



Purple Orange

**Submission to House of
Representatives Standing Committee
on Social Policy and Legal Affairs on
the Administrative Review Tribunal
Bill 2023**

January 2024

About the Submitter

JFA Purple Orange is an independent social-profit organisation that undertakes systemic policy analysis and advocacy across a range of issues affecting people living with disability and their families.

Our work is characterised by co-design and co-production and includes hosting a number of user-led initiatives.

Much of our work involves connecting people living with disability to good information and to each other. We also work extensively in multi-stakeholder consultation and collaboration, especially about policy and practice that helps ensure people living with disability are welcomed as valued members of the mainstream community.

Our work is informed by a model called *Citizenhood*.

JFA Purple Orange
104 Greenhill Road
Unley SA 5061 AUSTRALIA
Telephone: + 61 (8) 8373 8333
Fax: + 61 (8) 8373 8373
Email: admin@purpleorange.org.au
Website: www.purpleorange.org.au
Facebook: www.facebook.com/jfapurpleorange

Contributors

James Murphy, Policy and Research Leader
Rebecca Dowd, Manager, Policy and Projects
Tracey Wallace, Strategy Leader
Robbi Williams, CEO

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1. Summary and recommendations

We recommend:

Recommendation 1: The Committee should recommend Division 5 part 4 of the Administrative Review Tribunal Bill 2023 be amended to include additional principles: rights-based, person centredness, inclusivity and cultural safety. The definitions of these principles should be drawn from previous Public Interest Advocacy Centre submissions.

Recommendation 2: The Committee should recommend clause 193 of the Administrative Review Tribunal Bill 2023 be amended to empower the President with a co-design function.

Recommendation 3: The Committee should recommend clause 193 h) of the Administrative Review Tribunal Bill 2023 be amended to make the President's promotion of training in effective decision-making concerning people living with disability, cross-cultural communication, working with interpreters and a trauma-informed practice mandatory. The Committee should also recommend that clause 193 h) be amended to specify that any training promoted must be genuinely co-designed with the relevant lived experience community.

Recommendation 4: The Committee should recommend clause 249 f) of the Administrative Review Tribunal Bill 2023 be amended to specify that educational and training materials supported by the Administrative Review Council be genuinely co-designed with the relevant lived experience community.

Recommendation 5: The Committee should recommend the definition of 'merit-based' in clause 4 of the Administrative Review Tribunal Bill 2023 be amended to include specific and disaggregated employment targets for Tribunal Members with lived experience. These employment targets should align (at least) with APS employment targets, rising to population parity during the term of *Australia's Disability Strategy 2021-2031*, and should be tracked and publicly reported annually.

Recommendation 6: The Committee should recommend the definition of accessible in clause 4 of the Administrative Review Tribunal Bill 2023 be amended to ‘fully accessible’ to ensure conformity with article 21 of the *UNCRPD*.

Recommendation 7: The Committee should recommend clause 68 of the Administrative Review Tribunal Bill 2023 be amended to require all interpreters be trained in disability awareness, including mental health terminology, the Social Model of Disability, and the intersection between disability and culture, particularly regarding cultural perceptions of shame regarding disability.

Recommendation 8: The Committee should recommend clause 268 of the Administrative Review Tribunal Bill 2023 be amended to require that the Tribunal’s reasons for decisions must be provided in format/s accessible to the individual living with disability.

Recommendation 9: The Committee should recommend that the Parliament use the *Citizenhood* model as a lens to evaluate the implications the Bill will have on the life chances of people living with disability.

Recommendation 10: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 incorporate supported decision-making principles that conform with article 12 of the *UNCRPD*, the National Decision-Making Principles, Australian Law Reform Commission guidelines, national and international best practice, and the recommendations of the DRC.

Recommendation 11: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to rename litigation guardians to litigation supporters.

Recommendation 12: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to integrate the DRC’s Recommendation 6.8 regarding formal supporters.

Recommendation 13: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to replace all references to capacity/capable with ability/able.

Recommendation 14: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to enshrine a presumption of ability in accordance with DRC Recommendation 6.7.

Recommendation 15: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to state that when an assessment of decision-making ability is required, this must be a full assessment conducted at a time and in an environment that will result in the most accurate and transparent result before a litigation supporter is appointed.

Recommendation 16: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to recognise that decision-making ability fluctuates and that flexibility is necessary to accommodate provision of varying support needs.

Recommendation 17: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to specify that a litigation supporter should only be permitted to exercise substitute decision making powers under sub-clauses 7 and 8 as a last resort.

2. Introduction

Particularly in the last decade, for Australians living with disability, the Administrative Appeals Tribunal (AAT) was the final source of hope: that NDIS access could still be granted, or cuts to plans could be reversed; that Disability Support Pension (DSP) tables of impairment could be deemed met; or that Centrelink debts could be recalculated or deemed not to be owed. Decisions pivotal to the fulfillment of basic needs: food on the table, money for rent, access to life changing services and supports. While, notionally, administrative appeal rights are not exhausted until the Federal Court delivers a verdict, the cost, complexity and stress of this avenue was often prohibitive.

Under the previous AAT regime, people living with disability were up against government bureaucrats and their well-equipped counsel. Further, Tribunal Members, appointed without merit-based selection processes, demonstrated a concerning lack of knowledge regarding contemporary principles, philosophies and conceptions of disability and best-practice understandings of trauma-informed conduct.

Thankfully, this Bill will overhaul the nation's administrative review system, encompassing the dissolution of the AAT and the establishment of a new federal administrative review entity, the Administrative Review Tribunal (the Tribunal/ART). This initiative, by incorporating the implementation of a transparent, merit-based system for the appointment of tribunal members who will be responsible for the scrutiny of administrative decisions, does address some shortcomings of the previous system.

While we understand that the Bill was drafted following consultation with the community more broadly, and the disability community specifically, there remains scope to further strengthen the proposed legislation, particularly given the release of the Final Report of the Disability Royal Commission last year. By expanding the principles embedded in the Bill beyond mere accessibility, by:

- integrating the principles of co-design whenever training and education is contemplated;
- ensuring that lived-experience appointments to the Tribunal are targeted, not aspirational;
- ensuring that information communicated is accessible to all who receive it; and

- ensuring that decision-making ability is supported, not substituted

this Bill can increase the chances that the new tribunal will make “correct and preferable” decisions when reviewing matters where people living with disability are parties, and that all parties leave the process not necessarily happy with the outcome, but with faith in and understanding of the process.

3. Principles

In 2022-23, the Administrative Appeals Tribunal received 4,271 NDIS appeal applications and 12,260 Social Services and Child Support (SSCS) [applications](#). This comprised approximately 40% of the AAT’s workload. Most to NDIS appeals are people living with disability, and a significant percentage of applicants to SSCS, Veterans and Migration appeals also live with disability. It is therefore imperative that the general principles regarding Tribunal procedure in Division 5 of Part 4 of the Bill are framed with sufficient specificity and guidance to meet the needs of parties living with disability.

While we welcome the inclusion of clause 51, which requires that the Tribunal, as far as practicable, must conduct proceedings in an accessible manner and consider the needs of the parties, this clause could be further strengthened by integrating concepts drawn from:

- a) the *UN Convention on Rights of People with Disability* (UNCRPD)
- b) Submissions from the Public Interest Advocacy Centre (PIAC) as advocated by the Disability Advocacy Network Australia in their submission from May 12 of last year in response to the *Administrative Review Reform: Issues Paper*¹ and;
- c) Graeme Innes AM’s ‘Interim Report on long-term options for dispute resolution under the NDIS’, December 2022.

We do note that some of the PIAC’s principles, such as informality, accessibility, independence, transparency and timeliness² are prescribed within the Bill, while accountability measures, such as the Code of Conduct for Members and merit-based recruitment address, to an extent, address Graeme Innes AM’s call for an accountability

¹ Disability Advocacy Network of Australia, ‘Designing a new a new federal administrative review body that is user-focused, efficient, accessible, independent and fair’ May 12.

² Ibid 5.

mechanism. Further accountability, though, could be embedded within the new institution by including an affirmation within clause 51 of Australia's commitment under the UNCRPD to a rights-based approach, as well as by expanding the clause to include person-centredness, inclusivity and cultural safety. DANA, in their May 12th submission, defined these principles as:

“Person-centred:

- Dispute resolution system that is premised on co-design principles, with broad and genuine engagement with people with disability about the mechanisms, processes, and settings.
- Actively involves applicants and seeks to increase their understanding of review decisions, empowering applicants to be part of their own resolution process.
- For First Nations people, a self-determined process directed by First Nations communities, involving family and the broader kinship networks.

Inclusive:

- Inclusive of all people with a disability, languages, cultural backgrounds, and geographical location.
- Acknowledge intersectionality between disability and other factors including gender, sexuality, cultural diversity, and age.

Culturally safe:

- There must be knowledge and respect for First Nations people and of their communities and cultures.
- Consultation with FPDN and NEDA should take place to ensure the process is culturally safe.
- Staff and people involved in the dispute resolution process should be trained in cultural safety and cultural competence.
- Services offered should be culturally safe, e.g., phone line for people to call to obtain information about the review process.”³

³ Ibid 5-6.

By providing such tangible and explicit guidance, the risk of unduly narrow conceptions of accessibility being adopted are reduced.

Recommendation 1: The Committee should recommend Division 5 part 4 of the Administrative Review Tribunal Bill 2023 be amended to include additional principles: rights-based, person centredness, inclusivity and cultural safety. The definitions of these principles should be drawn from previous Public Interest Advocacy Centre submissions.

4. Co-Design

4.1 Importance of Co-Design

The functions of the President of the Tribunal outlined in clause 193 of the Bill concerning engagement with civil society should be amended to explicitly incorporate "co-design" as a pivotal element. Co-design is an inclusive, collaborative process whereby a diverse range of people with relevant skills, experience or interests come together to provide advice and make decisions on a project, policy, program or initiative. By enshrining co-design into their functions, particularly when drafting practice directions, such as those governing the Tribunal application process, under clause 36, the President can ensure that the Tribunal fulfills the objects and principles of the legislation that require accessibility. Nobody understands access needs for people living with disability like people living with disability themselves. Co-designing key resources would help the Tribunal to improve its processes not only for people living with disability, but for all applicants from diverse backgrounds.

Co-design, which was endorsed by the Disability Royal Commission, for example in Recommendation 4.19⁴, ensures that the diverse perspectives and expertise of civil society and diverse communities are considered when shaping and adapting the Tribunal's functions, promoting transparency, accountability, and the development of well-informed policies. Emphasizing co-design within the specified functions of the Tribunal President aligns with contemporary principles of governance.

Recommendation 2: The Committee should recommend clause 193 of the Administrative Review Tribunal Bill 2023 be amended to empower the President with a co-design function.

4.2 Need for Co-Designed Training and Education

While the explanatory memorandum of the Bill acknowledges that it is important for the President to promote training of Members, particularly in effective decision-making concerning people living with disability, cross-cultural communication, working with

⁴ Royal Commission Into Violence, Abuse, Neglect and Exploitation, Final Report, 'Realising the Human Rights of People with Disability' September (2023) 26.

interpreters, and trauma-informed practice, this training, under clause 193 h), must be mandatory and co-designed. By mandating this training, the Bill would ensure a consistent and heightened level of competence among Tribunal Members, fostering a more inclusive and responsive environment. The complexities associated with decision-making for diverse populations, such as people living with disability, requires standardized training of all Members to enhance inclusion, combat stigma and build understanding. Making this training mandatory aligns with the commitment to uphold equal access to justice and ensures that Tribunal Members possess the necessary skills and awareness to navigate the intricacies of diverse cases. Co-design ensures that this awareness accurately reflects the lived experiences of people living with disability.

Recommendation 3: The Committee should recommend clause 193 h) of the Administrative Review Tribunal Bill 2023 be amended to make the President’s promotion of training in effective decision-making concerning people living with disability, cross-cultural communication, working with interpreters and a trauma-informed practice mandatory. The Committee should also recommend that clause 193 h) be amended to specify that any training promoted must be genuinely co-designed with the relevant lived experience community.

4.3 Administrative Review Council’s Training and Education Function

Educational and training materials supported by the Administrative Review Council under clause 249 f) should be genuinely co-designed. We are concerned many of the processes that governments and others are currently referring to as co-design fall well short of best practice and do not include the active involvement of people living with disability in decision-making processes. We encourage the Committee to access our Guide to Co-Design with People Living with Disability, which was itself co-designed, via our [website](#). Our Guide to Co-Design can provide substantial guidance on how the Bill can integrate co-design into the creation of educational materials and training courses.

Recommendation 4: The Committee should recommend clause 249 f) of the Administrative Review Tribunal Bill 2023 be amended to specify that educational and training materials supported by the Administrative Review Council be genuinely co-designed with the relevant lived experience community.

5. Tribunal Member Targets

In Volume 7 Part B of the Disability Royal Commission’s Final Report⁵, the Commission identified that “[t]here should be a determined focus on increasing opportunities for people with disability in public sector employment across Australia.”⁶ This aligns with article 27 (g) of the *UNCRPD* that, in listing steps that party States should take, includes to “[e]mploy People with disabilities in the public sector”. Given the status and centrality of the AAT, and the new ART, within our national legal framework, and in determining the life chances of people living with disability, the Tribunal would be better served by employing a diverse workforce that is representative of the Australian community. The Tribunal would also become a beacon for all those who currently feel they can’t be what they can’t see.

While the Bill does obliquely promote the employment of people living with disability, to an extent, in clause 4, when specifying that merit-based appointments includes taking into account “the need for a diversity of...lived experience...within the Tribunal”, this provision alone is unlikely to be sufficient to reverse decades of entrenched stigma and discrimination against people living with disability in the workplace. The workforce participation rate (including those looking for work) for people living with disability has remained static at 53-54 percent for the last 30 years⁷, according to evidence submitted to the DRC, or, perhaps more precisely, an employment rate of only 47.8 per cent according to [measures](#) of those actually in work, despite myriad reports and interventions.

By encouraging disclosure of lived experience during recruitment without any accompanying commitments or targets, this could, perversely, lead to the reduced employment of people living with disability, as sub-conscious bias could colour the evaluation of whether other criteria, such as skills and knowledge, are met. Given the DRC’s findings that stigma was not just a barrier to workforce entry, but also progression and promotion⁸, positions that are at the pinnacle of a profession, such as Administrative Review Tribunal Member, which are the narrowest end of the funnel, require the greatest intervention.

⁵ Royal Commission Into Violence, Abuse, Neglect and Exploitation, Final Report, ‘Inclusive Education, Employment and Housing- Part B’ September (2023).

⁶ Ibid 378.

⁷ Ibid.

⁸ Ibid 379

We recommend amending the legislation to include lived experience employment targets. This would also align with *Australia's Disability Strategy 2021-2031* that seeks to “enshrine and elevate the ideals of respect, inclusivity, and equality... enabling every Australian to meet their potential, to achieve, to have a fair go and to have real choices”.⁹ Such pro-active leadership is also called for by the DRC, which said the public sector “should lead the way in employing people with disability and should model best practice inclusion for other workplaces”¹⁰, the CRPD Committee, which called for “a more rigorous approach to inclusion”¹¹ from public sector employers, and the *Shut Out* report.¹²

Legislative workforce targets, with rigorous tracking and accountability measures, are required in all realms of the Commonwealth public service. According to Australian Public Service Commissioner Peter Woolcott, the Commonwealth is currently failing to meet its present humble aspiration to ensure seven per cent of the APS workforce are people living with disability.¹³ By simply legislating a nebulous “taking into account lived experience” requirement, the provision risks being another example of the maxim “what you don’t count doesn’t count,”¹⁴ cited by Graeme Innes during the DRC. Clause 4 should be amended to align with the DRC’s recommendation 7.18 by including specific and disaggregated targets for the employment of people with lived experience as Tribunal Members.

Recommendation 5: The Committee should recommend the definition of ‘merit-based’ in clause 4 of the Administrative Review Tribunal Bill 2023 be amended to include specific and disaggregated employment targets for Tribunal Members with lived experience. These employment targets should align (at least) with APS employment targets, rising to population parity during the term of *Australia's Disability Strategy 2021-2031*, and should be tracked and publicly reported annually.

⁹ Australian Government Department of Social Services, *Australia's Disability Strategy 2021–2031*, December 2021, pp 7–8.

¹⁰ Royal Commission Into Violence, Abuse, Neglect and Exploitation, above n 5, 419.

¹¹ Committee on the Rights of People with Disabilities, General comment no. 8 (2022) on the right of People with disabilities to work and employment, advance unedited version, UN Doc CRPD/C/ GC/8 (9 September 2022), [40].

¹² National People with Disabilities and Carer Council, *Shut Out: The experience of people with disabilities and their families in Australia*, 2009, p 41.

¹³ Disability Royal Commission, Transcript, Peter Woolcott, Public hearing 19, 25 November 2021, P-319 [40].

¹⁴ Disability Royal Commission, Transcript, Graeme Innes, Public hearing 19, 22 November 2021, P-25 [38–41].

6. Accessible and Inclusive Communication

Given the quantity of engagements and communications that the new ART will have with people living with disability, it is imperative that all communications from the Tribunal, beginning with the lodgment of an application and ending with the receipt of reasons for a decision and/or appeal rights, are accessible, in the broadest conception of that term. As Dr Ariella Meltzer, Research Fellow at the Centre for Social Impact, University of New South Wales, told the DRC, accessibility encompasses visual and print accessibility, web accessibility, conceptual accessibility, as well as AUSLAN and alternative and augmented communications system needs.¹⁵

6.1 Fully Accessible

Clause 4, sub clause b) and c) of the accessible definition addresses the ease of understanding information and reasonable adjustments more broadly, and clause 68 of the Bill provides for the appointment of interpreters by the Tribunal. However, given Australia's international obligations under the UNCRPD and the recommendations of the DRC in Volumes 4 and 6 of their Final Report, as well as the consequences for parties when communications are not accessible, particularly when intersectionality¹⁶ is present, further clarity and precision within the Bill is recommended.

In official interactions, such as communications from the new ART, Australia is obliged under article 21 of UNCRPD, to 'accept and facilitate the use of sign languages, braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication that people with disability may choose'.¹⁷ While it is acknowledged that clauses 4 and 68 are sufficiently broadly phrased to allow the facilitation of such modes of communication, they are arguably not sufficiently precise to mandate their provision.

Greater precision is justified, particularly given that the UNCRPD Committee, in 2019, found that "aside from a provision under the *Disability Discrimination Act 1992* (Cth) (*DDA*), there

¹⁵ Royal Commission Into Violence, Abuse, Neglect and Exploitation, Final Report, 'Enabling Autonomy and Access' September (2023) 41.

¹⁶ Social Policy Research Centre and National Ethnic Disability Alliance, *Towards best-practice access to services for culturally and linguistically diverse people with a disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, April 2023.

¹⁷ Royal Commission Into Violence, Abuse, Neglect and Exploitation, above n 15, 43.

are no legally binding information and communications standards requiring information to be fully accessible to people with disability.”¹⁸ For the ART to play its part in complying with the UNCRPD, clause 4, the definition of accessible should be amended to:

fully accessible, in relation to the Tribunal, means enables People to apply to the Tribunal and to participate effectively in proceedings in the Tribunal

Recommendation 6: The Committee should recommend the definition of accessible in clause 4 of the Administrative Review Tribunal Bill 2023 be amended to ‘fully accessible’ to ensure conformity with article 21 of the UNCRPD.

6.2 Interpreters

Parties accessing the ART may need the Tribunal to appoint an interpreter for a range of reasons: they may be members of the d/Deaf or d/Deafblind community, First Nations sign language users and/or people from culturally and linguistically diverse backgrounds.¹⁹ To ensure that the appointment of interpreters fulfills the obligation of full accessibility, all interpreters, including spoken language interpreters, should be required to undertake Disability Awareness Training, including, as called for by the National Ethnic Disability Alliance, training “in the use of disability and mental health terminology, and the social model of disability in general”²⁰ as well as “instruction related to disability and culture, specific instruction around terminology used in disability”²¹ and to develop “an understanding of the shame experienced by some communities about disability”.²² Further, to ensure alignment with the Disability Royal Commission’s Recommendation 4.13, the Tribunal should be mandated to appoint interpreters that are “appropriately trained and credentialed.”²³

Recommendation 7: The Committee should recommend clause 68 of the Administrative Review Tribunal Bill 2023 be amended to require all interpreters be trained in disability awareness, including mental health terminology, the Social Model of Disability, and the

¹⁸ United Nations Committee on the Rights of People with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, (2019), [41].

¹⁹ Royal Commission Into Violence, Abuse, Neglect and Exploitation, above n 15, 73

²⁰ National Ethnic Disability Alliance, Federation of Ethnic Communities’ Councils of Australia and People with Disability Australia, Submission in response to *The experiences of culturally and linguistically diverse people with disability issues paper*, 2 November 2021, ISS.001.00719, p 20.

²¹ Ibid.

²² Ibid.

²³ Royal Commission Into Violence, Abuse, Neglect and Exploitation, Final Report, above n 4, 23.

intersection between disability and culture, particularly regarding cultural perceptions of shame regarding disability.

6.3 Accessible Information

Providing detailed reasons for a decision enhances the accountability of, and public trust in, administrative bodies like the Administrative Review Tribunal. This allows affected parties and the public to understand the rationale behind a decision, promoting transparency in the decision-making process. Detailed reasons contribute to the principles of natural justice and procedural fairness. Individuals affected by a decision of the ART have the right to know why a decision was made against them, and providing reasons allows them to assess the fairness of the decision and whether proper procedures were followed.

Decisions of the Tribunal are subject to judicial or administrative review. Clear and comprehensive reasons enable reviewing bodies, such as the Federal Court, to assess the legality and rationality of the decision. Without adequate reasons, it becomes challenging for review bodies to evaluate the merits of the decision. Reasons serve as guidance for both the administrative body making the decision and other parties involved, and require the decision maker to thoughtfully engage in a careful and systematic reasoning process. A well-reasoned decision provides legal certainty to the parties involved. It clarifies the legal basis and factual considerations that led to the decision, reducing ambiguity and potential misunderstandings. Transparent and well-explained decisions contribute to public confidence in the legal system and administrative processes. When the public understands the reasons behind decisions, they are more likely to trust the integrity of the administrative system, which could result in a reduction in the quantity of appeals.

Given the Tribunal's obligation to, upon request, give reasons for decisions in writing in certain circumstances under clause 268, to ensure equality before the law and the Bill's objective to ensure the Tribunal is accessible, these reasons should be communicated in accessible formats that meet the requirements of each parties, regardless of access needs.

Recommendation 8: The Committee should recommend clause 268 of the Administrative Review Tribunal Bill 2023 be amended to require that the Tribunal's reasons for decisions must be provided in format/s accessible to the individual living with disability.

7. Supported Decision Making

Supported decision making empowers each person to make their own decisions, upholding their autonomy, dignity, and human rights. This approach should sit at the heart of all laws, policies, and practices in a modern approach to how we protect the decision-making rights of people living with disability and older Australians. In the Bill, the Tribunal is empowered under clause 67 to appoint a litigation guardian who does, aside from in exceptional circumstances, owe a duty to give effect to the party's will and preferences, which accords with principles of supported decision making. The clause could, however, be further strengthened to align with international obligations under the *UNCRPD*.

Our organisation's work is informed by a model called *Citizenhood*. We believe that this model offers a valuable lens for the Committee to use when determining how to amend supported decision-making provisions in the Bill to protect decision-making rights. As such, the next section briefly introduces the Model of Citizenhood Support.⁴ We encourage the Committee to access the full paper via our [website](#).

7.1 Model of Citizenhood Support

JFA Purple Orange believes that the right to make one's own decisions is fundamental to living a good life. A good life largely depends on the availability of life chances – the assets and opportunities available to a person. The Model of Citizenhood Support, developed by our agency, provides a framework for advancing and maintaining life chances so that each person can live a good, valued life of *Citizenhood*. The Model provides a comprehensive framework for organising law, policy, and practice in support of people living with disability. Although it was developed with a focus on the life chances of people living with disability, it is also a highly relevant lens through which to approach the drafting of provisions regarding the appointment of a litigation guardian. Hence, we urge the Committee to consider how it can usefully amend clause 67 to ensure the human right of all Australians to make decisions is acknowledged, respected, protected, and promoted.

Citizenhood describes a situation where a person is an active and valued member of their local community. Their lifestyle is informed by personally defined *choices*, and they can grow through their involvement in meaningful activities and by their participation in a

network of relationships characterised by acceptance, belonging, and love. *Citizenhood* comprises roles that are valued by our communities: family member, friend, neighbour, worker, club member, customer, etc. It is dynamic in that it can rise or fall depending on a person's specific circumstances.

The concept of *Citizenhood* is not to be confused with the concept of Citizenship, which is a much narrower static construct typically referring to membership of a country.

The Model asserts that our life chances comprise four different, interrelated, types of assets we can call upon, termed the Four Capitals. These are: Personal Capital (how the person sees themselves, including how that is affected by how others see them; both of which are impacted by making one's own decisions); Knowledge Capital (what the person knows and can do); Material Capital (money and the tangible things in the person's life); and Social Capital (the people in the person's life).

When human rights are violated, such as when decision-making ability is taken away, the consequences can be understood in terms of the negative impact on a person's Personal Capital (for example, loss of self-esteem, physical and psychological trauma, feelings of helplessness and hopelessness, denial of self-advocacy voice, etc), Knowledge Capital (for example, loss of access to education and learning, denial of recognition of skill and knowledge, etc), Material Capital (for example, denial/loss of access to material resources such as housing, transport, fair wages, community venues and amenities, justice mechanisms, etc), and Social Capital (for example, denial/loss of access to significant others in the person's life, with a corresponding loneliness and isolation).

Conversely, when the right to decision making is upheld and defended, the consequences can be understood in terms of the *positive* impact on the person's Personal Capital (for example, growth of self-esteem, physical and psychological wellbeing, the person having personal and hopeful agency in their own life, exercise of self-advocacy voice, etc), Knowledge Capital (for example, access to education and learning and the growth that comes from this, recognition of skill and knowledge, etc), Material Capital (for example, fair and equitable access to material resources such as housing, transport, fair wages, community venues and amenities, justice mechanisms, etc), and Social Capital (for example,

access to significant others in the person's life, with a corresponding presence of love and belonging).

In these ways and more, the *Citizenhood* model can provide an effective framework for advancing a comprehensive national approach for the upholding of the right to exercise decision-making ability.

Recommendation 9: The Committee should recommend that the Parliament use the *Citizenhood* model as a lens to evaluate the implications the Bill will have on the life chances of people living with disability.

7.2 Right to Supported Decision Making

Canadian Associate Professor of Law Faisal Bhaba eloquently encapsulates the implications of stripping people living with disability of their right under article 12 of the UN Convention on the Right of People with Disabilities (UNCPRD) to make decisions:

Yielding decision making authority over one's own life, even "voluntarily," can have a profound impact on one's sense of identity, self-worth and independence. The power of decision is an essential aspect of having control over one's life. Even where the decision being made is not necessarily the correct decision, or the best among possible options, there may still be value in being free to make "bad" decisions. Indeed, there is freedom in directing one's life and there is value in having the opportunity to learn from experience.²⁴

While clause 67 of the draft Bill does empower the appointment of a supported decision maker in most instances, aside from in circumstances where this would pose a serious risk to the party or where the party's will and preferences cannot be ascertained, we strongly believe that clause 67 should be amended to insert general principles regarding supported decision-making, which should be consistent with the guidance given by the UN Committee on the Rights of People with Disabilities. This explains that States often conflate the concepts of mental and legal capacity 'so that where a person is considered to have impaired decision-

²⁴ Bhabha, F. (2021). Advancing Disability Equality Through Supported Decision-Making: The CRPD and the Canadian Constitution. In M. Stein, F. Mahomed, V. Patel, & C. Sunkel (Eds.), *Mental Health, Legal Capacity, and Human Rights* (pp. 140-154). Cambridge: Cambridge University Press.

making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed'.⁶ The Committee clearly states:

States parties must refrain from denying People with disabilities their legal capacity and must, rather, provide People with disabilities access to the support necessary to enable them to make decisions that have legal effect. Support in the exercise of legal capacity must respect the rights, will and preferences of People with disabilities and should never amount to substitute decision-making.⁷

The Committee further explains that 'States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives.⁸ Further, in its 2019 report on Australia ('Concluding observations on the combined second and third periodic reports of Australia'), the Committee expressed concern about the lack of progress made towards the abolishment of the guardianship system and substitute decision-making regime, recommending the following:

24. Recalling its general comment No. 1 (2014) on equal recognition before the law, the Committee recommends that the State party:

(a) Repeal any laws and policies and end practices or customs that have the purpose or effect of denying or diminishing the recognition of any person with disabilities as a person before the law;

(b) Implement a nationally consistent supported decision-making framework, as recommended in a 2014 report of the Australian Law Reform Commission entitled Equality, Capacity and Disability in Commonwealth Laws.

Given the above, we recommend the Bill be amended to conform with the UNCRPD, the National Decision-Making Principles, associated guidelines developed by the Australian Law Reform Commission, and national and international best practice.

Recommendation 10: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 incorporate supported decision-making principles that conform

with article 12 of the UNCRPD, the National Decision-Making Principles, Australian Law Reform Commission guidelines, national and international best practice, and the recommendations of the DRC.

7.3 Renaming Litigation Guardian to Litigation Supporter

While, mostly, litigation guardians as defined in the Bill utilise supported decision-making approaches, they retain the moniker of substitute decision makers: guardians. Words matter, which is one reason why the DRC recommended renaming guardians and administrators as formal supporters.

Recommendation 6.8 Formal supporters

States and territories should introduce into guardianship and administration legislation provisions to enable statutory and personal appointments of one or more supporters for personal and financial matters, following the approach taken by Victoria in Part 4 of the *Guardianship and Administration Act 2019* (Vic) and Part 7 of the *Powers of Attorney Act 2014* (Vic). This includes provisions on:

- appointment of supporters
- role, powers and duties of supporters
- safeguards in relation to supports
- review and revocation of support agreements and orders.

Recommendation 11: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to rename litigation guardians to litigation supporters.

Recommendation 12: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to integrate the DRC's Recommendation 6.8 regarding formal supporters.

7.4 Decision-making ‘ability’

In the previous section, we underscored the fundamental importance of the right to make one’s own decisions being placed at the core of clause 67 and emphasised how supported decision-making approaches can help to enable this. In this section, we move to discussing some of the essential elements and principles that need to underpin how this is operationalised.

7.5 Reframing ‘capacity’ as ‘ability’

We acknowledge the Bill was consulted on prior to the publication of the DRC’s Final Report. We firmly believe that this Bill should adopt the Disability Royal Commission’s Recommendation 6.4²⁵ in full, including replacing decision-making ‘capacity’ with decision-making ‘ability’. The definition for decision-making ability could also be further clarified by integrating other DRC recommendations.

JFA Purple Orange recognises the term ‘capacity’ is a widely applied concept across a range of legal and clinical settings with which the disability community regularly interacts. Examples include the NDIS, guardianship arrangements, and eligibility for the DSP. We believe that conceptualisations of ‘capacity/ability’ attest to various levels of ‘capacity/ability’ rather than a single differentiation between competent or not competent at a point in time. A single demarcation invites misinterpretation because authorities must make a definitive determination when considering the appointment of a litigation guardian. A shift from ‘capacity’ to ‘ability’ will help to reframe the concept in a way that moves past binary ‘competent’ and ‘not competent’ judgements and better reflects a range of levels of ‘ability’ and support needs.

Further, as the DRC Final Report points out, the concept of ‘capacity’ is loaded with outdated negative assumptions based on its historical association with substitute decision making. The more affirming concept of ‘ability’ reflects the fact that all people (with very few exceptions) have an ability to make decisions, although some may need to access appropriate supports to do so. The default position in law should be that such supports must be provided, not that a requirement for support means a person lacks ‘capacity’ and should be deprived of decision-making power. Further, clause 67 should state that there is a presumption of ‘ability’,

²⁵ Ibid 22.

integrating the Disability Royal Commission's Recommendation 6.7,²⁶ which asserts this presumption cannot be rebutted solely on the basis that a person has a disability.

Recommendation 13: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to replace all references to capacity/capable with ability/able.

Recommendation 14: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to enshrine a presumption of ability in accordance with DRC Recommendation 6.7.

7.6 Defining Ability

Defining 'ability' is a delicate art because it necessarily involves the interplay between medical and legal conceptions of cognition. Medical and legal understandings of ability have not always moved in lockstep. As South Australian Supreme Court Chief Justice Chris Kourakis has stated, some 'common law principles governing the legal effect of mental illness ... no longer reflect modern medical knowledge.'²⁷

Owing to this, we believe the term 'general decision-making ability' can only be meaningful if a clear definition is provided, alongside an acknowledgement that ability fluctuates over time (lucid intervals), settings, and interactions.

Based on a presumption of ability and the right to access appropriate decision-making supports, we believe the need to assess decision-making ability would rarely arise. When it does, we advocate for a fair and transparent approach to the assessment of decision-making ability. Given the significance of such assessments, we believe that on the rare occasion that an assessment is required, it must be a full, thorough assessment that leaves no room for outdated assumptions. As Kenneth Schulman *et al* wrote in the *Canadian Bar Review*:

[b]y updating the wording and incorporating medical and neuropsychological advances, the legal community would ensure greater clarity and precision with regard to the test for testamentary capacity. Disciplined legal reasoning requires precision, and such precision would also assist experts in drafting

²⁶ Ibid 178.

²⁷ *Roche v Roche* [2017] SASC 8, [17].

more accurate and useful capacity assessments when needed in disputed cases.²⁸

Therefore, we would recommend that the general principles clearly state who can challenge a person's decision-making ability, that a full assessment is always undertaken where level of ability is questioned, and that it is done at a time and in an environment that will result in the most accurate and transparent results. A general principles section should also recognise the fluctuating nature of 'ability' and the need for flexibility in providing appropriate decision-making supports.

Recommendation 15: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to state that when an assessment of decision-making ability is required, this must be a full assessment conducted at a time and in an environment that will result in the most accurate and transparent result before a litigation supporter is appointed.

Recommendation 16: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to recognise that decision-making ability fluctuates and that flexibility is necessary to accommodate provision of varying support needs.

7.7 Last Resort

While we acknowledge there may be extreme or exceptional circumstances where it is not possible to give effect to a party's will and preferences, we are very concerned by the proposed phrasing of exceptions to supported decision making under clause 67 sub-clause 7) and 8). Too often the scope of what constitutes a serious risk is drawn too broadly and too little time, effort and support is provided to ascertain a person's will and preferences. As such, we believe that the Disability Royal Commission's Recommendation 6.9²⁹, which specifies that representatives be appointed only as a last resort, is a preferable alternative to sub-clauses 7 and 8.

Recommendation 17: The Committee should recommend clause 67 of the Administrative Review Tribunal Bill 2023 be amended to specify that a litigation supporter should only be

²⁸ Kenneth Shulman et al, 'Banks v Goodfellow (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) Canadian Bar Review 251, 253.

²⁹ Royal Commission Into Violence, Abuse, Neglect and Exploitation, above n 15, 184.

permitted to exercise substitute decision making powers under sub-clauses 7 and 8 as a last resort.

8. Conclusion

We would like to thank the Committee for the opportunity to lodge this submission. We hope that the views we have put forward in this submission assist in the Committee's consideration of the merits of the Bill. In concluding, we reiterate the pivotal role that the new Administrative Review Tribunal will play in ensuring that the rights of people living with disability are actuated. We emphasise the need for this new institution to enable an adherence to Australia's international obligations, not just on paper, but also in the day-to-day operations of the Tribunal for decades to come.

We would be happy to give evidence to the Committee to further explain the important recommendations made in this submission and to answer questions. To arrange this, please contact Tracey Wallace, Strategy Leader of JFA Purple Orange, [REDACTED]
[REDACTED]