyen and Secretary, Department of Social Services (Social services second review)* [2018] AATA 12 (12 January 2018), [36]; *Yonan and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1856 (26 June 2018), [66]. [↑](#footnote-ref-133)
134. *Yonan and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1856 (26 June 2018), [5]. [↑](#footnote-ref-134)
135. Ibid [58]. [↑](#footnote-ref-135)
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137. *Harris and Secretary, Department of Employment and Workplace Relations* [2007] 158 FCR 252, 252, quoted in *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018) [18]. [↑](#footnote-ref-137)
138. See, eg, *Dunn and Secretary, Department of Social Services (Social Services and second review)* [2018] AATA 3777 (12 October 2018), [6]; *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [42]; *Shehata and Secretary, Department of Social Services (Social services second review*) [2018] AATA 747 (4 April 2018), [101]. [↑](#footnote-ref-138)
139. See *Social Security Act* s 94(2)(a). In cases where 20 points were assigned under a single table, the Tribunal noted it was unnecessary to have participated in a program of support. See, eg, *ZSYJ and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3969 (22 October 2018) [122]). In one case, it was found that the impairment was ‘of itself sufficient to prevent [the applicant’ from doing any work independently of a program of support or undertaking any training activity during the next two years’ - *Mongta and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2092 (4 July 2018), [59]. [↑](#footnote-ref-139)
140. See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018). [↑](#footnote-ref-140)
141. See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018). [↑](#footnote-ref-141)
142. *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [43]. [↑](#footnote-ref-142)
143. *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017), [47]. [↑](#footnote-ref-143)
144. See, eg, *Mowbray and Secretary, Department of Social Services (Social services second review)* [2017] AATA 3053 (8 December 2017). [↑](#footnote-ref-144)
145. *Collins and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2277 (17 November 2017); *Eyit and Secretary, Department of Social Services (Social services second review*) [2018] AATA 2091 (4 July 2018); *Ilievska and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1308 (18 May 2018); *Lisi and Secretary, Department of Social Services* (Social services second review) [2018] AATA 2308 (19 July 2018); *Obaidi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2968 (17 August 2018); *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018); *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018). [↑](#footnote-ref-145)
146. *Manjunath and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1077 (27 April 2018); *Sudak and Secretary, Department of Social Services* (Social services second review) [2018] AATA 4248 (14 September 2018). [↑](#footnote-ref-146)
147. *Impairment Tables*, s 6(4). [↑](#footnote-ref-147)
148. *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018) [42]. [↑](#footnote-ref-148)
149. *McMahon and Secretary, Department of Social Services* (Social services second review) [2018] AATA 1081 (30 April 2018) [↑](#footnote-ref-149)
150. *Ghattas and Secretary****,*** *Department of Social Services (Social services second review)* [2018] AATA 3937 (19 October 2018) [75]. [↑](#footnote-ref-150)
151. Devandas Aguilar, above n 122, 56. [↑](#footnote-ref-151)
152. Ibid 56. [↑](#footnote-ref-152)
153. Degener, above n 60, 3. [↑](#footnote-ref-153)
154. Louise Humpage, ‘Models of Disability, Work and Welfare in Australia’ (2007) 41(3) *Social Policy & Administration* 215, 224. [↑](#footnote-ref-154)
155. McAllister, Ashley, ‘Understanding the Australian approach to assessing capacity: A detailed case study of the Disability Support Pension’ (2016) 26(1) *European Journal of Public Health* 172, 172. [↑](#footnote-ref-155)
156. Devandas Aguilar, above n 122, 56. [↑](#footnote-ref-156)
157. *Report of the Special Rapporteur on the Rights of Persons with Disabilities* (Theme: The rights of persons with disabilities to social protection), UN Doc A/70/297 (7 August 2015), 18 [57]. [↑](#footnote-ref-157)
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159. Degener, above n 60, 2. [↑](#footnote-ref-159)
160. See, eg, *Kontossis and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1846 (21 June 2018); *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018). [↑](#footnote-ref-160)
161. *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018), [32], [34]. [↑](#footnote-ref-161)
162. Ibid [32] (emphasis added). [↑](#footnote-ref-162)
163. *Nguyen and Secretary, Department of Social Services (Social services second review)* [2018] AATA 12 (12 January 2018), [36]. [↑](#footnote-ref-163)
164. *Impairment Tables*, s 7. [↑](#footnote-ref-164)
165. *ZSYJ and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3969 (22 October 2018), [87]. [↑](#footnote-ref-165)
166. *Impairment Tables*, s 6(6). [↑](#footnote-ref-166)
167. See, eg, *GFHF and Secretary, Department of Social Services (Social services second review*) [2018] AATA 675 (28 March 2018) [13]; *Kontossis and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1846 (21 June 2018), [37]. [↑](#footnote-ref-167)
168. Louise Humpage, above n 154, 216. [↑](#footnote-ref-168)
169. *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018), [41]. [↑](#footnote-ref-169)
170. Ibid [2]. [↑](#footnote-ref-170)
171. Ibid [2]. [↑](#footnote-ref-171)
172. Ibid [3]. [↑](#footnote-ref-172)
173. *Impairment Tables* s 6(4). [↑](#footnote-ref-173)
174. *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018), [24]-[25]. [↑](#footnote-ref-174)
175. Ibid [25]. [↑](#footnote-ref-175)
176. Ibid [20]. [↑](#footnote-ref-176)
177. Ibid [24]. [↑](#footnote-ref-177)
178. Ibid [37]. [↑](#footnote-ref-178)
179. Ibid [28]-[29]. [↑](#footnote-ref-179)
180. Ibid [39]. [↑](#footnote-ref-180)
181. Ibid [37]. [↑](#footnote-ref-181)
182. Ibid [42]. [↑](#footnote-ref-182)
183. Ibid [47]. [↑](#footnote-ref-183)
184. This term was used in certain cases. See, eg, *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017), [41], [46]; *Taylor and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3632 (25 September 2018) [7]. [↑](#footnote-ref-184)
185. Shakespeare, above n 58, 219. [↑](#footnote-ref-185)
186. *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [34]. [↑](#footnote-ref-186)
187. *Dunn and Secretary, Department of Social Services (Social Services and second review)* [2018] AATA 3777 (12 October 2018), [21]. [↑](#footnote-ref-187)
188. See National People with Disabilities and Carer Council, above n 107, 45. [↑](#footnote-ref-188)
189. *Impairment Tables*, Table 3. [↑](#footnote-ref-189)
190. Ibid. [↑](#footnote-ref-190)
191. Australian Human Rights Commission (2016), p. 169; Simon Darcy, Tracy Taylor and Jenny Green, ‘“But I can do the job”: Examining disability employment practice through human rights complaint cases’ (2016) 31(9) *Disability & Society* 1242, 1260; Penelope S Scott, ‘Addressing Ableism in Workplace Policies and Practices: The Case for Disability Standards in Employment’ (2016) 18 Flinders Law Journal 121, 126. [↑](#footnote-ref-191)
192. *Plant and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3860 (15 October 2018) [↑](#footnote-ref-192)
193. Simon Darcy, Tracy Taylor and Jenny Green, ‘“But I can do the job”: Examining disability employment practice through human rights complaint cases’ (2016) 31(9) *Disability & Society* 1242, 1245. [↑](#footnote-ref-193)
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195. National People with Disabilities and Carer Council, above n 107, 38. [↑](#footnote-ref-195)
196. Ibid, 41. [↑](#footnote-ref-196)
197. Alan Morris, ‘Pain and mythology: Disability support pension recipients and work’ (2006) 7(1) *Australian Review of Public Affairs* 41, 45. [↑](#footnote-ref-197)
198. Degener, above n 60, 3. [↑](#footnote-ref-198)
199. *Plant and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3860 (15 October 2018), [1]. [↑](#footnote-ref-199)
200. Ibid [1]. [↑](#footnote-ref-200)
201. Ibid [1]. [↑](#footnote-ref-201)
202. Ibid [8]. [↑](#footnote-ref-202)
203. Ibid [9]. [↑](#footnote-ref-203)
204. Ibid [101]. [↑](#footnote-ref-204)
205. Ibid [103], [107], [109]-[110]. [↑](#footnote-ref-205)
206. Ibid [10]; [112]. [↑](#footnote-ref-206)
207. Ibid [93]. [↑](#footnote-ref-207)
208. Ibid [56]. [↑](#footnote-ref-208)
209. Ibid [61]. [↑](#footnote-ref-209)
210. Ibid [61]. [↑](#footnote-ref-210)
211. Ibid [61]. [↑](#footnote-ref-211)
212. A Special Rapporteur is an independent expert nominated by the United Nations Human Rights Council (UNHRC). Their role is to investigate and report to the UNHRC on issues relating to human rights. United Nations Human Rights, *Ms Catalina Devandas Aguilar, Special Rapporteur on the rights of persons with disabilities* (2018) <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/CatalinaDevandas.aspx>. [↑](#footnote-ref-212)
213. Catalina Devandas Aguilar, above n 122; *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, above n 157. [↑](#footnote-ref-213)
214. Catalina Devandas Aguilar, above n 122, 59. [↑](#footnote-ref-214)
215. Ibid 59. [↑](#footnote-ref-215)
216. Ibid 59. [↑](#footnote-ref-216)
217. *Disability Discrimination Act 1992* (Cth) s 15. [↑](#footnote-ref-217)
218. Devandas Aguilar, above n 122, 55. [↑](#footnote-ref-218)
219. Michael Palmer, ‘Social Protection and Disability: A Call for Action’ (2013) 41(2) *Oxford Development Studies* 139, 146. [↑](#footnote-ref-219)
220. Devandas Aguilar, above n 122, 55. [↑](#footnote-ref-220)
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222. *Social Security Act*s 94(1)(c) [↑](#footnote-ref-222)
223. Ibid s 94 (definition of ‘work’). [↑](#footnote-ref-223)
224. Ibid s 96(6); Department of Human Services, *Hours you can work when you get Disability Support Pension* (12 May 2018) <https://www.humanservices.gov.au/individuals/enablers/hours-you-can-work-when-you-get-disability-support-pension/39896>. [↑](#footnote-ref-224)
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226. Humpage, above n 154, 222. [↑](#footnote-ref-226)
227. Australian National Audit Office, *Qualifying for the Disability Support Pension*, Report No 18 of 2015-16 (2016) 1.12. [↑](#footnote-ref-227)
228. Morris, above n 197, 42. [↑](#footnote-ref-228)
229. Rose Galvin, ‘Can welfare reform make disability disappear?’ (2004) 39(3) *Australian Journal of Social Issues* 343, 344. [↑](#footnote-ref-229)
230. See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018); *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017) [47]. [↑](#footnote-ref-230)
231. Alan Morris, Shaun Wilson and Karen Soldatic, ‘Doing the “hard yakka”: implications of Australia’s workfare policies for disabled people’ in Chris Grover and Linda Piggot (eds), *Disabled people, work and welfare: is employment really the answer?* (Policy Press, 2015) 46, 59. [↑](#footnote-ref-231)
232. Devandas Aguilar, above n 122, 49. [↑](#footnote-ref-232)
233. Devandas Aguilar, above n 122, 49; Degener, above n 60, 12. [↑](#footnote-ref-233)
234. Devandas Aguilar, above n 122, 49 [↑](#footnote-ref-234)
235. Ibid 50. [↑](#footnote-ref-235)
236. Ibid 58. [↑](#footnote-ref-236)
237. Soldatic, above n 97, 155. [↑](#footnote-ref-237)
238. People with disabilities such as activist Jax Jacki Brown have identified that the DSP can amount to a ‘poverty trap’. Jax Jacki Brown ‘The price of love for people with disability on the poverty line’, *Daily Life* (online), 16 June 2017 <http://www.dailylife.com.au/life-and-love/love-sex-and-relationships/the-price-of-love-for-people-with-disability-on-the-poverty-line-20150615-ghoe6z.html>. [↑](#footnote-ref-238)
239. Soldatic, ‘Neoliberalising disability income reform’, above n 94, 135; Soldatic, ‘Policy Mobilities of Exclusion’, above n 97, 154. [↑](#footnote-ref-239)
240. Soldatic, ‘Policy Mobilities of Exclusion’, above n 97, 155. [↑](#footnote-ref-240)
241. Ibid. [↑](#footnote-ref-241)
242. Department of Human Services, *Newstart Allowance: What your commitments are* (30 October 2018) <https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/what-your-commitments-are>. [↑](#footnote-ref-242)
243. Devandas Aguilar, above n 122, 56. [↑](#footnote-ref-243)
244. *National Disability Insurance Scheme Act 2013* (Cth) s 24. [↑](#footnote-ref-244)
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246. *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(b)-(c). [↑](#footnote-ref-246)
247. Karen R Fisher, ‘Understanding the NDIS: many eligible people with disabilities are likely to miss out’, *The Conversation* (online), 7 July 2016 <https://theconversation.com/understanding-the-ndis-many-eligible-people-with-disabilities-are-likely-to-miss-out-61016>. [↑](#footnote-ref-247)
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250. *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018) [8]; *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018). [↑](#footnote-ref-250)
251. *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018). [↑](#footnote-ref-251)
252. *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018). [↑](#footnote-ref-252)
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     *Kontossis and Secretary, Department of Social Services (Social Services second review)* [2018] AATA 1846 (21 June 2018) [37]. [↑](#footnote-ref-255)
256. Esme Grant and Rhonda Neuhaus, ‘Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities’ (2013) 19(2) *ILSA Journal of International & Comparative Law* 348, 373. [↑](#footnote-ref-256)
257. *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018). [↑](#footnote-ref-257)
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259. Flynn, above n 75, 53. [↑](#footnote-ref-259)
260. *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017) [44]. [↑](#footnote-ref-260)
261. *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018);*Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018) [27]. [↑](#footnote-ref-261)
262. *Hutchinson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1842 (25 June 2018) [2]. [↑](#footnote-ref-262)
263. *Harris and Secretary, Department of Employment and Workplace Relations* [2007] 158 FCR 252, 252, quoted in *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018) [18]. [↑](#footnote-ref-263)
264. *McMahon and Secretary, Department of Social Services* (Social services second review) [2018] AATA 1081 (30 April 2018) [34]. [↑](#footnote-ref-264)
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270. *Plant and Secretary, Department of Social Services (Social services second review)*[2018] AATA 3860 (15 October 2018)[61]. [↑](#footnote-ref-270)
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280. *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018). [↑](#footnote-ref-280)
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283. See, eg, Administrative Appeals Tribunal, *2013-14 Annual Report* (2014) <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR1314-Chapter-4.pdf> 40. [↑](#footnote-ref-283)
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289. Rabeea Assy, *Injustice in person: the right to self-representation* (Oxford: Oxford University Press, 2015). [↑](#footnote-ref-289)
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306. Ibid, 300. [↑](#footnote-ref-306)
307. David Allen Larson, ‘Access to Justice for Persons with Disabilities: An Emerging Strategy’ (2014) 3(2) *Laws* 220. [↑](#footnote-ref-307)
308. Weller, above n 77, 3. [↑](#footnote-ref-308)
309. Grant and Neuhaus, above n 256, 372. [↑](#footnote-ref-309)
310. The AAT Annual Report 2017-18 states that the median time to finalise Centrelink first review cases is 2017-18 was 10 weeks (70 days), while the median time to finalise Centrelink second review cases was 22 weeks (154 days). Administrative Appeals Tribunal, *Annual Report 2017-18,* above n 82, 28, 38. [↑](#footnote-ref-310)
311. Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018. [↑](#footnote-ref-311)
312. *Hughson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 89 (30 January 2018) [29]; *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018) [50]; *Shehata and Secretary, Department of Social Services (Social services second review)* [2018] AATA 747 (4 April 2018) [10]; *VQFV and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3152 (31 August 2018) [61]-[62]. [↑](#footnote-ref-312)
313. *CRPD* art 13.See Kim Economides, Alfred A Haug and Joe Mcintyre, ‘Toward Timeliness in Civil Justice’ 41(2) *Monash University Law Review* 414, 415. [↑](#footnote-ref-313)
314. Commonwealth Ombudsman, above n 98, 9. [↑](#footnote-ref-314)
315. *CRPD* art 31(1). [↑](#footnote-ref-315)
316. *CRPD* art 31(2)-(3). [↑](#footnote-ref-316)
317. Report of the Special Rapporteur on the Rights of Persons with Disabilities, above n 157. [↑](#footnote-ref-317)
318. Devandas Aguilar, above n 122, 56. [↑](#footnote-ref-318)
319. Ortoleva, above n 76 , 315. [↑](#footnote-ref-319)