



7 March 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Chair,

Re: Administrative Review Tribunal Bill 2023 [Provisions] and related bills

I write on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**the ALS**) regarding your correspondence dated 14 February 2024. Thank you for reaching out to us.

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, and court representation in criminal law, children's care and protection law, and family law. We have a burgeoning civil practice, which includes our Greater Sydney Aboriginal Tenants Service (**GSATS**). Our GSATS tenant advocates provide a duty service at the NSW Civil and Administrative Tribunal (**NCAT**) in the Aboriginal Tenancy List where they advocate for ALS clients in the list.

I note we previously provided a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs on the Administrative Review Tribunal Bill, dated 5 February 2024.

The submission was informed by the expertise of solicitors in our Civil Law Practice, our tenancy advocates, and ALS staff working across all legal practice areas in relation to the experiences of Aboriginal and Torres Strait Islander people in contact with the legal system. We provide a copy of our submission to the Committee for your consideration. This submission is attached at **Annexure A**.

If you have any questions regarding this submission or wish to discuss this issue further, please contact policy@alsnswact.org.au. We look forward to your response and to the implementation of a strengthened Administrative Review Tribunal.

Sincerely,

Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited



5 February 2024

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
Parliament House, Canberra ACT 2600
By email: spla.reps@aph.gov.au

Dear Committee Secretary,

Re: Administrative Review Tribunal Bill

I write on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) regarding the Administrative Review Tribunal Bill (**the Bill**). Thank you for the opportunity to provide a submission.

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, and court representation in criminal law, children's care and protection law, and family law.

We also support clients with civil law issues, including tenancy issues, fines and fine debt, and services in support of the Disability Royal Commission. We continue to expand our work in civil law areas, including building on our work with the Disability Royal Commission, and providing general civil assistance to discrete cohorts of clients in a number of specialist programs. With an expanded civil law service, our future work may involve assisting clients with legal matters concerning the National Disability Insurance Scheme (**NDIS**) and social security issues.

This submission has been informed by the expertise of solicitors in our Civil Law Practice, tenancy advocates in our Greater Sydney Aboriginal Tenants Service (**GSATS**) and ALS staff working across all legal practice areas in relation to the experiences of Aboriginal and Torres Strait Islander people in contact with the legal system.

The ALS has not previously received specific funding to appear in the former Administrative Appeals Tribunal. This means we have limited practice-facing experience upon which to draw in relation to numerous aspects of the reforms. Accordingly, this submission is primarily focused on opportunities to strengthen the Bill to promote access to justice for Aboriginal and Torres Strait Islander peoples.

While we are unable to comment directly, we note that other legal stakeholders have raised concerns in relation to the abolition of the two-tier system currently in place for certain jurisdictions and the potential for this reform to hinder access to justice and accountability for primary decision-makers. We are supportive of fulsome consideration of this issue during the Bill review process.

National Agreement on Closing the Gap

The ALS supports an administrative review process with simple and accessible pathways for applicants and support for vulnerable cohorts, which emphasises just and efficient resolution and holds primary

decision-makers accountable. Above all, we support an administrative review process that promotes genuine access to justice.

While we welcome reforms to Australia's system of administrative review and the establishment of a new, fit-for-purpose federal review body, we consider that there are opportunities for the Bill to be strengthened to better promote access to justice for Aboriginal and Torres Strait Islander peoples.

Although the ALS is expanding its civil law services, we are not currently funded to represent parties in Tribunal proceedings. This means that ALS clients who have a reviewable decision are very likely to appear self-represented in the Tribunal. In our experience, many of our clients are not aware of their legal rights and resolution options. Those who are may be reluctant to initiate proceedings due to a lack of trust in the legal system or in mainstream government processes and institutions.

Despite the well-known access to justice barriers experienced by Aboriginal and Torres Strait Islander peoples and the increased likelihood that Aboriginal and Torres Strait Islander people will experience multiple, significant civil law issues (including those related to the NDIS and social security),¹ it is notable that the Bill is completely silent on Aboriginal and Torres Strait Islander people.

All Australian, State, Territory and Local Governments are signatories to the landmark National Agreement on Closing the Gap 2020-2030 (**National Agreement**) with the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (**Coalition of Peaks**).² The National Agreement is a commitment by Australian governments to set out a future where policy-making impacting the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership with Aboriginal communities. Implementing the National Agreement is everyone's responsibility and represents an unprecedented shift in the way governments work to improve life outcomes for Aboriginal and Torres Strait Islander people.

The National Agreement is built around four Priority Reforms intended to change the way governments work to accelerate improvements in the lives of Aboriginal and Torres Strait Islander people. Priority Reform Three is directed at transforming government and mainstream institutions to be far more responsive to the needs of Aboriginal and Torres Strait Islander peoples and to make a greater contribution to Closing the Gap. It requires governments to take steps to eliminate racism, embed and practice meaningful cultural safety, and support Aboriginal and Torres Strait Islander cultures.

Specialist Lists and Aboriginal and Torres Strait Islander Staff

The Bill should explicitly empower the Tribunal to implement specialist lists for Aboriginal and Torres Strait Islander people and employ specialist Aboriginal and Torres Strait Islander outreach officers. Specialist Lists and specialist Aboriginal and Torres Strait Islander officers are a critical mechanism for promoting cultural safety in proceedings and access to justice for Aboriginal and Torres Strait Islander people.³

¹ Law and Justice Foundation of NSW (2015) "Indigenous people, multiple disadvantage and response to legal problems" <[http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_48_Indigenous_people_multi_disadvantage.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_48_Indigenous_people_multi_disadvantage.pdf)> (viewed January 2024).

² National Agreement on Closing the Gap (National Agreement), July 2020, <https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf> [59].

³ ALS, Response 389891751 to Administrative Review Taskforce, *Administrative Review Reform Issues Paper* (15 May 2023) <<https://www.alsnswact.org.au/submission-to-administrative-review-taskforce>>.

In its *Pathways to Justice* Report, the Australian Law Reform Commission explored the value of inclusive and culturally appropriate specialist Aboriginal and Torres Strait Islander courts and lists.⁴ While many of these specialist courts operate in the criminal law jurisdiction, there are also specialist Aboriginal Lists operating in the family, care and protection and civil law jurisdictions. The Aboriginal List at the Federal Circuit and Family Court of Australia has developed special case management processes for Aboriginal and Torres Strait Islander litigants, which includes employing specialist Aboriginal liaison officers to support parties to understand and engage with court processes and connects parties to legal and other support services.⁵

Similarly, the NSW Civil and Administrative Appeals Tribunal (**NCAT**) commenced its Aboriginal Tenancy List in September 2023.⁶ Our GSATS tenant advocates provide a duty service at the Aboriginal Tenancy List and advocate for ALS clients in the list. In our observations, the list has resulted in greater cultural safety and improved access to justice for clients at NCAT.

Recommendation 1. Include provisions in the Bill imposing a positive obligation to promote cultural safety for Aboriginal and Torres Strait Islander people, including through specialist lists and inclusive and culturally safe case management and support services.

Accessibility and Inclusion

The Objectives of the Bill are outlined at cl 9. Relevantly, sub-cl 9(c) notes that the Tribunal must pursue the objective of providing an independent mechanism of review that “is accessible and responsive to the diverse needs of parties to proceedings”.

This sub-clause could be strengthened by non-exhaustively identifying some of the groups who are likely appear before the Tribunal and whose needs must be accommodated. For example, s 10 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) outlines the Objectives of the Northern Territory Civil and Administrative Tribunal (**NTCAT**) and specifically notes the Tribunal should “be responsive to parties, especially to people with special needs”. We submit that the Bill should make similar recognition of the needs of people with disability, the cultural and social needs of Aboriginal and Torres Strait Islander peoples, the needs of people from culturally and linguistically diverse backgrounds, and the needs of young people under the age of 18 years.

The Bill should also recognise the ways in which different aspects of a person’s identity and lived experiences intersect and, in the context of contact with the legal system, lead to compounded experiences of marginalisation and discrimination. Factors such as a person’s Aboriginal or Torres Strait Islander status, disability, race, religion, sexual orientation, gender identity, age, culturally and linguistically diverse background, and migrant, refugee or asylum-seeker background are generally poorly accounted for in mainstream policymaking and service delivery, meaning entrenched systemic inequalities in relation to each of these factors can create unique and novel challenges for persons seeking equitable access.⁷ We submit that this should be acknowledged in the Bill by amending the clause to refer to the “diverse **and intersecting** needs of parties.” This language should be adopted

⁴ ALRC, *Pathways to Justice--An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, ALRC Report 133, December 2017) 328 – 336.

⁵ ‘Indigenous List’, *Federal Circuit and Family Court of Australia* (Web page) accessed 1 February 2024, <<https://www.fcfa.gov.au/fl/indigenous-list#:~:text=The%20Federal%20Circuit%20and%20Family,Alice%20Springs>>.

⁶ ‘Aboriginal Tenancy List starts 6 September 2023’, *NSW Civil and Administrative Tribunal* (Announcement, 25 August 2023) <<https://ncat.nsw.gov.au/publications-and-resources/news-and-announcements/news/2023/aboriginal-tenancy-list.html>>.

⁷ Chin Tan, ‘Statement of the Race Discrimination Commissioner’ (Statement, Disability Royal Commission) accessed via <<https://humanrights.gov.au/about/news/speeches/disability-royal-commission-statement-race-discrimination-commissioner>>.

throughout the Bill or, at a minimum, adopted in cl 9, cl 36 (which empowers the President to make practice directions) and cl 51 (which requires the Tribunal to be accessible).

Recommendation 2. Amend sub-clause 9(c) to non-exhaustively enumerate some of the groups whose needs may need to be accounted for in promoting accessibility, including people with disability, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and young people under the age of 18 years.

Recommendation 3. Amend the Bill to recognise that accessibility and inclusion requires an intersectional approach and impose a requirement on the Tribunal to facilitate access to proceedings for persons with multiple, intersecting needs including, at a minimum by, amending sub-cl 9(c), 36(1)(k) and 51(1).

Co-Design and Collaboration with People with Lived Experience

Clause 193 of the Bill outlines the functions of the President of the Administrative Review Tribunal. Sub-clause (k) requires the President to “engage with civil society” in relation to the performance of the role. We welcome the inclusion of this provision and submit that it could be strengthened by explicitly empowering the President to engage in co-design with people with relevant lived experience in relation to the performance of any of the President’s enumerated functions. At a minimum, meaningful engagement by the President should be undertaken with Aboriginal and Torres Strait Islander people and people living with disability.

The National Agreement requires that all levels of government and government processes work in meaningful partnership with Aboriginal people to overcome the inequality experienced by Aboriginal and Torres Strait Islander people and achieve life outcomes equal to all Australians.

Article 4 of the Convention on the Rights of Persons with Disabilities (**CRPD**) requires parties to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations” in the development and implementation of legislation and policies and in other decision-making processes concerning issues relating to persons with disabilities.

Clause 59 of the National Agreement requires Government Parties to:⁸

- embed and practice meaningful cultural safety,
- deliver services in partnership with Aboriginal and Torres Strait Islander organisations, communities and people, and
- improve engagement with Aboriginal and Torres Strait Islander people.

In order to give effect to the obligations of signatories to the National Agreement and the CRPD, the Bill should incorporate and encourage meaningful co-design and collaboration with people with a disability and Aboriginal and Torres Strait Islander people.

Recommendation 4. Amend cl 193 to explicitly empower the President to collaborate and engage in co-design with people with lived experience, including Aboriginal and Torres Strait Islander people and people with disability.

⁸ Above n 2, National Agreement [59]. [59].

Education and Training

Sub-clause 193(h) confers a function on the President to promote the training, education and professional development of Members. While we commend the inclusion of this provision, we submit it would be strengthened by explicitly requiring promotion of training and education in relation to Aboriginal and Torres Strait Islander cultural safety, disability awareness training, cross-cultural communication training, use of interpreters, and trauma-informed practice.

Specialist training is imperative in a jurisdiction such as the Administrative Review Tribunal, where many applicants are self-represented and have diverse and intersecting needs.

Training should be mandatory for Members but also for registrars, court officers and other external-facing roles within the Tribunal. Where possible, training should be co-designed with people with lived experience and should address legal communication, cultural safety as well as facilitating access through accommodations for the diverse and intersecting needs of parties.

As well as implementing an amendment to the Bill to explicitly require the above, the Tribunal must be adequately resourced to give effect to this function of the President. Doing so would promote more positive outcomes and access to justice for less advantaged parties and support the Tribunal in providing reasons to parties that are consistent, accessible and easy to understand.

Recommendation 5. Amend sub-cl 193(h) to mandate training and education in relation to Aboriginal and Torres Strait Islander cultural safety, disability awareness, cross-cultural communication, use of interpreters, and trauma-informed practice for Members, Registrars and court officers. Such training should be co-designed by and developed in partnership with Aboriginal and Torres Strait Islander Community-Controlled Organisations (ACCOs) and people with lived experience.

Clause 249 outlines the functions and powers of the Council. Relevantly, sub-cl (1)(f) empowers the Council to support education and training for officials of Commonwealth entities in relation to making administrative decisions and exercising administrative discretions and the Commonwealth administrative law system.

We support this function of the Council and submit it should be strengthened by requiring the education and training to be developed through meaningful co-design with ACCOs and lived experience experts, as recommended above.

Recommendation 6. Amend cl 249 to require the Council to develop training and education material and courses in partnership with ACCOs and people with lived experience.

Representation and Diversity on the Tribunal

We welcome the strengthened requirements for senior members and general members to have legal qualifications and relevant experience.

Clause 208(2) outlines what the Minister must consider before making a recommendation to the Governor-General as to the appointment of a senior or general member. In particular, we support the requirement that recommendations are merit-based.

The membership of the Tribunal would be further strengthened by requiring the Minister to consider the need for diversity and representation within the membership of the Tribunal.

Section 183(5) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**) requires the Minister to have regard to the following, when recommending persons for appointment as a member of Queensland Civil and Administrative Tribunal (**QCAT**):

- the need for balanced gender representation in the membership of the tribunal;
- the need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders;
- the need for the membership of the tribunal to reflect the social and cultural diversity of the general community;
- the range of knowledge, expertise and experience of members of the tribunal.

We submit a similar sub-clause should be inserted into the Bill at cl 208(2), which outlines the requirements for recommendation of a person's appointment to the Governor-General. The provision should also recognise the need for the membership of the Tribunal to embed lived experience reflective of issues commonly arising in Tribunal proceedings, including barriers to justice faced by Aboriginal and Torres Strait Islander people, and people with disability.

Recommendation 7. Amend cl 208(2) to require the Minister to consider the need for a diverse range of representation and lived experience in the membership of the Tribunal, in terms similar to those outlined in the *Queensland Civil and Administrative Tribunal Act 2009*.

Positive Requirement to Ensure Proper Understanding by Participants in Proceedings

We support the inclusion of Objectives within the Bill. In particular, we support the emphasis on the Tribunal being fair, just, accessible and responsive to the diverse needs of the parties. However, we submit that additional provisions should be added to ensure these objectives are achieved by the Bill. We submit the Bill could be strengthened by legislating a positive requirement on the Tribunal to ensure that participants properly understand the proceedings so that they are empowered to meaningfully engage in the Tribunal process.

As noted at paragraph 209 of the Explanatory Memorandum, the majority of Tribunal users are self-represented. With this in mind, it is crucial that parties understand the proceedings, both procedurally and substantively.

Section 29 of the QCAT Act requires the Tribunal to take all reasonable steps to:

- ensure each party understands the practice, procedure, legal implications, and decisions of the Tribunal,
- understand the actions, expressed views and assertions of a party to or witness in the proceeding,
- ensure proceedings are conducted in a way that is responsive to cultural diversity, including Aboriginal tradition and Island custom,
- ensure proceedings are conducted in a way that is responsive to the needs of a party or witness that is a child, a person with an intellectual disability or a physical disability.

Sub-section (2) explains the ways in which QCAT may give effect to the requirements imposed by s 29, including by explaining matters to a person, supplying an explanatory note or by having an interpreter or support person to effectively communicate with the witness or party. Incorporation of similar provisions in the Bill will ensure the objectives of the Bill are achieved and will promote access to justice for parties and witnesses in Tribunal proceedings.

Recommendation 8. Insert a clause into the Bill imposing a positive obligation on Members to ensure that parties and witnesses to proceedings are able to properly understand the proceedings, in terms similar to s 29 of the *Queensland Civil and Administrative Tribunal Act 2009*.

Data Recording and Reporting Requirements

In addition to the reporting requirements outlined in the Bill, the Tribunal should be required to collect de-identified demographic data in relation to parties to proceedings, including Aboriginal and Torres Strait Islander status, age, gender and disability. This data should be made publicly available.

Recommendation 9. A sub-clause is inserted into the Bill requiring the Tribunal to record and publish de-identified demographic data in relation to parties to Tribunal proceedings on an annual basis.

Thank you for the opportunity to comment on the Bill. Please contact policy@alsnswact.org.au if you would like to discuss this submission further.

Sincerely,

Karly Warner

Chief Executive Officer

Aboriginal Legal Service (NSW/ACT) Limited

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P: