

The Hopkins Centre
Research for Rehabilitation and Resilience

 **Griffith** UNIVERSITY
Queensland, Australia
Law Futures Centre

**Submission to the Inquiry into the Administrative Review Tribunal Bill 2023
(ART Bill) and the Administrative Review Tribunal (Consequential and
Transitional Provisions No. 1) Bill 2023 (Consequential and Transitions Bill)**

Professor Kylie Burns

Professor Susan Harris Rimmer

Dr Eloise Hummell

Contact:

Professor Kylie Burns
[REDACTED]
[REDACTED]

**ARC Discovery Project (ARCDP2001100742) *Adjudicating Rights for a Sustainable National
Disability Insurance Scheme* Research Investigators:**

Professor Susan Harris Rimmer and Professor Kylie Burns, Law Futures Centre, Griffith Law School,
Griffith University

Dr Eloise Hummell, The Hopkins Centre, Menzies Health Institute, Griffith University

About Us

The Law Futures Centre was established in 2015 to produce outstanding scholarship that anticipates, innovates, and meets pressing emerging challenges for law and legal institutions in Australia and internationally. Bringing together researchers from law, environmental sciences, international relations, business, health, criminology and humanities, Law Futures Centre members are committed to outstanding collaborative research that harnesses law as a key melioristic tool for shaping a better, more just future.

The Hopkins Centre, established in 2017 and co-located at Griffith University and Metro South Hospital and Health Service, is Queensland's premier research agency examining rehabilitation and resilience for people with disability. With over 200 research affiliates, including both academics and clinicians, The Hopkins Centre's approach to research involves a distinctive coupling of the voice of lived experience with systems and policy analysis. The Hopkins Centre's work transcends traditional disciplinary boundaries to investigate how to drive improved outcomes for people with severe disability through translating research into effective policies and practice.

As academics and researchers from these two Griffith University centres, in drafting this submission we have drawn upon both our individual expertise and our work on a current research project, *Adjudicating Rights for a Sustainable NDIS* (2020-2023), which is funded by an Australian Research Council (ARC) Discovery Project (ARCDP2001100742) grant.

Summary of Submissions

Our submission focusses on issues related to **administrative review and appeal of National Disability Insurance Scheme ('NDIS') decisions**, currently undertaken in the NDIS Division of the Administrative Appeals Tribunal ('AAT').

This submission builds upon our previous submission to the Attorney-General's Department Appeals Administrative Review Reform Issues Paper which is attached as Annexure A. We **maintain and reiterate the views we expressed in that submission** as they are applicable to the new ART Bills. This submission also builds on our current research project, and submissions we have made to numerous Government and independent inquiries over the last several years including the recent NDIS Review. Details of our research findings and our previous submissions are available at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

Our research and engagement with a broad array of NDIS stakeholders, including NDIS participants who have been applicants in the AAT, suggests that any review/appeal body or mechanisms concerning NDIS decisions should include the following design principles:

- recognise the unique and beneficial nature of the NDIS as embedded in the objects and principles of the NDIS legislation.¹
- enhance the rights of people with disability and accord with the Convention on the Rights of Persons with Disability ('CRPD').
- co-design with NDIS participants.
- a collaborative, non-adversarial and non-traumatic process which engages participants directly in the resolution process.
- adequate advocacy and legal support for all NDIS participants/applicants.

¹ See s 3 and 4 *National Disability Insurance Act* 2013 (Cth).

- direct involvement by NDIA decision-makers in resolution of appeals.
- active facilitation of the gathering of all evidence necessary to make the best decision.
- transparency about how and why decisions are made.
- timely decision-making.
- decisions consistent with the legislative framework.
- consistency with the principles of administrative justice.

In summary, our **responses to the ART Bill are:**

- We support the objectives for the ART in section 9 including those relating to principles of fairness, justice, transparency, quality of decision making and the promotion of trust and confidence in the tribunal. We support the objective in clause 9 of providing an independent mechanism of review that maintains public trust and confidence in administrative decision-making more broadly and assert that this is particularly important for people living with a disability in light of the issues surveyed in the Disability Royal Commission findings.²
- There should be a broader overriding statutory object of the ART (eg in s 9) that indicates that it is intended to give effect (in conjunction with other laws) to Australia's obligations under the CRPD particularly Articles 12, 13 and 21.
- We support the provision of a jurisdiction/list specifically related to NDIS matters (eg s 196). Such a jurisdiction/list should be led by and staffed by decision-makers who have been specially trained regarding disability rights and the needs of applicants with disability and who have developed special expertise in NDIS matters.
- We support the re-establishment of an ARC in the ART Bill.
- Functions of the ARC in s 249 should include the ability to specifically commission external research to inform ARC recommendations.
- The ARC should include, as a matter of critical importance, as a member a person with disability, expertise in disability rights or lived experience of disability. This should be specified in the legislation.
- We support the provision of a Guidance and Appeals Panel (Part 5) and the ability to refer matters to the Federal Court (Part 7). Any process to refer general legal issues to either body should not disadvantage an individual participant in terms of legal costs and legal advocacy must be funded for NDIS participants involved in such a process.
- We consider that s 110 should be amended to provide the ART must follow a tribunal guidance decision concerning a matter of law. Without this provision, the addition of a Guidance and Appeals panel is unlikely to resolve the inconsistency issues currently experienced in AAT NDIS decisions.

Our Submission

We welcome the opportunity to provide our submission on the ART Bills in the particular context of **NDIS decision review and appeals**.

Our submission is based on our current research data relating to NDIS reasonable and necessary support decisions, as well as broader project engagement with NDIS stakeholders, NDIS participants including those who has sought review at the AAT, and review of public submissions to many previous

² Disability Royal Commission Final report 2023. <https://disability.royalcommission.gov.au/publications/final-report>

government inquiries relating to the NDIS which have included commentary on review and appeals processes. Further details and Policy Briefs in relation to our research are available at <https://www.hopkinscentre.edu.au/project/arc-adjudicating-rights-for-a-sustainable-112>.

We acknowledge that positive steps towards change in the implementation and administration of the NDIS have been taken, notably with the Labor Government and the Minister for the NDIS, the Hon. Bill Shorten, including stronger efforts in engagement and consultation with people with disability and the disability sector, improved representation of people with disability within the NDIA including on the board, the Independent Review of the NDIS and appointment of panel members with lived experience of disability, efforts to reduce the backlog of NDIS appeal cases at the AAT through a pilot Independent Expert Review program and through early resolution by the NDIA, and examination of NDIS participant experience, including Review and Appeal, as part of the recent NDIS Review. We also acknowledge the efforts of the AAT to date to improve review processes for NDIS participants.

Submission on ART Bill

Objectives of the new body: Section 9

We support the objectives for the ART included in section 9 including those relating to principles of fairness, justice, transparency, quality of decision making and the promotion of trust and confidence in the tribunal. We note in our previous submission that our research confirms these are critical matters in relation to the NDIS appeals and reviews.

We note that the objectives (s 9(1) (c)) include that the tribunal must provide review mechanisms that are ‘accessible and responsive to the diverse needs of parties to proceedings’. Accessibility is defined very broadly in s 4 as enabling persons to apply and effectively participate in proceedings in the ART. Despite very significant issues with NDIS reviews in the AAT that have widespread evidence, including our research of traumatic experiences of NDIS participants in appeal processes at the AAT, the continued existence of a NDIS Division in the ART, and a review load from NDIS applicants which has exploded in recent years, there is no significant mention of disability in the ART legislation. This is a significant oversight.

There should be a broader overriding statutory object of the new ART that indicates that it is intended to give effect (in conjunction with other laws) to Australia’s obligations under the Convention on the Rights of Persons with Disabilities (‘CRPD’).³ We support the need for general accessibility in relation to processes, outcomes and delivery of decisions by the ART. However, an object which merely refers generally to being ‘accessible’ is manifestly inadequate to take account of the needs and rights of people with disability who access administrative review of government decisions. The CRPD obligations include Article 12 of the CRPD which provides for equal recognition before the law, encompassing taking appropriate measures to provide access for people with disability to support to exercise their legal capacity; Article 13 which provides for access to justice measures including necessary accommodations and providing appropriate training for those who work in administration of justice; and Article 21 which refers to accessibility in relation to information and expression.⁴

³ See for example s 3 (1) (a) *National Disability Insurance Scheme Act 2013* (Cth).

⁴ See further Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law. Eleventh session 31 March–11 April 2014.

This will benefit not only people with disability who appeal in NDIS cases, but all people with disability including those who are applicants in social security and compensation appeals. It would also make the objects of the ART congruent with the National Disability Insurance Scheme Act 2013 (Cth) ('NDIS Act'). The NDIS Act is designed to bring the principles and obligations of the CRPD into Australia's domestic legislation in substance (ie disability support funding), process (including reviews of decision) and form.⁵

Recommendations:

- We support the objectives for the ART included in section 9 including those relating to principles of fairness, justice, transparency, quality of decision making and the promotion of trust and confidence in the tribunal.
- There should be a statutory object in the ART Bill that indicates that it is intended to give effect (in conjunction with other laws) to Australia's obligations under the Convention on the Rights of Persons with Disabilities ('CRPD') including Articles 12, 13 and 21.

Structure of the ART: s 196-199

For the reasons discussed in our previous submission, we support the provision of a jurisdiction/list specifically related to NDIS matters (eg s 196). Our research suggests it is important that this jurisdiction/list should be led by and staffed by decision-makers who have been specially trained regarding disability rights and the needs of applicants with disability and who have developed special expertise in NDIS matters.

Recommendations:

- A jurisdiction/list specifically related to NDIS matters (eg s 196) should be led and staffed by decision-makers trained regarding disability rights and the needs of applicants with disability, and with special expertise in NDIS matters.

Part 9 Administrative Review Council (ARC)

For the reasons we discuss in our previous submission in Annexure 1, we support the re-establishment of an ARC in the ART Bill. We believe such a body could address the systemic issues which are emerging in NDIS AAT and Federal Court appeals about both legal matters and the behaviour of the NDIA and NDIS participants.⁶ Such matters would appear to be covered in the general provisions in s 249 concerning ARC functions and powers.

We also suggest that an ARC body could make a significant contribution if it contained research capacity to capture and consider relevant data and could specifically commission external research.

⁵ See s 3 and 4 NDIS Act.

⁶ For example see discussion of these matters in the NDIS Review report

<https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf>; <https://www.ndisreview.gov.au/sites/default/files/resource/download/NDIS-Review-Supporting-Analysis.pdf>.

For example, there are particular issues emerging in NDIS AAT appeals which should be investigated further as they reveal some potentially very significant access to justice issues for people with disability including withdrawal of participants from the AAT process. In addition, the NDIS Review has noted the lack of disability related research as a significant issue in relation to making policy decisions.

Section 254 refers to the qualifications for ARC members which includes in s 254 (1) (c) a person that has 'direct experience, and has direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions' and s 254(2) (b) (ii) specifies at least one member of the ARC should include a member qualified under 254 (1) (c). Given the ARC should consider critical matters relating to NDIS appeals in the ART, such a body, in our view, must include a person with disability or lived experience of disability. Any body such as the ART without such a person would risk credibility and trust in relation to any report or recommendations prepared in relation to NDIS matters. As the NDIS Review makes clear, co-design and inclusion of people with disability at all stages of policy design and evaluation is absolutely critical.

Recommendations:

- We support the re-establishment of an ARC in the ART Bill.
- Functions of the ARC in s 249 should include the ability to specifically commission external research to inform ARC recommendations.
- The ARC should include, as a matter of critical importance, as a member a person with disability or lived experience of disability.

Part 5 Guidance and Appeals Panel and Part 7 References of Questions of Law to the Federal Court

As our previous submission indicated, our research of AAT and Federal Court 'reasonable and necessary support' cases has revealed that there are a range of unresolved legal issues in relation to the application and construction of the NDIS legislation which are of critical importance to all NDIS applicants, to the NDIA and to operation and policy design of the NDIS. Differing interpretations of these matters by different AAT members has resulted in inconsistency and often confusion for NDIS participants. While some of these matters could be resolved by the government by legislative amendment following the NDIS Review, nevertheless we consider that there would be value in a more streamlined process to identify NDIS legal issues within the new ART which could be referred to the Guidance and Appeals Panel or Federal Court for resolution and guidance. Accordingly, **we generally support the provision of a Guidance and Appeals Panel (Part 5) and the ability to refer matters to the Federal Court (Part 7). Any process to refer general legal issues to either body should not disadvantage an individual NDIS participant in terms of legal costs, and legal advocacy must be funded for NDIS participants involved in such a process.**

We note that s110 provides that the ART must have regard to Tribunal guidance decisions when making a decision. The section does not indicate that the ART must follow a Tribunal guidance decision when it concerns a question of law such as interpretation of the NDIS legislation. **We consider that s 110 should be amended to provide the ART must follow a tribunal guidance decision concerning a matter of law. Without this provision, the addition of a Guidance and Appeals panel is unlikely to resolve the inconsistency issues currently experienced in AAT NDIS decisions.**

Recommendations:

- We support the provision of a Guidance and Appeals Panel (Part 5) and the ability to refer matters of question of law to the Federal Court (Part 7). Any process to refer general legal issues to either body should not disadvantage an individual participant in terms of legal costs and legal advocacy must be funded for NDIS participants involved in such a process.
- We consider that s 110 should be amended to provide the ART must follow a tribunal guidance decision concerning a matter of law. Without this provision, the addition of a Guidance and Appeals panel is unlikely to resolve the inconsistency issues currently experienced in AAT NDIS decisions.

We stand willing to provide further information that would assist.

Kind regards,

Kylie Burns, Susan Harris Rimmer and Eloise Hummell