

Thursday 11 May 2023

Administrative Review Taskforce
Attorney General's Department
3/5 National Circuit
BARTON ACT 2600

Delivered by email to AATReformEnquiries@ag.gov.au

Dear Taskforce

We thank you for the opportunity to provide this submission to the Attorney-General Department's **Administrative Review Reform Issues Paper**.

People with Disability Australia (PWDA) is a leading disability rights advocacy and representative organisation and the only Australian national cross-disability organisation representing the interests of all people with disability.

PWDA also receives funding from the Department of Social Services' Disability and Carer Program to provide individual advocacy support for National Disability Insurance Scheme (NDIS) participants seeking to review and appeal NDIS decisions.

Additionally, PWDA receives funding to provide individual advocacy support for NDIS participants who wish to have their matter considered via the Independent Expert Review (IER) process.

This submission is based on feedback from our NDIS appeals advocates, who assisted in 335 NDIS appeals matters in the 2021-2022 financial year. The submission outlines the key issues our advocates have experienced with the Administrative Appeals Tribunal (AAT), and corresponding recommendations for the new review body.

Issue 1: National Disability Insurance Agency engagement in dispute resolution processes

Section 34A(5) of the *Administrative Appeals Tribunal Act 1975* (Cth) requires parties to act in good faith when participating in alternative dispute resolution (ADR) processes, including case conferences. This includes treating other parties with respect, ensuring that the person attending the ADR process has the necessary authority to settle the case and disclosing information in a timely fashion.¹ The NDIA and its representatives are also obliged to act as ‘model litigants’ under the *Legal Services Directions 2005* (Cth).

Despite these obligations, our advocates have raised concerns about the conduct of the National Disability Insurance Agency (NDIA) in dispute resolution processes both prior to and at the AAT.

NDIA conduct prior to the AAT

Our advocates report that the NDIA rejects plans at first instance, without contacting participants to ask for further information and clarification. As a result, matters are then progressed to internal review, where the NDIA routinely repeats its initial decision. When a participant lodges a review application at the AAT, the NDIA assigns a special case manager to conduct dispute resolution.

Before AAT cases proceed to case conference, NDIA case managers cold-call participants, and offer marginal increases to NDIS plans. Participants report that these case managers offer vague explanations and pressure participants to provide an immediate response, without allowing time to consider the offer and consult support people.

To promote good faith conduct and prevent cases unnecessarily progressing to the new review body, we recommend that:

Recommendation 1 – The new legislation grants the review body power to examine whether the NDIA has made reasonable attempts to resolve the dispute and remit the matter back to the NDIA where such attempts have not been made.

Recommendation 2 – The new legislation must clearly set out what constitutes reasonable attempts to resolve a matter, and that there should be recognition that reasonable attempts

¹ AAT (2013) *The Duty to Act in Good Faith in ADR Processes at the AAT*, accessed 3 May 2023.

should be proportional to the complexity of the plan at issue. Additionally, there must be an onus for new offers to be made in writing with participants given a reasonable time to consider these offers. The opportunity to choose an appropriate meeting time to discuss the offer and attend with support people must also be provided.

NDIA conduct at case conferences

Our advocates have raised several concerns regarding the conduct of the NDIA and its lawyers at AAT case conferences. These include that:

- The NDIA regularly sends lawyers to case conferences without approval to make decisions, which makes negotiations impossible and leads to further delay in dispute resolution.
- NDIA lawyers often verbally agree to certain matters in the case conference, but then record a different position in the following draft terms of agreement. This leads to delay in the dispute resolution process and adds unnecessary frustration and stress for applicants.
- The NDIA regularly breaches clause 4.24 of the AAT's *General Practice Direction* by providing the Statement of Issues on the day of the case conference instead of the required one business day ahead of the first conference. This does not allow the applicant sufficient time to prepare.
- NDIA lawyers often behave in an adversarial manner towards applicants at case conferences. For example, they often accuse applicants of defrauding the public.

PWDA views this conduct as breaching good faith requirements, with our advocates reporting that the AAT registry and conference registrars rarely hold the NDIA to account for this conduct. As a result, the people with disability we support to exercise their appeal and review rights regarding NDIS decision-making have reported significant stress and negative mental health impacts.

In turn, we have observed the significant stress and negative mental health impacts having a deterrent effect on NDIS participants exercising their appeal and review rights, by abandoning active matters and/or not initiating new matters to prevent stress and negative mental health impacts.

To address the above issues with NDIA conduct at case conferences, we recommend that:

Recommendation 3 – The new legislation and/or practice directions require that NDIA decision-makers, rather than solely lawyers, be present and visible at case conferences.

Recommendation 4 – The new review body’s practice directions specify that verbal agreements must be put in writing and signed off by both parties at the time of the case conference.

Recommendation 5 – The new review body’s practice directions require the NDIA to lodge its Statement of Issues at least five working days before the case conference. The new review body’s registry must strictly enforce this requirement.

To hold the NDIA accountable for its conduct, we recommend that:

Recommendation 6 – The new review body creates an easily accessible and well-publicised avenue for complaining about the conduct of the NDIA and its lawyers, with appropriate consequences for misconduct.

Issue 2: Access to legal advice

We are concerned that applicants lack access to legal advice, while the NDIA spends significant funds on contracting legal representation. This creates an imbalance in access to justice and needs to be rectified. While this matter is not entirely in the remit of the AAT, we recommend that:

Recommendation 7 – The new review body should engage a ‘duty lawyer’ who can assist participants on the day of their case conference, conciliations, and hearings.

Issue 3: Support for applicants

Article 13(1) of the *Convention on the Rights of Persons with Disabilities* (CRPD) requires the Australian government to ensure that people with disability have access to justice on an equal basis with others, including through the provision of procedural accommodations.

Article 13(2) of the CRPD requires the Australian Government to promote appropriate training to those working in administration of justice to promote access to justice for people with disability.

To ensure the new review body complies with Article 13 of the CRPD, we recommend that:

Recommendation 8 – In all communications, the new review body should provide all applicants with information about advocacy services along with contact details. This information should be provided in accessible formats.

Recommendation 9 – Staff and members of the new review body should complete disability and trauma awareness training.

Recommendation 10 – The new legislation should include an obligation to promote accessibility, with appropriate guidance that thoroughly addresses accessibility issues, including that conference times are scheduled at times that suit people with disability and allow them time to organise their required supports.

Recommendation 11 – The new legislation should also include an obligation to support the psychosocial health of people going through the review process, including through making referrals to mental health supports and advocacy services.

Issue 4: Guardianship and supported decision-making

The Discussion Paper asks how the new review body can ensure people with disability can participate in proceedings and whether the new review body should be able to appoint a litigation guardian.

We note that Article 12(3) of the CRPD obliges the Australian Government to provide people with disability with support for decision-making. Article 12(4) of the CRPD requires that any measure relating to the exercise of legal capacity is subject to safeguards that ensure that the person with disability's rights, will and preferences are respected. For further information, please see our [guardianship and supported decision-making position paper](#).

To ensure that the new review body complies with the CRPD, we recommend that:

Recommendation 12 – All measures relating to guardianship and supported decision-making comply with Article 12 of the CRPD and respect the will and preferences of the person with disability.

Our advocates report that guardians often cause delay in proceedings. This is because they are reluctant to attend AAT case conferences and proceedings and take a long time to sign-off on decisions. In addition, where an applicant has an advocate and a guardian, it is not clear what each person's role is in AAT processes. Therefore, we recommend that:

Recommendation 13 – The role and expectations of all types of guardians in proceedings of the new review body should be well defined, with a strong emphasis on supported decision-making and expediency in signing-off decisions.

Issue 5: Accessible applications

Participants face financial barriers to accessing functional assessments that are required as part of the review process. The NDIA often rejects participants' functional assessments during case conferences and requests specialist assessments. In many cases, the costs of these assessments are unaffordable for participants and there can be significant waiting time for specialist assessments. Where people live in remote areas, the travel costs to attend appointments related to specialist reports can amount to thousands of dollars. Our advocates have engaged with NDIA lawyers to confirm whether the NDIA will pay for the new reports, but the lawyers often do not reply.

To address this issue, we recommend that:

Recommendation 14 – The new review body has a mechanism to ensure the NDIA cannot unreasonably reject functional assessment reports and must pay for new report requests and the associated costs.

Issue 6: Data protection

Our advocates report that the AAT's NDIS Division database could be more secure. This is concerning as participants' names, the state/territory they reside in, the fact that they have disability and that they are on the NDIS could be misused.

Recommendation 15 – That the review body ensures adequate data protection for all applicants, but particularly those in the NDIS division, to protect their right to privacy.

Other Miscellaneous Recommendations

In addition to the above, we recommend that:

Recommendation 16 – The new review body should have a mechanism for communicating systemic issues to the NDIA to improve administrative decision making.

Recommendation 17 – The new review body’s legislation should include Australia’s international human rights obligations as guiding principles.

Recommendation 18 – Members of the new review body should be appointed transparently and based on merits, with affirmative action measures for people with disability and other groups.

Recommendation 19 – The new review body must publish decisions in a way that is accessible by all people with disability, including through providing Easy-Read versions.

If you wish to discuss our submission further, please contact my Senior Manager of Policy, Mx Giancarlo de Vera, at giancarlo@pwd.org.au or via telephone on 0413 135 731.

Yours sincerely



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