



**7 March 2024**

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

## **Additional Submission to the Inquiry into the Administrative Review Tribunal Bills**

Dear Committee,

Thank you for the opportunity to provide further feedback on the *Administrative Review Bill 2023* and associated legislation. DANA is the peak body for Disability Advocacy organisations across Australia and made a submission to the House's Standing Committee on Social Policy and Legal Affairs' inquiry into the bills early last month.

This additional submission is not intended to raise any additional recommendations, but instead to offer some brief commentary on some of the points raised by the committee's report and responses from the Attorney-General's Department:

### **Consultation with Users when Designing Practice Directions**

DANA maintains the position that there should be a positive duty on the Tribunal to consult with people with disability and other relevant users when designing Practice Directions. While we note that the Department identified that there are substantial powers for the Tribunal to enact such changes and a general obligation on the Tribunal Advisory Committee,<sup>1</sup> those powers will likely be only of limited effect without ongoing engagement with relevant communities to identify and escalate issues to senior leadership.

### **Support for Legal Aid and Advocacy**

While noting that funding these bodies is not a direct responsibility of the ART in the current bill, there would be significant value in providing resources that is responsive to workloads experienced by Legal Aid and Advocacy bodies.

We would also like to stress that while the Department's ongoing work on the National Legal Assistance Partnership is critical to ensuring meaningful access to justice at the new review body,<sup>2</sup> additional support for independent advocacy is also required to ensure that people with disability receive appropriate support through all stages of an

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<sup>1</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1)* (Final Report, February 2024), 20

<sup>2</sup> Ibid, 26



appeal. This includes those initial stages assisting people to be referred to legal aid and in supporting them to work with a lawyer to advance their case in the first instance. Ensuring that these supports are available is also critical to ensuring supported decision-making principles can be implemented, particularly in matters where litigation guardians or NDIS nominees may be present. Ensuring the availability of legal aid and advocacy support is also absolutely essential in matters that proceed to the Guidance and Appeals panel.

### **Embedding principles from Independent Expert Review and Centerlink tiers**

We have ongoing concerns about the ability of the new ART body to resolve NDIS matters in a quicker manner than current reviews. Two proposals were discussed in submissions, focusing on the trial of the Independent Expert Review program by the NDIA and the introduction of the ‘two-tier’ system in Centerlink matters to the NDIS division. Submissions from the department note the Guidance and Appeals panel does expand implement a form of this two-tier approach and seeks to adapt the ‘best features’ of tiered systems.<sup>3</sup>

While we are supportive of the panel generally, the panel alone is unlikely to substantially reduce the time it takes to decide on NDIS matters, many of which are inherently detailed and complex due to the assessment of medical information, personal circumstances, and community expectations required. Few matters will meet the threshold needed to proceed to that panel (either on referral or after an initial decision by the Tribunal), and the bills currently do little to improve the speed and efficiency of the main review pathway.

We hope the Senate committee will be in a position to incorporate the many extensive and detailed submissions provided the house. DANA is also eager to see examination of the legislation in areas where the House report only had limited discussion, particularly regarding:

- Scope for costs orders to be made against government bodies in the event of inappropriate conduct, as discussed by the Public Interest Advocacy Centre (PIAC)<sup>4</sup> and in light of ongoing issues with Respondent conduct in the NDIS division.
- Litigation Guardians and the *Convention on Rights of Persons with Disabilities*, noting the concerns raised by People with Disability Australia (PWDA) in their submission.<sup>5</sup>

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<sup>3</sup> Ibid, 28

<sup>4</sup> Public Interest Advocacy Centre, Submission no 24 to House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023*, 11.

<sup>5</sup> People with Disability Australia, Submission no 22 to House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023*, 4-5.

- The need for a disbursements mechanism to fund reports that are necessary to reach an effective decision, as discussed in our original submission.<sup>6</sup>

We otherwise would refer the committee to our original submission for more extensive discussion of these issues, which recommended that the bill:

1. Be amended to require that before making a practice direction the President (through the Tribunal Advisory Committee), must:
  - a. take reasonable steps to obtain the views of bodies representing the interests of users of the ART or a specific jurisdictional area (as may be relevant); and
  - b. have regard to those views in developing the practice direction.
2. When considering how best to make the tribunal accessible more generally, ensure that people with disability are consulted directly.
3. Ensure appropriate funding for Legal Aid services in each state as well as expand the NDIS Appeals Advocacy program to ensure that people with disability have equitable access to support at the new Tribunal.
4. Consider the introduction of additional lump-sum payments to Legal Aid and advocacy bodies when large increases in the number of applications to the Tribunal occur. Ensure that at least quarterly statistics on caseload and case management is publicly available to facilitate this.
5. Amend section 36 of the Bill to construct practice directions to allow for IER or Tier 1-like decisions to take place in particular divisions, including regulating when particular parties can appear as well as allowing substantive review earlier in the process.
6. In designing practice directions, ensure that the learnings and application of the IER program are considered to ensure participants can access a decision sooner.
7. Be amended to introduce a scheme where the Tribunal can provide disbursements to assist in the production of evidence where parties agree that such evidence would have significant value to the assessment of a case.
8. Be amended to give the ART the power to award costs against a government respondent where that respondent is found to have acted inappropriately in its conduct of the matter before the ART.
9. The litigation guardian provisions of the Bill are amended to ensure that the 'litigation guardian' has a supportive, rather than substitute decision-making role. This includes ensuring that the party has the right to participate directly in all proceedings, meetings, and correspondence. In addition, to reflect their supportive rather than substitute decision-making role, the term 'litigation guardian' should be changed to 'nominated supporter' or 'appointed supporter.'

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<sup>6</sup> Disability Advocacy Network Australia, Submission no 20 to House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023*, 5-6



10. Clause 67(2) of the Bill should be amended to require the Tribunal to follow, rather than 'take into account', the party's will and preferences when deciding whether to appoint a litigation guardian and who to appoint as a litigation guardian.
11. Clauses 67(7) and (8) of the Bill should be amended to substitute references to promoting the party's 'personal and social wellbeing' with reference to promoting the party's 'human rights.'

Thank you again for the opportunity to speak on these bills. Please contact us if we can provide any more information that would assist the committee in assessing this legislation.

Kind regards,



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