First Peoples Disability Network Australia

07 March 2024

Committee Secretary

Senate Standing Committee on Legal and Constitutional Affairs

FPDN Submission: Administrative Review Tribunal Bill 2023 and related bills

The First Peoples Disability Network (FPDN) welcomes the opportunity to make a submission regarding the Administrative Review Tribunal Bill 2023 and related bills ('ART Bill'). This submission provides key points for the Senate Legal and Constitutional Affairs Committee to consider in relation to the proposed replacement of the Administrative Appeals Tribunal ('AAT') with the Administrative Reviews Tribunal ('ART').

About FPDN

The First Peoples Disability Network (FPDN) is the national peak organisation of and for Australia's First Peoples with disability, their families and communities. We actively engage with communities around Australia and represent Aboriginal and Torres Strait Islander people with disability in Australia and internationally. Our goal is to influence public policy within a human rights framework established by the United Nations Convention on the Rights of Persons with Disability ('UNCRPD') and the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'). Consistent with our principle of community control, our organisation is governed by First Peoples with lived experience of disability.

More information about FPDN and the First Nations disability policy context has been included in Appendix A.

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Overarching Position

FPDN supports the bulk of the changes within the ART Bill. Taken as a whole, they appear to reflect a genuine improvement to the overall process of appealing administrative decisions. In this respect, FPDN endorses the submissions that were made by the Disability Advocacy Network Australia ('DANA'), People with Disability Australia ('PWDA'), Public Interest Advocacy Centre ('PIAC') and the Aboriginal Legal Service NSW/ACT ('ALS') to the House of Representatives Standing Committee on Social Policy and Legal Affairs in February 2024.[1]

However, FPDN holds deep concern that the provisions of ART Bill remain incapable of addressing the systemic problems which are routinely encountered by those attempting to pursue NDIS Appeals, where those problems are the result of the NDIA's behaviour. Such as such as the stresses and costs of protracted litigation, as a consequence of the NDIA adopting an unnecessarily aggressive approach towards NDIS appeals.

FPDN appreciates that the ART Bill's Explanatory Memorandum acknowledges the obligation to ensure an *'effective access to justice for persons with disabilities on an equal basis with others'* in Article 13 of UNCRPD.[2]

Additionally, the Explanatory Memorandum asserts that:

> *'The Bill establishes a Tribunal that is flexible, informal and accessible, has the power to appoint practitioners to assist people with disability and expressly empowers the President to make practice directions in relation to the accessibility of the Tribunal and the responsiveness of the Tribunal to the diverse needs of parties to the proceedings, such as people with disability. These provisions empower the Tribunal to adapt to the differing needs of persons with disabilities and as a result, promote their right of access to justice.'*[3]

To the extent that the Tribunal has been empowered to make disability/ accessibility adjustments, FPDN would tend to agree with those statements. Clause 67, which allows for the appointment of a

[1] Disability Advocacy Network Australia, 'Submission to Inquiry into the Administrative Review Tribunal Bills', 2 February 2024.
People with Disability Australia, 'Administrative Review Tribunal Bill', 2 February 2024.
Public Interest Advocacy Service, 'Submission to Standing Committee on Social Policy and Legal Affairs - Administrative Review Tribunal Bill 2023', 2 February 2024.
Aboriginal Legal Service (NSW/ACT) Limited, 'Administrative Review Tribunal Bill', 5 February 2024.
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/ARTbillsInquiry/Submissions

[3] Ibid [

litigation guardian, is an example of particularly meaningful step forward that will have pertinent applications during NDIS reviews.

However, these types of provisions are not all that is required to ensure an 'effective access to justice'. On the contrary, the ART Bill does not appear to contain any specific measures which will prevent the conduct of government agencies from operating against the ART Bill's legislative aims.

Bolstering the capacity of the ART in this regard would target a core area of concern, and truly serve as a meaningful paradigm shift towards providing a single avenue for administrative review that is accessible, fair, informal and quick, improves the transparency and quality of government decision-making, and promotes public trust and confidence in the Tribunal itself.[4]

Within the Senate Legal and Constitutional Affairs References Committee's own findings and recommendations on the performance and integrity of Australia's administrative review system in 2022, it was acknowledged that:

> *'[T]he fact that the AAT is setting aside the decisions of departments at consistently high levels indicates problems with the decision-making process in departments themselves. This is exemplified by the National Disability Insurance Scheme (NDIS) Division, where more than half of the relevant agency's decisions have been changed by the Tribunal.*
>
> *The caseload at the AAT will not diminish while departments and agencies continue to make decisions which are not the correct or preferred ones.'*[5]

However, the fact remains that for NDIS decisions, the administrative reviews process is increasingly being overwhelmed by people and matters which do not belong there in the first place. FPDN would take this opportunity to re-emphasize some extremely distressing evidence that was originally provided by People with Disability Australia ('PWDA') and acknowledged by the Senate Legal and Constitutional Affairs References Committee,[6] in regards to NDIS appeals conducted by PWDA's advocates in Queensland:

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[4] See *Administrative Review Tribunal Bill 2023* (Cth), cl 9.
Also see *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.
[5] Senate Legal and Constitutional Affairs References Committee, 'The performance and integrity of Australia's administrative review system', March 2022, [7.21-7.22].
[6] Ibid [3.71-3.72].
See also People with Disability Australia, 'The performance and integrity of Australia's administrative review system', 1 December 2021, 2.
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Submissions

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- 95% of those appeals were being settled in conciliation; and
- Within the span of a financial year, NDIS appeals went from making up approximately 1% of advocate workload to nearly 100%, concurrent with an overall 629% increase in NDIS appeals for PWDA advocates.

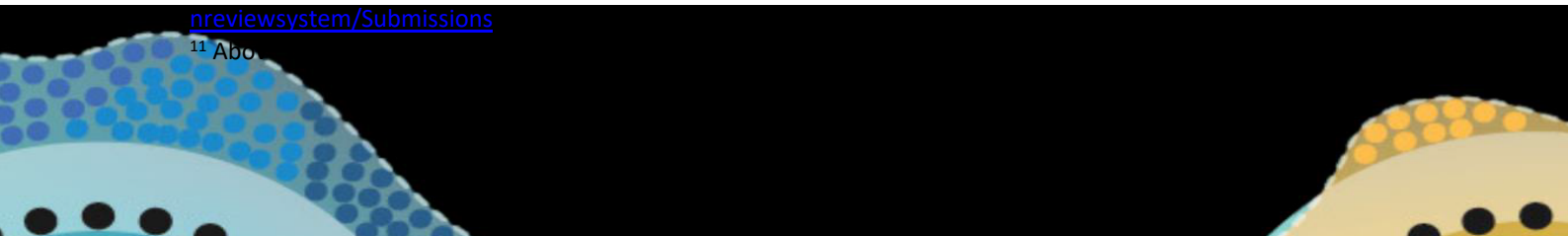
Since that time, the AAT NDIS division has consistently been burdened nationwide with (i) an ever increasing number of total NDIS appeals,[7] and (ii) median finalisation times which appear to be far closer to 20 weeks,[8] as opposed to the aspirational goal of 60 days.

The AAT is *already* intended to offer a review process that is fair, just, and economical, with proceedings to be conducted with as little formality as possible, in the way the Tribunal sees fit.[9] Putting aside incremental improvements, portions of the Explanatory memorandum which espouse the insertion of these principles into the ART Bill are not revolutionary, in fact they already existed in some form in the older AAT Act.

There are significant indicators (corroborated by highly qualified and experienced entities such as Legal Aid NSW) of the NDIA having adopted an 'increasingly adversarial approach' towards all AAT matters.[10] Respectfully, the resultant delays, expenses and trauma which are doled out to applicants is the same, regardless of whether this behaviour is ultimately pinned upon the internal policies of the NDIA itself (in its own capacity) or the behaviour of its chosen legal representatives.

Where does it end? The buck must stop somewhere. Statistics such as a 95% conciliation rate and 55% rate of decisions changed upon appeal (the worst of any division) paint a convincing picture that it is not realistic to expect the ART (as currently proposed) to be able to 'solve' the problem of a bloated NDIS review process.[11] At present, the AAT (whether through conciliation, directions hearings or final hearings) has become the overflow tank for a series of problems with the internal behaviour of the NDIA. In many respects, it is the agency which holds the power (and responsibility as a model litigant) to resolve these problems effectively.

[7] Above n 5, [3.69-3.70].
[8] Ibid 20.
[9] *Administrative Appeals Tribunal Act 1975* (Cth), ss 2A, 33(1)(b).
[10] Legal Aid New South Wales, 'Senate Legal and Constitutional Affairs Reference Committee's inquiry into the performance and integrity of Australia's administrative review system', 30 November 2021, 6. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Administrativereviewsystem/Submissions
[11] Abo



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If the ART is to function any differently than the AAT, then the ART's NDIS division will require the adoption of a fundamentally different approach. FPDN fundamentally supports the often suggested power to issue narrowly tailored cost orders against administrative decision makers (or at least the NDIA specifically), which is notably absent from the ART Bill.[12]

The NDIA and the need to ensure an *effective* access to justice

In 2022, Disability Rights Organisations (DROs) throughout Australia endorsed an extremely thorough submission by Disability Advocacy NSW, Your Say Advocacy Tasmania, and Villamanta Disability Rights Legal Service Inc. into NDIS appeals at the AAT,[13] which included 'significant concerns' regarding the NDIA's various failures to adhere to model litigant obligations (which originate from common law and have since been enshrined via legislative directions),[14] and the duty to act in good faith (as per AAT guidelines).[15]

FPDN does not propose to fully outline the extent of a Commonwealth entity's model litigant obligations, but a mere sampling of the common experiences of signatories indicates that the NDIA routinely:

- Does not act consistently with its obligation to deal with claims promptly and without unnecessary delay, and instead fails to meet deadlines or disclose materials in accordance with the Tribunal's deadlines and instructions (which often 'wastes' case conferences and delays matters by anywhere from weeks to months).[16]
- Disregards the foundational requirement that a model litigant must keep the costs of litigation to a minimum. Instead of acting efficiently, the NDIA appears to have adopted a culture and practice of:
    - Failing to proactively monitor each case and identify the core issues / relevant information that is readily available at an early stage;[17]

[12] See House of Representatives, *Administrative Review Tribunal Bill 2023* (Cth), Explanatory Memorandum, [728].
It is simply noted that *'[t]he Tribunal is by default a no-costs jurisdiction, meaning each party bears their own legal costs'.*
[13] Disability Advocacy NSW, Your Say Advocacy Tasmania, Villamanta Disability Rights Legal Service Inc., 'National Disability Insurance Scheme appeals at the Administrative Appeals Tribunal', 3 June 2022.
[14] Ibid 18.
[15] Ibid 24-26.
[17] Ibid

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- Continuously 'peppering' the applicant with requests for 'more evidence' (often in the form of expensive and time-consuming reports from medical professionals),[18] especially in situations where the agency already has access to those facts and/or is requiring the applicant to prove something that the NDIA already knows, or a fact that ought to simply be conceded, such as recent proof of disability for an adult whose entire life has been defined by the presence of disability;[19] and
- Based on inconsistently applied 'internal guidelines' (which are not publicly available), insisting that the NDIA will not pay for these reports and will require the applicant to fund them.[20] Concerningly, the NDIA seems to have somewhat of a tendency to then largely disregard these reports, before requiring an (NDIA funded) 'independent assessment', which delays the matter by a further 4-6 weeks.[21]

- Defaults to contesting disputes, instead of paying legitimate claims without litigation. This is also a failure of case management, insofar as matters which have been fiercely contested for months are briefed out to Counsel and suddenly capable of prompt settlement.[22]

The above illustrations are far from exhaustive. FPDN only seeks to draw attention to them as a means of emphasising that, for a vulnerable person with disability, what should be a simple application to the NDIS AAT division can quickly become a burdensome ordeal, where each attempt to move forward is met with yet another set of delays and burdensome requests.

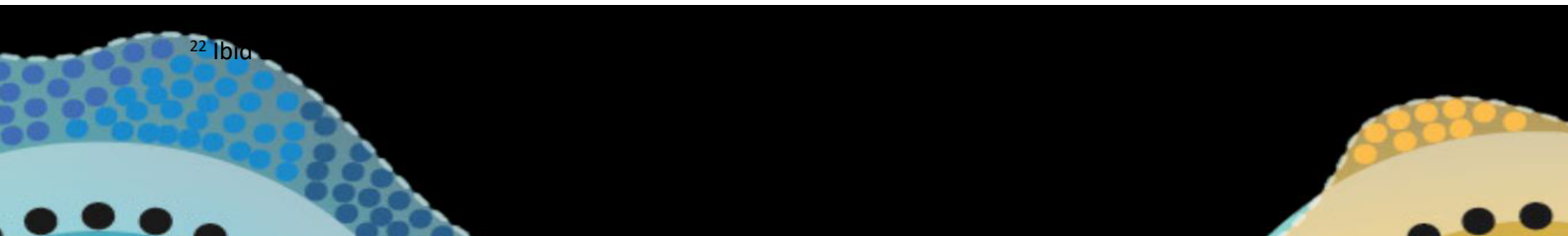
Whether intentional or otherwise, these types of behaviour exhaust and exploit the lack of resources of disabled individuals, who have done no more than seek a correct and consistent administrative decision regarding a statutory entitlement under the NDIS.

The mere existence of a forum (the AAT or ART) is not, by itself, all that is required to provide the *effective* access to justice which is contemplated by Article 13 of the CRPD.

Need for an ability to issue cost-orders against an agency

The ART Bill is a good foundation. However, in relation to the NDIS Division, the Tribunal must be granted meaningful powers that will allow it to preserve and protect the rights of vulnerable and

[18] Ibid 18-19.
[19] Ibid 20-21.
[20] Ibid 19.
[22] Ibid



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disabled applicants, and deter agencies from continuing undesirable patterns of behaviour, both in initial decision-making and conducting litigation.

The Explanatory Memorandum does not provide any justification for the stated intention that the ART will be a no-costs jurisdiction by default. It is not being requested that 'costs follow the event' --- only that, in the narrow set of circumstances where it is evident that the NDIA has demonstrated serious non-compliance with Tribunal directions, Tribunal guidelines and/or conduct unbecoming of a model litigant, the ART should at least have a discretion to order costs against the agency. Such orders would only be directed towards highly inappropriate conduct.

FPDN believes it would be appropriate that the ART should possess some level of power to issue a costs order against a government respondent. In this respect, FPDN further endorses the contents of PIAC's and DANA's submissions.[23] However, FPDN wishes to further emphasise that this would be the most direct mechanism of improving the NDIS Division. In the hopes that this influence of cost orders will extend to changing agency conduct before the relevant administrative decisions are even made. The ART otherwise has no downwards influence (even indirectly) upon the amount that the NDIA chooses to expend on litigation (which has been reported to be as much as $65 million on external AAT legal fees alone within the 2022-2023 financial year).[24]

FPDN believes that current exploitative approach of exhausting applicants (in terms of both time and legal funds) will remain if this does not attract monetary penalty or admonishment, then there is simply no real reason to expect those types of behaviours to stop. The ART President can create any practice direction that they see fit, but the ART will still not have any real ability to correct behaviour when, for example, a case conference is yet again rendered obsolete/delayed for another month due to late requests for further information, failing to provide a statement of issues until 'the last minute', etc.

Furthermore, to the extent that it might become evident that issues are arising due to profiteering/irresponsible behaviour by outside Counsel, the NDIA will have a means of (and be incentivised to) identify and promptly discontinue those retainers. Better yet, the scales of efficiency

[23] Public Interest Advocacy Service, 'Submission to Standing Committee on Social Policy and Legal Affairs - Administrative Review Tribunal Bill 2023', 2 February 2024, 11-12
Disability Advocacy Network Australia, 'Submission to Inquiry into the Administrative Review Tribunal Bills', 2 February 2024, 6-7.

[24] Rick Morton, The Saturday Paper, 'NDIA used the law to 'exhaust' participants', 28 October, 2023. https://www.thesaturdaypaper.com.au/news/health/2023/10/28/exclusive-ndia-used-the-law-exhaust-participants#hrd

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within the NDIA might tip towards endeavouring to pre-emptively ensure that a vast majority of matters are decided correctly and consistently in the first instance, such as to not to require any obvious changes or concessions upon an appeal.

Lastly, outside of deterrence, it should not be ignored that the power to issue cost orders will enshrine the position that *NDIS appeals concern individual applicants who absolutely do have the right to have their time and efforts respected*. If, for example, the Tribunal is duly satisfied that a simple matter has been forcibly turned into a six- month long endeavour, stretching over multiple case conferences and requiring the unnecessary review of piles of documentation, then compensation ought to be due. This principle extends to the labour of the various organisations, including Legal Aid and DROs which must expend their limited resources in order to finalise these matters.

A narrow power to make cost orders does not work against the intention of the ART to provide a mechanism of administrative review that is fair, just, economical, informal and quick. On the contrary, those objectives are currently being thwarted by the inability of the NDIS Division of the AAT to make costs orders, and the consequent absence of any incentive for the NDIA to respect and abide by all facets of the administrative decision-making process.

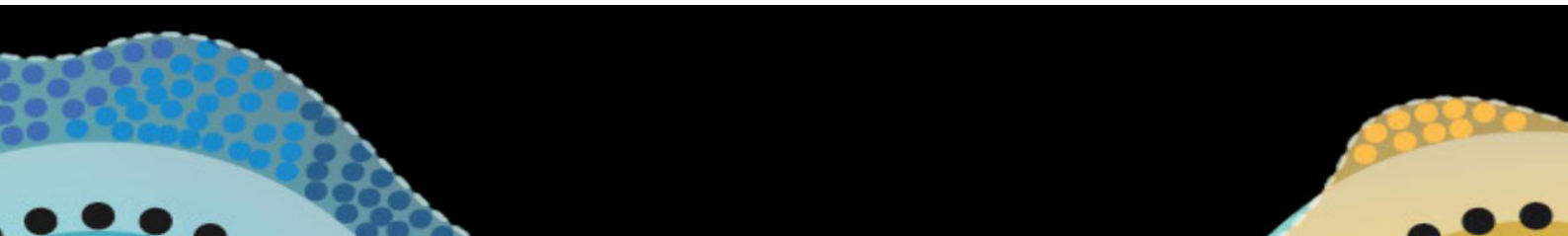
As will be set out throughout the remainder of this submission, once the real deterrent of cost-orders is established, the mere possibility that the ART could, if sufficiently provoked, utilise cost orders against the NDIA will become the core pillar of enforcement through which every other mechanism of managing/monitoring the effectiveness of the ART can be granted a tangible, immediate presence within the day-to-day proceedings of the Tribunal.

Empowering the ART to manage the NDIS Division

The Current Significance of Practice Directions within the AAT/ART

The Explanatory Memorandum repeatedly places a great deal of weight and significance on the ART Bill allowing the ART President to make practice directions. In particular, under the heading of '[e]nhanced powers and procedures' it is explained that:

> *'The Bill would provide for simple and accessible methods of applying for review, including by allowing the President to make practice directions setting out the manner in which applications may be made. The Bill would create an adaptive framework that creates*



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flexibility for the Tribunal to adjust and continuously improve its operation, and to support collaboration on best practice across its entire caseload….'[25]

Once again, the Explanatory Memorandum is largely referring to a measure (in this case, practice directions) which already exists under the AAT Act.[26] Nothing about the content of the Explanatory Memorandum or the relevant clause of the Bill suggests that any revolutionary, or even substantial, change has occurred.

In fact, there already exists an AAT Practice Direction specifically for the NDIS Division, which was created by the President and has been in effect (without amendment) since 1 July 2015.[27] Some of the matters which are covered by the Practice Direction include:

- Requirements for the NDIA ('an agency') to provide the applicant with all T-documents as soon as possible, after being notified of the application;[28]
- Requirements as to what the NDIA must consider *prior to* any case conference, including the extent of any need for further information/documents, how the application might be resolved, and whether the matter raises any complex issues.[29]
- Requirements for the NDIA do all things that are set out in a Case Plan before a hearing, including sending a summary of their position no later than 7 days before a hearing, making sure any witnesses are going to be available on the day of the hearing, etc.[30]

In other words, practice directions for the NDIS Division already exist, but that does not mean that the AAT has any meaningful recourse against an agency who wilfully, repeatedly and/or routinely disregards them. By all appearances, it seems reasonable to assume that the ART will be in a similar position.

The roles of the Administrative Review Council and guidance and appeals panel

FPDN does acknowledge that, to some extent, the re-establishment of the Administrative Review Council ('ARC') will offer assistance in relation to 'systemic challenges in administrative law, and

[25] House of Representatives, *Administrative Review Tribunal Bill 2023* (Cth), Explanatory Memorandum, [24].
[26] *Administrative Appeals Tribunal Act 1975* (Cth), section 18B.
[27] Administrative Appeals Tribunal, 'Practice Direction - Review of National Disability Insurance Scheme Decisions', 30 June 2015.
https://www.aat.gov.au/resources/practice-directions-guides-and-guidelines
[28] Ibid [2.5].
[30] Ibid

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supporting education and training for Commonwealth officials in relation to administrative decision-making and the administrative law system'.[31]

However, the ARC will exist as a reactive body which cannot be relied upon as the sole mechanism of profoundly transforming how agencies such as the NDIA approach 'first-instance' administrative decision-making and subsequent ART litigation.

Even if presented with a systemic disaster on the scale of 'Robodebt', it must be acknowledged that the ARC's role will be one of monitoring, inquiring and ministerial reporting (which could potentially result in *future* legislative changes). The ARC cannot (and rightfully is not intended to) directly intervene in matters before the NDIS Division of the ART at any given time.

Similarly, the establishment of a guidance and appeals panel within the ART is a positive step, but more will be required before agencies will have any incentive to alter much of their systemic behaviour in accordance with the guidance and appeal panel's decisions.

FPDN accepts and appreciates that the guidance and appeals panel will allow for appropriately senior members of the Tribunal to rehear and publish decisions for matters of 'systemic importance', which other members would then be required to have regard to as guidance decisions, if presented with similar issues or facts.[32] However, even a brief assessment of the AAT NDIS Division's history should destroy any confidence that, as is set out in the Explanatory Memorandum, *'[a] decision of the guidance and appeals panel on an issue of significance to administrative decision-making would provide clarity and certainty for others seeking review and would enhance the quality of future administrative decisions, both by the original decision-maker and by the Tribunal, on similar issues'.*[33]

The NDIA has not reached the point where 55% of the agency's decisions are changed upon appeal through a lack of 'clarity and certainty'. Any notion that, once the ART is established, a disabled person 'seeking review', let alone a First Nations person with disability alongside all the intersectional challenges that our community faces will be able to resolve their matter via simply pointing the NDIA towards an informative guidance decision is in our view nonsensically optimistic and not a true reflection of the wider operational context.

[31] See House of Representatives, *Administrative Review Tribunal Bill 2023* (Cth), Explanatory Memorandum, [33].

[33] Ibid.

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In particular:

- The NDIA will still have little incentive to deviate from a strategy of aggressively pursuing litigation (outside of an internal desire to produce high-quality administrative decisions, which has clearly not been the case to date); and
- For the guidance and appeals panel, addressing 'a matter of systemic importance' will not extend beyond correcting patterns of error in original decision making.[34] The panel would have no grounds to, for example, consider systemic behaviour of an agency which does not pertain to the result in the original decision, such as excessive delay and unnecessary requests for further documents.

I.e. Even if, in the future, the ARC was to (hypothetically) make findings regarding the NDIS Division/ NDIA which are substantially similar to those referred to throughout this submission, and the ART was subsequently presented with a matter in which all of those exact systemic problems are present, nothing of significance would result. The ARC's actions would not directly empower the ART or provide any recourse to the applicant, even if amendments to a practice direction had since come into effect and/or the guidance and appeals panel had since published a relevant guidance decision. At best, the ART might decide to refuse to grant the NDIA an adjournment in that instance, if the matter happened to involve issues of undue delay.

In summary we believe the current AAT/ART NDIS Division relates issues has reached a point where, in the absence of a narrowly-tailored power to issue cost orders against the NDIA, nothing can be expected to function efficiently and as intended. This must be rectified.

It is not an exaggeration to say that the prospect of cost orders allows everything else to fall into place. As has been highlighted, the ART Bill provides for practice guidelines and the re-establishment of the ARC (which itself can issue specific reports, best practice guides, practical guidelines, commentary and other publications). The duty to act as a model litigant arises outside of the ART Bill and will also continue to apply. Once an agency who recklessly disregards these materials can be subjected to cost orders, we believe major behaviours change will occur by matter of due course.

[34] Ibid

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Unmet commitments and the need to tailored responses for First Nations people with disability

FPDN would like to take this opportunity to stress that other amendments to the ART Bill should be considered, on this note FPDN endorses the recommendations contained within the prior submissions of DANA, PWDA, PIAC and ALS.[35] These submissions are thorough, well-considered, and FPDN generally does not see any need to rehash their contents. However, there is one particular area that FPDN wishes to elaborate upon and contribute additional context.

Creating an ART that is accessible to First Nations persons with disability

FPDN is the community-controlled disability peak and a member of the Coalition of Peaks, a partner to all Australian governments to the National Closing the Gap National Agreement ('CtG Agreement'), in addition to the Disability Sector Strengthening Plan ('DSSP'). All levels of Australian Government have signed these agreements.

As such, FPDN is disappointed that the provisions of the ART Bill do not contain any definitive, specific commitments by the Australian Government towards First Nations persons with disability who engage with the ART. The Bill presents a monumental opportunity to advance the objectives of CtG Priority Reform One (formal partnerships and shared decision making) and Priority Reform 3 (transforming government agencies).

The Explanatory Memorandum makes it incredibly clear that the Australian Government is conscious of its human rights obligations, including the rights under the International Covenant on Economic, Social and Cultural Rights ('ICESCR') to an effective remedy and fair hearing (article 2(3)) and to equality and non-discrimination (article 26).[36]

However, the Explanatory Memorandum contains nothing more than a single direct reference to First Nations Australians (in relation to non-discrimination), in a paragraph which reductively 'bundles' First Nations persons together with persons from culturally and linguistically diverse backgrounds, migrants, persons of any age, sex or religion and those who cannot afford to engage representation or participate in court processes.[37] Furthermore, the provisions of the main ART Bill do not contain any mention of First Nations persons.

[35] Above n 1.
[36] See House of Representatives, *Administrative Review Tribunal Bill 2023* (Cth), Explanatory Memorandum,
[37] Ibid

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FPDN and other peak bodies have simply not been consulted to a degree which would satisfy the Australian Government's core commitments (under CTG and DSSP) to the principles of co-design and partnership. From the outset, relevant legislation should be based on extensive engagement and consultation with First Nations people with disability.

Therefore, there is no reason for the Australian Government to be caught off guard by ALS's observations, which include that:

i. The ART Bill should be amended to impose upon the ART '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', and the employment of 'specialist Aboriginal and Torres Strait Islander outreach officers';[38]
ii. Clause 193 of the ART Bill should, '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';[39] and
iii. The ALS has not received funding to appear in the AAT/ART.[40]

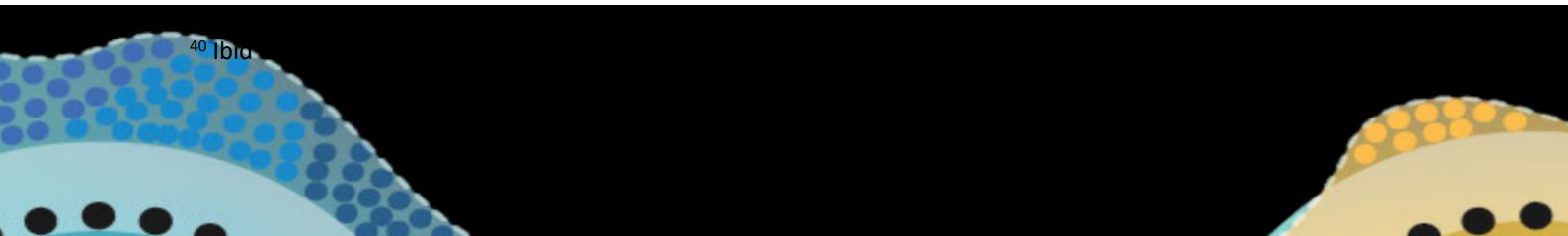
First Nations persons with a disability routinely face an combination of racism, ablism, and a historical lack of opportunities, resulting in a unique experience of intersectional discrimination at the hands of systems and institutions key to the proposed reforms. It is difficult to image a more systemically marginalised cohort in Australia that will be substantially impacted by these changes. It is not enough for the ART Bill/ Explanatory Memorandum to stop at paying mere 'lip service' to our existence. The unique cultural, social and economic considerations that apply to First Nations persons with disability (especially those who are applying to NDIS division in order to protect their primary means of disability supports) demands tailored legislative responses.

Conclusion

FPDN thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to participate in this submission and FPDN would be happy to discuss any of these points further with you. Please don't hesitate to contact us via: Tahlia-Rose Vanissum, National Policy and Systemic Advocacy Manager at policy@fpdn.org.au.

[38] Aboriginal Legal Service (NSW/ACT) Limited, 'Administrative Review Tribunal Bill', 5 February 2024, 2-3.

[40] Ibid.



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APPENDIX A:

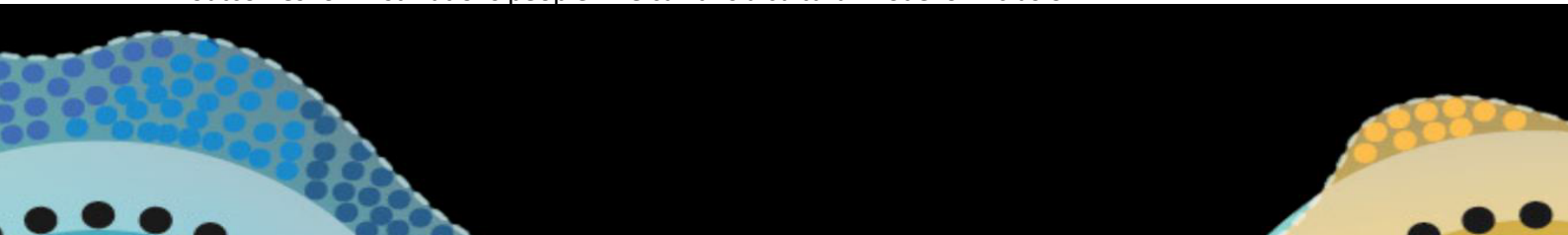
Further information about FPDN and the First Nation Disability Policy Context

FPDN is the community-controlled disability peak and a member of the Coalition of Peaks, a partner to all Australian governments to the Closing the Gap National Agreement. We are also the First Nations Disability Representative Organisation actively representing the voices of First Nations peoples within Australia's Disability Strategy governance structures. For millennia, First Nations peoples, communities, and cultures have practiced models of inclusion. However, despite this, since colonisation, First Peoples with disability and their families have been and continue to be amongst the most seriously disadvantaged and disempowered members of the Australian community. FPDN gives voice to their aspirations, needs and concerns and shares their narratives of lived experience. Our purpose is to promote recognition, respect, protection, and fulfilment of human rights, secure social justice, and empower First Peoples with disability to participate in Australian society on an equal basis with others. To do this, we proactively engage with communities around the country, influence public policy and advocate for the interests of First Peoples with disability in Australia and internationally.

Our extensive national work includes community engagement, capacity building and rights education; systemic advocacy, policy, research, evaluation and data; the development and delivery of evidence-informed training and resources with community for community and to a range of sectors including the Community Controlled sector and mainstream disability sector, Commonwealth and state/territory government policy and service delivery agencies and departments. FPDN also has an international presence and networks, including with the United Nations, and provides consultancy and support to international regions.

We follow the human rights framework established by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), to which Australia is a signatory, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

We are also guided by both the social and cultural models of disability. The social model views disability to be the result of barriers to equal participation in the social and physical environment. These barriers can and must be dismantled. However, FPDN recognises the critical need to move beyond a social model to ensure the cultural determinants of what keeps First Nations people with disability strong is centred when working with and in designing policies and programs to improve outcomes for First Nations people. We call this a cultural model of inclusion.



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A cultural model of inclusion recognises the diversity of cultures, languages, knowledge systems and beliefs of First Nations people and the importance of valuing and enabling participation in society in ways that are meaningful to First Peoples.[41] A First Nations cultural model of inclusion includes the human rights framework and the social model of disability to ensure that enablers, approaches, services and supports are culturally safe and inclusive, and disability rights informed. It is the only disability model that seeks to improve the human condition through focussing on what keeps people strong, as distinct to merely negating the adverse impact of difference.

Our community has to operate in multiple worlds – First Nations, disability, and mainstream society. The disability sector reflects this and is a complex and interconnected web of approaches to enable First Nations people with disabilities to realise their rights to participate in all aspects of their life, including safe, affordable, accessible and inclusive housing. These enablers, approaches, services and supports need to exist across the entire life-course, including the Aboriginal and Torres Strait Islander Community Controlled Sector and mainstream disability sector, as well as mainstream organisations and services.

The policy context

FPDN recognises the unique opportunity both Closing the Gap and Australia's Disability Strategy to ensure the legislation, policies, programs and service delivery are accessible, inclusive and equitable for First Nations people with disability.

FPDN discussion points and recommendations are in line with the Closing the Gap (CTG) National Agreement Priority Reforms and the Disability Sector Strengthening Plan (Disability SSP) and its Guiding Principles. The Priority Reforms focus on changing the way governments work with Aboriginal and Torres Strait Islander peoples and the Disability SSP outlines high-level priorities and actions at a national level to strengthen and build a Community Controlled Disability Sector. The Commonwealth government, all State and Territory Governments and the Local Government Authority are signatories and partners to the National Agreement and also the Disability SSP. The CTG Priority Reforms are:

1. Formal partnerships and shared decision-making
2. Building the community-controlled sector
3. Transforming government organisations

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4. Shared access to data and information at a regional level

Applying the Closing the Gap approach to disability as a cross-cutting outcome through the Priority Reforms offer structure to government to ensure First Nations peoples with disability have:

- A greater say in how policies and programs are designed and delivered;
- Have access to community-controlled services and sectors that delivers culturally safe, accessible and inclusive, and disability right informed services;
- Have access to mainstream organisations and services, such as NDIS services, hospitals, schools and government agencies, that are culturally safe, accessible and inclusive, and disability right informed;
- And have access to, and the capability to use, locally-relevant, First Nations disability informed, data and information.

Australia's Disability Strategy

Australia's Disability Strategy (2021-2030) (ADS) is Australia's national disability policy framework and plays a role in protecting, promoting and realising the human rights of people with disability, in line with Australia's commitments under the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). All levels of government developed and committed to the Strategy, which sets out priorities and plans for governments to work with the community, businesses, and peoples with disability to deliver the needed changes identified by the sector. The Strategy recognises the importance of making sure actions taken to deliver on its policy priorities are implemented with an intersectional and diversity lens.

First Nations Inclusion and Disability

For millennia, First Nations peoples, communities, and cultures have practiced models of inclusion. This embracing of diversity and inclusion "is derived from a belief system and worldview of humanity in which biological, physical and intellectual differences are accepted as part of the fabric of society".[42] Drawing on nation-wide available data, First Nations people with disability are included in their own communities across social, cultural and community events on average more than other Australians with disability.

However, despite this strength, since colonisation First Nations people with disability experience significant levels of inequality across all other life areas compared to other Australians, including in

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areas of health, education and social inequality.[43] Whilst population prevalence data is limited, First Nations people are twice as likely to experience disability than the rest of the Australian population.[44] Using the statistical definitions of 'severe and profound disability' in the Australian Bureau of Statistics (ABS) datasets, including the ABS Survey of Disability, Ageing and Carers (SDAC), 2018,[45] it is estimated that over 60,000 Aboriginal and Torres Strait Islander people live with severe or profound disability in Australia today.[46]

First Nations people with disability experience many intersectional forms of discrimination, including discrimination based on age, gender, sexuality and geographic location. These intersecting forms of discrimination are institutionalised and embedded in how policies and programs have been designed, including the NDIS.

Consistent with the social and cultural models of disability within which FPDN works, we recognise that Aboriginal and Torres Strait Islander people are disproportionally affected by poor outcomes. This impact is widespread and has social, emotional, physical, economic and cultural impacts.

Disability Sector Strengthening Guiding Principles

The CTG Disability SSP included Guiding Principles to reflect the unique experiences of First Nations people with disability and their specific social and cultural rights and needs. These principles were developed in line with both the Closing the Gap Agreement and Australia's Disability Strategy and were endorsed by all levels of government. The Guiding Principles set a minimum standard for all existing and future work with First Nations Peoples with disability and further developing jurisdiction led sector strengthening actions in Implementation Plans. They also align with both the Australia's Disability Strategy Guiding Principles and CtG.

The Disability Sector Strengthening Plan Guiding Principles focus on the following:

- Human rights
- Self-determination
- Cultural integrity
- Cultural safety

[43] S Avery, 'Culture is Inclusion,' 2018, First Peoples Disability Network: Australian Bureau of Statistics (ABS) (2016) National Aboriginal and Torres Strait Islander Social Survey, (NATSISS) 2014-15 (Release 4714.0).
[44] Australian Bureau of Statistics (ABS) (2016) National Aboriginal and Torres Strait Islander Social Survey, (NATSISS) 2014-15 (Release 4714.0).

[46] S Av

First Peoples Disability Network Australia

- Partnership
- Place based
- Innovation
- Empowerment
- Equity
- Sustainability
- Knowledge
- Nationally consistent approach.

More needs to be done by all governments to meet the minimum standard set by the Disability SSP Guiding Principles and to achieve outstanding commitments to First Nations people, their communities, services providers and peak organisation under the National Agreement on Closing the Gap.