

2 February 2024

Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO BOX 6021
Parliament House
Canberra ACT 2600

Submission to Inquiry into the Administrative Review Tribunal Bills

Dear Committee,

Thank you for the opportunity to make submissions on the *Administrative Review Bill 2023* and *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Consequential and Transitional Bill)* currently before Parliament.

Disability Advocacy Network Australia (DANA) is the peak body for Disability Advocacy organisations across Australia. Many of our members receive funding from the Federal Government to help support people with a disability to contest decisions made by the National Disability Insurance Agency (NDIA) about a person's access to the National Disability Insurance Scheme (NDIS) or whether particular supports can be funded. Advocacy providers also regularly interact with the AAT to assist clients with decisions made by Centrelink around payment eligibility and access, though this submission is primarily based on the experience of advocates in the NDIS Appeals program.

Advocates play a critical role in supporting people to challenge decisions made by the NDIA, helping people to develop and clarify their requests, navigate the complexities of the Tribunal, apply for Legal Aid, engage with specialists, and have a person in their corner. This work is regularly done in conjunction with state Legal Aid bodies, as well as organisations like Public Interest Advocacy Centre (PIAC).

Overall, DANA is supportive of the changes in these bills, which are a positive development for people looking to contest administrative decisions made by government agencies. We are hopeful that the introduction of the Administrative Review Council will help to improve decision making, particularly in the NDIS matters, and are hopeful that the guidance and appeals panel will help to provide clearer and more authoritative decisions on consequential cases sooner.

However, we would like to draw attention to several issues which, if dealt with differently, could further improve the efficiency and fairness of the reforms. These include:

- Practice directions and accessibility
- Funding of advocacy and legal aid
- Integrating Tier 1 and IER Procedures
- Paying for Reports
- Costs orders
- Litigation Guardians and the *CRPD*

These are addressed in turn.

Practice Directions and Accessibility

The proposed Tribunal provides significant scope for determining the best method for administering cases that come before the different jurisdictional areas through the operation of practice directions. At this stage, however, the President must only consult with the Tribunal Advisory Committee, which is made up with the President, Principal Registrar, Jurisdictional Area leaders and other members that may be nominated.¹ We recommend that there is also an obligation to take reasonable steps to engage with users when designing and changing those practice directions. The establishment of a User's Group – which represents the key stakeholders, including people with disability - is a common model which could help to ensure best practice administrative processes and standards.

The inclusion of an obligation to make the tribunal “accessible and responsive to the diverse needs of parties to proceedings”² is also a positive inclusion. While the AAT in its current form has many advantages over the court system in how it can adapt to individual circumstances, there are still difficulties that emerge when people interact with an intimidating and formal system, often for the first time. Many jurisdictional areas, but particularly NDIS matters, feature applicants who require additional support to participate in the process.

The new Tribunal must consult with people with disability to determine the best methods of making the Tribunal accessible. Some recommendations likely to emerge may already be covered (such as the flexibility around making applications)³ but people with direct experience of the barriers to participation are best positioned to advise how to get rid of them. While clearly not intended to be exhaustive, the current definition and examples may not capture the specific need for support staff to be trauma-informed when managing cases that raise issues that have intense, emotionally charged subject matter, which is common in NDIS matters. Engaging with users regularly and often, as well as individuals as they lodge and work through applications, is key to making sure that the obligation is not merely lip-service.

Recommendation 1

Amend the ART Bill to require that before making a practice direction the President (through the Tribunal Advisory Committee), must:

- a. take reasonable steps to obtain the views of bodies representing the interests of users of the ART or a specific jurisdictional area (as may be relevant); and
- b. have regard to those views in developing the practice direction.

Recommendation 2

When considering how best to make the tribunal accessible more generally, ensure that people with disability are consulted directly.

Funding of Advocacy and Legal Aid

¹ *Administrative Review Bill 2023*, s 36.

² *Administrative Review Bill 2023*, s 4, 9.

³ *Administrative Review Bill 2023*, s 34.

The changes to access to justice and accessibility are positive developments in this bill; however, they will be of limited practical value without more substantial efforts to support people with disability to contest government decisions. As has been said: ‘There is little point in opening the doors to a Court, unless people can afford to come through them.’ This is the difference between procedural access to justice and substantive access to justice. The most potent investment in this space is investing in Legal Aid and Advocacy services to ensure people can meaningfully engage in these processes.

As per the last report from the AAT, over half of applicants within the NDIS Division did not have a lawyer or advocate to assist them.⁴ Advocates regularly report clients who say that they would not have been able to navigate an application without a lawyer or an advocate, as well as many who had to discontinue an application when they were unable to secure the assistance of a lawyer or advocate. The number of private lawyers working in the space is low, and hiring a solicitor privately to tackle a NDIS matter is out of reach for many.

In the NDIS example, there is a sharp disparity in the amount of funds made available to the firms that represent the agency and those allocated to Legal Aid and advocacy bodies. During the peak of the last wave of applications before the AAT, the NDIA have spent approximately \$72m in external legal fees⁵ (in addition to maintaining an internal legal team) while only amounts between \$10-15m typically provided to Legal Aid and Advocacy bodies each year.⁶ This disparity was also noted by the Disability Royal Commission in their final report, which recommended that the NDIS Appeals Program receive additional funding in the region of \$20.3m per year.⁷

Given the length of time between funding agreements (typically 3-year blocks), there should also be a mechanism that provides direct funding to Legal Aid and advocacy bodies when there is a sharp uptick in applications before the Tribunal. These are typically reported quarterly by the current AAT and that would be a suitable frequency to respond to issues as they arise. An effectively limitless pool of funds is available for government agencies to ensure those bodies are represented, an equivalent mechanism for individuals looking to contest decisions by those agencies is a key part of the imbalance between citizens and government.

Recommendation 3

⁴ Presentation from Administrative Appeals Tribunal to NDIS Appeals Forum, October 2023, slide 10.

⁵ Morton, Rick, ‘Exclusive: NDIA Used the Law to “Exhaust” Participants,’ The Saturday Paper (28 October 2023) <<https://www.thesaturdaypaper.com.au/news/health/2023/10/28/exclusive-ndia-used-the-law-exhaust-participants>>

⁶ For legal aid, \$5.103m was provided in the 2021-22 budget:

<https://www.apf.gov.au/api/qon/downloadattachment?attachmentId=f4861ff8-1c41-4115-ba60-fb9ca332ee32>

For disability advocacy \$21.2 million was provided over 3 years in addition to a baseline of \$6.1m/year in the 2022-23 budget:

https://www.dss.gov.au/sites/default/files/documents/10_2022/disability_factsheet_-_budget_october_22-23.pdf.

⁷ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 25.

Ensure appropriate funding for Legal Aid services in each state as well as expand the NDIS Appeals Advocacy program to ensure that people with disability have equitable access to support at the new Tribunal.

Recommendation 4

Consider the introduction of additional lump-sum payments to Legal Aid and advocacy bodies when large increases in the number of applications to the Tribunal occur. Ensure that at least quarterly statistics on caseload and case management is publicly available to facilitate this.

Integrating IER and Tier 1 Procedures into NDIS Appeals

We are disappointed that there has not been more engagement with the proposals around alternate models of dispute resolution in NDIS matters. We understand this issue has been raised by others, including National legal Aid.

We believe there is an opportunity to make more significant changes to the conferencing and alternative dispute resolution pathways of the tribunal, which are the main ways our members and people with disability interface with the current AAT.

A regular pattern that many advocates and lawyers report is that the NDIA will regularly draw out matters with requests for information, only to later concede many of the issues after several months of negotiations. Despite many years of opportunity for reform and change, internal review decisions from agencies like the Agency remain of a very poor quality.

Tier 1 arrangements have some advantages that are likely to have some utility in NDIS matters, for example:

- Discussions can take place without the respondent, reducing the stress and concern experienced by many applicants.
- An authoritative decision can be made (typically of a higher quality than internal reviews) sooner without doing away with further review if needed.
- An inquisitorial approach is closer to the way the original decision is made and is less confrontational than a contested hearing making self-representation easier.
- Later efforts at Tier 2 can more constructively reflect on a higher quality decision rather than proceeding with a low-quality internal review decision through to a contested hearing.

These benefits mirror some of the benefits found in the introduction of the Independent Expert Review program following the 2021 Election. The program invited people whose application had been before the Tribunal for 9 months or more to submit their case to an expert (typically a lawyer or academic with experience in the disability sector) who would come to an arbitrated decision that in most circumstances the NDIA was obliged to accept. While not reaching the level of availability that was sought by advocates, those who participated in the program generally reported positive experiences.⁸ Cases that went through IER also tended to save the

⁸ Research and Evaluation Branch (NDIA), Independent Expert Review Program - Evaluation Report (October 2023) <https://www.ndis.gov.au/media/6420/download?attachment>, vi.

NDIA and AAT money.⁹ What limited problems emerged either related to the small scope of the project or the NDIA arguing a point of law with the conclusions of the independent review.

However, it does not appear that constructing such procedures for a Division of the Tribunal is possible on the current construction of section 36 of the Bill. Some provisions of the section, such as those in subsection (j) note the ability for those practice directions to dictate ADR procedures under Subdivision C of Division 6, rather than the broader powers (e.g. to regulate parties) in the other areas of Division 6. The definition of ‘*dispute resolution*’ in section 4 also does not allow arbitration as a dispute resolution method, which may necessitate the involvement of members to perform this role more directly.

Recommendation 5

Amend section 36 of the Bill to construct practice directions to allow for IER or Tier 1-like decisions to take place in particular divisions, including regulating when particular parties can appear as well as allowing substantive review earlier in the process.

Recommendation 6

In designing practice directions, ensure that the learnings and application of the IER program are considered to ensure participants can access a decision sooner.

Paying for Reports

A regular issue for applicants who find themselves in applications for access to the NDIS is the expense of getting the reports required to engage in negotiation with the Agency. These often include functional capacity assessments to determine whether a person experiences a substantial reduction in capacity under section 24 (c) of the *NDIS Act*.

Parties often agree that additional expert evidence is needed to properly assess a person’s case; however most applicants are rarely in a position to pay for this. Currently, this is typically resolved by the NDIA choosing to privately fund the cost of the report, an approach which rely on the good faith of the Agency, which has not always been present.¹⁰ Furthermore, the Agency retains control over the expert that is appointed. There are examples where the commissioned evidence has been assessed as low quality by the tribunal¹¹ and advocates have reported times where the expert lacks the proper expertise around a particular person’s disability or does not capture a person’s circumstances accurately.

A model for how to address these issues in matters where an applicant can secure the help of Legal Aid. When approved, the applicant will usually have a small disbursements budget to produce relevant reports for the Tribunal. However, this is not typically available in Access

⁹ Research and Evaluation Branch (NDIA), Independent Expert Review Program - Evaluation Report (October 2023) <https://www.ndis.gov.au/media/6420/download?attachment>, xiii.

¹⁰ Disability Advocacy NSW, Your Say Advocacy Tasmania, and Villamanta Disability Rights Legal Service Inc., National Disability Insurance Scheme Appeals at the Administrative Appeals Tribunal (3 June 2022) <<https://villamanta.org.au/wp-content/uploads/2022/07/Model-litigant-obligations-and-NDIS-Appeals.pdf>>, 24-27;

¹¹ *Ray and NDIA* [2020] AATA 3452, [148]-[151].

matters where an occupational therapy or other allied health report is needed as a pre-existing therapeutic relationship is usually required to authorise a disbursement.

We note that there is a proposed change from the NDIS Review to fund and develop these assessments much earlier in someone's planning with the Agency, which is likely to help reduce the number of cases that require this type of secondary evidence. However, having the option available at review is still necessary to make sure the quality of decisions is as high as possible.

Implementing a scheme within the Tribunal that can supply funds to generate relevant reports where agreed by the parties would help address these issues. Providing it universally helps to mitigate the difficulty experienced in accessing Legal Aid and requiring the consent of both parties can help to mitigate undue cost. Provision of these reports may also help to reduce the volume of cases that proceed to hearing and attract additional costs.

Recommendation 7

Amend the bill to introduce a scheme where the Tribunal can provide disbursements to assist in the production of evidence where parties agree that such evidence would have significant value to the assessment of a case.

Endorsing other Recommendations

We have also been provided with the opportunity to discuss elements of other submissions with the Public Interest Advocacy Centre and People with Disability Australia. We would like to highlight a couple of recommendations from those organisations:

Costs Orders - PIAC

DANA members have reported frustration and disquiet at the approach of some legal representatives at the AAT, particularly in NDIS Appeals. This has been collated and submitted on several occasions,¹² and drew an apology from the NDIA in late 2022.¹³ However, there is little in the way of systemic remedies to address non-compliance with Tribunal directions, unprofessional conduct or otherwise acting out of step with community expectations.

The current bill maintains current arrangements ensuring that most jurisdictions do not attract any costs orders. DANA would endorse a limited change to the principle and through the introduction of a very narrow exception for costs orders to be made against Government respondents in the event of serious non-compliance or inappropriate conduct. Models exist in other jurisdictions for this approach where a party acts unreasonably and/or for an improper purpose (such as 3.7(2) and (3) of the Land and Environment Court Rules).

¹² Disability Advocacy NSW, Your Say Advocacy Tasmania, and Villamanta Disability Rights Legal Service Inc., National Disability Insurance Scheme Appeals at the Administrative Appeals Tribunal (3 June 2022) <<https://villamanta.org.au/wp-content/uploads/2022/07/Model-litigant-obligations-and-NDIS-Appeals.pdf>>; Every Australian Counts and Disability Advocacy Network Australia, Unreasonable and Unnecessary: How the NDIA Could Improve by Being Model Litigants (6 November 2022) <<https://everyaustraliancounts.com.au/ndia-model-litigants/>>.

¹³ Amber Schultz, "We Failed and We Shouldn't Have": NDIA Apologises for AAT Mismanagement', Crikey (20 December 2022) <<https://www.crikey.com.au/2022/12/20/ndia-ndis-apologises-aat-mismanagement/>>.

In the context of the Tribunal, orders should not be able to be made against applicants. This protection is essential to ensuring there is not a chilling effect on review applications because people are fearful of costs.

Recommendation 8 (replicated from PIAC’s submission)

The ART be empowered to award costs against a government respondent where that respondent is found to have acted inappropriately in its conduct of the matter before the ART.

Litigation Guardians and Substitute Decision Making – PWDA

We also wish to highlight the concerns raised by People with Disability Australia in their submission regarding the introduction of a Litigation Guardian provision in the Act. The current operation of the bill implements a model of substitute decision making out of step with the *Convention of Rights of Persons with Disabilities (‘CRPD’)* and does not adequately ensure that people can have their will reflected in proceedings.

As is noted above, properly funding independent legal and advocacy supports allows opportunity for supported decision-making models to operate, rather than more invasive and intrusive models of substitute decision making.

PWDA have recommended:

Recommendation 9

The litigation guardian provisions of the Bill are amended to ensure that the ‘litigation guardian’ has a supportive, rather than substitute decision-making role. This includes ensuring that the party has the right to participate directly in all proceedings, meetings, and correspondence. In addition, to reflect their supportive rather than substitute decision-making role, the term ‘litigation guardian’ should be changed to ‘nominated supporter’ or ‘appointed supporter.’

Recommendation 10

Clause 67(2) of the Bill should be amended to require the Tribunal to follow, rather than ‘take into account’, the party’s will and preferences when deciding whether to appoint a litigation guardian and who to appoint as a litigation guardian.

Recommendation 11

Clauses 67(7) and (8) of the Bill should be amended to substitute references to promoting the party’s ‘personal and social wellbeing’ with reference to promoting the party’s ‘human rights.’

We would support such changes in the bill to protect the rights of people with a disability and ensure compliance with Australia’s obligations under the *CRPD*.

Thank you again for the opportunity to provide a submission.

Kind regards,

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Disability Advocacy Network Australia