



TOWNSVILLE
COMMUNITY
LAW

Senate Standing Committee on Legal and Constitutional Affairs

INQUIRY INTO ADMINISTRATIVE REVIEW TRIBUNAL BILL 2023

To: Committee Secretariat
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100,
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Canberra ACT 2600

From: Townsville Community Law
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Consent is given for publication by the Committee

RECOMMENDATIONS

- A. The Bills¹ should be amended to preserve the current dual tier system of review including the existing Social Security and Child Support Division (the SSCSD), review by the General Division, and additionally, where necessary and appropriate to the Guidance and Appeal Panel (the GAP).
- B. In the event the Committee recommends the Bills in their current form, they should also recommend there is a formal transitional period of at least three (3) years, where current arrangements are maintained, and monitored and evaluated by the Administrative Review Committee (the ARC) with input from key stakeholders such as within the legal assistance sector and Tribunal users from a diversity of backgrounds.
- C. Key terms of reference for any review and evaluation by the ARC should include possible and likely issues relating to human rights and access to justice, and the financial and structural impacts of moving to a single tier system.
- D. In the event that the Committee recommends the Bills in their current form and makes no recommendations about a transitional process, the Committee should recommend that safeguards against increased formalism, legalism and adversarialism are explored and entrenched in the Bills in such a way as to ensure the Administrative Review Tribunal (the ART) meets its statutory objectives for social security applicants.
- E. In the event that the Committee recommends the Bills in their current form and makes no recommendations about a transitional process, that the Committee consider and recommend increased resourcing to the legal assistance sector including the specific needs of people in rural, regional, remote and very remote locations, First Nations people and others who will be disproportionately impacted by the loss of dual tier review.

BACKGROUND TO SUBMISSION

- 1. Townsville Community Law² is a member of *Economic Justice Australia* (EJA). We endorse EJA's submissions on the Bills to this Committee and those previously to the House of Representatives Standing Committee on Social Policy and Legal Affairs (the House Inquiry). We also endorse and agree with the submission by National Legal Aid to the House Inquiry. Townsville Community Law is prepared to provide evidence to the Inquiry in support of our submissions.

OUR INTEREST

- 2. Townsville Community Law first received funding to undertake 'welfare rights' appeals in 1993 as part of (the then) Minister Tate's allocation of \$1 Million to establish a network of welfare rights advocacy services across Australia. Townsville Community Law services clients from Sarina to the

¹ Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024, Administrative Review Tribunal Bill 2023.

² Then called 'Townsville Community Legal Service Inc.'

Torres Strait and west to the Territory border. It shares service delivery within Queensland with Basic Rights Queensland and Legal Aid Queensland.

3. Since 1993, Townsville Community Law has represented applicants in social security appeals in all iterations of that jurisdiction. Townsville Community Law has represented applicants in ~3,000 appeals in the Social Security Appeals Tribunal (the SSAT), the Administrative Appeals Tribunal's (the AAT) SSCSD and the AAT's General Division over that period. While the areas of decision-making most commonly subject to review have changed over time, the areas that remain consistent include eligibility for disability support pension, social security and family assistance debts, and decisions involving key definitions and key discretions.
4. Townsville Community Law has also represented applicants in other divisions of the AAT including Migration and Refugee, Citizenship, Freedom of Information, National Disability Insurance Scheme, Veterans Entitlements and Military Compensation, Workers Compensation and others.
5. Accordingly, our perspective and experience are not just that of the SSCSD; Townsville Community Law has a deep understanding of the AAT's operations – over time and in different parts of its referred jurisdiction.
6. For example, Townsville Community Law undertook limited migration, refugee, deportation/character work in the AAT and other predecessors prior to the 2015 amalgamation and for a time afterwards. Townsville Community Law's Veterans' Legal Service regularly assists veterans with AAT appeals across a range of relevant veterans' entitlements laws. Townsville Community Law has also undertaken work in the Federal courts reviewing AAT decisions.

OUR FOCUS

7. This submission is focused on the possible and likely impacts of the removal of an entire tier of review for social security and related appeals.
8. We note the AAT SSCSD is a legacy arrangement that has been reviewed on a significant number of occasions. The work of the first tier social security review (in whatever form) has always been regarded by reviewing bodies as unique. As the ARC noted:

Having concluded that a two-tiered structure of external appeals should be retained, the Council has considered practical matters concerning the form and operation of the proposed first tier appeals tribunal. The Council's primary concern in this context has been to ensure that the proposed SSAT will operate substantially as SSATs presently do, providing an informal, expeditious and economical form of review while achieving a standard of procedural fairness befitting an appeals tribunal operating as the first tier of external review in a mass volume jurisdiction. In particular, the Council would reiterate that the procedures and approach appropriate to a tribunal at this level of review will be different from those expected from a final review tribunal because the two tribunals perform distinct, albeit complementary, functions.³

³ Administrative Review Council, Report to the Attorney-General the Structure and Form of Social Security Appeals, Report No. 21, Australian Government Publishing Service, Canberra, 1984, p.32.

9. We consider that dual tier review in social security has survived various review processes because of its inherent value to the rule of law in Australia, and in particular its role in the enforcement of important human rights by Australians from all walks of life.⁴

HUMAN RIGHTS COMPATIBILITY

10. Our understanding is that the ART will be the principal mechanism by which Australians will enforce their human rights to social security, our view is that the Bills' Statement of Compatibility and the Parliamentary Joint Committee on Human Rights Report⁵ (the Joint Committee) underestimated the likely diminution of appeal rights and consequent removal of extant human rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
11. The Joint Committee's Report did not examine or consider the possible human rights implications of the loss of dual tier review in social security. This includes, but is not limited to, the loss of ICESCR article 9 rights,⁶ which are described by the Committee on Economic, Social and Cultural Rights in General Comment 19.⁷ In our submission the removal or diminution of appeal rights does raise concerns about Australia's obligations to respect, protect and fulfil its obligations under ICESCR.
12. The House Inquiry noted:

Some concerns were raised there will no longer be an automatic second-tier review for social security and family assistance matters, as the AAT currently provides. The Committee is satisfied that the best elements of first and second tier review have been incorporated into the design of the ART and that systemic issues will be escalated. The new model of review will be accessible to allow people to resolve their matters as quickly as possible without unnecessary formality. The GAP will then provide a critical safeguard to deal with material errors of law and fact. That said, the Committee encourages the Government to continue to engage with stakeholders and work through their concerns in relation to the proposed changes to the existing two-tier merits review structure for social security and family assistance decisions.⁸

13. The House Inquiry also failed to consider that a reduction in appeals mechanisms might be antithetical to Australia's obligations under ICESCR and ICCPR.
14. The Explanatory Memorandum (the EM) provides a short summary of compatibility, "the right to social security in Article 9 and others of the International Covenant on Economic, Social and Cultural Rights (ICESCR) - for example, by providing access to a fair and independent mechanism of reviewing social security decisions,". The EM also failed to consider whether the loss of dual tier might reduce the strength of the existing review and appeals system.

⁴ Including the right to social security. The right to social security is contained in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women, article 26 of the Convention on the Rights of the Child (CRC) and article 28 of the Convention on the Rights of people with disability (CRPD).

⁵ Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report 1 of 2024, 7 February 2024

⁶ It also affects rights in arts 6, 10, 11 and 12.

⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, E/C.12/GC/19, 4 February 2008.

⁸ P.iv.

15. It is therefore our observation that the human rights implications of loss of the dual tier system of review have not been adequately considered at any stage. The human rights implications need to be carefully considered by this Committee.

SOCIETAL IMPORTANCE OF DUAL TIER REVIEW

16. Decisions that fall into the dual tier system include payment systems that support highly vulnerable Australians, such as homeless people, people with disabilities, those experiencing or at risk of violence and First Nations persons. Payment systems also impact on people with everyday legal issues around family payments, childcare, parental leave and child support. Importantly, we should never lose sight of the enormity of the review system's chief task given almost 10 million Australians access payments or concessions annually and millions of administrative decisions are made annually.
17. The Robodebt Royal Commission Report (the Robodebt Report) endorsed the dual tier system of review, and its recommendations plainly expect that it would remain undisturbed.⁹ We submit that it is disingenuous to now remove a safeguard that the Commission noted as critical to good decision making and fairness.
18. The Robodebt Report described the safeguards as follows:

Social Security recipients against whom a debt was raised could seek review from the first level, or Tier 1, of the Administrative Appeals Tribunal (the AAT). To do so required some understanding of what had actually happened, which was virtually impossible to ascertain on the DHS documents, as well as the confidence and capacity to seek review. Still, a number of decisions was made by AAT members setting aside debts raised under Robodebt in its various incarnations for the reason that averaging, of itself, could not provide evidence of actual income or, it followed, overpayment and debt. Section 8(f) of the Social Security (Administration) Act requires the DSS secretary to apply government policy with due regard to relevant decisions of the AAT. If the secretary disagreed with them, Tier 1 decisions could be appealed to Tier 2, a higher level of the AAT.¹⁰

19. The Robodebt Report devoted significant time to describing how the AAT operated in the context of Robodebt. It is clear that the Commission regarded that the dual tier system of review was a critical systemic check and balance even if it noted some limitations in the historical context of the Robodebt scheme. Further, as previously noted, the Commission's recommendations expect that the dual tier system of review will continue *in situ*.¹¹

THE LOSS OF FIRST TIER

20. The principal question to be asked in this Inquiry is how will the loss of a tier of review impact on social security review applicants and what will a future social security division look like?
21. Currently, the AAT has a first tier in SSCSD and a further, second tier of review in the AAT's General Division. In 2022-2023, the data for Centrelink decisions was SSCSD (9,896) and AAT General

⁹ Commonwealth of Australia, Royal Commission into the Robodebt Scheme Report Volume 1 (2023), p.xix.

¹⁰ Ibid, p.xxviii.

¹¹ See Recommendations 20 (20.1, 20.3).

Division (Secretary Appeals 54).¹² Accordingly, it is important to note that the AAT in its second tier sees a much smaller percentage of Centrelink cases.

22. In our view this does not undermine second tier's importance, rather it emphasises its ongoing utility as a higher and more comprehensive system of review after the bulk processing role of the first tier has been exhausted but where important issues still remain to be resolved. We note the proposed GAP within the Bills but note, like EJA, that the proposed GAP will almost certainly reduce opportunities for settlement of disputes in the same manner as is achieved under the dual tier system. GAP's purpose is to correct errors of law and fact – this is very different to full *de novo* merits review. We note and endorse the EJA's concerns in this regard.
23. The importance of two tiers of review for social security applicants has been recognised since the 1980s. The ARC's 'Better Decisions' Report noted:

*In general, however, the Council notes that review by the SSAT tends to be relatively timely. The other review tribunals (particularly the AAT) tend to be less timely, although the Council notes that in the migration area there are often good reasons why some matters take a long time to resolve, and that delays in the proceedings may work in favour of applicants.*¹³
24. In the 2014-2015 process leading to the current structure of the AAT, the Veterans' Review Board (the VRB) was retained as an independent means of review of certain decisions. This was for a number of reasons, but principally as noted by Creyke, "that significant opposition from within the veterans' community — opposition which led ultimately to the removal of the VRB from the Bill."¹⁴ While the SSAT was not retained independently of the AAT, it was in essence retained by the creation of dual tiers of review.
25. The SSCSD is the AAT's second largest division behind the Migration and Refugee Division (the MRD) and there remain good reasons why the formalism of the MRD should not be echoed in the SSCSD. The nature of migration and refugee cases, and the idiosyncratic processes of the AAT in that division, mean that it is not an appropriate model for single tier review for social security and related appeals.
26. Similarly, other divisions such as veterans and military entitlements have added levels of complexity that serve to resolve more complicated disputes where legal representation is a given, at least on the part of the Commonwealth.
27. In essence our submission is that removal of the dual tier system of review will:
 - Import unnecessary processes and culture from other divisions (including those from within existing 2nd tier social security appeals), and potentially create backlogged hearing arrangements;
 - Increase adversarialism in social security appeals, including creating a false re-focus on jurisprudential litigation where it isn't needed;

¹² Administrative Appeals Tribunal, Annual Report 2022–23, (2023), pp.37-43

¹³ Administrative Review Council, Report to the Minister for Justice: Better Decisions: Review of Commonwealth Merits Review Tribunals Report No. 39 (1995), p.20 (para 2.29).

¹⁴ <https://classic.austlii.edu.au/au/journals/AJAdminLawF/2016/15.pdf>

- Impact on access to justice in social security appeals; and
- Disproportionately impact on applicants in regional, rural, remote and very remote areas.

INCREASED COMPLEXITY & ADVERSARIALISM

28. A single tier system within the AAT runs the risk of creating further complexity by:

- Importing processes and culture from within 2nd tier social security appeals; and or
- Importing processes and culture from within other divisions of the AAT.

29. The Bills should not be a case of back to the future given the experience of the long-gone Student Assistance Review Tribunal (SART), whose jurisdiction was given over to the SSAT and later the AAT. The SART is a salutary lesson in that it was a first-tier review process below the AAT where the Department was represented by in-house advocates. The SART process was widely regarded as adversarial and inefficient. It is a model for why departmental representation is unnecessary and inappropriate in first tier review cases. We note that other bulk processing divisions also limit adversarialism by removing Departmental representation, and others such as National Disability Insurance Scheme (the NDIS) are plagued by formality and adversarialism.

30. While it might be the case that Government has no intentions of appearing in each and every matter before a single tier ART, there are limited safeguards within the Bills to prevent departmental representation becoming the rule rather than the exception. There are very good reasons why individual applicants ought to be represented by an advocate or lawyer, however there are far fewer reasons why the Department ought to be represented.

31. As noted, a useful comparison can be made with review matters conducted in the AAT's NDIS jurisdiction which operates with a single tier. The involvement of formalism and adversarialism in that system used in the AAT has led to an identifiable culture of confrontational adversarial conduct which delays decisions and traumatises applicants.¹⁵ For example, the NDIA's past five (5) annual reports indicate an alarming rise in legal expenditure by the NDIA from \$10,181,000 in 2018/2019 to \$72,272,000 in 2022/2023.

32. By eliminating the two-tier structure for social security matters there is potential for a similar increase in expenditure by the Department on internal and external legal representatives. The procedural ramifications of adversarialism have been acknowledged by the AAT:

There were ongoing challenges associated with the inherent complexity of this caseload throughout the reporting period. Also, during 2022–23, we received a higher proportion of applications from people seeking access to the NDIS than we had in previous years. Unlike applications relating to level of supports in a participant's funded plan, access decisions made by the NDIA are less likely to be resolved by agreement during the AAT's alternative dispute resolution*

¹⁵ See generally <https://www.abc.net.au/news/2022-10-15/ndis-model-litigant-obligation-breaches/101501670> and the comments of (now Chief) Justice Mortimer in *National Disability Insurance Agency v Davis* [2022] FCA 1002: "The Agency's closing submissions to the Tribunal constituted 442 paragraphs, and 51 pages, of densely compiled submissions, with 337 footnotes. That is on top of a statement of facts, issues, and contentions of 137 paragraphs and 37 pages, and written opening submissions of 3 pages. The Tribunal was deluged with contentions by the Agency...In a merits review the Agency would do well to remember its role. As a model litigant, and another part of the executive, it appears to assist the Tribunal to perform its function, which is to reach the correct or preferable decision on the material before it."

*stage. These types of cases tend to take longer to finalise as they generally require a decision by a member following a substantive hearing.*¹⁶

** This inherent complexity arises not only from the legislative framework governing the scheme... but from the diverse range of applicants seeking review: applicants are of all ages, disabilities, ethnicities, educational level, life experience and economic circumstances, and may have psychosocial and mental health issues, cognitive and intellectual impairments, require special accessibility arrangements, and be experiencing circumstances requiring urgent attention.*¹⁷

33. There is an abundance of practice directions created by the AAT to assist in the efficient and fair conduct of all matters within the Tribunal's jurisdiction. Social security matters are structured by the *"Guide to Social Services and Related Jurisdiction"*. This guide establishes a goal to complete first tier reviews within 6 weeks of lodgment of application for review.¹⁸ The guide also outlines procedures for second tier reviews which allow time for multiple conferences and alternative dispute resolution, additional time to acquire documentation and expert reports, preparation of statements of facts and contentions, and issue of summonses.¹⁹
34. Our concern is that the procedures and expectations of second tier reviews will inevitably creep into a single tier and become the default structure for undertaking SSCSD reviews. The ideal of concluding social security reviews within a 6 week timeframe may become impossible and cause undue hardship to applicants and hopelessly backlog the system.
35. Townsville Community Law's more substantial concern is the potential for applicants to be negotiated out of potential successful outcomes. The current system restricts any adversarial influence from the Department on an applicant when engaged in the first tier of review. If a single-tier system is implemented there is a substantial risk of vulnerable applicants acquiescing to unfavourable outcomes.

ACCESS TO JUSTICE

36. The corollary of increased adversarialism is the impact on access to justice. Townsville Community Law recognises the focus of the Bills on ensuring that the ART is an accessible system of review. In particular, we note the objectives,²⁰ and the obligation on the Tribunal to "conduct each proceeding in the Tribunal in a way that is accessible for the parties to the proceeding, taking into account the needs of the parties."²¹
37. We also note the House Inquiry Report noted the suggested need for increased access to justice resources.²² We reiterate these concerns and note that a duty lawyer or specialist program should build on existing structures such as those with EJA and other legal assistance sector providers. However, we caution that increased resourcing must recognise the already limited review

¹⁶ Emphasis added.

¹⁷ Administrative Appeals Tribunal Annual Report 2022/2023 p. 53.

¹⁸ Administrative Appeals Tribunal / Guide to Social Services and Related Jurisdiction / February 2017, p. 9.

¹⁹ Ibid, p. 21-24.

²⁰ Administrative Review Tribunal Bill 2023 ss 9(b) and (c).

²¹ Administrative Review Tribunal Bill 2023 s 51.

²² P.24.

processes for those outside capital cities with AAT registries wherein phone hearings by a single member are the norm.

38. Townsville Community Law have an acute understanding of the access to justice barriers that AAT applicants experience. Our clients have diverse, intersecting backgrounds including:
- Aboriginal or Torres Strait Islander people;
 - People from culturally and linguistically diverse backgrounds;
 - Migrants, refugees and asylum seekers;
 - Older people;
 - People with physical, cognitive or psychological disability;
 - People with poor or limited literacy;
 - People with poor or limited digital literacy;
 - People experiencing domestic or family violence or elder abuse;
 - People living in rural, regional, remote and very remote areas;
 - People who have recently been released from custody;
 - People with carer responsibilities; and
 - People experiencing financial hardship.
39. This can often lead to clients experiencing intersectional barriers to access to justice including:
- Linguistic barriers;
 - Other communication barriers (due to poor or limited literacy, digital literacy, telephone connection or internet connection, or disability);
 - Cultural barriers;
 - Difficulty accessing appropriately qualified experts and medical professionals who are willing and able to produce medical reports and evidence (for example, in social security appeals about whether a person qualified for the disability support pension, or if the person has special circumstances);
 - Financial barriers (for example, inability to afford transport to medical appointments, or medical reports); and
 - Inability to progress their matter due to the very nature of their disability, periods of hospitalisation, safety concerns, or competing carer or cultural responsibilities.
40. Accordingly, retaining a non-adversarial system of review is crucial to ensuring applicants' diverse needs are met by the system.
41. Our experience is that SSCSD Registries and Members are adept at working with people from diverse backgrounds and who are experiencing intersecting barriers to access to justice. In our experience, SSCSD Registries and Members are generally efficient, responsive to our clients' needs (such as fast-tracking hearings), and where possible, have operated in a way that is trauma informed.
42. As National Legal Aid submitted to the House Inquiry, "a lack of access to a second tier of review will reduce opportunities to rectify incorrect government decision making" which is ultimately

inconsistent with the objectives of the Bills to ensure a system of review that is “accessible and responsive to the diverse needs of parties to proceedings.”²³

RURAL, REGIONAL, REMOTE & VERY REMOTE APPLICANTS

43. The outcomes of merits review are contingent upon a range of circumstances including an applicant’s geographic location. This impacts on their ability to participate in the process fairly and effectively. Currently, applicants in rural, regional, remote, and very remote locations (RRRR locations) only have access to the tribunal by way of remote hearing setting, that is by video conference or more commonly by telephone hearing. In recent times, applicants have faced barriers to obtaining hearings by video conference.
44. Any additional complexity and adversarialism within tribunal hearing processes will certainly disadvantage people in RRRR locations and will further undermine confidence in the tribunal’s ability to fairly determine matters through proper merits review.
45. Applicants in RRRR locations already struggle with a litany of disadvantage, including access to stable Internet, confidential hearing locations outside their own home, access to information, advocacy, and representation in specialist areas such as social security, and overwhelming expectations or perceptions that they will receive a second-class justice outcome.
46. The simple reality is that face to face hearings provide less opportunity or at least an imperfect opportunity to determine matters that require consideration of complex factual scenarios, the functional impact of medical conditions, and more importantly for social security purposes, the exercise of discretionary factors in decision making.
47. Applicants from RRRR locations will bear an unrealistic and unreasonable burden and will be unable in some cases to advance their interests without a concomitant injection of resources and expertise in RRRR locations.

Townsville Community Law

²³ National Legal Aid, House of Representatives Standing Committee on Social Policy and Legal Affairs (2 February 2024), p. 5.