A Submission on Administrative Review Tribunal (Miscellaneous Measures) Bill 2024

The following is a quick submission written for the https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ARTMiscMeasures24

Contact information for the Inquiry is given as:

Phone: +61 2 6277 3560
legcon.sen@aph.gov.au

My name is Bob Buckley. I am the longtime (20+ years) voluntary Co-convenor of *Autism Aspergers Advocacy Australia* (A4). I have been recently (Apr 2024) employed in this role until recently. I am an advocate for my severely autistic son, for autistic Australians, their families and carers.

My concerns relate to disputes with the *National Disability Insurance Agency* (NDIA) and perhaps with the overarching Department of Social Security (DSS) that were previously adjudicated independently in the Administrative Appeals Tribunal.

Since the start of the NDIS, I have personally helped over 50 families with their AAT appeals against NDIS decisions. This work is not part of my A4 Co-convenor role, it is done as an individual volunteer. I am not a lawyer: I have no legal training. I provide advocacy support to autistic children and their families for free.

These cases involved autistic NDIS participants. Most of these cases relate to severely or profoundly autistic children. All the children I've supported had clinical advice that they needed evidence-based early intervention for their severe disability.

Initially, most of the matters were settled with substantially revised offers from the NDIS.

More recently, the NDIA and the AAT have been taking matters I am involved in to hearing. The resulting decisions have been mixed; more recently, AAT matters for young autistic NDIS participants have been unsatisfactory for a plethora of reasons that I spell out below.

From what I see, the new ART will be very similar to the AAT. The main change seems to be Labor's appointment's process replacing the previous LNP approach. From my perspective, this makes very little difference to the operation and outcomes we can expect from the "new model". And it does nothing to improve the trust of the autism sector in the new ART.

Contest of experts

Matters relating to early intervention for autistic children that go to hearing in the AAT are basically a "contest of experts". In these matters, the AAT Member is required to choose between:

a) the so-called experts that the NDIA presents to the AAT, and

b) the clinicians, the parents and any other expertise that the Applicant brings to hearing.

The High Court of Australia warned the AAT[1] that

> *It would be an exceptional case in which it would be right for the A.A.T., forming its own view of competing medical theories, to hold an hypothesis of connection favouring entitlement to be unreasonable, when the hypothesis is supported by "a responsible medical practitioner, speaking within the ambit of his expertise.*

Basically, Tribunal Members simply cannot be expected to have the expertise, time, or resources needed to decide complex technical arguments between competing experts. This says the role of the Tribunal is to decide whether the advice the Applicant chooses/prefers is from a sufficiently qualified medical (or allied health) professional/clinician; the issue before the Tribunal should not be whether the Respondent agrees or not.

However, the NDIS division of the AAT has chosen to completely ignore the High Court's advice even when Applicants explicitly reminded them of it. In most cases the Member ignored the Applicant's contentions on this issue in their decision.

Increasingly, AAT Members have ignored the Applicant's evidence, issues, and contentions. Recent decisions show declining consideration of or respect for an Applicant's statements, submitted or oral evidence, and closing statements.

NDIA is not a model litigant

It seems like AAT Members are conditioned or required to expect the NDIS/NDIA as respondent will conduct itself as a model litigant. However, this is far from the reality. The AAT treats the NDIA as Respondent as if it is a model litigant and consequently accepts most of its evidence and contentions uncritically. But the NDIA is not a model litigant; so the Tribunal treating the NDIA as a model litigant is unjust, unfair, and biased.

If the ART wants to be fair, or even be seen as being fair, it will need to be far more careful with evidence and contention from the NDIA as Respondent.

[1] *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 11, para 11.

The NDIA does not trust clinicians. It seeks to have the AAT and families not trust them either. The NDIA's conduct is unconscionable. The AAT fails to ensure the safety of the people who come before it.

Delays in early intervention decisions

Another serious failure of the AAT in NDIS matters is that it often extends matters unreasonably. Consistent clinical advice in relation to autistic children is that their early intervention should start as early as possible. The main reason for this is to maximise the opportunity available while the child's brain develops and to make maximum use of brain plasticity. However, the AAT often requires protracted litigation for years to avoid evidence-based early intervention for autistic children. A4 has raised concerns[2] over delays and the time taken in these matters but did not get responses.

AAT matters have been taking years and very young autistic children are missing their opportunity for effective and evidence-based early intervention while the NDIA and the AAT prolong their cases.

By the time the AAT decides a matter for a young autistic child, the child has already spent a substantial amount of its life in the AAT.

The NDIA's cruel policy targets the most severely affected autistic children imposing a disproportionate or undue burden on their access to evidence-based early intervention - see https://a4.org.au/node/2567. This practice is contrary to the "reasonable accommodation" definition in Article 2 of the UN Convention on the Rights of Persons with Disabilities. The NDIA does not follow its own policy; the NDIA's AAT Case management Guide on ABA says:

> The NDIA is likely to fund up to 20 hours per week of ABA therapy where it is considered likely to be effective and beneficial.

yet the NDIA forces families whose support request is more modest (like DRXK's family who requested 14 hours) through the AAT hearing process.

Notably, the NDIA's policy of sending autistic children with the greatest need to the AAT was meant to be reviewed every six months - but when aspects of it were questioned the NDIA shut down its review of this Case Management Guideline.

NDIA's adversarial approach

In the matters I have been involved in, the NDIA took an especially adversarial position. And the AAT apparently supports the NDIA to progress matters in this manner.

[2] For example, see https://a4.org.au/node/2496 and https://a4.org.au/node/2496.

The parents of autistic children are treated as criminals in the proceedings. They are self-represented and have no legal training; they are unable to defend themselves in the Tribunal. The Respondent denigrates them and denies their credibility. In some instances, the AAT Member joins in.

They are accused of being gullible and susceptible to being unduly influenced by unscrupulous clinicians who are out to make money and are not acting in the interest of their patients. The credibility of professionals who work with autistic children and their families are also questioned, even though these professionals hold graduate level qualifications and are bound by a code of ethics. In some cases, the AAT has accepted the Respondent's claims that professionals/clinicians are unreliable and not credible sources of information about the needs of the child and evidence-based early intervention. This has been the case even when professionals present objective information showing the child's positive response to intervention.

The adversarial approach and the delays (above) have unquantified but substantial negative effects on mental health, employment, and many other issues for families.

AAT was not a safe place for Applicants

Applicants should be able to expect that the AAT will protect them while matters are in progress. However, that was not the case.

For example, in DRXK vs NDIA the AAT allowed the Respondent to remove contested supports while the matter progressed. The AAT should have protected those supports as the Applicant requested but the AAT ignored those requests.

Further, the Respondent's decision to cut reasonable and necessary supports became a further reviewable decision as is noted at para. 4 of the decision. However, other than this mention, the Member's decision ignores this issue. In that matter, as in all such matters, the Member is meant to "stand in the shoes of the original decision maker" however, in this matter that did not happen unless somehow those shoes were magically able to transport the original decision maker forward to the date of the Member's decision in the matter.

One of the problems with the AAT Member's decision was that it made an order going forward but failed to insist that it was from the date of the original decision. The Member did not "stand in the shoes of the original decision maker" in relation to any of the decisions that the case was meant to review. It seems this was largely at the behest of the respondent.

When it fails to stand in the shoes of the original decision makers - as happens more often than it should, the AAT does not do its job.

AAT bias

There appears to have been a very strong bias in how AAT Member's treated requests to subpoena information. There are many examples of decisions that the Tribunal would not allow Applicants to subpoena information about the decisions that the Tribunal was meant to be reviewing[3].

An obvious example is the recent QLYQ vs NDIA matter where the Tribunal refused to subpoena how the original decision was made. The consequence of this is that the Tribunal had no information at all about the original decision. Yet the Tribunal's eventual decision in the matter *affirmed* a decision that it knew nothing about.

By contrast, AAT Members routinely granted the NDIA, the Respondent, whatever subpoenas they requested no matter how unreasonable. In DRXK, the AAT granted a subpoena for *all* medical records: there was zero attempt to limit it to relevant material. The subpoena was granted on the basis that there was no evidence from a treating paediatrician despite the Applicant clearly demonstrating that there were multiple reports already in evidence. The Tribunal ignored the Applicant's arguments.

In Hill vs NDIA, the Applicant asked to subpoena records of NDIS payments for services. The Tribunal refused. The Applicant obtained the information via Freedom of Information and put it in evidence. The Member's decision ignored the Applicant's evidence (that support was provided only for a half day on Saturdays each fortnight) and instead accepted the Respondent's completely unevidenced claim that it was being used for a full day every Saturday because the funding was in the Applicant's plan. The effect of ignoring this evidence favours the Respondent and diminished the Applicant's reasonable and necessary supports by at least 14%.

NDIS sustainability

When the Applicant's I have advocated for obtained the cost of lawyers in their matters, those costs have always exceeded the level of funding they requested.

It cost more for the NDIS to defend matters than it would to settle them. In the Hill vs NDIA matter, the Respondent's legal fees exceeded $340K but the support in question was less than 25% of that.

[3] E.g. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3518.html?context=1;query=qlyq;mask_path=au/cases/cth/AATA https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1269.html?context=1;query=drxk;mask_path=au/cases/cth/AATA https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3431.html?context=1;query=hill%20disability%20insurance%20autism;mask_path=au/cases/cth/AATA

Families do not go to the AAT in these matters over money; they go to get the supports they believe their child needs … that is, supports they were advised about by their clinicians. The families fight the battle but they do not get money as a result.

If the AAT and its Members believe they need to rule against autistic children to protect/ensure the overall financial viability of the NDIS then they are misguided. When they fail to ensure autistic children access evidence-based early intervention to help them improve their life-long outcomes, then long-term cost to the NDIS, the government and Australia's taxpayers is increased substantially.

Conclusion

From what I see, the NDIA finds some issues too challenging to manage. Rather than having its own expertise to decide complex cases fairly, it finds it easier to shift responsibility for hard decisions onto the AAT. Recently, the NDIA told a family (who has already been to the AAT three times) that the NDIA does not have a process for approving a plan like their child's. Consequently, the family will need to go back to the AAT as part of the planning process for their child's next NDIS plan.

Notably, the families I've helped have little or no other support in AAT matters. The advocacy agencies that are funded through the National Disability Advocacy Program do not have the knowledge or understanding of autism that is needed to deliver effective advocacy. Families choose to address their child's disability needs rather than pay for legal support … and in most instances Legal Aid does not support them adequately. For example, legal aid withdrew its support for DRXK as soon as a hearing date was set.

The AAT is extremely stressful for families.

And there is no real process for addressing the failings I've raised above. For so many reasons, very few families are able to contest unacceptable decisions from the AAT.

I have a number of other issues that the ART needs to address. I am happy to provide further detail in relation to any of the issues raised above.

For many reasons, the AAT lost the trust of people in the autism sector. The AAT needs a credible replacement. The challenge is to show the autism sector that the ART will be a substantial improvement. And that will require much more effort than is currently visible.

For the ART to succeed in relation to matters that affect autistic children, it needs to radically improve on the performance of the AAT. It needs to be timely, fairer and respectful of Applicants. Unlike the AAT, the ART must respect Applicants and their evidence; and consider and address their contentions.

Acknowledgements

I showed this submission to the families that I specifically named. I thank them for their suggestions and for their permission for me to refer to their cases in the above submission.

Bob Buckley

8/10/2024