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Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Delivered by email to **spla.reps@aph.gov.au**

Dear Committee Secretary

Administrative Review Tribunal Bill

We welcome the opportunity to make this submission to the **Inquiry into the Administrative Review Tribunal Bill (the Bill) and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill**.

People with Disability Australia is Australia's peak cross-disability Disability Representative Organisation and is funded by the Australian Government to represent the 1 in 6 Australians with disability nationally. Our organisation is made up of, and led by, people with disability.

In preparing this submission, we consulted with our individual advocates, who regularly represent people with disability at the Administrative Appeals Tribunal (AAT). The submission also draws upon our knowledge of the ***Convention on the Rights of Persons with Disabilities*** (CRPD), as an NGO with Special Consultative Status with the United Nations Economic and Social Council.

We welcome the Government's efforts to establish a new administrative review tribunal that is fair, timely, informal, inexpensive and accessible.[1] In particular, we commend clause 51 of the Bill, which places an obligation on the Administrative Review Tribunal (ART) to conduct proceedings in an accessible manner.

[1] Administrative Review Tribunal Bill 2023 (Cth), cl 9.

This submission will make recommendations aimed at enhancing the Bill's ability to achieve its objectives.[2] While not within the scope of this Inquiry, we note that the Government must provide the ART with sufficient funding to achieve its objectives, particularly the objective of accessibility.

Rules, regulations and practice directions

We recognise that the Bill provides a broad framework for creating a fair, timely and accessible Tribunal. However, whether this will translate into practice will largely depend on the drafting of the ART's rules, regulations and practice directions. As the Bill's explanatory memorandum states, the practice directions will 'operationalise' how the ART can meet its statutory objective.[3] The Rules will also govern important areas relating to people with disability, such as litigation guardians.[4]

Given the importance, we propose creating an express obligation to consult people with disability and our representative organisations when developing relevant rules, regulations and practice directions. This will allow us to identify and co-design solutions to problems currently occurring at the AAT, to ensure they are not repeated at the ART.

It will also ensure that the Government is compliant with the CRPD Article 4(3) obligation on States parties to consult people with disability, through their representative organisations, in the development of legislation and policies that implement the CRPD.[5] The ART's rules, regulations and practice directions will implement Article 12 of the CRPD (access to justice) and must therefore be formulated in consultation with us.

An example of an express obligation to consult with people with disability can be found in the *Disability Inclusion Act 2014* (NSW). The Act requires the NSW Department of Communities and Justice to consult with people with disability, the Disability Council and disability advocacy organisations when preparing the State Disability Inclusion Plan.[6]

To ensure we can support the ART meeting its objectives and to uphold Australia's CRPD obligations, we recommend that:

Recommendation 1 – The Bill is amended to include an express requirement that people with disability and our representative organisations are consulted when the Government drafts ART rules, regulations and practices directions that affect our ability to access justice at the ART.

[2] Administrative Review Tribunal Bill 2023 (Cth), cl 9.
[3] Administrative Review Tribunal Bill 2023 (Cth), Explanatory Memorandum, [357].
[4] Administrative Review Tribunal Bill 2023 (Cth), cls 11-12.
[5] Convention on the Rights of Person with Disabilities, article 4(3) (entered into force in Australia 16 August 2008).
[6] *Disability Inclusion Act 2014* (NSW), s 10(2).

We also note that enshrining a consultation obligation would assist the Tribunal to address less formal mechanisms for improving accessibility. For example, our advocates report that the lack of access to information about Tribunal processes is a major barrier to justice. Having a 'seat at the table' when developing practice directions would provide us with an avenue to share these insights with the Tribunal while it is being established.

Legal representation

Well-drafted rules, regulations and practice directions will, in theory, enable the ART to meet its objectives. However, in practice, if parties do not have equal access to legal representation, the objective of establishing a review mechanism that is fair and just will be impossible to achieve.

Our advocates report that people with disability struggle to access legal assistance, while the National Disability Insurance Agency (NDIA) is represented by lawyers from prestigious law firms, and in some cases, barristers. Indeed, in the first 10 months of FY22, the NDIA spent over $41 million on AAT legal costs, while Legal Aid Commissions received a mere $5.1 million through the NDIS Appeals Program.[7]

This inequality of access to legal representation leads to an 'uneven' playing field and is intimidating for people with disability. In addition to being fundamentally unfair, the presence of NDIA lawyers also increases the formality of the AAT and creates an unnecessarily adversarial atmosphere.

To rectify this issue, the ART Bill should be amended to provide that parties cannot be legally represented at the ART unless leave is granted. This would give the Tribunal flexibility to consider whether allowing legal representation for one or both parties would further the Tribunal's objectives, including fairness, informality and timeliness.

The model of seeking leave for legal representation is common in other Tribunals and dispute resolution mechanisms, such as certain divisions of both the New South Wales Civil and Administrative Tribunal and Queensland Civil and Administrative Tribunal, the Fair Work Commission and the Victorian Workplace Injury Commission.[8] The rationale for this model has been cited as a measure to reduce formality and adversarial processes.[9]

To further the objectives of establishing a Tribunal that is fair, just and informal, we recommend that:

Recommendation 2 – The Bill is amended to require parties to seek leave if they wish to be represented by a lawyer at any dispute resolution process. The Bill should set out the

[7] Senate Estimates response to Questions on Notice – Senator Stirling Griff, 7 April 2022.
[8] See for example *Civil and Administrative Tribunal Act 2013* (NSW), s 45(1)(b).
[9] Fair Work Bill 2008 (Cth), Explanatory Memorandum.

factors that the Tribunal must consider in deciding whether to grant leave, including whether the other party has access to legal representation.

Litigation guardians

We are concerned about the Bill's litigation guardian provisions, which empower the Tribunal to appoint a litigation guardian in limited circumstances.[10] The litigation guardian 'stands in the place' of the party and must give effect to the will and preferences of the party, or, where not ascertainable, act in a manner that promotes the party's personal and social wellbeing.[11]

As a party to the CRPD, all Australian laws concerning legal capacity should comply with Article 12 of the CRPD (equal recognition before the law). The Committee on the Rights of Persons with Disabilities' ***General Comment No.1 (2014)*** provides extensive guidance on Article 12's requirements. Importantly, it states that substitute decision-making regimes breach Article 12 of the CRPD.[12] It defines substitute decision-making regimes as systems where:

- (i) **legal capacity is removed from a person**, even if this is in respect of a single decision;
- (ii) a substitute decision-maker can be **appointed by someone other than the person** concerned, and this can be **done against his or her will**; and
- (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective **"best interests"** of the person concerned, as opposed to being based on the person's own will and preferences [emphasis added].[13]

We believe that the following features of the Bill's litigation guardian provisions resemble a substitute decision-making scheme, potentially placing the Government in breach of its Article 12 CRPD obligations.

a) Removal of legal capacity

The explanatory memorandum states that '[a] litigation guardian stands in the place of the party, and makes all the decisions about the conduct of the proceedings that would have been made by the party.'[14] Clause 67(5)(a) of the Bill states that if a party has a litigation

[10] Administrative Review Tribunal Bill 2023 (Cth), Explanatory Memorandum, [157].
[11] Administrative Review Tribunal Bill 2023 (Cth), Explanatory Memorandum, [157].
[12] Committee on the Rights of Persons with Disabilities (2014), *General Comment No.1; Article 12: Equal recognition before the law*, CRPD/C/GC/1.
[13] Committee on the Rights of Persons with Disabilities (2014), *General Comment No.1; Article 12: Equal recognition before the law*, CRPD/C/GC/1, [27].
[14] Administrative Review Tribunal Bill 2023 (Cth), Explanatory Memorandum, [501].

guardian, the party 'may participate in the proceeding only by the litigation guardian'. This is fundamentally different to a supported decision-making model, where the person can directly participate in decisions and is not 'replaced' by another person. As such, the Bill's proposed model removes certain aspects of the person's legal capacity.

b) Appointment of decision-maker

Clause 67(2) of the Bill requires the Tribunal to '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. This falls short of following the party's will and preferences and means that a litigation guardian can be appointed against the party's will.

To ensure the Bill meets Australia's obligations under the CRPD, we recommend that:

Recommendation 3 – 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'.

Recommendation 4 – 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.

We also note that clause 67(7) of the Bill states that the party's will and preferences must be followed, unless doing so would pose 'a serious risk to the party's personal and social wellbeing', in which case the guardian must act in a manner that promotes the party's personal and social wellbeing.

Clause 67(8) of the Bill states that if the party's will and preferences, or likely will and preferences, cannot be ascertained, the guardian must act in a manner that promotes the personal and social wellbeing of the party.

As the term 'personal and social wellbeing' is highly subjective and value-laden, we propose that:

Recommendation 5 – 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.'

Early resolution of disputes

The timeliness of the ART could be enhanced by encouraging parties to resolve disputes prior to applying to the ART. Our advocates report that the NDIA does not work with participants at the NDIA's internal review stage to seek additional evidence. Previously, the NDIA would allow participants 28 days to gather further information before issuing an internal review decision, but this practice has ceased.

To address this issue and improve the timeliness of dispute resolution, we reiterate the following recommendations made in our submission to the **Attorney General's Department's Administrative Review Reform Issues Paper**:[15]

Recommendation 6 – The new legislation grants the ART 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 7 – The new legislation must clearly set out what constitutes reasonable attempts to resolve a matter, and that there should be recognition that reasonable attempts should be proportional to the complexity of the plan at issue. Additionally, there must be an onus on the NDIA to make new offers 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.

Thank you again for the opportunity to make this submission. If you would like to discuss our submission, please contact my Senior Manager of Policy, Mx Giancarlo de Vera via email at **giancarlod@pwd.org.au** or on 0413 135 731.

Yours sincerely

Sebastian Zagarella
Chief Executive Officer
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[15] People with Disability Australia. *Submission to Commonwealth Attorney-General Departments Administrative Review Reform Issues Paper* (11 May 2023).